The Abolition of the Blasphemy Laws

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In a series of three articles published in this journal in 2005, Francis Bennion explored the development of the law relating to blasphemy and made a convincing case that the common law offences of blasphemy and blasphemous libel ought to be abolished: see (2005) 169 JPN 588-590; (2005) 169 JPN 609-611; and (2005) 169 JPN 629-631. That case was not new. As the author reminded his readership, a majority of the Law Commission had recommended that the offences be abolished in 1985: see *Offences Against Religion and Public Worship* (Law Commission No.145). However, as Bennion pointed out, the strength of the Law Commission's recommendation was somewhat lessened by the fact that two Commissioners dissented from the majority view by favouring statutory replacement rather than abolition. Neither was it the first time that the author had called for the abolition of the offences since as he informed his readership, he had been a member of the Committee Against Blasphemy Law which had called for the abolition of the blasphemy laws in 1978. The catalyst for the committee's establishment had been a successful private prosecution, which the late Mary Whitehouse had brought against the editor and publishers of *Gay News*, in respect of the publication of a poem by James Kirkup entitled "The Love that Dares to Speak its Name." Following the House of Lords' decision in *Whitehouse v. Lemon* [1979] AC 617, to uphold the defendants' convictions by a majority of 3-2, the Committee had published a statement in which it declared:

> "So long as it is possible … for litigious persons to initiate legal proceedings for blasphemy or blasphemous libel, the threat of prosecution, often resulting in crippling financial outlay and even the danger of imprisonment, will hang over artists, writers, journalists, publishers and commentators. This is intolerable in a free society."

Since the publication of the Bennion articles, several important developments have occurred which suggest that the end is in sight for the blasphemy offences.

Jerry Springer: the Opera

The first of these developments relates to the recent decision in *R (on the application of Green) v. City of Westminster Magistrates' Court* [2007] EWHC 2785 (Admin). The case arose out of an attempt by the National Director of the Christian Voice organization to bring a private prosecution for blasphemous libel against the producer of a show, *Jerry Springer: the Opera*, and the Director-General of the BBC for broadcasting it. The show itself sought to parody and lampoon Mr Springer's television chat show. It did so with the use of characters drawn from the Bible who appear in the second act in various situations to which the complainant objected. Thus, for example, an argument takes place between the Satan and Christ characters, during which the Christ character tells Satan to talk to the stigmata and accepts an accusation that he is gay. It was the complainant's contention that the show amounted to a blasphemous libel on the ground that it was contemptuous and reviling of the Christian faith, certain Biblical characters, and of the formularies and tenets of the Church of England, and that it had been delivered in a scurrilous and ludicrous manner. At first instance, however, the District Judge refused to grant the summonses sought on the basis that the prosecution would be contrary to the Theatres Act 1968 and that there was no *prima facie* case to answer. On appeal, the Divisional Court (Hughes LJ and Collins J) upheld that

decision and therefore refused to grant a mandatory order requiring the District Judge to issue the summonses. In reaching its decision, the Divisional Court paid particular attention to the second element of the blasphemous libel offence; that the publication of that which is contemptuous, reviling etc. must be such as to tend to endanger society as a whole by endangering the peace, depraving public morality, shaking the fabric of society or tending to cause civil strife. It was the view of the court in *Green* that this second element "must not be watered down" as the following words of Hughes LJ make clear:

> "This element will not be shown merely because some people of particular sensitivity are, because deeply offended, moved to protest. It will be established if but only if what is done or said is such as to induce a reasonable reaction involving civil strife, damage to the fabric of society or their equivalent" (at [16]).

Having regard to the facts of the appeal, the Divisional Court held that the second element of the offence was absent. Thus, Hughes LJ explained:

> "The play had been performed regularly in major theatres in London for a period of nearly two years without any sign of it undermining society or occasioning civil strife or unrest; there had been no violence (or even demonstrations). We have been told, and accept for present purposes, that on the day before and the day of the broadcast … demonstrations were mounted outside BBC Television Centre, that there were approximately 75 and 500 people present respectively, and that on the first of those occasions there was some disorder and at least one arrest. But even if that evidence had been before the District Judge it would not have justified a finding of a *prima facie* case of damage to society or of risk of civil strife." (at [33])

Page 165

The Divisional Court also agreed with the District Judge's view that s.2(4) of the Theatres Act 1968 precluded a prosecution for blasphemous libel in respect of the performance of a play because the essence of the offence was "offensiveness" which fell within the scope of the prohibition on prosecution. Furthermore, there was agreement that the television broadcast of the show did not amount to a "play" for the purpose of s.18 of the 1968 Act because it was not a live performance.

The Harris Amendment

During the course of a debate (see HC debates, January 9, 2008, cols.442-453) on the Criminal Justice Bill which is before Parliament at the time of writing, the Liberal Democrat MP Dr Evan Harris, laid an amendment which sought to abolish the common law offences of blasphemy and blasphemous libel. In speaking to that amendment, Dr Harris condemned the offences on the grounds that they were "ancient, discriminatory, unnecessary, illiberal and non-human rights compliant". With regard to the first of these criticisms, Dr Harris remarked that the blasphemy laws amounted to "ancient law which is out of time and not needed any more". In support of the point he noted that the last successful public prosecution had occurred in 1922. Although he did not identify the case by name, he was clearly referring to the decision in ***R. v. Gott*** (1922) Cr. App. R 87, where a man who had published two papers entitled "The Rib Tickler" and "The Liberator" had been found guilty of the offence of blasphemous libel and sentenced to nine months' hard labour. In upholding both his conviction and the sentence imposed at trial, the Lord Chief Justice, Lord Trevethin, remarked on behalf of the Court of Appeal that:

> "It does not require a person of strong religious feelings to be outraged by a description of Jesus Christ entering Jerusalem 'like a circus clown on the back of two donkeys'." (at [89]).

Continuing on the same point, the Lord Chief Justice observed:

> "There are other passages in the pamphlets equally offensive to anyone in sympathy with the Christian religion, whether he be a strong Christian, or a lukewarm Christian, or merely a person sympathizing with their ideals." (at [89]-[90]).

During the recent Parliamentary debate, Dr Harris contended that the blasphemy offences are unnecessary for two reasons: there are already enough laws on the statute book which make it an offence to outrage public decency or disturb public order; and that God "does not need the protection of these ridiculous laws, which is why many people with a religious perspective share the view that those offences should be abolished". He also argued that the blasphemy offences are "illiberal" on the grounds that their "scope is uncertain". This is a common criticism of these offences in that the *actus reus* of the offence, the doing of that which is contemptuous, reviling, scurrilous and or ludicrous to God, Christ, the Bible or the formularies of the Church of England is less clear than it might be. The same may also be said of the second element of the *actus reus*, that the words or publication must endanger society as a whole by endangering the peace, depraving public morality, shaking the fabric of society or tending to cause civil strife.

Dr Harris also criticized the strict liability nature of the offence, ie, that it need not be shown that a defendant intended his words or publication to be blasphemous in order for him to be found guilty of the offence, and the fact that it acts in a discriminatory manner in that it protects the sensitivities of the adherents to the Anglican faith but fails to do likewise in relation to other faiths such as Hinduism, Sikhism, Judaism and Islam. That blasphemy only protects the religious beliefs of the Church of England was confirmed in *R. v. Metropolitan Stipendiary Magistrate ex parte Choudhury* [1991] 1 All ER 306, when the Divisional Court upheld a first instance decision not to issue summonses against the author and publishers of *The Satanic Verses* for the offence of blasphemous libel.

In addition to the foregoing, Dr Harris had other reasons for wanting to see the blasphemy offences abolished. Thus it was his contention that the offences have a "chilling effect" in that they induce "a reluctance amongst some theatre directors, publishers or press people to print material that might be alleged to be blasphemous, because there is a criminal offence". In other words, the very existence of the blasphemy offences inhibits freedom of expression and "catalyses attempts at private prosecution" (for proof that this may be the case, see the recent case of *R (on the application of Green) v. City of Westminster Magistrates Court* [2007] EWHC 2785 (Admin) above).

Doctor Harris' final argument in favour of abolition related to the UK's position *vis-à-vis* other countries with blasphemy laws akin to our own. In his opinion, the existence of our own laws undermined the UK's standpoint if it wished to be critical of another state's use of their blasphemy laws such as "Sudan's outrageous use of its blasphemy laws against a UK subject over the naming of a teddy bear". In short, it would be far easier and less inconsistent to condemn other blasphemy laws if we did not have our own.

The amendment moved by Dr Harris enjoyed cross party support in the House of Commons. At the end of the debate, however, he did not press his new clause to a division. His reason for not doing so was that in responding on behalf of the Government, Maria Eagle MP, the Parliamentary Under-Secretary of State at the Ministry of Justice, agreed that "it is high time that Parliament reached a conclusion on the issue". The Government accepted that the offences "have largely fallen into desuetude" and that the decision in *Green* (see above) suggested that they appear to be "moribund". Accordingly, it had "every sympathy for the case for formal abolition". However, before bringing forward a provision "in another place" to achieve the same purpose as Dr Harris' proposed amendment, the Minister stated that the Government wished to conduct a "short and sharp" consultation with the Anglican Church given that it would be particularly affected by the abolition of the offences.

Page 166

The *Daily Telegraph* Letter

The day before, (January 8, 2008) Dr Harris moved his amendment to the Criminal Justice and Immigration Bill an impressive list of signatories had a letter published in the *Daily Telegraph* in which they called on MPs to support the Harris amendment. The signatories, who included the former Archbishop of Canterbury, Lord Carey of Clifton, Shami Chakrabarti, Sir Jonathan Miller, David Starkey and Lord Lester of Herne Hill, opened their letter by posing the following question:

> "Sir – In the light of the widespread outrage at the conviction of the British teacher for blasphemy in Sudan over the name of a teddy bear, is it not time to repeal our own blasphemy law?"

What followed was a series of reasoned objections to the blasphemy laws, many of which were subsequently aired in the Parliamentary debate. Amongst those objections were that the blasphemy offence: serves no useful purpose; damages social cohesion; and is unlikely to result in a conviction. The signatories, who were subsequently described as "more than a dozen atheists and two clergymen" by the National Director of *Christian Voice* in his own letter to the *Daily Telegraph* (January 9, 2008), in which he explained why he had brought a private prosecution in relation to *Jerry Springer: the Opera*, also pointed out that the Church of England was no longer opposed on principle to the abolition of the blasphemy offences.

Conclusion

In drawing his discussion of the blasphemy laws to a close, Bennion briefly considered how the reform of the law which he advocated might be achieved in practice. Two possibilities occurred to him: inserting a consequential provision into the Religious Hatred Bill (which was then before Parliament) abolishing the offences; or for a backbench MP to introduce a private member's Bill to achieve the same purpose. In the light of recent developments, it seems that it will be the Government rather than a backbench MP who will be able to claim the credit for a long overdue reform. The form of the words used is likely to be simple – "The common law offences of blasphemy and blasphemous libel are hereby abolished" – will suffice. The significance of such a reform will, however, be in marked contrast to the ease with which it will be achieved. It will bring an end to laws which amount to an anachronism in a modern, multi-faith 21st century society.

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