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The Strange Death of Blasphemy

Russell Sandberg and Norman Doe *

INTRODUCTION

Tucked away in Part 5 of the Criminal Justice and Immigration Act 2008, amid a plethora of provisions affecting various parts of the criminal law,¹ can be found one line that ends a long-running debate in England and Wales about the future of the blasphemy laws. Section 79(1) states that: ‘The offences of blasphemy and blasphemous libel under the common law of England and Wales are abolished’. Although many had already pronounced the offence of blasphemy dead,² or at least moribund,³ the abolition of these ancient offences in such an understated way has caught many by surprise.⁴ The purpose of this article is to explain what has been lost, to explore why blasphemy has been abolished now and to examine the extent to which the criminal law still nevertheless protects religious beliefs and believers.

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¹ Part 5 includes provisions affecting, *inter alia*, the law on pornography, data protection offences, the use of reasonable force in self defence. It also expands the offence of stirring up religious hatred found in part 3A of the Public Order Act 1986 to include hatred on grounds of sexual orientation.

² See, eg A. Denning, *Freedom Under the Law* (London: Stevens, 1949) 46: ‘the offence of blasphemy is a dead letter’.

³ Writing in 2005, Ahdar and Leigh commented how the offence ‘has lingered on, enjoying a perilous existence on a life support machine while legislators, commentators and judges huddle around the bedside debating whether it has a future’: R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005) 368.

⁴ The popular and academic coverage of the abolition of the blasphemy laws has been much more muted than the coverage concerning the Racial and Religious Hatred Act 2006.

THE STRANGE LIFE OF BLASPHEMY

Blasphemers were originally dealt with by the Church Courts; it was not until the seventeenth century that the law was enforced by the secular criminal courts. The rationale for the offence is clearly elucidated in one of the earliest cases heard by the criminal courts: *Taylor's Case*.⁵ In that case it was established that blasphemy was akin to treason: the Chief Justice of the day held that Taylor's cry that 'Jesus Christ was a bastard, an impostor and a cheat' was 'not only an offence to God and to religion, but a crime against the laws, state and Government'. He reasoned that to undermine religion was 'to dissolve all those obligations whereby the civil societies are preserved'; since 'Christianity is parcel of the Laws of England', it followed that 'to reproach the Christian religion is to speak in subversion of the law'.⁶ However, since the law of blasphemy rested, in the main, on decisions made by courts in the seventeenth to nineteenth centuries,⁷ it was often difficult to determine the exact scope of the law.⁸ That said, despite what one academic called the offence's

⁵ (1676) 1 Vent 293.

⁶ See House of Lords Select Committee on Religious Offences in England and Wales, Volume I - Report (2003), Volume I, Appendix 3, para 2.

⁷ Blasphemy was originally both a statutory and a common law offence. It is now only an offence at common law: the Criminal Law Act 1967 repealed the Blasphemy Act 1697.

⁸ See, eg, House of Lords Select Committee, n 6 above, Appendix 3, paragraph 1; A. Bradney, *Religions, Rights and the Law* (Leicester: Leicester University Press, 1993) 82; D. Feldman, *Civil Liberties and Human Rights in England and Wales* (Oxford: Oxford University Press, 2002) 913.

‘chameleon-like’ capacity to adapt to changed social conditions,⁹ it was possible to outline the essence of the offence.¹⁰

The *actus reus* of blasphemy was to publish ‘blasphemous’ material in any form.¹¹ To be ‘blasphemous’, the content of the material had to be both in conflict with the tenets of the Church of England and couched in indecent or offensive terms likely to shock and outrage the feelings of the general body of Church of England believers. The extent to which the law protected Christian denominations other than the Church of England was an open question. Indeed, by the nineteenth century judicial pronouncements were becoming increasingly confused. In *Gathercole’s Case*¹², for instance, it was noted that a person could lawfully attack ‘any sect of the Christian Religion (save the established religion of the country)’ because the Church of England alone is ‘the form established by law, and is therefore a part of the constitution of the country’. However, the judgment continued to state that ‘any general attack on Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country’.¹³ Nevertheless, as it was made clear in

⁹ C Munro, ‘Prophets, Presbyters and Profanity’ [1989] PL 369 at 371

¹⁰ See, eg P W Edge, *Legal Responses to Religious Difference* (The Hague: Kluwer Law, 2002) 207-211.

¹¹ ‘Blasphemous’ material could be published in a written or verbal form.

¹² (1838) 2 Lewin 237.

¹³ See also *Stephen’s Digest of the Criminal Law* which defined blasphemous matters as those ‘relating to God, Jesus Christ or the Bible, or the formulation of the Church of England as by law established’: (London: Sweet & Maxwell, 1950) article 2.14, quoted by the House of Lords in *R v Lemon*, *R v Gay News* [1979] AC 617.

*Williams*¹⁴, other Christian denominations and other religions were protected ‘to the extent that their fundamental beliefs are those which are held in common with the established Church.’¹⁵ In *Williams*, a publication attacking Old Testament was not interpreted merely as an attack upon Judaism. It was rather held that the ‘Old Testament is so connected with the New that it was impossible that such a publication as this could be uttered without reflecting upon Christianity itself’. Other religious groups, Christian or not, were protected ‘to the extent that their beliefs overlapped with those of the Church of England.’¹⁶

The second limb of the definition of ‘blasphemous’ material was important: the material must be couched in indecent or offensive terms likely to shock and outrage the feelings of the general body of Church of England believers.¹⁷ In *R v Gott*¹⁸ the

¹⁴ (1797) 26 St Tr 654.

¹⁵ *R v Chief Stipendiary Magistrate ex parte Choudhury* [1991] 1 QB 429.

¹⁶ House of Lords Select Committee, n 6 above, Volume 1, Appendix 3, para 4.

¹⁷ This requirement seems slacker than the criterion that needs to be met in discrimination law before a religious group can benefit from an exemption from generally applicable laws. Under Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661), for example, there is an exemption where the employment is for purposes of an organised religion: such an employer can apply a requirement related to sexual orientation either to comply with the doctrines of the religion, or because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers. The employer can discriminate either where the employee does not meet the requirement imposed or where the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it. See R Sandberg and N Doe, ‘Religious Exemptions in Discrimination Law’ (2007) 66(2) *Cambridge Law Journal* 302.

¹⁸ (1922) 16 CR App R 87.

selling of a newspaper that described Jesus as entering Jerusalem ‘like a circus clown on the back of two donkeys’ was held blasphemous on the basis that the passages were ‘equally offensive to anyone in sympathy with the Christian religion, whether he be a strong Christian, or a lukewarm Christian, or merely a person sympathising with their ideas’.¹⁹ This requirement did mean however, that the offence of blasphemy did ‘not protect religious *beliefs* as such’ but rather was ‘concerned with attacks on those beliefs expressed in highly offensive *ways*’.²⁰ The mere publication of a self confessed anti-Christian work,²¹ and the registration of a company promoting the principle that human conduct should be based upon natural knowledge and not supernatural belief,²² were thus not caught by the blasphemy law. Decent and reasonable criticism was not blasphemous. These decisions questioned, however, the original rationale of the offence since it was made clear that ‘if the decencies of controversy are observed, even the fundamentals of religion may be attacked’²³ and that ‘reasonable men do not apprehend the dissolution or the downfall of society because religion is publicly assailed by methods not scandalous’.²⁴

The *mens rea* of the offence was only firmly established in the last successful prosecution. The House of Lords in *R v Lemon*, *R v Gay News*²⁵ held that the

¹⁹ Interestingly the references here are to ‘Christianity’ rather than the ‘Church of England’.

²⁰ R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (2005, Oxford) 367. See also *Stephen’s Digest of the Criminal Law* (London: Sweet & Maxwell, 1950) article 2.14.

²¹ *R v Ramsay and Foote* (1883) 15 Cox CC 231.

²² *Bowman v Secular Society Ltd* [1917] AC 406.

²³ *R v Ramsay and Foote* (1883) 15 Cox CC 231.

²⁴ *Bowman v Secular Society Ltd* [1917] AC 406.

²⁵ [1979] AC 617.

defendant must have intended to publish the blasphemous material. There was no requirement that the defendant had an intention to blaspheme;²⁶ it was sufficient for the prosecution to prove that the publication had been intentional and that the matter was blasphemous. The *Gay News* case was the first successful prosecution for almost sixty years.²⁷ During that period, blasphemy was policed extra-legally; it was curtailed ‘by the fears, anxieties and sensitivities of individuals’.²⁸ copies of Siné’s *Massacre*, a French cartoonist's book of anti-clerical cartoons (some of which had a sexual theme) were burned; permission to film in Britain a motion picture entitled *The Many Faces of Jesus* concerning Jesus’ sex life was denied; and Mary Whitehouse led a campaign against *Monty Python’s Life of Brian*.²⁹ A similar moral panic led to the *Gay News* case itself:³⁰ in 1979 Mary Whitehouse brought a private prosecution against the editor and publishers of *Gay News* alleging that the publication of the poem ‘The Love That Dares to Speak its Name’, by James Kirkup with illustrations was blasphemous.³¹ The *Gay News* case showed that the blasphemy laws remained very much alive.

²⁶ P W Edge, *Legal Responses to Religious Difference* (The Hague: Kluwer Law, 2002) 209-210.

²⁷ Since *R v Gott* (1922) 16 CR App R 87.

²⁸ See R Webster, *A Brief History of Blasphemy* (Southwold: Orwell Press, 1990) chapter 1.

²⁹ See R Hewison, *Monty Python: The Case Against* (London: Eyre NMethuen Ltd, 1981) 66-67.

³⁰ In 1972, Whitehouse had failed in her private prosecution against the BBC for transmitting an episode of *Till Death Do Us Part* in which Alf Garnett was disparaging on the subject of the virgin birth. The Director of Public Prosecutions decided that the case was unlikely to succeed due to the constitutional position of the BBC: see: R Hewison, *Monty Python: The Case Against* (London: Eyre NMethuen Ltd, 1981) 60.

³¹ The poem described acts of fellatio and sodomy committed on Christ’s body immediately after his death. It also suggested that Jesus had committed promiscuous homosexual practices with the Disciples and other men.

The *Gay News* case also showed that the law on blasphemy was compliant with the European Convention on Human Rights (ECHR). Although the ECHR safeguards both freedom of religion (Article 9) and freedom of expression (Article 10), Strasbourg has held that the freedom to manifest religion does not include a right to be exempt from all criticism³² and freedom of expression contains ‘a duty to avoid expressions that are gratuitously offensive to others and profane’.³³ It was therefore unsurprising that the editor and publisher of *Gay News* were unsuccessful in petitioning Strasbourg. The European Commission of Human Rights found that the application was manifestly ill-founded and declared the application inadmissible.³⁴ The Commission held that the common law offence of blasphemous libel constituted a restriction to freedom of expression but that restriction was justified in order to protect the religious feelings of citizens, legitimate and was necessary in a democratic society provided the principle of proportionality is respected.³⁵ Subsequent

³² *İA v Turkey* (Application no. 42571/98) 13 September 2005, para 28: ‘Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.’

³³ *İA v Turkey* (Application no. 42571/98) 13 September 2005, para 24.

³⁴ *Gay News Ltd v United Kingdom* (1983) 5 EHRR. 123.

³⁵ The failure of the Article 10 claim was also fatal for the Article 9 claim since interference would be justified under Article 9 (2) on the same grounds as under Article 10 (2). An argument on grounds of Article 14 (discrimination in the enjoyment of a Convention right) was also dismissed since there was no evidence that the applicants were discriminated against on account of their homosexual views or of beliefs not shared by confessing Christians.

judgments by the European Court of Human Rights in relation to other States followed the same approach.³⁶

Following the *Gay News* case, it seemed that the offence of blasphemy was experiencing something of a revival. The public order disturbances following the publication of Salman Rushdie's *The Satanic Verses*³⁷ led to a claim for judicial review in the High Court.³⁸ This was refused on the grounds that the common law offence of blasphemy applied only to the Christian religion and there was no justification for a court to extend this, not least since this was likely to do more harm than good. A subsequent Strasbourg was declared inadmissible.³⁹ The blasphemy law was also enforced by the decision-making of public bodies: for example, the

³⁶ See eg *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34 in which the Court (but not the Commission) held that the seizing of a satirical religious film, *Council in Heaven*, before it could be shown did not breach the filmmaker's Article 10 rights to freedom of expression since the interference was prescribed by law, had a legitimate aim in protecting the Convention rights of others and was necessary in a democratic society given the pressing social need to ensure religious peace in that region and was proportionate in that authorities did not overstep their margin of appreciation.

³⁷ The fictional novel tells the story of two men: one of whom is divided between his attraction to life in the East and his attraction to life in the West; the other is divided between his desire to believe in God and his inability to believe in God. The first man survives by returning to the East; the second is unable to return to his religious beliefs and finally kills himself. The novel includes disparaging references to God, Abraham, Muhammad and the teachings of Islam.

³⁸ *R v Chief Stipendiary Magistrate ex parte Choudhury* [1991] 1 QB 429.

³⁹ *Choudhury v United Kingdom* (1991) 12 HRLJ 172. The Applicant applied to European Commission of Human Rights on grounds of violation of Articles 9 and 14. The Commission dismissed the claim on the grounds that 'no State authority or any body under which the United Kingdom Government may be responsible under the Convention, directly interfered in the applicant's freedom to manifest his religion or belief'.

British Board of Film Classification has refused to grant films a certificate on the ground that their content was blasphemous. Again, this was upheld by Strasbourg:⁴⁰ the refusal to issue a certificate for Wingrove's *Visions of Ecstasy*⁴¹ was prescribed by law, had a legitimate aim in protecting the rights of others, was necessary in a democratic society given that the film made serious offensive attacks on matters regarded sacred by Christians, and was proportionate given the 'high threshold of profanation embodied in the definition of the offence' of blasphemy.⁴² In addition to the use of the blasphemy laws by public authorities, the high profile of the *Gay News* case meant that the offence was also invariably policed in offence by means of self-censorship.

THE DEATH OF BLASPHEMY

The 'high threshold of profanation' elucidated by the European Court of Human Rights in *Wingrove v United Kingdom* and the lack of a successful prosecution since 1979 could be interpreted as meaning that the Criminal Justice and Immigration Act 2008 was hasty in that the lack of court action was a sign of the success of the law not of its weakness. An alternative interpretation, however, is that the *Gay News* case was the exception to the rule that the offence was moribund; the fact that the 'The

⁴⁰ *Wingrove v United Kingdom* (1997) 24 EHRR.

⁴¹ The eighteen minutes long silent film was derived from the life and writings of St Teresa of Avila, a sixteenth century nun who experienced ecstatic visions of Christ. The film showed scenes of a sexual nature juxtaposed with images of Christ fastened to the Cross. The film ends with St Teresa kissing and licking the body of Christ, and placing her hand in his which he then holds.

⁴² Compare the decision of the Commission who held that the interference was not necessary in a democratic society. The total ban was disproportionate. Since the film was a video rather than cinematic release, it was unlikely to be displayed to general public. Its short length meant conscious decision to view was required so no there was pressing social need.

Love That Dares to Speak its Name' had been broadcast on BBC television⁴³ and recited publicly without prosecution⁴⁴ means that the offence of blasphemy was dead long before the formal recognition of its demise by the Criminal Justice and Immigration Act 2008.

A cursory examination supports this latter view. Since 1979, numerous commentators and politicians called for the offence to be abolished.⁴⁵ For example, in 1981, the Law Commission proposed abolition,⁴⁶ while in 2001, the then Home Secretary David Blunkett told the House of Commons that the Government's position was that 'There is a good case for revising and, indeed, removing existing blasphemy law'.⁴⁷ However, a more detailed analysis of the events of the last ten years suggests a more nuanced conclusion. Five developments need to be examined in turn: the 1999 decision of the Supreme Court of Ireland that a prosecution crime of blasphemy could not succeed in Ireland,⁴⁸ the work and findings of the House of Lords Select Committee on Religious Offences in England and Wales in 2003, the enactment of the

⁴³ During the course of the BBC 2 television programme *Taboo* (broadcast 12.12.01), the text and cartoon drawing published in *Gay News* was shown on the screen while Joan Bakewell read out a section of the poem. The response from the BBC's Head of Programme Complaints Unit was that this 'was responsible and appropriate to the subject matter and the inclusion of part of the poem was justified. [The] change in public attitudes over time has extended the degree of tolerance'.

⁴⁴ In 2002, a group from the National Secular Society arranged a public recitation of 'The Love That Dares to Speak its Name' to commemorate the twenty-fifth anniversary of the prosecution. Advanced notice was provided in the press. Again, there was no police action.

⁴⁵ N. Addison, *Religious Discrimination and Hatred Law* (London: Routledge, 2007) 124.

⁴⁶ Law Commission.(1981). *Offences against Religion and Public Worship* (Working Paper No. 79).

⁴⁷ David Blunkett, HC Deb Column 707 26 Nov 2001.

⁴⁸ *Corway v Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484.

Racial and Religious Hatred Act 2006 , a 2007 High Court decision concerning *Jerry Springer: the Opera*,⁴⁹ and, finally, the parliamentary history of section 79(1) of the Criminal Justice and Immigration Act 2008. These developments are critical to an understanding of the reasons for the abolition of the blasphemy offences in 2008.

The abolition of blasphemy in Ireland

In *Corway v Independent Newspapers (Ireland) Ltd*, proceedings were brought in relation to a cartoon published in the *Sunday Independent* which it was claimed treated the sacrament of the Eucharist and its administration as objects of scorn and derision. The allegation of blasphemy required the court to examine the evolution of the crime of blasphemy in England and then its evolution in Ireland. Although the Irish Constitution states that ‘The publication or utterance of blasphemous... matter is an offence which shall be punishable in accordance with law’,⁵⁰ blasphemy is undefined by the Constitution and Irish law. The Supreme Court concluded that that a prosecution crime of blasphemy could not succeed in Ireland for three related reasons. The first reason was the wording of the Irish Constitution:⁵¹ it was debatable if the ‘secular’ Constitution carried over the English law on blasphemy and even if it did, it was questionable whether that law was compatible with Article 44.1 which places the duty on the State to respect and honour religion as such meaning that the State’s ‘only

⁴⁹ *Green v The City of Westminster Magistrates’ Court* [2007] EWHC (Admin) 2785.

⁵⁰ Article 40.6(1)(i).

⁵¹ On which, generally see P Colton, ‘Religion and Law in Dialogue: Covenantal and Non-Covenantal Cooperation of State and Religions in Ireland’ in R. Puza and N. Doe (eds), *Religion and Law in Dialogue: Covenantal and Non-Covenantal Cooperation between State and Religion in Europe* (Leuven: Peeters, 2006).

function is to protect public order and morality'.⁵² The second reason was the disestablishment of the Church of Ireland in 1871. The Supreme Court reasoned that since the English law of blasphemy only protected the Church of England as the 'established Church' it is difficult to see how the common law crime of blasphemy, could survive in such a different constitutional framework.⁵³ The third reason was legal uncertainty: the Court held that in the absence of any legislative definition of the constitutional offence of blasphemy, it was 'impossible to say of what the offence of blasphemy consists' since neither the *actus reus* nor the *mens rea* is clear.

These objections, however, are questionable. The first reason seems to be undermined by the Constitutional reference to blasphemy and seems contrary to the Strasbourg case law: there is no legal basis to say that a religious protection constitutional clause means that there can be no offence of blasphemy. The second reason seems incorrect in law: even if it is assumed that the offence protects the Church of England only as opposed to Christianity generally, *Williams* establishes that the offence of blasphemy protects other Christian denominations to the extent that their beliefs overlap with the established Church. It follows that the disestablishment of the Church of Ireland is as irrelevant as the disestablishment of the Church in Wales.⁵⁴ The third reason is contrary to the Strasbourg case law which has consistently held that the English prohibition against blasphemy is 'prescribed by law'

⁵² *Corway v Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484 [31], [34].

⁵³ *Ibid* [35].

⁵⁴ The Welsh position is buttressed further by the fact that England and Wales share the same criminal law jurisdiction. For a contrary view, see N. Addison, n45 above, 123.

and is not in breach of the legal certainty requirements of Article 7 ECHR. Although the Irish Supreme Court declined to follow the *Gay News* case,⁵⁵ there was nothing preventing the Irish Court from reviewing the same centuries-old authorities as the House of Lords to reach the identical conclusion that the *mens rea* of the offence was certain. However, despite its flaws, the importance of the Irish Supreme Court's decision on the mainland should not be under-emphasized. In particular, *Corway* cast a long shadow upon the deliberations of the House of Lords Select Committee on Religious Offences in England and Wales in 2003.

Select Committee on Religious Offences

Established 'to consider and report on the law relating to religious offences', the House of Lords Select Committee on Religious Offences in England and Wales identified two main strands of their inquiry: whether existing religious offences (notably blasphemy) should be amended or abolished and whether a new offence of incitement to religious hatred should be created and, if so, how.⁵⁶ Although the Report was light in terms of definite conclusions, it did note that there was a gap in the law and seemed reluctant to see blasphemy filling that gap. The Report concluded that the future of the common law offence of blasphemy 'may not depend upon legislation but upon the contemporary climate, both social and legal, which could lead to a decision to take no action at all'.⁵⁷ The Report also expressed the view that the offence of blasphemy was a dead-letter, contending that 'any prosecution for

⁵⁵ n 52 above [31].

⁵⁶ House of Lords Select Committee, n 6 above, chapter 1, para 1.

⁵⁷ *Ibid*, para 139.

blasphemy today ... is likely to fail on grounds either of discrimination or denial of the right to freedom of expression'.⁵⁸

The Report made three distinct contentions in this respect. First, the report contended that the *Wingrove* decision that blasphemy was in the UK's 'margin of appreciation' does not mean that it will continue to be Convention compatible: 'the Court's decision in *Wingrove* that there was not 'as yet...sufficient common accord' to mean that the English law of blasphemy was in breach of the European Convention does not mean that it will not rule otherwise in the future'.⁵⁹ Second, the common law is uncertain in relation to whether the offence applies to the Church of England or Christianity. This means that the law is not compatible with Article 7 ECHR.⁶⁰ The third contention was that the discrimination against non-Christian faiths and the dis-proportionality of the unlimited penalty may cause problems. The Report pointed out that these factors had not been in point in any of the Strasbourg cases so far and domestic courts have to give a definite ruling, unlike Strasbourg which can lean on its 'margin of appreciation'.⁶¹

⁵⁸ Ibid, Appendix, para 9.

⁵⁹ Ibid, Appendix 3, para 12.

⁶⁰ In *Wingrove*, 'counsel for both sides presented a united front that Lord Scarman's speech in the *Gay News* case had defined the *actus reus* of blasphemy in common law'. This was questionable especially since in *Wingrove* the British Board of Film Classification adopted a definition of blasphemy but omitting any reference to the Church of England: In *Wingrove*, 'counsel for both sides presented a united front that Lord Scarman's speech in the *Gay News* case had defined the *actus reus* of blasphemy in common law'. This was questionable especially since in *Wingrove* the British Board of Film Classification adopted a definition of blasphemy but omitting any reference to the Church of England

⁶¹ House of Lords Select Committee, n 6 above, appendix 3, para 15.

This reasoning is similar to but more nuanced than that in *Corway*. The first contention borders on the farcical since if taken to its logical conclusion it would call into question every pronouncement by Strasbourg. Although it is true that the ECHR is a living instrument and that its interpretation will change over time, it seems disingenuous to speculate in the light of a clear judicial statement that Strasbourg would perform a *volte-face* in the short-term. The second contention is also questionable on practical grounds: ‘To date the English courts have taken a very narrow view of the protection afforded by Article 7 and have failed to accept that common law crimes such as manslaughter by gross negligence and public nuisance are incompatible with Article 7 on the grounds of their vagueness’.⁶² The third reason seems contrary to Strasbourg case law, particularly *Choudhury v United Kingdom*⁶³: the Article 14 prohibition on discrimination is not a free-standing right;⁶⁴ there must be breach of another Convention Article. The decision in *Choudhury v United Kingdom*, coupled with the current unwillingness of English courts to accept

⁶² D. Ormerod, *Smith & Hogan Criminal Law* (Oxford: Oxford University Press, 11th ed, 2005) 20.

⁶³ (1991) 12 HRLJ 172.

⁶⁴ Article 1 of Protocol 12 extends this to ‘any right set forth by law’ but this has not been ratified in the UK. See R. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005) 109.

interference with Article 9,⁶⁵ suggests that it is unlikely that an English court would declare the blasphemy laws incompatible with the Convention.⁶⁶

Racial and Religious Hatred Act 2006

The Racial and Religious Hatred Act 2006 amended the Public Order Act 1986 to create Part 3A entitled 'Hatred against persons on religious grounds'.⁶⁷ The Act, in the words of section 1, 'creates offences involving stirring up hatred against persons on religious grounds'. It creates numerous criminal offences protecting groups of believers from being threatened in a way that is defined by reference to religious belief or lack of religious belief.⁶⁸ However, contrary to Government's original intentions, a prosecution can only be brought if the defendant intended to stir up

⁶⁵ On which see M. Hill and R. Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' [2007] PL 488 and R. Sandberg, 'Controversial Recent Claims to Religious Liberty' (2008) 124 LQR 213.

⁶⁶ There is also some evidence of an emergence of a domestic margin of appreciation, on which *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2002] EWCA Civ 297, at paras 31-33 *per* Laws LJ, and [2003] UKHL 23, at para 132 *per* Lord Nicholls: as commented upon by M. Hill, 'Freedom of Expression: Defining the Limits for Broadcasters' (2004) 7 *Ecclesiastical Law Journal* 466; and *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 16 at para 36, *per* Lord Bingham: and para 64 *per* Lord Hoffmann: as commented upon by M. Hill and R. Sandberg, 'Muslim Dress in English Law: Lifting the Veil on Human Rights' (2006) 1 *Religión y Derecho (Law and Religion)* 302.

⁶⁷ For an account of the Act's extraordinary legislative history, see N. Addison, n 45 above, 139-141.

⁶⁸ For a full account, see I. Hare, 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' [2006] PL 521; and K. Goodall, 'Incitement to Religious Hatred: All Talk and No Substance' (2007) 70(1) MLR 89.

religious hatred.⁶⁹ This, coupled with a freedom of speech clause included in the final Act,⁷⁰ has decreased the likelihood of a successful prosecution under the Act.⁷¹

The focus of the new law differs from that of the law on blasphemy.⁷² Unlike the law of blasphemy, which seeks to protect Christian religious beliefs as a source of public morality and social cohesion, the Racial and Religious Hatred Act 2006 simply seeks to outlaw antisocial behaviour committed against people on grounds of religion. The protection extends far beyond the sensibilities of the established church: indeed, the protection is not focused on 'religion' as such but rather upon deviant acts that happen to involve 'religion'. Although some commentators have seen aspects of the Act as possible replacements for the law on blasphemy,⁷³ and this was the original stated intent of the Government,⁷⁴ at Report Stage,⁷⁵ the House of Lords voted down an amendment to abolish the law on blasphemy by 153 votes to 113.

⁶⁹ The Government had wanted the offence to be charged either when the defendant had the intention to stir up religious hatred or was being reckless as to whether religious hatred would be stirred up thereby. The Government had also wanted to include 'abusive or insulting' words or behaviour in addition to 'threatening'.

⁷⁰ Section 29J .

⁷¹ See A. Jeremy 'Practical Implications of the Enactment of the Racial and Religious Hatred Act 2006' (2007) 9 *Ecclesiastical Law Journal* 187.

⁷² See R. Sandberg, 'Religion and Morality: A Socio-Legal Approach' [2007] *DISKUS* (online).

⁷³ See N. Addison, , n 45 above, 133.

⁷⁴ See the comments of David Blunkett, n above 47.

⁷⁵ 8th November 2005. As Lord Avebury noted this was simply the latest in a long line of debates concerning the future of the offence, including debates surrounding the Blasphemy (Abolition) Bill of 1995; in the Anti-Terrorism, Crime and Security Bill of 2000; the Religious Offences Bill of 2002; in

At Report Stage, Lord Averbury's arguments supporting his amendment to abolish blasphemy echoed those of the Irish Supreme Court and the Select Committee. However, in addition to the well-rehearsed arguments concerning legal certainty, discrimination against other faiths and incompatibility with Article 10 ECHR,⁷⁶ two further arguments were advanced. First, that the enactment of the Racial and Religious Hatred Act without the abolition of blasphemy would lead to 'confusion between incitement to hatred of believers and hatred of beliefs themselves' (since the Act only forbade the former);⁷⁷ and second, that the law on blasphemy should be abolished because of the low level of *mens rea* required for a blasphemy prosecution (simply an intention to publish).⁷⁸ It was this first argument that other peers rejected: rather than opposing the abolition of blasphemy, successive speakers questioned whether it was the right time and the right Bill for such an amendment.⁷⁹ Although their lordships noted that there was 'broad consensus outside the House for change',⁸⁰ the amendment fell largely because the Church of England Bishops had given 'a red

the Serious Organised Crime and Police Bill in 2004 and at Second Reading of the Racial and Religious Hatred Bill itself: HL Hansard, Column 520 8 Nov 2005

⁷⁶ Ibid, Columns 521-522.

⁷⁷ Ibid, column 521.

⁷⁸ Ibid, column 522.

⁷⁹ See eg 'If religious hatred is nothing to do with blasphemy, let the two be dealt with separately': the then Lord Bishop of Oxford, *ibid* column 52; 'it would be totally wrong to move forward with the clause as it stands at this stage when there will be no proper opportunity to consider the wider implications': Lord Crickhowell, *ibid* column 528. Baroness O'Cathain's contribution (at *ibid* Columns 532-533) is an exception to this overall picture.

⁸⁰ Baroness Whitaker, *ibid* column 535.

signal to [the] amendment but a green signal to the principle';⁸¹ the conclusion was simply 'not in this Bill'.⁸² The question following the debate and the astonishing final parliamentary stages of the Racial and Religious Hatred Bill was how long the abolition of blasphemy was to stay in the political long grass.

Jerry Springer: the Court Case

Although the furore surrounding the television transmission of *Jerry Springer: the Opera* in 2005 cast attention on the relationship between freedom of expression and freedom of religion,⁸³ it was the resulting litigation almost two years later that focussed attention upon the existence and future of the blasphemy law. In *Green v The City of Westminster Magistrates' Court*⁸⁴ a member of Christian Voice sought to bring a private prosecution for blasphemous libel against the producer of *Jerry Springer: the Opera* and the Director General of the BBC. When the District Judge sitting in the Magistrates Court refused to issue a summons on the grounds that prosecution was prevented by the Theatres Act 1968 and in any case there was no

⁸¹ Lord Hunt of Wirral, *ibid* column 539.

⁸² Baroness Scotland of Asthal, *ibid* Column 540.

⁸³ The BBC received a record 55,000 complaints before transmission and 8,000 further complaints post transmission. Many Commentators, including BBC News, attributed this high volume of complaints to an orchestrated campaign by various Christian groups – such as Christian Voice and The Christian Institute. Christian Voice published the home addresses of several BBC executives on their website which led to one executive receiving death threats and having to leave their home for a while to protect their live and that of their children. See T. G. Ash, 'In Praise of Blasphemy' *The Guardian* (13.01.05).

⁸⁴ [2007] EWHC (Admin) 2785.

prima facie case,⁸⁵ Green applied for a judicial review, seeking a mandatory order requiring the issue of the summons

The High Court refused the application. Hughes LJ, giving the judgment of the court, noted that, although it very rarely invoked, the offence of blasphemous libel still existed. The law could be accurately stated and was Convention compliant since interference with freedom of expression is permitted under Article 10(2) and there would not normally be an interference with that Article 9 rights since the right to hold and practise a religion was generally unaffected by such insults. These findings undermined much of the reasoning of the Irish Supreme Court, the House of Lords select committee and the House of Lords debate on the Racial and Religious Act, which assumed that the blasphemy laws would not be compatible with the ECHR.

However, the two grounds upon which the High Court refused the judicial review provided a more cogent rationale for abolishing the offence. First, the High Court held that the District Judge was right to refuse the summons on the basis that section 2(4) of the Theatres Act 1968 prevented prosecution. The Act states that ‘No person shall be proceeded against in respect of a performance of a play or anything said or done in the course of such a performance ... for an offence at common law where it is of the essence of the offence that the performance or, as the case may be what was said or done was obscene, indecent, offensive, disgusting or injurious to morality’. The High Court held that this applied to the offence of blasphemy, which was a common law offence, the essence of which was such

⁸⁵ She added that, given the long delay and the circumstances in which the offence had been invoked, the application bordered on the vexatious but that this was not a reason for her decision.

offensiveness as to endanger a threat to society in general. Although the Theatres Act 1968 did not apply to the broadcast by the BBC, the Broadcasting Act 1990,⁸⁶ contained provisions identical to those in the Theatres Act applicable to broadcasts.

Second, the High Court found that the District Judge has not erred in her finding that there was no *prima facie* case to answer. Rejecting the claim that previous unsuccessful challenges in respect of *Jerry Springer: the Opera* had led the judge to fetter her discretion,⁸⁷ the High Court held that the District Judge had been entitled to conclude that the play as a whole was not and could not reasonably be regarded as aimed at Christianity or at what Christians held sacred. It was apparent from the claimant's own description of the work (and confirmed by the Court's own brief viewing of a recording) that the target of *Jerry Springer: the Opera* was 'the tasteless "confessional" chat show, rather than the Christian religion'⁸⁸. Moreover, there was no evidence before the District Judge justifying a finding of *prima facie* damage to society or of the risk of civil strife. Since the facts were not in dispute, her conclusion was within the range of decisions properly open to her.

⁸⁶ Schedule 15 paragraph 6.

⁸⁷ The claimant had contended that she had fettered her discretion by treating the issue before her as being concluded by two previous findings of other bodies in relation to the play: in *R (the Christian Institute) v BBC* c/1378/2005, Crane J had dismissed a judicial review into the decision to broadcast the production on the basis that submissions contending a breach of the Corporation's Charter and Article 9 ECHR did not constitute an arguable case and the BBC Governors had also rejected a complaint. The Court dismissed this claim, since it was apparent that the District Judge did not regard the issue before her as a decision for anyone but herself. There was no sign that she had placed too much weight upon these decisions but in any event, weight was a matter for the primary decision-maker, not for the High Court.

⁸⁸ *Ibid* [8].

The High Court thus undermined many of the human-rights based reasons given for the need to abolish blasphemy. However, in their place, it added two new dimensions to the debate. The significant curtailing of the blasphemy law by the Theatres Act 1968 coupled with the recognition of the high threshold that needed to be proved, including evidence of societal damage moved the debate on. It is quite extraordinary that the impact of the Theatres Act 1968 was previously ignored in the debate concerning whether the blasphemy offences should be abolished: it is not mentioned, for example, in the report by the House of Lords Select Committee. This, in itself, however, did not mean that abolition was inevitable since the demanding requirements of the *actus reus* of the offence had long been recognised.⁸⁹ Perhaps, more important, was the High Court's insistence that the offence of blasphemy was alive and could still be elucidated. Although *Green v The City of Westminster Magistrates' Court* revealed that the potential for a blasphemy prosecution was small, it also served as a reminder that the offence lay dormant rather than dead and could in special circumstances be revived in much the same way as it was in the *Gay News* case. Although the House of Lords refused to hear the case judicially, it was not to be long before Parliament dealt with the offence of blasphemy yet again.

Criminal Justice and Immigration Act 2008

On 9 January 2008 on the floor of the House of Commons, Dr Evan Harris moved a new clause to the Criminal Justice and Immigration Bill to abolish what he called 'the ancient discriminatory, unnecessary, illiberal and non-human rights compliant

⁸⁹ *Wingrove v United Kingdom* (1997) 24 EHRR.

offences of blasphemy and blasphemous libel'.⁹⁰ In addition to the usual criticisms concerning legal uncertainty, discrimination and alleged incompatibility with the ECHR,⁹¹ which Dr Harris elucidated without reference to *Green v The City of Westminster Magistrates' Court*,⁹² a number of further arguments were advanced. Dr Harris claimed that the blasphemy law was unnecessary: there were 'enough laws dealing with outraging public decency and public order offences already on the statute book to ensure that the removal of these two offences will not lead to widespread outrageous behaviour in public'.⁹³ Moreover, and particularly tellingly given the recent comments of the High Court, Dr Harris contended that abolition was required because although the law had not been used for a long time, it had 'a chilling effect', leading to self-censorship.⁹⁴ Referencing the objections to abolishing blasphemy at the time of debating the Racial and Religious Hatred Bill, Dr Harris argued that there was no longer 'an excuse for prevarication' since 'religious hatred was dealt with two years ago'.⁹⁵

⁹⁰ HC Hansard, Column 442 9 Jan 2008

⁹¹ Ibid, Column 443.

⁹² Reference to the case was made, however, by Nick Herbert, who commented that 'it is hard to understand how any prosecution under the blasphemy laws could succeed when that action did not': Ibid, Column 451.

⁹³ Ibid, Column 443.

⁹⁴ Ibid, Column 445. He further commented that abolition was required because of the offence's 'impact on our ability to conduct our affairs in terms of international human rights and international relations, and to criticise other countries' uses of their blasphemy laws': Ibid, Column 448.

⁹⁵ Ibid, Column 447.

However, Dr Harris was persuaded of the virtues of prevarication, withdrawing his new clause in response to an undertaking by the Government to bring forward its own new clause to the like effect in the Lords, subject to a satisfactory outcome to consultations with the Church of England.⁹⁶ The Government relied heavily on *Green v The City of Westminster Magistrates' Court* to reach its conclusion that it was 'high time that Parliament reached a settled conclusion on the issue':⁹⁷ they contended that the decision in *Green* concerning the Theatres Act reinforced the idea that the offences appear to be moribund.⁹⁸ On 5th March 2008, an amendment abolishing blasphemy was moved by the Government in the House of Lords.⁹⁹ The Government's reasons for the amendment were said to be two-fold: first, since the law 'has fallen into disuse', this 'runs the risk of bringing the law as a whole into disrepute'; second, there is now 'new legislation to protect individuals on the grounds of religion and belief'.¹⁰⁰ This first reason seems questionable: whilst it is true that there had been no prosecutions since 1979; the *Green* decision surely showed that the law was being used.¹⁰¹ The Government was on far steadier ground in relation to its second reason:¹⁰² although *Green* showed that blasphemy still existed, it showed that

⁹⁶ *Ibid*, Column 453-454. This reflects the understanding that the blasphemy laws were commonly understood to apply only to the established Church,

⁹⁷ *Ibid*, Column 453.

⁹⁸ *Ibid*, Column 453.

⁹⁹ H L Hansard, Column 1118, 5 Mar 2008.

¹⁰⁰ *Ibid*, Column 1118.

¹⁰¹ The wider argument that this undermines the rest of the law seems overstated. The second reason is also slightly inaccurate since the Racial and Religious Hatred Act 2006 concerns 'religious belief' rather than 'religion or belief', the term used in Article 9 ECHR.

¹⁰² The Government further noted, at column 1120, that 'the offences of blasphemy and blasphemous libel do not protect the individual or groups of people from harm, the new offences of incitement to

the offences had been severely curtailed. The amendment was passed by 148 votes to 87 by the House of Lords and then by 378 votes to 57 in the House of Commons.

CONCLUSIONS: THE AFTER LIFE OF BLASPHEMY

The move against the laws on blasphemy was characterised by evolution not revolution. Although the well-rehearsed arguments based on the Human Rights Act were specious, as the High Court judgment in *Green v The City of Westminster Magistrates' Court* confirmed, they nevertheless built up the momentum began by the Law Commission's early call for the abolishment of the offence. The High Court judgment in *Green* was especially important in noting despite the amputation of the offence by the Theatres Act and the significant thresholds that needed to be overcome prior to prosecution, the offence of blasphemy still existed. Although the offence was largely symbolic, it was not completely symbolic.

This realisation suggests that the death knell of blasphemy was sounded not by the Irish Supreme Court, the House of Lords Select Committee, the enactment of the Racial and Religious Hatred Act or by the High Court in *Green*. Rather, the death knell was sounded by Mary Whitehouse over thirty years ago. The *Gay News* case, in showing that a prosecution for blasphemy could succeed, demonstrated that the blasphemy laws had teeth; they were not merely historical symbols of the country's organic constitution and religious heritage. The High Court in *Green*, unlike the Irish Supreme Court in *Corway* and the House of Lords Select Committee, accepted this

religious hatred and discrimination on the grounds of religion and belief—in the provision of goods, services and employment—do.'

and held in *obiter* that the law was ECHR compliant. Ironically, it was the very finding that blasphemy was not dead that proved to be fatal.

It is not the case that section 79(1) of the Criminal Justice and Immigration Act 2008 has resulted in legal clarity. The abolition of blasphemy leaves untouched other areas of the criminal law affecting religious beliefs and believers. Some of the same criticism made of the blasphemy laws can now be made in respect of the Racial and Religious Hatred Act 2006: the neutering of the Act by the House of Lords, regardless of the merits of such actions, has resulted in a law of largely symbolic importance. Furthermore, the growth in public order offences has led to the creation of a plethora of other criminal offences affecting religion. In addition to numerous cases concerning religion relying on the general provisions of the Public Order Act 1986,¹⁰³ prosecutions have been made under the common law offence of breach of the peace¹⁰⁴ and under the Protection from the Harassment Act 1997,¹⁰⁵ in addition to the use of Anti Social Behaviour Orders (ASBOS).¹⁰⁶ Since 2001, the criminal law has recognised that the sentence for specific crimes may be increased if that crime is

¹⁰³ See, e.g. *Horseferry Road Metropolitan Stipendiary Magistrate ex parte Siadatan* [1991] 1 QB 260; *Percy v DPP* [2001] EWHC Admin 1125; *Norwood v DDP* [2003] EWHC Admin 1564; *Hammond v DDP* [2004] EWHC Admin 69; *Dehal v CPS* [2005] EWHC Admin 2154.

¹⁰⁴ See, e.g. *Wise v Dunning* [1902] 1 KB 167.

¹⁰⁵ See, e.g. *Christ of Latter Day Saints v Price* [2004] EWHC Admin 325; *Singh v Bhaker* [2006] Fam Law 1026.

¹⁰⁶ See N. Addison, n 45 above, 137-138.

racially or religiously aggravated.¹⁰⁷ This applies to the law on assault, criminal damage, public order offences and offences under the Protection from Harassment Act 1997.¹⁰⁸ Moreover a number of statutory provisions, enacted in the nineteenth and early twentieth centuries,¹⁰⁹ which protected religious worship and fettered freedom of expression, remain operative.¹¹⁰ The criminal law continues to affect religion even after the abolition of blasphemy: facts that previously may have resulted in a blasphemy prosecution may now be pursued under a range of different pieces of legislation.¹¹¹

¹⁰⁷ The Crime and Disorder Act 1998 created a new category of ‘racially aggravated criminal offences’. Under section 39 of the Anti-Terrorism, Crime and Security Act 2001 (post 9-11), this category becomes ‘racially or religiously aggravated criminal offences’.

¹⁰⁸ Sections 20 and 47 of the Offences Against the Person Act 1861; Section 1(1) of the Criminal Damage Act 1971; Sections 4-5 of the Public Order Act 1986; Protection From Harassment Act 1997, sections 29-32 of the Crime and Disorder Act 1998 (as amended by section 39 of the Anti-Terrorism, Crime and Security Act 2001).

¹⁰⁹ Such as the Ecclesiastical Courts Jurisdiction Act 1860, section 36 of the Offences against the Persons Act 1861 and section 7 of the Burial Laws Amendment Act 1880.

¹¹⁰ Although the Criminal Justice and Immigration Act 2008 does remove the references to blasphemous libel in the Criminal Libel Act 1819, and for eliminating blasphemy in the Law of Libel Amendment Act 1888. As Lord Avebury noted in the debate on the Criminal Justice and Immigration Bill, ‘The Government have unfortunately neglected the opportunity to repeal the other ancient statutory religious offences, which were covered by the Select Committee’s report in 2003’: n 99 above.

¹¹¹ For the specific argument that the offence now found in section 4A of the Public Order Act 1986 ‘could in many respects serve as a replacement’ for the blasphemy laws, see N. Addison, n 45 above, 133.

Moreover, as the furore concerning the Satanic Verses and more recently the Mohammed Cartoons in *Jyllands Posten* makes only too clear, moral panics concerning the clash of freedom of expression and freedom of religion will occur even when there is no chance of a successful prosecution. The lack of legal redress may serve to restrict rather than reinforce free speech. Policing blasphemy by public pressure is inherently problematic, since the most active pressure groups may not be representative of society as a whole. Fear of ‘obdurate believers’ may lead to greater self-censorship than ever before.¹¹² The democratic basis that underpins the law is absent in relation to rule by pressure group. The body of the blasphemy laws may be dead but its spirit lives on. Section 79(1) of the Criminal Justice and Immigration Act 2008 is just one of a number of legislative changes in the last decade to the way in which religion is regulated under English law. Only time will tell how whether these changes are successful. It remains to be seen whether this new law on religion, which has replaced a stance of passive tolerance with detailed prescriptive regulation guided by active promotion of religious liberty as a right, is a step in the correct direction.¹¹³

¹¹² For a discussion of obdurate believers see A. Bradney, ‘Faced by Faith’ in P. Oliver *et al* (ed) *Faith in Law* (Oxford: Hart, 2000) 89.

¹¹³ For further reflection see N. Doe and R. Sandberg (ed) *Law and Religion: New Horizons* (Leuven: Peeters, forthcoming).