

***To Be or Not to Be Charlie?***  
***Charlie Hebdo, Blasphemy and the Defamation of Religions***

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In France, various events – more or less recent, and more or less violent – have sparked a renewed interest in the appropriate legal response to statements that are offensive towards, or insulting to religious beliefs. Most recently, on 7 January 2015, a terrorist attack was launched against satirical magazine *Charlie Hebdo* as retribution for the journalists’ perceived disrespect for religious matters. It led to the killing of twelve, leaving eleven injured.<sup>1</sup>

In the wake of the attack on *Charlie Hebdo*, the importance of the #jesuischarlie campaign on social media websites sparked a controversy as to whether or not one identified as *Charlie*. Such identification symbolised the protection of freedom of expression and the rejection of the murderous attacks. On another level, it also appeared to amount to an implicit agreement with the magazine’s content. In this context, some felt that they were not *Charlie*. Although they did not condone the attacks, they felt that the editorial line of *Charlie Hebdo* generally went too far in mocking religious beliefs. Thus, in the influential *Financial Times*, Europe editor-in-chief and Englishman Tony Barber reflected on the magazine’s “editorial foolishness” and “stupidity”.<sup>2</sup>

According to Pew Research Center’s Forum on Religion & Public Life, as of 2012 22% of countries in the world possessed laws and policies penalising blasphemy (including 16% of European Union countries such as Germany, Italy and Ireland).<sup>3</sup> In 2011, they had indicated that 44% of countries in the world still criminalised defamation of religions.<sup>4</sup>

In that context, the question that emerges is whether the right to freedom of expression is regulated differently in England and France in relation to statements that are offensive towards, or insulting to religious beliefs. This could potentially justify why some (including Barber), could not identify as *Charlie*, by contrast with the

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<sup>1</sup> Other events date back to the 1980s. In 1984, a poster promoting the film ‘Ave Maria’ and representing a topless young woman on a cross created turmoil in traditional catholic associations. A few months later, Godard’s film ‘Hail Mary, full of grace’, which was concerned with Mary’s virginity, provoked some disquiet among the same associations. In 1988, Scorsese’s film ‘The last temptation of Christ’ positively created a scandal by showing Jesus coming down from the cross to live with Mary Magdalene. On 22 August 1988, the French Christian ‘Ligue contre le blasphème’ [League Against Blasphemy] threw Molotov cocktails inside a theatre showing the film, injuring thirteen people.

<sup>2</sup> “Le ‘Financial Times’ critique ‘Charlie Hebdo’ puis revoit sa copie”, *Le Monde (Blogs)*, 8 January 2015. .

<sup>3</sup> “Which countries still outlaw apostasy and blasphemy?”, *Pew Research Center*, 28 May 2014. URL:

<sup>4</sup> “Laws Penalizing Blasphemy, Apostasy and Defamation of Religion are Widespread”, *Pew Research Center*, 21 November 2012.

majority of the French population. Contrary to this, an analysis of the applicable law actually shows that the framework of liability is very similar in England and France: both have abolished blasphemy offences and have rejected the concept of defamation of religions. This suggests that to be or not to be *Charlie* ultimately boils down to a question of cultural sensitivity.

### **A shared “right to blasphemy”<sup>5</sup>**

The wrong of blasphemy affords legal protection to one or more religions against offensive or insulting statements. Blasphemy prohibitions are generally found in states in which the population predominantly adheres to a given religion. It therefore constitutes a bridge between the state and religious beliefs.

In this context, it is unsurprising to find that blasphemy laws have long been abolished in France, which adheres to a principle of secularism enshrined in article 1 of the Constitution of 4 October 1958. As early as 1789, during the French Revolution, the National Constituent Assembly affirmed in articles 10 and 11 of the Declaration of the Rights of Man and of the Citizen that:

“No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order.”

“The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.”

The practical effect of these articles in relation to statements that are offensive of, or insulting to a specific God or religion was that they would no longer be punished for being blasphemous. There was only one attempt to reinstate a formal regulation for such wrongs in the law on sacrilege of 20 April 1825. However, this law was never enacted due to the impossibility to agree on the countless requested amendments. To this day, there are no more blasphemy laws in France and so there is arguably a “right to blasphemy”. One notable exception is found in the local law of Alsace and Moselle, in the northeast of the country. This is because the German Criminal code, which was introduced in these regions in 1870, does regulate blasphemy. However, these provisions are not applied in practice.

Similarly in the law of England and Wales,<sup>6</sup> and despite the fact that Britain is not a secular state, there no longer exist any statutory or common law offences of blasphemy. The Blasphemy Act 1697 was repealed by section 13(2) and Part I of Schedule 4 to the Criminal Law Act 1967, doing away with statutory offences. In 1985 the Law Commission recommended that the remaining common law offences of blasphemy and blasphemous libel be abolished. It argued that:

“Blasphemy and blasphemous libel at common law provide protection only for the Christian religion and, it seems, the tenets of the Church of England. We take the view that, where members of society have a multiplicity of faiths or none at all, it is invidious to single out that religion, albeit in England the established religion, for

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<sup>5</sup> The expression is borrowed from Orlando de Rudder, *Le droit au blasphème*, Paris, Renaudot, 1989.

<sup>6</sup> This essay is strictly concerned with the law applicable in England and Wales. Therefore, it does not consider the law applicable in Scotland or in Northern Ireland.

protection. In our view, therefore, for this reason and for other reasons earlier summarised, the common law cannot remain as it is.”<sup>7</sup>

In 2008, acting upon the Law Commission’s recommendation, section 79 of the Criminal Justice and Immigration Act abolished the common law offences of blasphemy and blasphemous libel. The last prosecution for blasphemy is traced to 1922; the last prosecution for blasphemous libel on the other hand is much more recent and only dates back to 1977.

At this date, in neither France nor England do blasphemy laws subsist. Nevertheless, it is arguable that there have been attempts at reintroducing modern versions of a wrong of blasphemy.

### **The role of defamation: a common focus on the rights of individuals**

One such attempt consists in expanding the scope of the law of defamation. Since defamation law protects the right to reputation, introducing a concept of “defamation of religions” grants legal protection to the reputation of one or various religions. This wrong is recognised, for instance, in the Turkish legal system. Thus, two journalists working for the Turkish newspaper *Cumhuriyet* are currently under investigation for “religious defamation” for insulting religious values by featuring a selection of *Charlie Hebdo* cartoons. This wrong has also been recognised at an international level. From 2000 to 2010, the United Nations Human Rights Council adopted a number of resolutions on defamation of religions. This generated an outcry from human rights organisations, which argued that it undermined international guarantees on freedom of expression and potentially even lent support to the state suppression of religious and dissenting voices.<sup>8</sup> One commentator suggested that this amounted to an international law of blasphemy.<sup>9</sup>

What is the position of the French and the English legal systems on defamation of religions? On a cursory view, the way in which the French and English wrongs of defamation are constructed appears to diverge significantly. The most noticeable differences are the nature of the regulation (civil in England, criminal in France) and the scope of the wrong. The English wrong is broader than its French counterpart; its scope covers both the French wrongs of *diffamation* (defamation) and of *injures* (injurious words) regulated in article 29 of the law of 29 July 1881. Their focus is also on the regulation of speech that harms the victim’s reputation, but the disputed statement is alternatively characterised as *diffamation* or *injures* depending on whether or not it imputes a sufficiently precise fact.<sup>10</sup>

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<sup>7</sup> Law Commission, *Report No. 145, Offences against religion and public worship*, London, Her Majesty’s Stationery Office, 1985, §2.54.

<sup>8</sup> Sejal Parmar, “The challenge of ‘defamation of religions’ to freedom of expression and the international human rights system”, *European Human Rights Law Review*, vol. 3, 2009, p. 353-375. This led, in 2011, to the United Nations Human Rights Council changing the focus of its protection. It has shifted from protecting beliefs to protecting believers.

<sup>9</sup> Austin Dacey, “Calvin’s Geneva? The New International Discourse of Blasphemy”, *The Revealer*, 12 June 2012.

“One thing will never be taken from Charlie Hebdo: courage”, *The Guardian*, 7 January 2015.

<sup>10</sup> If a fact is sufficiently precise to be proven, it falls within the scope of *diffamation*; if it is not, it falls within the scope of *injures*. This has a number of consequences, including on the defences that are available to the defendant. In practice, the distinction between *diffamation* and *injures* is somewhat

Despite these significant differences, one element of commonality in the English and French laws is that neither recognise the concept of defamation of religions. Indeed, the shared focus of their protection is the reputation of individuals (whether they are private individuals or legal entities).<sup>11</sup> Religions, which do not possess a legal personality, cannot be held to possess a reputation of their own. Therefore, they fall short of the scope of defamation law. As a telling illustration, in 2001 French writer Michel Houellebecq was not held liable for the wrong of *injures* for his affirmation in the magazine *Lire* that “*La religion la plus con, c’est quand même l’Islam*” (“Islam is the shittiest religion of all”). The court considered that the statement was directed at Islam itself rather than at Muslim people. And thus, the wrong of *injures* could not be characterised.

This is not to say that anything can be said in relation to religious beliefs with complete immunity. However, in both France and England the focus of the protection is on the rights of individuals, rather than on those of religious groups. As long as a person can show that they were directly referred to in a defamatory statement, they can bring a claim in the law of defamation. They need not be named as long as they are objectively designated and identifiable. Thus, when the statement refers to a group, body or class of persons (such as adherents to a given faith), an individual member of the said group can bring a claim where the words are reasonably capable of being understood to refer to him or herself.<sup>12</sup> French law goes even further, treating defamation on the basis of religion as an aggravated form of the wrong. According to article 32 of the law of 29 July 1881, it is consequently sanctioned by a fine of €45,000 instead of the regular €12,000.

Furthermore, in both jurisdictions there are a variety of public order offences whose purpose it is to protect public peace. As such, incitement to religious hatred is a criminal offence in both England and France, which protects believers and non-believers alike against intentionally threatening words and behaviour.<sup>13</sup>

Overall, it appears that England and France share a similar legal framework in the limitation of speech relating to religious beliefs. Therefore, the identification to *Charlie* (or lack thereof) cannot be rationalised on the basis of different legal conceptions of the regulation and scope of freedom of expression.

### **Rationalising the miscomprehension: sensitivity to the French culture of satire**

The type of speech found in *Charlie Hebdo* is one that often falls just short of what is legally prohibited under the current legal framework, both in England and in France. Is it the case that the judgement made on *Charlie Hebdo*’s content – the fact that it goes too far – is due to a cultural difference? Reliance on the French culture of satire

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artificial, and at times properly impossible to establish, to the point that the reasoning applicable to one can be extended to the other.

<sup>11</sup> Michael Jones, Anthony Dugdale, Mark Simpson (dir.), *Clerk & Lindsell on Torts*, London, Sweet & Maxwell, 2014, §22-01.

<sup>12</sup> *Knupffer v London Express Newspaper Ltd* [1944] AC 116 (HL); Jean Pradel, Michel Danti-Juan, *Droit pénal spécial*, Paris, Librairie Générale de Droit et de Jurisprudence, 2010.

<sup>13</sup> See, in France: article 24, *alinéa* 8 of the law of 29 July 1881. In England and Wales: Racial and Religious Hatred Act 2006.

has certainly been a popular argument in the press to explain why *Charlie Hebdo* is not just a racist magazine. Thus, Natalie Nougayrède, former executive and managing editor of French journal *Le Monde*, and current foreign affairs commentator at British journal *The Guardian* describes it as:

“A particularly free-thinking, provocative [media platform], one that very much symbolises what in France is called the ‘1968 generation’, a current of thought that sought to shake up the country, or at least the old family, patriarchal and religious traditions of Gaullist France.”<sup>14</sup>

If this is so, perhaps the reason why Barber and others felt that *Charlie Hebdo* was going too far was because they are not acquainted enough with the French cultural context. It was not because the jurisdiction that they come from has a more restrictive approach to freedom of expression. Therefore, their lack of identification with *Charlie* does not imply that they believe such type of irreverent speech should be legally prohibited. Rather, they could not identify with *Charlie* because the #jesuischarlie campaign created a distorted dichotomy. Indeed, it appeared to present a choice between condoning murderous attacks, and embracing a type of speech that is not legally prohibited but that is undoubtedly culturally alien outside of France.

### Conclusion

What emerges from the preceding analysis is that France and England share a similar legal (though not cultural) approach to the regulation of statements that are offensive of, or insulting to religious beliefs. Regardless of one’s cultural sensitivity, three principles can be extracted from such shared legal framework, which must be kept in mind when thinking about the appropriate limits to the right to freedom of expression in relation to religious matters:

1. The regulation of blasphemy presupposes the recognition of God. Therefore, contemporary secular states (including France) cannot regulate blasphemy.
2. What is more, when the law regulates statements that are offensive of, or insulting to religious beliefs, the object of legal protection is not God or a religion, but the believers’ rights to freedom of conscience and religion, and to respect for religious feelings. Thus, there can be no legal wrong of blasphemy or of defamation of religions.
3. As is the case in relation to most legal issues, conflicting rights must be balanced against one another. In this instance, freedom of conscience and religion must be balanced against freedom of expression. Such type of conflict between fundamental legal rights is unavoidable, and cannot be settled once and for all. It calls for a casuistic analysis, in light of all the circumstances of the case.

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<sup>14</sup> “One thing will never be taken from Charlie Hebdo: courage”, [The Guardian](#), 7 January 2015. .