

The end of blasphemy law

by Paul Kearns

Blasphemy law was once an integral part of English constitutional and criminal law, such as the law's close affiliation with the precepts of Christianity. The author marks the end of blasphemy law in England by adumbrating the reasons for its decline, and by providing a brief history of the crucial developments within that defunct but once important law, with reference to international as well as domestic case law. He also alludes to the sea change in religious priorities in England and the attempted resolution of possible inter-religious antipathies.

The sociologist Max Weber observed that the ultimately possible attitudes to life are irreconcilable, and hence their struggle can never be brought to a final conclusion. Nevertheless, blasphemy law, which has been a venerable offence for several centuries in English law, and which has durably protected Christian values, has now been repealed, practically irretrievably, because it is allegedly demoded in both policy and principle. The law abrogating blasphemy law is section 79 of the Criminal Justice and Immigration Act 2008, which received Royal Assent on May 8, 2008. Section 153(2)(d) of that Act provides for its provisions to come into force two months after Royal Assent. At the time of writing, this enforcement date has only very recently been reached.

Although blasphemy law has now been rendered obsolete, it was once a key plank in the English criminal law which has been much influenced by Christianity. Moreover, blasphemy law has acted in the past as a law of constitutional importance for the enforcement of public morality, recognising Christ as the *Kulturheros* of western civilisation, and protecting his image and theosophy accordingly. In affording him and his religious creed particular iconic protection, the law in effect attempted to insulate his reputation and beliefs from defamation. With the passage of time, only ill-tempered or scurrilous attacks on Christ's image and teachings formed the *actus reus* of the crime, but the *mens rea* of the offence was always minimal, and a matter of strict liability: it was never required that intention to blaspheme was necessary for the offence to be committed. All that was required for a conviction was that Christ and his religion had in fact been vilified by the defendant in an unseemly way. The reasons for prohibiting blasphemy eventually became secularised and blasphemy law was used to keep public order, primarily, highlighting again the requirement that the criticism of Christianity

needed to be other than sober for the offence to be properly constituted.

It is also significant that, throughout its history, blasphemy law's protection was claimed to relate to Anglicanism alone, so the Virgin Mary, for example, as a Catholic symbol, arguably fell outside its terms. However, this theological point is neither certain nor compelling because in "high church" Anglicanism the Virgin plays a very crucial part in everyday worship. What is indisputable, though, is that the law of blasphemy adversely affected freedom of expression throughout its progress in England, hence why the Americans refused to use it, since it would have infringed the right to free speech enshrined in the First Amendment, a provision that to them has itself acquired almost religious significance. In England, blasphemy law has now been superseded, in effect, by incitement to religious hatred, in 2006 legislation that came into force on October 1, 2007, namely the Racial and Religious Hatred Act. Muslims had never been protected under the Public Order Act 1936 because this legislation extended only to races, so religious minorities were denied parity of protection. The 2006 Act has filled this lacuna but, like blasphemy law, is still, in the minds of some, an undue restriction on free speech. There is also always the intractable legal problem of how to define a "religion" for protection purposes. The shift in protective priorities is more important than it might at first appear and will be referred to in this short article after the elaboration of the historical significance of blasphemy law is complete.

A BRIEF ANALYSIS OF BLASPHEMY LAW IN THE UNITED KINGDOM

Such was once the importance of the Christian religion in England that it was from early times illegal to produce blasphemous statements, orally or in writing. Blasphemy included the denial of the truth of the Christian religion,

the Bible, the Book of Common Prayer or the existence of the Christian God. Protecting undifferentiated “society” from any event of blasphemy was to ensure the internal tranquillity of the kingdom as much as to prevent the tainting of the image of Christ. It was supposed that the whole of society would lose its basic integrity if blasphemy was permitted, but it was also acknowledged that decorous formal discourse on the fundamentals of any religion could not constitute the offence. The law was aimed at the riotous mode or even potential of the utterance. Civil disorder today is unlikely to result from blasphemy relating to the Christian religion, but it is important to note that anti-Islamic utterances could easily lead to breaches of the peace in contemporary England, so the law has recently evolved in a different way to accommodate Muslims, as specified above.

Somewhat unconscionably, when the traditional blasphemy offence became utilised in more modern times, in the case of *Lemon* [1979] AC 617, for example, illegal blasphemy was deemed to result in accordance with a much less violence-based rationale, attenuating one implicit reason for the offence that rested on the projected ill-defined but probable volatile and hostile reaction to the blasphemous statement. In the aforementioned case, an allegedly blasphemous poem plus illustration in the newspaper *Gay News* was the target of prosecution at the instigation of family-values campaigner, the late Mary Whitehouse. The prosecution succeeded based on the offensiveness of the material, and it was never suggested that that material had to provoke violence to come within the ambit of blasphemy law, which was an unwelcome step for those concerned about the human right of free speech. The contentious material in *Lemon* had been published in a newspaper for gay and bisexual people but the House of Lords ignored the fact that its selective context was relevant. It also failed to investigate the intentions behind the material which could be described as “art”. It simply applied strict liability. This is out of tandem with the postmodern emphasis on respecting all sub-sets of society, including artists and writers. It took the law back to the values of its mediaeval roots. There had, moreover, been no blasphemy prosecution for over 60 years before the *Lemon* imbroglio.

The law was to be tested again in more recent times in the case of *Chief Metropolitan Stipendiary Magistrate, ex p Choudhury* [1991] 1 QB 429, which can be referred to as the Rushdie case. A summons was sought against Salman Rushdie and his publishers for an alleged blasphemous libel, *inter alia*, by the publication of Rushdie’s novel *The Satanic Verses*. A summons was refused at both first instance and Divisional Court levels. Both courts concurred in stating that blasphemy law only applied to the protection of the Christian religion and could not be extended to protect Islam. This was evidently in ignorance of the pertinent hierological consideration that Christ is recognised as a prophet (if not the Messiah) in Islam. In addition, neither court considered the culturally specialised position of art (a

novel) in the blasphemy context, and other relevant questions. Is it possible to blaspheme through characters in a work of art or does blasphemy law only apply to literal, as opposed to symbolic, fictive statements? In a religiously-plural society, can a law protecting only one religion be fair and justifiable? Should blasphemy law be a strict liability offence or should it, for example, include an assessment of whether Rushdie, or any other creative writer in a similar position, knew the probable effect of his words, even though their locus was a solely artistic context?

In 1985, the Law Commission had recommended that blasphemy law should be abolished. The two commissioners against such a radical step *simpliciter* suggested that blasphemy law should be replaced by a new offence designed to proscribe any acts that were deemed to outrage religious feelings. The Racial and Religious Hatred Act 2006 broadly amounts to implementing the salient part of their proposals. Regarding the majority decision, it has taken until July 2008 to remove blasphemy law from the common law as the Law Commission instructed in the mid-1980s. This delay is no shock; neither is the ultimate abrogation: blasphemy law has been only rarely prosecuted in England, and, when it was eventually repealed, its state was anachronistic, and moderately vestigial.

UNITED KINGDOM BLASPHEMY LAW IN AN INTERNATIONAL CONTEXT

Blasphemy has appeared as a central issue before the European Court of Human Rights. Although the cases involving the United Kingdom directly are few, they are seminal significant. The European Commission of Human Rights affirmed the legitimacy of operating a national blasphemy law in *X and Y v United Kingdom*, which was the international extension of the *Lemon* case [EHRR 123 1983]. It did so even though the elements of such offences are usually relatively unclear, and the use of such crimes haphazard, and the results of their application inconsistent. In *Choudhury v United Kingdom*, which was the international extension of the Rushdie case (12 HRLJ 172 1991), the application contending that English law was prejudicial against Islam was declared inadmissible by the Commission as manifestly ill-founded because there was no positive obligation on states, under European Convention on Human Rights law, to protect all religious sensibilities. These cases are interesting because, by using its margin of appreciation, the Strasbourg organs of the Convention have allowed the contracting states to apply their own blasphemy laws without Convention review of a thorough kind, which is arguably a dereliction of duty. Instead of revising unsatisfactory blasphemy law in a proactive way, the Strasbourg organs have been content to give the local states a free rein, and no remedial assistance, even with such an opaque and sometimes arbitrarily-applied law. It is unusual for the Convention, as a “living instrument”, to be developmentally behind national initiatives regarding such law, since the duty of the

Convention organs that apply it is to secure decisions that are in harmony with the prevailing current social, moral and political consciousness of the people it is meant to protect.

There is now the anomaly that blasphemy law has been abolished in the United Kingdom but is still very much extant in European Convention jurisprudential doctrine. In the United Kingdom case of *Wingrove v United Kingdom* (1997 24 EHRR 1), which was adjudicated upon by the European Court of Human Rights, and which resulted in Nigel Wingrove failing in his attempt to reverse a local decision that had found his video-film, *Visions of Ecstasy*, potentially blasphemous, the international court's decision was to simply reaffirm without appropriate analysis the local refusal to give the video-film a certificate, so that the consequence that it could not be distributed and shown remained insubstantially reviewed. It also appears that, paradoxically, the organs of the Convention, notably the court, now have a less liberal approach to artistic freedom than the United Kingdom itself, whose decisions the Convention organs are conscientiously bound to reappraise, and test for legitimacy, in relation to the fundamental rights that those organs are specifically designed to protect.

SOME CONCLUDING OBSERVATIONS

The operation of blasphemy law in England historically preserved a reverence for the sociologically-indigenous, if not completely native, Anglican religious culture in England, centred on widespread, and nearly uniform, Christian belief. In the era of postmodernism, the pre-eminence of such endemic spiritual values in the United Kingdom has been reduced in part following a gradual political reappraisal of our now religiously-diverse national society. A central concern has focused on the vibrant faith of Muslims, and the need for the protection of Islam from vilification. Emphasis has thus shifted from one God to another, and the preservation of law and order in a religiously-plural society has featured strongly as a motivating factor in bringing about the Racial and Religious Hatred Act 2006 primarily to protect Muslims. Some commentators of a conservative disposition resent the displacement of Christianity for another faith as a matter of political and legal priority. However, this

recalcitrant approach does not accommodate the importance of *realpolitik*. Faced with a potentially volatile situation given the stark reality of terrorism, it is perhaps politically, and thereafter legally, wise to try to accommodate peaceably a possibly inflammatory confrontation between more traditional Christianity-based religious values and those that are somewhat alien to a number of United Kingdom citizens but which are strongly adhered to and strenuously vocalised by a religious minority. There is arguably a sensible sacrifice of the Christian dominance in British affairs for the promotion of a more eclectic social reality's various forms of personal religious identification.

However, this tendency has been promoted by the Blairite fostering of multi-culturalism and its logical partner political correctness, both of which have been founded on sociological misassumptions, and which have contributed to the suppression of free speech, a democratic value which the organs applying the European Convention on Human Rights purport to uphold as cardinal. What Christian conservatives now discern in contemporary Britain is the lessening of one religion's legal support in favour of another's, even though it is far from axiomatic that one faith's religious rights or freedoms should increasingly prevail over any other's, or prevail over the right to free speech. They would contend that such dramatic though stealthily incremental changes should be brought about in a politically overt and very well-reasoned way to the total satisfaction of all members of the national community. Nevertheless, our legal policy-makers are obliged to take an ideologically-neutral, pragmatic and syncretic course regarding a lamentably complex and controversial matrix of virtually irreconcilable competing interests; and, as Isaiah Berlin opined, the world that we encounter in ordinary experience is one in which we are faced by choices equally absolute, the realisation of some of which must inevitably mean the sacrifice of others. 

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