

GAY NEWS LTD. AND LEMON *v.* UNITED KINGDOM  
(Blasphemous libel)

BEFORE THE EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 8710/79  
7 May 1982

1982  
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*Gay News v.*  
*United*  
*Kingdom*  
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European  
Commission  
of Human  
Rights

**1. Freedom of expression. Restrictions prescribed by law (Article 10 (2)). Common law offence of blasphemous libel. Acts not criminal when committed (Article 7).**

In the interpretation and application of common law criminal offences the law-making function of the courts must remain within reasonable limits. Acts not previously punishable should not be held to entail criminal liability nor should existing offences be extended to cover facts which clearly did not constitute a criminal offence when committed. In the present case the courts had given a reasonable and foreseeable interpretation of the existing law and had not violated Article 7 or 10.

**2. Freedom of expression. Restrictions necessary in a democratic society (Article 10 (2)). Blasphemous libel.**

The restriction of freedom of expression in order to protect the religious feelings of citizens is legitimate and necessary in a democratic society provided the principle of proportionality is respected. The common law offence of blasphemous libel satisfied these conditions.

**3. Freedom of thought and religion (Article 9 (2)). Blasphemous libel.**

Even if the publication in question constituted the exercise of a religious or other belief protected by the Convention, interference would be justified under Article 9 (2) on the same grounds as under Article 10 (2).

**4. Freedom of expression. Discrimination in the exercise of rights (Article 14).**

There is no evidence that the applicants were discriminated against on account of their homosexual views or of beliefs not shared by confessing Christians. The restriction of the law to the protection of Christianity involves no discrimination against the applicants.

The following cases are referred to in the decision:

1. *KNULLER v. D.P.P.* [1973] A.C. 435.
2. *R. v. LEMON* [1979] A.C. 617.
3. *SUNDAY TIMES v. UNITED KINGDOM* (1979) Series A, No. 30; 2 E.H.R.R. 245.
4. Application No. 1852/63, *X v. AUSTRIA* (1965) 8 *Yearbook* 191.
5. Application No. 8490/79, Decision of 12 March 1981 (unpublished).
6. Application No. 8866/80, Decision of 5 October 1981 (unpublished).

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## DECISION OF THE COMMISSION

### The Facts

1. The first applicant, a limited liability company with its seat in London, is the publisher, and the second applicant, a citizen of the United Kingdom born in 1945, who is resident in London, is the editor of a magazine called 'Gay News' the readership of which consists mainly of homosexuals. Issue No. 96 of this magazine, which was published in June 1976, carried a poem by a Professor James Kirkup entitled 'The Love that Dares to Speak its Name' which, according to the headnote of the House of Lords' decision,<sup>1</sup> 'purported to describe in explicit detail acts of sodomy and fellatio with the body of Christ immediately after His death and ascribed to Him during His lifetime promiscuous homosexual practices with the Apostles and other men.' The poem was accompanied by a drawing illustrating its subject-matter.

2. A private prosecution was brought against the applicants by a Mrs. Mary Whitehouse. The Director of Public Prosecutions had declined to take over the prosecution after leave had been given by a single judge to commence a criminal prosecution pursuant to section 8 of the Law of Libel Amendment Act 1888. The charge was that the applicants had 'unlawfully and wickedly published or caused to be published a blasphemous libel concerning the Christian religion, namely an obscene poem and illustration vilifying Christ in His life and in His crucifixion'.

3. The case was tried from 4 to 12 July 1977 at the Central Criminal Court. The applicants first submitted that the common law offence of blasphemous libel had fallen *in desuetudo*, the last case having been tried in 1921-22. The trial judge, however, ruled that he could not quash the indictment for this reason as in his opinion the offence still existed. The trial then dealt mainly with the elements of this offence in the present state of the law, in particular whether it required an intent to attack the Christian religion, to insult or outrage Christian sympathisers or believers, and to provoke a breach of the peace. In his summing up the trial judge directed the jury that for the applicants to be convicted it was sufficient that the publication complained of vilified Christ in His life and crucifixion and that it was not necessary to establish any further intention on the part of the applicants beyond an intention to publish that which in the jury's view was a blasphemous libel. The applicants, who had pleaded not guilty, were convicted on 11 July 1977 by a majority verdict of ten to two. On 12 July the trial judge imposed a fine of £1,000 on the first applicant, and a sentence of nine months' imprisonment suspended for 18 months, plus a fine of £500 on the second applicant.

4. The applicants appealed against the respective convictions and

<sup>1</sup> R. v. LEMON [1979] A.C. 617.

sentences. In their grounds of appeal they submitted, *inter alia*, that the trial judge had been wrong in law in directing the jury that an intent to blaspheme was not a necessary element in the offence of blasphemous libel, and that an attack on Christ or on the Christian religion was not a necessary element either. The appeals were, however, dismissed by the Court of Appeal on 17 March 1978. The Court of Appeal found after a review of the earlier case law that the trial judge had correctly described the legal situation. The Court of Appeal further rejected the appeals from sentence in so far as they were directed against the fines imposed by the trial judge. It quashed the conditional prison sentence which had been pronounced against the second applicant.

5. The Court of Appeal admitted that a point of law of general public importance was involved in its decision, namely the question whether the trial judge had been correct in directing the jury that

- (1) it was sufficient if the jury took the view that the publication complained of vilified Christ in His life and crucifixion, and that
- (2) it was not necessary for the Crown to establish any further intention on the part of the applicants beyond an intention to publish that which in the jury's view was a blasphemous libel.

Nevertheless, the Court of Appeal refused leave to appeal against conviction to the House of Lords. But on 17 May 1978 the House of Lords itself granted leave to appeal to the applicants. It heard the appeals in November 1978, and on 21 February 1979 it dismissed them by a majority decision of three against two votes.

6. The only point considered in the Law Lords' judgments was the question of intent. Two judgments (Lord Diplock and Lord Edmund-Davies) came to the conclusion that an intent to blaspheme was a necessary element of the offence of blasphemous libel although they conceded that the state of the law in this respect as it appeared from the precedents was unclear and that the House of Lords' task in deciding the present case was to give it certainty now. Of the three judgments which came to the opposite conclusion, namely that intent to blaspheme was not a necessary element of the offence of blasphemous libel, two (Lord Russell of Killowen and Lord Scarman) likewise admitted that the question at issue was open for decision, an issue of legal policy in the society of today. Only the judgment of Viscount Dilhorne took the view that the law had always been clear to the effect that the intent to blaspheme was not an element of the offence of blasphemous libel.

### Complaints

1. The applicants complain that their conviction and punishment for blasphemous libel involved violations in particular of Article 10, but also of Articles 7, 9 and 14 of the Convention.

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1. The applicants, who are respectively the publisher and the responsible editor of a journal for homosexuals, were found guilty of the common law offence of blasphemous libel in connection with the publication of a certain poem. They complain that this conviction amounted to an unjustified interference with their freedom of expression as guaranteed by Article 10 of the Convention. They further claim that the publication of the poem amounted to an exercise of their right to freedom of thought and religion within the meaning of Article 9 of the Convention, and that the interference with this right was likewise unjustified. Apart from the argument that the restriction imposed on them was not necessary in a democratic society for any of the legitimate purposes enumerated in the above two Convention Articles, the applicants submit in particular that their conviction was based on legal principles which had not existed, or at least had not been defined with sufficient clarity, at the time of the commission of the offence. In this respect they claim that the restriction was not 'prescribed by law' as required under paragraph (2) of Articles 9 and 10, and they allege in addition a violation of Article 7 of the Convention. The applicants finally complain that they have been discriminated against, contrary to Article 14 of the Convention, in the exercise of their freedom under Articles 9 and 10 of the Convention.

2. The principal issues arise under, or in connection with, Article 10 of the Convention which reads as follows:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

3. There can be no doubt that the applicants' freedom of expression, and more particularly their freedom to express ideas which is expressly included in Article 10 (1) of the Convention, has been interfered with, and that this interference which took the special form of a penalty, needs to be justified under the second paragraph of this Article.

4. This provision requires, first, that any restrictions of the freedom of expression should be 'prescribed by law'. However, in the particular case of restrictions on the freedom of expression taking the form of criminal sanctions, Article 7 must be taken into account

in addition to the more general requirement of lawfulness laid down in Article 10 (2). As a specific provision applicable to the legal basis of any criminal sanctions, this Article in fact sets out much more elaborate criteria in particular as regards a possible retrospective effect of the law. Paragraph (1) of the Article reads as follows:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

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5. In the present case, the parties are first of all in disagreement as to whether the criminal offence of blasphemous libel was defined with sufficient certainty in the common law principles which were applied by the courts. The existence of the offence, *i.e.* the fact that it has not fallen *in desuetudo*, is apparently no longer challenged even by the applicants themselves. But they contend that essential elements of the offence, in particular the principle of strict liability (*i.e.* the necessity to prove only the intent to publish but not the intent to blaspheme), had not been laid down in pre-existing rules of law but were developed by the courts only in the course of the proceedings in their own case. In this connection it is alleged that even the majority of the House of Lords itself recognised the law-making function of its decision when it took up this particular issue. The Government, on the other hand, denies that the courts, including the House of Lords, created new law in this case when they applied a standard of strict liability. They merely clarified the existing law and in doing so based themselves on established case law without departing from the views expressed in recent leading textbooks.

6. The Commission first observes that not only written statutes, but also rules of common or other customary law may provide a sufficient legal basis both for restrictions of fundamental rights subject to exception clauses such as the one contained in Article 10 (2) of the Convention, and for the criminal convictions envisaged in Article 7 of the Convention. The problem in the present case therefore does not reside in the fact that the offence of blasphemous libel was not a statutory, but a common law offence.<sup>2</sup>

7. The crucial point is rather one of the certainty of the law, and the functions of the courts in clarifying or developing vague legal provisions or concepts. This problem was also considered in the *SUNDAY TIMES* case both by the Commission<sup>3</sup> and the Court. In paragraph 49 of its judgment, the Court said the following:

In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a

<sup>2</sup> Cf. *SUNDAY TIMES v. UNITED KINGDOM* (1979) 2 E.H.R.R. 245, para. 47.

<sup>3</sup> Paras. 201–204 of its report of 18 May 1977.

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given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.<sup>4</sup>

8. These considerations are of a general nature, but the Commission has also dealt with the more particular question of extensive interpretation of criminal law, and its relevance under Article 7 (1) of the Convention. One case was in fact declared admissible because the Commission considered that the extensive interpretation of a certain statutory provision, applied for the first time by the courts after the commission of the acts of which the applicant was accused, could raise an issue under this provision.<sup>5</sup> In another case brought against the Federal Republic of Germany the Commission rejected a similar complaint on the ground that the application of a specific article of the Penal Code to certain facts had not gone beyond the limits of a reasonable interpretation of the provision in question. It stated that Article 7 (1) of the Convention forbids the retrospective application of the criminal law to the detriment of the accused and stipulates in a general way the principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*). What is, among other things, prohibited is the application of the penal law *in malam partem* in relation to facts which the text of the law cannot reasonably extend to.<sup>6</sup> A similar test had already been applied in an earlier case.<sup>7</sup>

9. The Commission considers that the same principles also apply to the interpretation and application of the common law. While this branch of the law presents certain particularities for the very reason that it is by definition law developed by the courts, it is nevertheless subject to the rule that the law-making function of the courts must remain within reasonable limits. In particular in the area of the criminal law it is excluded, by virtue of Article 7 (1) of the Convention, that any acts not previously punishable should be held by the courts to entail criminal liability, or that existing offences should be extended to cover facts which previously clearly did not constitute a criminal offence. This implies that constituent elements of an offence such as, *e.g.* the particular form of culpability required for its completion may not be essentially changed, at least not to the

<sup>4</sup> (1979) 2 E.H.R.R. 245.

<sup>5</sup> ZIMMERMANN v. AUSTRIA (App. No. 8490/79) (Decision of 12 March 1981, unpublished).

<sup>6</sup> Admissibility decision on App. No. 8866/80, of 5 October 1981, unpublished.

<sup>7</sup> X v. AUSTRIA (1965) 8 Yearbook 191, 201 (App. No. 1852/63)

detriment of the accused, by the case law of the courts. On the other hand it is not objectionable that the existing elements of the offence are clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence.

10. The Commission notes that the Law Commission has criticised the state of the law of blasphemous libel in particular with regard to its lacking clarity, but it nevertheless considers that the courts in the present case in fact did not go beyond the limits of a reasonable interpretation of the existing law. The House of Lords in particular was aware of the limits of its law-making functions in the area of the criminal law which had been circumscribed in the practice statement of 1966 and put into operation in the case of *KNULLER V. D.P.P.*<sup>8</sup> The courts of all degrees confirmed the continued existence of the offence of blasphemous libel. There was only one point which was not clear, namely the particular requirements as to the *mens rea* of a person who commits this offence. This question was answered in the same way by each of the courts. Despite the admission by the Court of Appeal and the majority of the House of Lords that a point of principle was involved in the determination of this question which required clarification, it is equally clear that the application of a test of strict liability and the exclusion of evidence as to the publisher's and editor's intention to blaspheme did not amount to the creation of new law in the sense that earlier case law clearly denying such strict liability and admitting evidence as to the blasphemous intentions was overruled. By stating that the *mens rea* in this offence did only relate to the intention to publish, the courts therefore did not overstep the limits of what can still be regarded as an acceptable clarification of the law. The Commission further considers that the law was also accessible to the applicants and that its interpretation in this way was reasonably foreseeable for them with the assistance of appropriate legal advice. In conclusion therefore the Commission finds that there is no appearance of a violation of Article 7 (1) of the Convention in this case, and the applicants' complaint in this respect must accordingly be rejected as being manifestly ill-founded within the meaning of Article 27 (2) of the Convention. From that it follows that the requirement under Article 10 (2) of the Convention that any restriction on the freedom of expression must be 'prescribed by law' has also been complied with.

11. As regards the applicants' further allegation that the restriction of their freedom of expression did not pursue a legitimate purpose covered by Article 10 (2) of the Convention, the Commission notes that the Government has invoked three grounds of restriction included in this provision, namely prevention of disorder, protection of morals, and protection of the rights of others.

<sup>8</sup> [1973] A.C. 435.

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All these grounds may be pertinent, but the Commission nevertheless finds it appropriate to observe that in this case the public authorities themselves did not consider it necessary to institute criminal proceedings against the applicants either for blasphemous libel or obscenity. The case was therefore brought only on the basis of a private prosecution, and although this procedure required the consent of a public authority, namely leave by a single judge, it cannot be said that the public interest (prevention of disorder and protection of morals) was so preponderant that it provided the real basis for the interference with the applicants' right to freedom of expression. In the circumstances, the justifying ground for the restriction must therefore primarily be sought in the protection of the rights of the private prosecutor. The Commission considers that the offence of blasphemous libel as it is construed under the applicable common law in fact has the main purpose to protect the right of citizens not to be offended in their religious feelings by publications. This was the thrust of the arguments put before the jury by the trial judge, arguments which were subsequently confirmed by the higher courts in this case. The Commission therefore concludes that the restriction was indeed covered by a legitimate purpose recognised in the Convention, namely the protection of the rights of others.

12. It remains to be seen whether the restriction imposed on the applicants for this purpose can also be considered as necessary within a democratic society. In this respect, the Commission first observes that the existence of an offence of blasphemy does not as such raise any doubts as to its necessity: If it is accepted that the religious feelings of the citizen may deserve protection against indecent attacks on the matters held sacred by him, then it can also be considered as necessary in a democratic society to stipulate that such attacks, if they attain a certain level of severity, shall constitute a criminal offence triable at the request of the offended person. It is in principle left to the legislation of the State concerned how it wishes to define the offence, provided that the principle of proportionality, which is inherent in the exception clause of Article 10 (2), is being respected. The Commission considers that the offence of blasphemous libel as laid down in the common law of England in fact satisfies these criteria. In particular it does not seem disproportionate to the aim pursued that the offence is one of strict liability incurred irrespective of the intention to blaspheme and irrespective of the intended audience and of the possible avoidability of the publication by a certain member of the public. The issue of the applicants' journal containing the incriminated poem was on sale to the general public, it happened to get known in some way or other to the private prosecutor who was so deeply offended that she decided to take proceedings against the publication of this poem, and the outcome of these proceedings showed that not only the private prosecutor herself, but also the judicial authorities of all



degrees were convinced of its blasphemous nature. The Commission therefore considers that the application of the blasphemy law could be considered as necessary in the circumstances of this case. The applicants' complaint that it was not necessary and therefore contrary to Article 10 (2) of the Convention is therefore again manifestly ill-founded within the meaning of Article 27 (2) of the Convention.

13. The applicants have further alleged that there was an unjustified interference with their rights under Article 9 of the Convention, in particular their right to freedom of thought and religion. However, the Commission considers that it has not been substantiated that the publication of the poem in question constituted the exercise of a religious or other belief protected by the above Convention Article. Even assuming that there had in fact been an interference with the applicants' rights under Article 9, it would have been justified under Article 9 (2) on the same grounds as the restriction of the applicants' freedom of expression under Article 10 (2). It follows that this part of the application is also manifestly ill-founded.

14. The only remaining point is the question whether the applicants were discriminated against, contrary to Article 14 of the Convention, in the exercise of their right to freedom of expression under Article 10 of the Convention. The distinction which the applicants wish to draw between the content and the style of the restricted publication is wholly irrelevant in this connection. What matters is that there is no indication in the facts of the case to support their allegation that they were singled out for restriction on account of their homosexual views, or on account of beliefs not shared by confessing Christians. However, the poem in question was restricted only because of its blasphemous character and for no other reason. Nothing suggests that it would not have been restricted in exactly the same way if it had been published by persons without homosexual tendencies, and with other views on the Christian doctrines. Apart from that, the applicants cannot complain of discrimination because the law of blasphemy protects only the Christian but no other religion. This distinction in fact relates to the object of legal protection, but not to the personal status of the offender. This last part of the application is therefore also manifestly ill-founded.

For these reasons THE COMMISSION *declares* the application inadmissible.

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