



Irish Council for
Civil Liberties

October 2018 Referendum to Remove Blasphemy from the Constitution

Vote YES for Freedom of Speech



ICCL's position on the referendum: Vote YES

The Irish Council for Civil Liberties (ICCL) supports the Government's proposal to amend the Constitution by removing the word "blasphemous" from Article 40.6.1. We believe that removing the crime of blasphemy from the Constitution will strengthen the protection of free speech and will ensure that the Constitution better reflects the values of the Irish people.

Speech that ridicules ideas or institutions is not the same as speech which is aimed at individuals or at groups or communities. The latter categories of speech can and should be dealt with through hate speech legislation and the law of defamation. Existing statutory gaps in Ireland in the area of hate speech can and should be dealt with separately.

Why does ICCL support deleting the constitutional offence of blasphemy?

The ICCL believes that the constitutional offence of blasphemy is an unwarranted and illegitimate restriction on the right to freedom of expression, and violates international human rights norms, for the following reasons:

1. The prohibition of blasphemy is intended to stifle the spread of ideas.

The free exchange of ideas is the lifeblood of a democratic and free society. In a mature democracy, critique of ideas and institutions is tolerated and encouraged. We note that the main religious bodies recognise that Ireland is such a society and are supporting the referendum proposal (see the statements by the [Irish Catholic Bishops' Conference](#) and the [Irish Council of Churches](#)).

Under international human rights law, restrictions on right to freedom of expression are only permitted where necessary to protect the rights or reputations of others, or to protect national security, public order, public health or morals (see Article 19 [International Covenant on Civil and Political Rights](#) and Article 10(2) [European Convention on Human Rights](#)). The prohibition of blasphemy, however, is intended to protect religious institutions and the authority of religious ideas.

The current criminal prohibition of blasphemy in the Defamation Act 2009 covers all religions. This broad and ill-defined (and impossible to define) protection from criticism could present real threats to necessary free speech and the public exchange of ideas. The provision could become more important in the future as new religions or organisations claiming the status of religions might emerge. The removal of the constitutional provision (and subsequent deletion of the clause in the Defamation Act) will have the effect of discouraging vexatious legal action from those who would seek to attack free speech in society.

2. The prohibition of blasphemy is discriminatory, because it is intended to protect majority beliefs.

Not only is the offence of blasphemy designed to protect religion, but it is designed and functions to [protect majority beliefs](#).ⁱ EU and Council of Europe bodies have called for blasphemy laws to be abolished for this reason. In 2013, the European Union Directorate General for Internal Policies produced a [report](#) on religious practice and observance in the EU Member States, which stated (at p.17):

“Laws that criminalize blasphemy or religious insults should be abolished, as the Parliamentary Assembly of the Council of Europeⁱⁱ and the Venice Commission have recommended.ⁱⁱⁱ In the past, blasphemy laws often reflected the position of dominant religions. Given the greater diversity of religious beliefs and of other sorts, this kind of laws is no longer justified.”^{iv}

Under section 36 of the Defamation Act 2009, blasphemy can only be committed when it intentionally causes “outrage among a substantial number of the adherents of that religion”. Recent examples from countries such as Russia and Pakistan show that blasphemy laws are often used against critics of the majority religious institutions and adherents of minority religions.

Originally, the crime of blasphemy was created in England to protect the established Church and the position of Christianity as the law of the land, and it essentially functioned as a law against treason.^v

The prohibition of blasphemy in Irish law provides no protection to non-believers.

3. The crime of blasphemy is unworkable because the Courts do not, and should not, have the power to arbitrate the meaning of religious beliefs.

In a modern society, it is inappropriate for the State to be in the position of protecting religious ideas, and it is inappropriate for the Courts to adjudicate on religious or theological questions.

In the 1999 Supreme Court case of [Corway v Independent Newspapers \(Ireland\) Ltd](#), Barrington J agreed that the State is not equipped to be, and should not be, the arbiter of religious tenets.

In *Corway*, the Supreme Court held that the constitutional wording, on its own, was not sufficient to ground a criminal prosecution for blasphemy because of its lack of clarity. In any event, however, Barrington J concluded that, under the Constitution, “*the State is not placed in the position of an arbiter of religious truth. Its only function is to protect public order and morality.*”^{vi}

4. As a general rule, it is not the function of the Constitution to provide for criminalisation of individuals or individual action.

The Supreme Court has already found that the previous offence of blasphemy could not be interpreted or applied in a constitutional manner (in *Corway v Independent Newspapers (Ireland) Ltd* in 1999, explained further below). In general the Constitution does not provide for criminal offences of any type, as the specific details of criminal liability are more appropriately dealt with in statute.

5. Removal of blasphemy will be a further step in the modernisation of the Constitution and will move Ireland into the category of modern progressive states which have abolished criminalisation of blasphemy.

The removal of the constitutional provision will be a powerful statement of Ireland's values as a society in which free speech is cherished. The states that continue to criminalise blasphemy are largely authoritarian or restrictive countries.

While there have not been any successful legal actions under the current law, the symbolism of the Constitutional offence remains powerful. In *Norris v Ireland*, the State also argued that the non-enforcement of obsolete laws might justify their retention. This ignores the real significance of the Constitution in setting values.

Removing Ireland from the category of states that retain blasphemy laws would weaken the position of states that wish to use blasphemy laws to suppress religious minorities or non-religious groups. Conversely, a referendum vote to retain blasphemy would be offer strong symbolic support to those states.

What this Referendum is NOT about:

1. This referendum is not about freedom of religion, which does and will still enjoy strong protection under the Constitution, European and international human rights law, and domestic anti-discrimination law.

Under Irish law, religious organisations enjoy special protections under equality law and under charity law. The right to freely practice religion is a fundamental human right. It is also important that those of no religion or faith enjoy equal protection under law. This can be achieved under equality legislation.

2. The prohibition of blasphemy is not the proper response to the genuine problems of division and racism in Ireland; if anything it risks heightening feelings of exclusion.

Speech that ridicules ideas or institutions is not the same as speech which is aimed at individuals or at groups or communities. Often what people might call blasphemy is in fact violence towards a particular individual or group of individuals based on their race, ethnicity, culture or background. The latter categories of speech can and should be dealt with through hate speech legislation and the law of defamation. Existing statutory gaps in Ireland in the area of hate speech can and should be dealt with separately.

The State does have an obligation to protect individuals, rather than religions, from harm. Ireland has a problem of racism and discrimination, and hate- and hostility-based crime (as demonstrated in the ICCL's recent *Lifecycle of a Hate Crime* report and through the European Network Against Racism Ireland's [iReport](#) data gathering tool).

Ireland is obliged by European and international human rights law to have in place a robust framework to respond to and prevent hate- and hostility-based crime. ICCL's recent report, [A Human Rights-Based Approach to Policing in Ireland](#), sets out a framework of measures that the State urgently needs to put in place to address race-based hate crime.

In its [General Comment No 34](#) on freedom of opinion and expression under the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee states that "Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2."

Article 20, paragraph 2 of the ICCPR states: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

If there is a yes vote, what does ICCL believe should happen next?

Amendment of Article 40.6.1 should be followed by repeal of section 36 of the Defamation Act 2009. Although the criminal nature of section 36 is obscured by its inappropriate inclusion in an otherwise civil law statute (and there has never been a prosecution under this statutory provision), section 36 of the Defamation Act 2009 creates a criminal offence of blasphemous utterance in order to give effect to the constitutional crime.

Brief history of the law on blasphemy in Ireland

Article 40.6.1(i)

Article 40.6.1(i) of the Irish Constitution guarantees the right to freedom of expression. Similarly to international and European human rights instruments, the Constitution qualifies the right to freedom of expression by stating that it is "subject to public order and morality". However, Article 40.6.1(i) goes further. It creates the following constitutional criminal offence:

The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.

Corway v Independent Newspapers (Ireland) Ltd

In the 1999 case of [Corway v Independent Newspapers \(Ireland\) Ltd](#), the Supreme Court held that the constitutional provision on its own was not clear enough to form the basis of a prosecution for blasphemy. In *Corway*, the applicant had sought the courts' permission to criminally prosecute the creator of a cartoon published in the aftermath of the 1995 divorce referendum suggesting that the Catholic Church's influence in Ireland was waning. The cartoon (below) was a play on a phrase used by anti-divorce campaigners, "Hello divorce – bye bye daddy".



Defamation Act 2009

Due to the Supreme Court's finding in *Corway* that the elements of the crime of blasphemy were not clear from the Constitution, the Oireachtas passed legislation in 2009 to give effect to the constitutional offence.

Section 36 of the Defamation Act 2009 currently states that it is an offence carrying punishment of a fine up to €25,000 to 'publish or utter blasphemous matter'. The legislation explains that a person is guilty of the offence if they publish or utter 'matter that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion', provided the person intended to cause such outrage. It is a defence to 'prove that a reasonable person would find genuine literary, artistic, political, scientific, or academic value' in the publication or utterance.

Prosecutions for blasphemy in Ireland?

The crime of blasphemy has not been prosecuted in Ireland since 1885.^{vii} In 2017, Gardai [refused to prosecute Stephen Fry](#) following public complaints about his words during an interview with Gay Byrne on RTE's 'Meaning of Life' programme.

Gay Byrne "Suppose it's all true. And you walk up to the pearly gates and you are confronted by God. What will Stephen Fry say to him, her or it?"

Stephen Fry "...I'd say, bone cancer in children? What's that about? How dare you? How dare you create a world in which there is such misery that is not our fault? It's not right. It's utterly, utterly evil. Why should I respect a capricious, mean-minded, stupid god who creates a world which is so full of injustice and pain? That's what I'd say."

National and international criticisms of the constitutional and statutory offences of blasphemy

The 2009 legislation was widely criticised in public and the Government pledged soon after to put the question of the removal of the constitutional offence of blasphemy to the Convention on the Constitution in 2013. In November 2013 the Convention on the Constitution voted 61% in favour of removing the offence of blasphemy from the Constitution.^{viii}

Over the past few decades, the Law Reform Commission,^{ix} Constitution Review Group^x and Legal Advisory Group on Defamation^{xi} have also all called for the abolition of the offence of blasphemy in Irish law.

In 2014, the UN Human Rights Committee [called on Ireland](#) to remove the offence of blasphemy from the Constitution. It stated the following in its Concluding Observations on Ireland's human rights record:

Blasphemy

1. While welcoming the repeal of the Defamation Act, 1961, the Committee remains concerned that blasphemy continues to be an offence under article 40.6.1 (i) of the Constitution and section 36 of the Defamation Act 2009 (art. 19).

The State party should consider removing the prohibition of blasphemy from the Constitution as recommended by the Convention on the Constitution, and taking into account the Committee's general comment No. 34 (2011) on article 19: freedoms of opinion and expression, concerning the incompatibility of blasphemy laws with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.

i **ENDNOTES**

See Saba Mahmood, 'Religious Reason and Secular Affect: An Incommensurable Divide?' (2009) 35(4) *Critical Inquiry* 836.

ii Parliamentary Assembly, Recommendation 1805 (2007) on Blasphemy, religious insults and hate speech against persons on grounds of their religion, 29 June 2007, para. 4.

iii European Commission for Democracy through Law (Venice Commission), Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, 17-18 October 2008, Doc. No. CDL AD(2008)026.

iv European Commission for Democracy through Law (Venice Commission), Preliminary Report on the National legislation in Europe concerning blasphemy, religious insults and inciting religious hatred (Venice, 16-17 March 2007) CDL-AD(2007)006, para. 25-26.

v Barrington J in *Corway v Independent Newspapers (Ireland) Ltd* [1999] IESC 5; [1999] 4 IR 485; Dr Neville Cox, Presentation to the Convention on the Constitution, 2 November 2013,

<http://www.constitutionalconvention.ie/AttachmentDownload.ashx?mid=687a658f-b2a2-e311-a7ce-005056a32ee4>

vi *Corway v Independent Newspapers (Ireland) Ltd* [1999] IESC 5; [1999] 4 IR 485, para 34.

vii Forde and Leonard, *Constitutional Law of Ireland* (3rd edn, Bloomsbury Professional 2013) 573; *Corway v Independent Newspapers (Ireland) Ltd* [1999] IESC 5; [1999] 4 IR 485 para 24.

viii Sixth Report of the Convention on the Constitution: The removal of the offence of blasphemy from the Constitution, January 2014, <http://www.constitutionalconvention.ie/AttachmentDownload.ashx?mid=687a658f-b2a2-e311-a7ce-005056a32ee4>

ix Law Reform Commission Report on the Crime of Libel (LRC 41-1991) p12, para 21, http://www.lawreform.ie/_fileupload/Reports/rCrimeofLibel.htm

x Report of the Constitution Review Group (The Stationery Office, Dublin, 1996) p274, <http://archive.constitution.ie/publications/default.asp?UserLang=EN>

xi Report of the Legal Advisory Group on Defamation (Dublin, 2003) pp34-35, para 59, <http://www.justice.ie/en/JELR/rptlegaladgpdefamation.pdf/Files/rptlegaladgpdefamation.pdf>