

## **A New Reason For Blasphemy Reform – Part II**

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### **The Court of High Commission 1559-1640**

Blasphemy became a serious element in church politics only with the breaking up of Christendom at the Reformation. It then replaced heresy as the principal charge against forms of Christian belief that were seen as undermining both faith and society. It became a term of abuse employed to describe error in doctrinal controversy. During the Tudor period, as in the mediaeval period, Church and State were regarded as a single society which had many common objects. The two components of this society were bound to give one another assistance in carrying out these joint purposes. The Church must help the State to maintain its authority, and the State must help the Church to punish non-conformists and infidels. The Church was the church of the State, and membership of it was therefore a condition precedent for full rights in the State; the king was the supreme governor of the Church; and the law of the Church was the king's ecclesiastical law.

A series of Acts of Henry VIII, starting in 1529, removed the papal jurisdiction over England. When Catholic Mary came to the throne these were repealed by an Act of 1554. However in 1558 the Act of Supremacy, the first Act of the reign of Elizabeth, finally removed the papal jurisdiction. Section 8 (which is still in force) said that "all powers for the visitation of the ecclesiastical state and persons, and for reformation, order and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts and enormities, shall for ever by authority of this present parliament be united and annexed to the imperial crown of this realm".

Under powers conferred by the Act of Supremacy the Court of High Commission was set up in 1559 to exercise the royal jurisdiction in church matters over both laity and clergy. It consisted of 44 commissioners, some clerical and some lay. Any three, provided they included a bishop, could impose punishments including spiritual censures, fines or imprisonment. The procedure was based on canon law, so the common law doctrine against self-incrimination did not apply. However the church law as applied by the court began to diverge from the general body of canon law. The emphasis of the law came to be put on blasphemy rather than heresy, and this was to remain to the present day.

The Court of High Commission dealt with Puritans and Independents. At the Revolution against Charles I the court was found to wield too great a discretionary and dispensing power in favour of the Crown. Like the prerogative Court of Star Chamber, it was abolished in 1640.<sup>1</sup> The Blasphemy Act 1650 of the Rump Parliament, which designated blasphemy a capital crime, having in view Anabaptists, Socinians, Familists, Ranters and other "enthusiasts", ceased to have effect on or before the restoration of the monarchy in 1660. Certain ancient statutory offences of heresy and the like, contained in the Sacrament Act 1547, the Act of Supremacy 1558 and the Act of Uniformity 1662, were repealed in modern times.<sup>2</sup>

### **The common law period**

With the demise of the Court of High Commission a vacuum was left, since the punishments that could be imposed by the old church courts had lost their effectiveness. It was filled by the common law, as enforced by the Court of King's Bench. Occasionally Parliament acted as a court, as in the trial

<sup>1</sup> 16 Cha. I c. 11.

<sup>2</sup> By the Statute Law (Repeals) Act 1969 and the Church of England (Worship and Doctrine) Measure 1974.

of the Quaker James Nayler in 1656 for allowing himself to be honoured as Jesus Christ. He was sentenced by the House of Commons to be put in the pillory, whipped from Westminster to the Exchange, again placed in the pillory, to have his tongue bored, his forehead branded with “B” for Blasphemer, then taken to Bristol, there again whipped, and then sent to Bridewell until Parliament should release him.

Twenty years later one Taylor was convicted of blasphemy at common law. The report is brief-

“An information exhibited against him in the Crown Office, for uttering of divers blasphemous expressions, horrible to hear, (viz.) that Jesus Christ was a bastard, a whoremaster, religion was a cheat; and that he neither feared God, the devil, or man. Being upon his trial, he acknowledged the speaking of the words, except the word bastard; and for the rest, he pretended to mean them in another sense than they ordinarily bear, (viz.) whoremaster, i.e. that Christ was master of the whore of Babylon, and such kind of evasions for the rest. But all the words being proved by several witnesses, he was found guilty. And Hale<sup>3</sup> said, that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable in this Court. For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law. Wherefore they gave judgment upon him, (viz.) to stand in the pillory in three several places, and to pay one thousand marks fine, and to find sureties for his good behaviour during life.”<sup>4</sup>

Page 610

### **Legislative interventions**

The preamble to the Blasphemy Act 1697 recited that “many persons have of late years openly avowed and published many blasphemous and impious opinions, contrary to the doctrines and principles of the Christian religion, greatly tending to the dishonour of Almighty God, and may prove destructive to the peace and welfare of this kingdom”. For the benefit of Jews, it applied only to persons educated in, or at any time professing, the Christian religion.

The 1697 Act made it an offence (1) to deny any one of the persons in the Trinity to be God, or (2) to assert that there are more gods than one, or (3) to deny the Christian religion to be true, or (4) to deny the Bible to be of divine authority. For a first conviction the offender was deprived of the right to hold any office or employment. For a second conviction he was liable to be deprived of civil rights and imprisoned for 3 years. There were few if any convictions under the Act, which was repealed by the Criminal Law Act 1967.

Fox’s Libel Act 1792 was passed through the instrumentality of Charles James Fox. It provides that it is a question of fact for the jury, and not as hitherto a question of law for the judge, to decide whether a publication really is a blasphemous or other libel. This enactment, passed in what was known as the Age of Reason, enabled juries to soften the force of the law in favour of atheists and dissenters. The jurist Thomas Starkie stated the new view of the law-

“There can be no doubt as to the general right of inquiry and discussion even upon the most sacred subjects, provided the licence be exercised in the spirit of temperance, moderation, and fairness, without any intention to injure or affront . . . It cannot be doubted that any man has a right, not merely to judge for himself on [the questions of the relations between the Creator and the beings of his creation], but also legally speaking to publish his opinions for the benefit of others.”<sup>5</sup>

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<sup>3</sup> Sir Matthew Hale LCJ.

<sup>4</sup> (1676) 86 ER 189.

<sup>5</sup> *Practical Treatise on the Law of Slander, Libel, and Incidentally of Malicious Prosecutions* (2nd edn, 1830), pp. 145-6.

The justification for this distinction between an appeal to reason and an appeal to the emotions was stated by Lord Denman CJ in *R v Hetherington*<sup>6</sup> when he described the latter type of publication as one where “the tone and spirit is that of offence and insult and ridicule, which leaves the judgment really not free to act and therefore cannot truly be called an appeal to the judgment, but an appeal to the wild and improper feelings of the human mind, more particularly to the younger part of the community”. This overlooks the fact that if a person truly considers that for the public good a religious doctrine should be opposed he ought to be able to use effective means such as satire, sarcasm and ridicule.

The Libel Act 1843 (which is still in force) assists publishers of blasphemous and other libels such as newspaper editors or proprietors by exempting them if they prove that they were unaware of the nature of the item and had not been careless. They were further aided by the Law of Libel Amendment Act 1888 (also still in force), which requires the leave of a judge before prosecution for newspaper libel.

### **State security**

A large number of common law prosecutions for blasphemy occurred in the late 18th and early 19th centuries. In 1838 Alderson B told a jury:

‘. . . a person may, without being liable to prosecution for it, attack Judaism, or Mohammedanism, 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 in the form established by law, and is . . . therefore part of the constitution of the country.’<sup>7</sup>

Preservation of the King’s peace has always been a prime concern of the common law courts. In the 1917 case of *Bowman v The Secular Society* Lord Parker of Waddington said that “to constitute blasphemy at common law there must be such an element of vilification, ridicule, or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace”.<sup>8</sup> In the same case Lord Sumner said “the gist of the offence of blasphemy is a supposed tendency to shake the fabric of society generally”. He added that the question whether a given opinion is a danger to society “is a question of the times and is a question of fact”. Thirty years later we find Lord Denning saying of this postulated danger in his 1949 Hamlyn lecture that there is no such danger to society now and the offence of blasphemy is a dead letter.

The last successful prosecution for blasphemy before the *Gay News* case in 1977 (described in Part I of this article) was *R v Gott* in 1922, where the defendant, who had three previous convictions for blasphemy, was sentenced to nine months with hard labour for selling blasphemous pamphlets.<sup>9</sup> A paper called *The Liberator* contained “two pamphlets, entitled respectively ‘Rib Ticklers, or Questions for Parsons’ and ‘God and Gott’. One man in the crowd said: ‘You ought to be ashamed of yourself’: one woman said ‘Disgusting, disgusting!’ Nothing further occurred”. The Lord Chief Justice, upholding the conviction, said “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’ . . . Such a person might be provoked to a breach of the peace”.

In a 1981 Working Paper the Law Commission said the state’s primary interest at this period was its own security. They went on:

“Consequently the State intervened by using the criminal law to punish those whose attacks on Christianity or the Deity were regarded as a menace to the foundations of the established religion and thus to society in general. It is therefore not surprising that the number of prosecutions increased during the disturbed period following the French Revolution for fear that the denial of Christian truths in such a work as Paine’s *Age of Reason* might give rise to

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<sup>6</sup> (1841) 4 Sr. Tr. N.S. 563.

<sup>7</sup> *R v Gathercole* (1838) 2 Lew. C.C. 237.

<sup>8</sup> [1917] AC 406.

<sup>9</sup> [1922] 16 Cr. App. Rep. 87.

civil disobedience.”<sup>10</sup>

*Page 611*

In 1985 the Law Commission published a report recommending that the common law offences of blasphemy and blasphemous libel be abolished and not replaced.<sup>11</sup> The impact was marred by the fact that of the five commissioners a minority of two (including the Chairman of the Law Commission Ralph Gibson J) dissented, so not surprisingly the report has not been acted on. The minority wished to replace the present law by a new offence. This “would penalise anyone who published grossly abusive or insulting material relating to a religion with the purpose of outraging religious feelings”.<sup>12</sup> This suggestion was modelled on a provision in the Indian Penal Code which prohibits the deliberate outraging of the religious feelings of any person.<sup>13</sup>

*Part III of this article, to be published in next week's issue, surveys connected matters, particularly the Government's Racial And Religious Hatred Bill, and gives an account of the two alternative ways in which blasphemy law abolition might at last be accomplished.*

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<sup>10</sup> Law Commission W.P. No. 79, *Offences against Religion and Public Worship*.

<sup>11</sup> LAW COM No. 145, *Offences against Religion and Public Worship*.

<sup>12</sup> LAW COM No. 145, para. 5.2.

<sup>13</sup> A footnote to para. 5.3 of the report says that the Code “has existed for over a century and does not contain any definition of ‘religious’”.