

To hell with this ancient anomaly



It looks likely that blasphemy will cease to be a criminal offence under English law. Paul Magrath charts the events leading to the government change of heart and explores its implications.

It is hard to imagine a militant atheist and a leading churchman sharing the same opinion about any matter of religious sensitivity. Yet that is exactly what has happened with the ancient law of blasphemy. Professor Richard Dawkins, Darwinian expert and best-selling author of *The God Delusion*, and the Right Reverend Lord Carey of Clifton, former Archbishop of Canterbury, have both lent their names to a campaign to abolish the crime of blasphemous libel.

Those who opposed the change on the grounds that it would ‘send out a signal’ to the effect that ‘nothing is sacred’, and that it would mark a further step in the nation’s creeping secularisation, will probably be proved right

The campaign, which has also been supported by such diverse public figures as comedian Ricky Gervais, children’s author Philip Pullman, human rights activist and director of Liberty, Shami Chakrabarti and TV historian David Starkey, seems to be gathering both intellectual steam and political clout. Following an apparent change of heart by the government, there is now a very real prospect of a change in the law.

And yet only last year, when I contacted the Law Commission, they assured me there were no current plans to reconsider the law. So what has brought about this u-turn? Although there has been a gathering groundswell of opinion in favour of abolition, two recent events seem to have tipped the balance.

The first was the arrest in November last year of Gillian Gibbons, a British school teacher in Sudan, and her subsequent trial and imprisonment for blasphemy because her pupils named their class teddy bear ‘Mohammed’. The international media outcry which ensued, and the diplomatic efforts which eventually led to her release, drew uncomfortable parallels with the English blasphemy law.

The second event was a failed attempt on behalf of an evangelical group, Christian Voice, to use English blasphemy law to prosecute the producer of the West End musical, *Jerry Springer – The Opera*, and the director general of the BBC, which had broadcast the show (prompting a record 63,000 complaints from offended viewers).

In a judgment given in December last year the High Court dismissed an appeal against the refusal by the district

judge to issue informations, on the grounds that a *prima facie* case of blasphemous libel had not been made out, and such a prosecution would be barred by section 2(4) of the Theatres Act 1968 and paragraph 6 of Schedule 15 to the Broadcasting Act 1990: see *R (Green) v City of Westminster Magistrates’ Court* [2007] EWHC 2785 (Admin).

The judgment includes a brief survey of the history of the common law offence of blasphemous libel, the last successful prosecution for which took place thirty years ago, in the case of *Whitehouse v Lemon* [1979] AC 617. Before that, it had not been invoked since 1922. Indeed, when Mary Whitehouse began her private prosecution against the magazine *Gay News*, accusing it of “vilifying Christ” by printing a poem suggesting Jesus had been a homosexual, it was widely believed that the offence no longer existed. Both the Court of Appeal and the House of Lords confirmed that it still did.

The crime of blasphemy may originally have been seen as an ecclesiastical offence, akin to heresy, but by the time of *Taylor’s Case* (1676) 1 Vent 293, its metamorphosis into a civil offence was complete. Chief Justice Hale directed the jury in that case with: “To say religion is a cheat, is to dissolve all those obligations whereby civil societies are preserved.”

Like its secular twin, seditious libel, blasphemous libel was a common law crime whose victim was the established order of society, as governed by a monarch who was both head of state and head of the church. As Lord Sumner explained in *Bowman v Secular Society Ltd* [1917] AC 406, 458: “The established form of Christianity ... is the basis of the law itself” and the “gist of the offence of blasphemy is a supposed tendency in fact to shake the fabric of society”.

It was for that reason that the offence only protected the Christian faith: as Baron Alderson remarked to the jury in *Gathercole’s Case* (1838) 2 Lewin 237, 254: “A person may, without being liable to prosecution for it, attack Judaism, or Mahomedanism, or even any sect of the Christian Religion (save the established religion of the country); and the only reason why the latter is in a different situation from the others is, because it is the form established by law, and is therefore a part of the constitution of the country.”

That aspect of the matter was challenged when, in the wake of the worldwide wave of Muslim protests, riots and fatwah-inspired assassinations prompted by publication of Salman Rushdie’s novel, *The Satanic Verses*, a representative of the British Muslim Action Front laid informations against the novelist and his publishers alleging blasphemy. But the suggestion that the crime of blasphemy should apply to Islam

was rejected by the High Court on the ground that the offence was “for historical reasons clearly restricted to a scurrilous vilification of the Christian religion”: see *Regina v Chief Metropolitan Stipendiary Magistrate, Ex p Choudhury* [1991] QB 429. Giving the judgment of the court, Lord Justice Watkins acknowledged the “anomaly” in an “increasingly plural society” of established Christianity being the only religion protected by the law of blasphemy. Nevertheless, he concluded it was for parliament alone to consider any extension of the law to include attacks on other religions.

The alternative, of course, was its total abolition and that was exactly what the Law Commission had recommended a few years earlier in its report, prompted by the *Lemon* case, “Offences against Religion and Public Worship” (1985) (Law Com No 145).

That recommendation of the Law Society seems to have fallen, not so much on deaf ears, as on the ears of a government (or successive governments) confused by the noisy competing claims of, on the one hand rationalists and secularists in favour of abolition and, on the other hand, religious groups clamouring for the law’s extension to protect cherished beliefs of their own, or indeed, of all faiths.

Nor did everyone agree that the existing law was anomalous. Even the European Court of Human Rights had accepted, in the case of *Wingrove v United Kingdom* (1996) 24 EHRR 1, that a refusal to classify the applicant’s film *Visions of Ecstasy* on grounds of blasphemy (thus effectively banning its commercial release) was a justified interference with his freedom of expression under article 10(2) of the European Convention on Human Rights - despite the anomaly that the relevant restriction only applied to Christianity.

What happened this year was that, while parliament was considering the Criminal Justice and Immigration Bill 2008, a Liberal Democrat MP, Evan Harris, with cross-party support, tabled an amendment that would abolish the common law crime of blasphemy: “The Almighty does not really need the protection of these ridiculous laws,” he said. Labour MPs had initially been told to vote against the amendment, but on January 9, 2008 justice minister Maria Eagle declared in the Commons that the government was now in favour of scrapping the offence and only wanted to consult the Church of England first.

The government’s own amendment was eventually brought forward by Baroness Andrews, a minister from the Department for Communities and Local Government, during the Lords debate on the Bill on March 5, 2008. After a lively debate, it was carried by 148 votes to 87, with several bishops supporting the change.

At the time of writing, clause 77(1) of the Bill (as amended in the Commons) provided simply that: “The offences of blasphemy and blasphemous libel under the common law of England and Wales are abolished.” Other subsections deal with consequential amendments.

Assuming that provision eventually receives the royal assent, what will be the consequences in practical terms? The

change in the law is unlikely to manifest itself in a sudden rash of insults and outrageous conduct towards the Church of England. But those who opposed the change on the grounds that it would ‘send out a signal’ to the effect that ‘nothing is sacred’, and that it would mark a further step in the nation’s creeping secularisation, will probably be proved right.

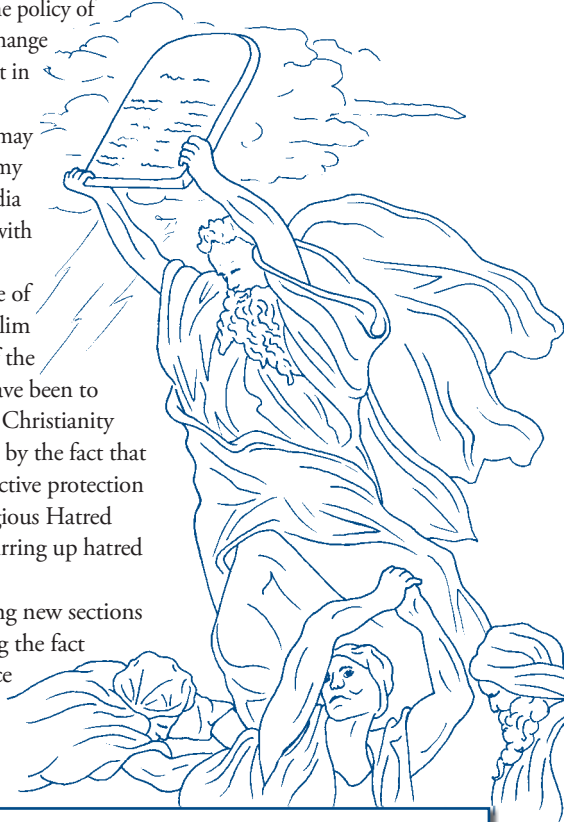
For example, the King’s Head theatre in Islington recently put on a play called *Fat Christ*, which featured a mock crucifixion. London Underground banned posters advertising the play on the basis that people might find it offensive. The policy of organisations like London Underground will change now that the risk of prosecution, however slight in real terms, has been removed altogether.

On the other hand some theatre producers may decide that, without a law banning it, blasphemy is no longer ‘edgy’ enough to generate free media publicity, and they will look for plays dealing with some other kind of holy cow (so to speak).

The most disappointed group will be those of other religions, particularly those in the Muslim community, for whom the best correction of the discriminatory effect of the old law would have been to extend it to cover their own beliefs as well as Christianity

However, their concerns should be allayed by the fact that there is already a potentially rather more effective protection accorded to them under the Racial and Religious Hatred Act 2006, which creates a new offence of “stirring up hatred against persons on religious grounds”.

Significantly, this was achieved by inserting new sections into the Public Order Act 1986, underlining the fact that the new offence, just like the old offence of blasphemy, has everything to do with public order and nothing whatever to do with private conscience. ■



Key points

- Old common law offence of blasphemous libel applied only to Christianity.
- The law was widely seen as anachronistic and anomalous.
- The Law Commission recommended abolition of blasphemy crime in 1985.
- Muslims and other religious groups wanted ambit of offence extended to other faiths.
- Government finally backed plans for change with support of senior churchmen as well as secular abolitionists.
- Recent enactment of provisions outlawing religious hatred offers fairer protection to religious minorities.
- The abolition of blasphemy crime is to be achieved by amendment to the current Criminal Justice and Immigration Bill.