

Blasphemy and Human Rights: An English Experience in a European Context

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INTRODUCTION

The criminal offences of blasphemy and blasphemous libel¹ have a long and intricate past which is of equal interest to the social historian as to the jurist.² This article examines the nature of the crimes as they have been understood and applied over centuries, but gives particular emphasis to certain recent events which led to their abolition in England and Wales at precisely the time they had been given a clean bill of health under the European Convention on Human Rights. Whilst it is possible to identify a constellation of factors which may have had a bearing on the movement for abolition, a critical analysis reveals significant confused thinking, some of it deliberate. What is plain, however, is that the death of blasphemy was effected not because of a perceived non-compliance with the provisions of the European Convention on Human Rights, but arose out of practical expediency rooted in misguided motives of secularism and social engineering. For a fuller understanding, the article begins with a brief discussion of the British constitutional framework within which these recent events took place.³

¹ For convenience, the term 'blasphemy' is used hereafter to refer to both.

² For an extended account of the development of the blasphemy law and events leading to its abolition, see R Sandberg and N Doe 'The Strange Death of Blasphemy' (2008) 71 (6) *Modern Law Review* 971. For a more general discussion, see D Nash, *Blasphemy in the Christian World* (Oxford University Press, 2007).

³ The abolition of the crime blasphemy is just one of a number of important changes in recent years concerning how English law interacts with religion. For a fuller examination of these changes see the essays in N Doe and R Sandberg (ed) *Law and Religion: New Horizons* (Peeters, Leuven 2009).

CONSTITUTIONAL BACKGROUND

A fundamental principle of British constitutional law⁴ is that of parliamentary sovereignty: the supremacy of the bi-cameral legislature over all other organs of the state. In consequence the United Kingdom has no constitutional court as such. Its highest appellate court is the Judicial Committee of the House of Lords.⁵ Once an Act of Parliament has been passed by both Houses and received the Royal Assent it cannot be challenged in the domestic courts.⁶ There is no process for the judiciary to adjudicate on the constitutionality of a statute: parliament is sovereign and the judiciary is required to construe the words of the statute and apply them in the particular case before the court. There is no Bill of Rights or other constitutional document with which all legislation must comply.

The United Kingdom was the first state of the Council of Europe to ratify the European Convention on Human Rights, which it did on 18 March 1951 and has permitted individual petition to the European Court of Justice in Strasbourg since 1966.⁷ Sometimes perceived as politically euro-sceptic, the government is in reality euro-compliant and domestic law has been changed in numerous instances in response to adverse adjudications in Strasbourg.⁸

Since 1 October 2000, when the Human Rights Act 1998 came into force, the rights articulated in the European Convention have been directly enforceable in the domestic courts of the United Kingdom. This has had two significant effects, neither of which has eroded the principle of parliamentary sovereignty. First, all primary and secondary legislation must be ‘read and given effect’ in a way which is compatible with the Convention.⁹ Secondly, if a court is satisfied that a statutory provision is incompatible with a Convention right, it may make a ‘declaration of incompatibility’.¹⁰ Once a

⁴ The fact that the United Kingdom has no formal written constitution of the type familiar elsewhere in the European Union does not mean that it is without constitutional law. A sophisticated corpus of law and convention regulates constitutional affairs with subtlety and dignified precision.

⁵ Soon to be renamed the ‘Supreme Court’ and relocated from within the Palace of Westminster: see Constitutional Reform Act 2005.

⁶ The same applies to Measures of the Church of England which have the same force and effect of Acts of Parliament: Church of England Assembly (Powers) Act 1919, s 4, applied in *R v Ecclesiastical Committee of Both Houses of Parliament, ex parte The Church Society* (1994) 6 Admin LR 670, Court of Appeal, per McCowan LJ; *R v Archbishops of Canterbury and York, ex parte Williamson* (1994) *The Times*, 9 March, Court of Appeal; *Williamson v Archbishops of Canterbury and York*, 5 September 1996, Court of Appeal (unreported).

⁷ See M Hill, ‘A New Dawn for Freedom of Religion’ in M Hill (ed) *Religious Liberty and Human Rights* (University of Wales Press, Cardiff, 2002) 2.

⁸ Examples include homosexuals serving in the armed forces (following *Lustig-Prean v United Kingdom* (2000) 29 EHRR 548), corporal punishment in schools (*Tyrer v United Kingdom* (1978) 2 EHRR 1), marriage of transsexuals (*Goodwin v United Kingdom* (2002) 35 EHRR 477), telephone tapping (*Malone v United Kingdom* (1984) 7 EHRR 14).

⁹ Human Rights Act 1998, s 3(1). The extent to which this marks a departure from the search for ‘legislative intent’ is a matter of conjecture: most likely all the provision creates is a rebuttable presumption that the legislator intended all statutory provisions to be Convention compliant.

¹⁰ Human Rights Act 1998, s 4(2).

declaration has been made, a government minister may make a remedial order amending the legislation so as to remove the incompatibility.¹¹ However the minister is under no obligation to do so and if he wishes may leave the provision in its unamended form as enacted – parliament remains sovereign.¹²

THE HISTORIC OFFENCE OF BLASPHEMY

English criminal law interacts with religion in various different ways. Although the law occasionally allows religious exemptions from specific crimes to accommodate religious practices,¹³ there is no general defence of carrying out divine instructions.¹⁴ The crime of blasphemy was an example of how the law reflected Christian morality. The law protected the sanctity of religious beliefs since those religious beliefs were regarded as being at the heart of society. *Taylor's Case*,¹⁵ one of the first cases determined by a secular court,¹⁶ established that blasphemy was akin to treason: the Chief Justice held that saying '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'.¹⁷ As the House of Lords Select Committee on Religious Offences commented in 2003:

¹¹ *Ibid*, s 10(2). Note that this power does not permit a minister to make a remedial order in respect of a Church of England Measure: s 4(6).

¹² It would still be open to a litigant to seek redress against the United Kingdom government at the European Court of Justice in Strasbourg.

¹³ Under section 139 of the Criminal Justice Act 1988, it is a defence to the charge of having a blade in a public place if the blade is carried 'for religious reasons'. In *R v Brown* [1993] 2 All ER 75, the House of Lords hinted that consensual body modification, including ritual circumcision of males and religious flagellation, is an answer to a charge under the Offences Against the Person Act 1861. See generally R Sandberg and N Doe, 'Religious Exemptions in Discrimination Law' (2007) *Cambridge Law Journal* 302.

¹⁴ *Blake v DPP* [1993] Crim LR 556 (carrying out divine instructions not permitted as a defence to a charge of criminal damage). Similarly, English law provides no special protection for Rastafarians for their use of cannabis on religious grounds (*R v Taylor* [2001] EWCA Crim 2263, *R v Andrews* [2004] EWCA Crim 947). See P W Edge, 'Religious Drug Use in England, South Africa and the United States of America' (2006) 1(2) *Religion & Human Rights* 165.

¹⁵ *Taylor's Case* (1676) 1 Vent 293.

¹⁶ Originally, it was the church courts that policed the offence but from the seventeenth century, it has been enforced by the ordinary criminal courts.

¹⁷ See House of Lords Select Committee on Religious Offences in England and Wales, Volume I – Report (2003), Volume I, Appendix 3, para 2.

‘Faith was seen to be the root of society’s political and moral behaviour. Therefore, to challenge that faith or to offend against it was to seriously threaten the very fabric of political and moral society and had to be punished severely.’¹⁸

The offence comprised publishing ‘blasphemous’ material in any form,¹⁹ by which the content had to be contrary to 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 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 contradictory. In *Gathercole’s Case*,²⁰ 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 that ‘any general attack on *Christianity* is the subject of criminal prosecution, because Christianity is the established religion of the country’.²¹ Nevertheless, the question was largely academic because of the overlap principle, identified in *Williams*:²² attacks on other Christian denominations and other religions were protected to the extent that their fundamental beliefs coincided with those of the established Church.²³ In *Williams*, a publication attacking the Old Testament was interpreted not merely as an attack upon Judaism: rather it was 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’.²⁴

The material needed to be couched in indecent or offensive terms likely to shock and outrage the feelings of the general body of Church of England believers.²⁵ This requirement meant that the offence of blasphemy did ‘not protect religious *beliefs* as such’ but was ‘concerned with attacks on those beliefs expressed in highly offensive

¹⁸ House of Lords Select Committee on Religious Offences in England and Wales, First Report (2002-2003) Volume I, Appendix 3, para 2.

¹⁹ ‘Blasphemous’ material could be published in a written or verbal form. See *R v Gott* (1922) 16 Cr App R 87.

²⁰ (1838) 2 Lewin 237.

²¹ Emphasis added. 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.

²² (1797) 26 St Tr 654.

²³ See also *R v Chief Stipendiary Magistrate ex parte Choudhury* [1991] 1 QB 429.

²⁴ *House of Lords Select Committee* (above) Volume 1, Appendix 3, para 4.

²⁵ In *R v Gott* (1922) 16 Cr App R 87, the selling of a newspaper that described Jesus as entering Jerusalem ‘like a circus clown on the back of two donkeys’ was held to be 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’. Interestingly the references here are to ‘Christianity’ rather than the ‘Church of England’.

ways.²⁶ The mere publication of a self-confessed anti-Christian work,²⁷ and the registration of a company promoting the principle that human conduct should be based upon natural knowledge and not supernatural belief,²⁸ were thus not caught by the blasphemy law. Decent and reasonable criticism was not blasphemous.²⁹ Somewhat more recently, the House of Lords in *R v Lemon*, *R v Gay News*³⁰ emphasised the ingredient of 'intent'. There was no requirement that the defendant had to have an intention to blaspheme;³¹ it was sufficient for the prosecution to prove that the publication had been intentional and that its content was blasphemous.

The offence of blasphemy was rarely prosecuted in the twentieth century. There was no reported case between 1922 and 1979. However, in the middle twentieth century, blasphemy was policed extra-legally; it was curtailed 'by the fears, anxieties and sensitivities of individuals' rather than by law:³² copies of Siné's *Massacre*, a French cartoonist's book of anti-clerical cartoons (some of which had a sexual theme) were burned; permission was refused to make a film entitled *The Many Faces of Jesus* concerning Jesus' sex life; and Mary Whitehouse led a campaign against *Monty Python's Life of Brian*.³³ A similar moral panic led to the *Gay News* case itself in 1979, the first successful prosecution for almost sixty years,³⁴ in which Mary Whitehouse brought a private prosecution alleging that the publication of the poem 'The Love That Dares to Speak its Name' was blasphemous.³⁵ In 1991 public order disturbances following the publication of Salman Rushdie's *The Satanic Verses*³⁶ led to a judicial review in the High Court of the decision not to issue a criminal summons.³⁷ 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 it was likely to do more harm than good.

²⁶ R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 367. See also *Stephen's Digest of the Criminal Law* (Sweet & Maxwell, 1950) article 2.14.

²⁷ *R v Ramsay and Foote* (1883) 15 Cox CC 231.

²⁸ *Bowman v Secular Society Ltd* [1917] AC 406.

²⁹ These decisions brought into question 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': *R v Ramsay and Foote* (1883) 15 Cox CC 231.

³⁰ [1979] AC 617.

³¹ P W Edge, *Legal Responses to Religious Difference* (Kluwer Law, 2002) 209-210.

³² See R Webster, *A Brief History of Blasphemy* (Orwell Press, 1990) chapter 1.

³³ See R Hewison, *Monty Python: The Case Against* (Eyre N Methuen Ltd, 1981) 66-67.

³⁴ Since *R v Gott* (1922) 16 CR App R 87.

³⁵ The poem by James Kirkup (who died in May 2009) described acts of fellatio and sodomy committed on Christ's body immediately after his death. It also suggested that Jesus had committed promiscuous homosexual acts with his disciples and other men.

³⁶ 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.

³⁷ *R v Chief Stipendiary Magistrate ex parte Choudhury* [1991] 1 QB 429.

THE END OF BLASPHEMY

The demise of blasphemy came in Part 5 of the Criminal Justice and Immigration Act 2008, almost lost amongst provisions amending various other parts of the criminal law. Section 79(1) of the Act marked the end of centuries of legal history in the briefest and most anodyne of sentences. It reads:

‘The offences of blasphemy and blasphemous libel under the common law of England and Wales are abolished.’³⁸

At first glance, it seems that the demise of blasphemy was inevitable. The private prosecution of *Gay News* had been exceptional: latterly similar publications had passed unnoticed: ‘The Love That Dares to Speak its Name’ had been broadcast on BBC television³⁹ and recited publicly without prosecution.⁴⁰ The offence of blasphemy had apparently fallen into desuetude. Commentators spoke of the offence as a ‘dead letter’⁴¹ and abolition was mooted by those who considered its removal as a mere tidying-up exercise.⁴² In 1981, the Law Commission proposed abolition,⁴³ while in 2001, the then Home Secretary 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’.⁴⁴

However, this is a simplification. The abolition of the offence of blasphemy was by no means inevitable. The dearth of prosecutions could alternatively be seen as a sign of the success of the law, rather than its futility. Moreover, reference to events leading up to the abolition of blasphemy in 2008 suggests that section 79(1) was passed because the offence was dormant not dead. There were four important events preceding abolition: the decision of the Supreme Court of Ireland in *Corway*,⁴⁵ the report of the House of Lords Select Committee on Religious Offences in England and Wales,⁴⁶ the enactment of the

³⁸ Criminal Justice and Immigration Act 2008, s 79(1).

³⁹ During the course of the BBC2 television programme *Taboo* broadcast in December 2001, the text and cartoon drawing published in *Gay News* were shown on the screen while Miss 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’.

⁴⁰ 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.

⁴¹ A Denning, *Freedom Under Law – Hamlyn Lecture* (London, Stevens & Co, 1949) 46.

⁴² Ahdar and Leigh commented in 2005 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.

⁴³ Law Commission (1981) *Offences against Religion and Public Worship* (Working Paper No. 79).

⁴⁴ David Blunkett, HC Deb Column 707 26 Nov 2001.

⁴⁵ *Corway v Independent Newspapers (Ireland) Ltd* [1999] 4 IR 484.

⁴⁶ House of Lords Select Committee on Religious Offences in England and Wales, First Report (2002-2003) Appendix, para 9.

Racial and Religious Hatred Act 2006 and the High Court decision in *Green*⁴⁷ concerning *Jerry Springer: the Opera*. The arguments advanced in each case rested upon the assumption that the offence of blasphemy could not exist in a modern multi-faith society since it would be incompatible with the European Convention on Human Rights:

In *Corway v Independent Newspapers (Ireland) Ltd*,⁴⁸ concerning proceedings 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 Irish Supreme Court concluded that that a prosecution for the crime of blasphemy could not succeed in Ireland.⁴⁹ The Court considered it questionable whether the blasphemy law was compatible with the freedom of religion provision in Article 44.1 of the Constitution which places the duty on the State to respect and honour religion. Moreover, although the Irish Constitution states in Article 40 that ‘The publication or utterance of blasphemous ... matter is an offence which shall be punishable in accordance with law’,⁵⁰ the Court noted that since blasphemy is undefined by the Irish Constitution or in its law, it was ‘impossible to say of what the offence of blasphemy consists’ and the necessary element of legal certainty was lacking.⁵¹

The Report of House of Lords Select Committee on Religious Offences in England and Wales expressed the view that the offence of blasphemy was a dead-letter, contending that ‘any prosecution for blasphemy today ... is likely to fail on grounds either of discrimination or denial of the right to freedom of expression’.⁵² The Report contended that in addition to discrimination against non-Christian faiths and the disproportionality of the unlimited penalty, the law on blasphemy was also incompatible with Article 7 of the Convention in that the common law was uncertain in relation to whether the offence applies only to the Church of England or more widely to all Christian denominations.

⁴⁷ *Green v The City of Westminster Magistrates’ Court* [2007] EWHC (Admin) 2785.

⁴⁸ [1999] 4 IR 484.

⁴⁹ The Court also considered disestablishment of the Church of Ireland in 1871 to be decisive. The Supreme Court reasoned that since the English law of blasphemy protected only the Church of England as the ‘established Church’ it was difficult to see how the common law crime of blasphemy, could survive the different constitutional framework following disestablishment (para 35). This seems incorrect in law: even if it is assumed that the offence protects only the Church of England as opposed to Christianity generally, *Williams* establishes that the offence of blasphemy protects other Christian denominations to the extent that their beliefs coincide with those of the established Church. It follows that the disestablishment of the Church of Ireland is as irrelevant as the disestablishment of the Church in Wales. 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, *Religious Discrimination and Hatred Law* (Routledge, Oxon 2006) 123.

⁵⁰ Article 40.6(1)(i).

⁵¹ Curiously, however, in May 2009, the Irish Minister for Justice announced his Government’s intention to amend the Defamation Bill currently before *Dáil Éireann* (Irish parliament) so as to create a statutory offence of blasphemous libel, which (were it to pass into law) would effectively reverse the decision in *Corway*.

⁵² House of Lords Select Committee on Religious Offences in England and Wales, First Report (2002-2003) Appendix, para 9.

At the Report Stage of what was to become the Racial and Religious Hatred Act 2006, Lord Averbury's speech supporting his amendment to abolish blasphemy echoed the Irish Supreme Court and the Select Committee. The well-rehearsed arguments concerning legal certainty, discrimination against other faiths and incompatibility with Articles 7, 9, 10 and 14 of the Convention were again advanced.⁵³ Successive speakers merely questioned whether it was the right time and the right vehicle for such an amendment.⁵⁴ However, the arguments expressed by the Irish Supreme Court and British Parliamentarians seem questionable. Both the caselaw of the European Court of Human Rights and that of the English courts (most notably the High Court decision in *Green*⁵⁵ concerning *Jerry Springer: the Opera*) suggest that the assumption that the offence of blasphemy was incompatible with the Convention was fallacious.

COMPLIANCE WITH THE EUROPEAN CONVENTION

An important and often overlooked feature of the prosecution of *Gay News* and the resultant legal proceedings was that it determined that the United Kingdom law on blasphemy was compliant with the European Convention on Human Rights, which protects both freedom of religion (Article 9) and freedom of expression (Article 10). The Commission found the application by *Gay News* manifestly ill-founded and declared it to be inadmissible.⁵⁶ It held that the common law offence of blasphemous libel constituted a restriction on freedom of expression but that the restriction was justified in order to protect the religious feelings of citizens was legitimate and necessary in a democratic society provided the principle of proportionality was respected.⁵⁷ A subsequent application concerning the refusal to grant a summons in respect of *The Satanic Verses* was similarly declared inadmissible.⁵⁸

⁵³ HL Hansard, Column 520 8 Nov 2005, Columns 521-522. Two further arguments were made. First, 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 outlawed the former); and second, 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).

⁵⁴ 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.

⁵⁵ *Green v The City of Westminster Magistrates' Court* [2007] EWHC (Admin) 2785.

⁵⁶ *Gay News Ltd v United Kingdom* (1983) 5 EHRR 123.

⁵⁷ The failure of the Article 10 claim was also fatal for the Article 9 claim since the 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.

⁵⁸ *Choudhury v United Kingdom* (1991) 12 HRLJ 172. The Applicant applied to European Court 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

Strasbourg also upheld the right of public bodies to enforce the English law of blasphemy. For example, the British Board of Film Classification refused to grant a certificate on the ground that a film's content was blasphemous, and this too was upheld in Strasbourg.⁵⁹ In *Wingrove* the European Court of Human Rights held that the refusal to issue a certificate for *Visions of Ecstasy*⁶⁰ 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 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.⁶¹

Subsequent judgments by the European Court of Human Rights deriving from other States have followed a similar approach.⁶² Strasbourg has held that although the freedom to manifest religion does not amount to an exemption from all criticism,⁶³ freedom of expression contains 'a duty to avoid expressions that are gratuitously offensive to others and profane'.⁶⁴ Moreover, the Court has frequently stressed 'the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs',⁶⁵ suggesting that more rather than less regulation of religion is to be expected.

Given this strong and authoritative body of case law it would be expected that English courts would have rejected any challenge to the law of blasphemy under the Human Rights Act 1998. In relation to the alleged breach of Article 7 (legal certainty), it may be noted that it was not difficult to elucidate the ingredients of the offence. Indeed, in the *Gay News* case,⁶⁶ the House of Lords was able to review centuries-old authorities to reach

responsible under the Convention, directly interfered in the applicant's freedom to manifest his religion or belief'.

⁵⁹ *Wingrove v United Kingdom* (1997) 24 EHRR.

⁶⁰ The eighteen minute 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.

⁶¹ This was in total contradistinction to the prior decision of the Commission which had 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 a conscious decision to view was required so there was no pressing social need for a ban.

⁶² See eg *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34 in which the Court (contradicting the earlier adjudication of 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 right 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.

⁶³ *IA 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.'

⁶⁴ *IA v Turkey* (Application no. 42571/98) 13 September 2005, para 24.

⁶⁵ *Refah Partisi v Turkey* (2003) 37 EHRR 1 (para 91).

⁶⁶ *Corway v Independent Newspapers (Ireland) Ltd* (above) [31].

the conclusion that the *mens rea* of the offence was certain. The alleged lack of clarity as to whether the offence protected the Church of England specifically or Christianity generally was a moot point given the overlap principle elucidated in *Williams*:⁶⁷ Christian denominations other than the Church of England and other religions were protected 'to the extent that their fundamental beliefs are those which are held in common with the established Church.'⁶⁸ Moreover, it is also questionable on practical grounds whether a domestic court would rule that blasphemy was incompatible with the Convention on Article 7 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'.⁶⁹

In relation to arguments based upon Article 10 (freedom of expression), it seems clear that English courts would have followed Strasbourg and held that any interference was justified under Article 10(2). Curiously, the Report of House of Lords Select Committee on Religious Offences contended that, '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'.⁷⁰ Although it is true that the Convention is a living instrument and that its interpretation will change over time, it seems disingenuous to presume an immediate reversal of interpretation.

In relation to alleged breach of Article 14 (discrimination), it must be remembered the Article 14 prohibition on discrimination is not a free-standing right;⁷¹ the discrimination must be within the ambit of another Convention Article. If it was alleged that the offence was not Convention compliant since it discriminated against non-Christian faiths, then the relevant other Convention Article would be Article 9. Such a claim was made in *Choudhury v United Kingdom*⁷² in respect of the refusal of a prosecution against Salman Rushdie following the publication of *The Satanic Verses*. The Commission dismissed the claim on the grounds that 'no State authority or anybody 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'. The current unwillingness of English courts to accept interference with Article 9,⁷³ especially in conjunction with

⁶⁷ (1797) 26 St Tr 654.

⁶⁸ This was affirmed in *R v Chief Stipendiary Magistrate ex parte Choudhury* [1991] 1 QB 429.

⁶⁹ D Ormerod, *Smith & Hogan Criminal Law* (Oxford University Press, 11th ed, 2005) 20.

⁷⁰ *Ibid*, Appendix 3, para 12, being an exercise of the margin of appreciation.

⁷¹ 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 University Press, 2005) 109.

⁷² *Choudhury v United Kingdom* (1991) 12 HRLJ 172.

⁷³ On which see M Hill and R Sandberg, 'Is Nothing Sacred? Clashing Symbols in a Secular World' [2007] *Public Law* 488, R Sandberg, 'Controversial Recent Claims to Religious Liberty' (2008) 124 *Law Quarterly Review* 213 and R Sandberg, 'The Changing Position of Religious Minorities in English Law: The

Article 14,⁷⁴ suggests that the domestic courts would have reached a similar decision on the issue of blasphemy.

Indeed, human rights based arguments were rejected by the High Court in *Green v The City of Westminster Magistrates' Court*.⁷⁵ 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.⁷⁶ 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 there was no *prima facie* case,⁷⁷ Green applied for judicial review.

The Divisional Court refused the application. Hughes LJ, giving the judgment of the court, noted that although it was very rarely invoked, the offence of blasphemous libel still existed. The law could be accurately stated and was Convention compliant. This undermined much of the reasoning of the Irish Supreme Court, the House of Lords Select Committee and the parliamentary debate on the Racial and Religious Hatred Act, all of which had assumed that the offence of blasphemy would not be considered compatible with the European Convention on Human Rights.

However, the two grounds upon which the Court refused judicial review provided a more cogent rationale for abolishing the offence. First, the 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 Court held that this applied to the offence of blasphemy, which was a common law offence, the essence of which was such offensiveness as to engender a threat to society in general.⁷⁸

Legacy of *Begum*’ in R Grillo et al (ed) *Legal Practice and Cultural Diversity* (Ashgate, Aldershot) forthcoming.

⁷⁴ On which see R Sandberg, ‘Underrating Human Rights: *Gallagher v Church of Jesus Christ of the Latter-Day Saints*’ (2009) 11 *Ecclesiastical Law Journal* 75.

⁷⁵ [2007] EWHC (Admin) 2785.

⁷⁶ *Jerry Springer – The Opera* is a musical written by Stewart Lee and Richard Thomas based on the television programme, *The Jerry Springer Show*. The play shows Jerry being shot dead and finding himself in Purgatory, where he encounters several individual who had featured in his show. Springer subsequently proceeds down to Hell where the Devil forces him to present a special episode of *The Jerry Springer Show* featuring Christ, God, Mary, Satan and Eve (played by the ‘guests’ from the earlier talk show). On January 8th 2005, the musical was broadcast on BBC2. Two million people watched it. The BBC received a record 55,000 complaints before transmission and 8,000 further complaints post transmission.

⁷⁷ 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.

⁷⁸ Although the Theatres Act 1968 did not apply to the broadcast by the BBC, the Broadcasting Act 1990, contained provisions identical to those in the Theatres Act applicable to broadcasts.

Second, the Court found that the District Judge had 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,⁷⁹ the 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'.⁸⁰ 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.

The Court thus negated many of the human rights justifications advanced for the abolition of blasphemy. However, it added two new dimensions to the debate: the significant curtailing of the blasphemy law by the Theatres Act 1968 and the recognition of the requirement for proof of societal damage. The decision in *Green*, whilst acknowledging that the prospect of a prosecution was small, served as a reminder that the offence was sufficiently certain and Convention compliant to be successfully invoked if necessary.

However, it was not to be long before Parliament consigned the offence of blasphemy to history. On 9 January 2008 on the floor of the House of Commons, Dr Evan Harris MP 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 offences of blasphemy and blasphemous libel'.⁸¹ However, Dr Harris withdrew his amendment in response to an undertaking by the Government to bring forward its own new clause to like effect in the House of Lords, subject to a

⁷⁹ 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.

⁸⁰ *Ibid* [8].

⁸¹ In addition to the usual criticisms concerning legal uncertainty, discrimination and alleged incompatibility with the European Convention on Human Rights, which Dr Harris elucidated without reference to *Green v The City of Westminster Magistrates' Court*, 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'. Moreover, 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. He argued that there was no longer 'an excuse for prevarication' since 'religious hatred was dealt with two years ago': HC Hansard, Column 442 9 Jan 2008.

satisfactory outcome to consultations with the Church of England.⁸² 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'.⁸³ On 5 March 2008, an amendment abolishing blasphemy was moved by the Government in the House of Lords.⁸⁴ 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'.⁸⁵ The underlying factor, however, was the decision in *Green*: although the High Court had shown that the offences had been severely curtailed, it also had showed that blasphemy still existed. The fact that there had been no prosecutions since 1979, actually showed that the law was *unused* rather than *disused*. The amendment was passed by 148 votes to 87 in the House of Lords⁸⁶ and then by 378 votes to 57 in the House of Commons.

CONCLUSIONS

The judgment of the Divisional Court in *Green v The City of Westminster Magistrates' Court* affirmed the certainty of the offences of blasphemy and blasphemous libel and also their compatibility with the European Convention on Human Rights. The earlier pronouncements of the Irish Supreme Court, the House of Lords Select Committee, and those promoting the enactment of the Racial and Religious Hatred Act must be read with caution and assessed with scepticism. Ironically, it was the very finding in *Green* that blasphemy was not obsolete (as many had assumed) which galvanised the abolitionists.

In the same way as it is incorrect to assume that the abolition of blasphemy was inevitable because of its non-compliance with the provisions of the European Convention on Human Rights, it is also incorrect to assume that the death of blasphemy means that English criminal law is no longer concerned with religion. The Racial and Religious Hatred Act 2006 has created 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.⁸⁷ However, contrary to the Government's original intentions, a prosecution can only

⁸² *Ibid*, Column 453-454. This reflects the understanding that the blasphemy laws were commonly understood to apply only to the established Church.

⁸³ *Ibid*, Column 453.

⁸⁴ H L Hansard, Column 1118, 5 Mar 2008.

⁸⁵ *Ibid*, Column 1118. The wider argument that this undermines the rest of the law seems overstated. By way of analogy, the police forces in England and Wales have recently acknowledged that the criminal offence of fox hunting is largely unenforceable but the law remains in force. 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.

⁸⁶ And, typically of broad church Anglicanism, the Bishops of Durham and Portsmouth voted in favour of abolition whilst the Bishops of Chester and Rochester voted against.

⁸⁷ For a full account, see I Hare, 'Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred' [2006] *Public Law* 521, and K Goodall, 'Incitement to Religious Hatred: All Talk and No

be brought if the defendant intended to stir up religious hatred.⁸⁸ This, coupled with the late inclusion of a freedom of speech defence,⁸⁹ has stripped the offence of much of its meaning making the prospect of a successful prosecution remote.⁹⁰

Inevitably, the substitute crime of inciting religious hatred is proving equally as illusory and symbolic as the offence of blasphemy which it replaced, and sits uncomfortably amongst a plethora of criminal activities involving religion. In addition to matters under the Public Order Act 1986,⁹¹ prosecutions have been brought for the common law offence of breach of the peace⁹² and under the Protection from the Harassment Act 1997,⁹³ anti-social behaviour orders have also been made.⁹⁴ Since 2001, the criminal law has included provision for the increase in sentence for specific crimes if racially or religiously aggravated.⁹⁵ This applies to assault, criminal damage, public order offences and offences under the Protection from Harassment Act 1997.⁹⁶ Moreover a number of statutory provisions, enacted in the nineteenth and early twentieth centuries,⁹⁷ which protected religious worship and fettered freedom of expression, remain operative.⁹⁸ Some of these offences are similar in tone if not ambit to that of blasphemy.⁹⁹ The

Substance' (2007) 70(1) *Modern Law Review* 89.

⁸⁸ 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'.

⁸⁹ Section 29J reads: 'Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system'.

⁹⁰ See A Jeremy 'Practical Implications of the Enactment of the Racial and Religious Hatred Act 2006' (2007) 9 *Ecclesiastical Law Journal* 187.

⁹¹ See, eg *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.

⁹² See, eg *Wise v Dunning* [1902] 1 KB 167.

⁹³ See, eg *Christ of Latter Day Saints v Price* [2004] EWHC Admin 325; *Singh v Bhaker* [2006] Fam Law 1026.

⁹⁴ See N Addison, *Religious Discrimination and Hatred Law* (Routledge, Oxon 2006) 137-138.

⁹⁵ 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'.

⁹⁶ 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).

⁹⁷ 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.

⁹⁸ 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'.

⁹⁹ Although it is commonly asserted that the Criminal Law Act 1967 abolished the statutory offence of blasphemy, since the 1967 Act simply repealed the Blasphemy Act 1697, it is possible that other statutory

criminal law continues to affect religion,¹⁰⁰ the major difference being that Christianity is now treated in the same manner as all other religions.

Policing religiously related crime by public pressure is inherently problematic, since the most active pressure groups may not be representative of society as a whole.¹⁰¹ Fear of ‘obdurate believers’ may lead to greater self-censorship.¹⁰² Liberal democracies thrive on freedom of expression, but when that freedom is curtailed by the mob rule of protestors,¹⁰³ as opposed to the rule of law, there is cause for legitimate concern. The pretence that the English law on blasphemy was not Convention compliant masks the social engineering implicit in removing from the statute books an offence overtly favourable to Christianity. The abolition of the offence of blasphemy may be welcomed by other religious groups, notably Muslims, but the lack of integrity in the argumentation which preceded it will concern students of Church and State, and offend supporters of the European Convention on Human Rights. Only time will tell how this English experience will play out elsewhere in Europe, but it will be immediately obvious that the concept of establishment affords fewer advantages to the Church of England, or Christianity in general, than do the European Church-State models of laïcité and separation.¹⁰⁴ In truth, the change in England is from a symbolic offence of blasphemy which applied only to Christianity but which in practice was not enforced, to a symbolic raft of offences designed to criminalise violence in the name of (or against) religion, but with a statutory defence drawn so widely as to render successful prosecutions virtually impossible. The dormant offence of blasphemy seems to have been substituted with an unworkable offence of inciting religious hatred.

offences of blasphemy continue to exist. For instance, under section 7 of the Burial Laws Amendment Act 1880 it is an offence to ‘bring into contempt or obloquy the Christian religion, or the belief or worship of any church or denomination of Christians, or the members or any minister of any church or denomination, or any other person’. At the very least this would seem to be an offence of blasphemy in the context of burial grounds.

¹⁰⁰ 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 (above) 133.

¹⁰¹ An interesting example occurred in Birmingham in 2004. A group of Sikh protestors objected to Birmingham Repertory Theatre’s production of ‘Behzti’ (meaning Dishonour), a contemporary play by Sikh playwright Gurpreet Bhatti which explored issues of sexual abuse, manipulation and relationships inside a Gurdwara, a Sikh place of worship. The protest became violent and the windows of the theatre were broken. Threats were made against the director and actors. The play was immediately withdrawn from production and no criminal charges were brought.

¹⁰² 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.

¹⁰³ As in the Birmingham Repertory Theatre’s production of ‘Behzti’ in 2004 (above).

¹⁰⁴ For a judicial discussion of the religious (as opposed to public) nature of the Church of England see *Aston Cantlow Parochial Church Council v Wallbank* [2004] 1 AC 546. For general commentary see M Hill, ‘Church Autonomy in the United Kingdom’ in G Robbers (ed) *Church Autonomy: A Comparative Study* (Frankfurt a. Main, 2001).

