

BLASPHEMY

*The Report of the Archbishop of Canterbury's Working Group
on Offences against Religion and Public Worship*¹

A personal view by Chancellor Graham Routledge

In 1977 the House of Lords in *R v Lemon*² unanimously asserted that the offence of blasphemy had survived a long period of desuetude, and remained very much alive and capable of being used. This surprised many. There had been no prosecution for the offence for sixty-five years. Lord Goddard had once declared it 'obsolescent', Lord Denning had described it as a 'dead letter', and in 1959 the Society for the Abolition of the Blasphemy Laws had abolished itself. Despite this, and despite disagreement among their Lordships as to the intention or *mens rea* of the offence, they had no doubt that it still existed as a criminal offence. Indeed, Lord Scarman expressly disassociated himself from the view that the offence 'serves no useful purpose in modern law'.³

A publication is blasphemous 'which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which doctrines are advocated and not as to the substance of the doctrines themselves.' This definition, formulated in article 214 of Stephen's *Digest of the Criminal Law*, was approved and adopted by Lord Scarman in *Lemon's case*.⁴ It is to be noted that it is the manner of expression, not necessarily the matter, that characterises blasphemy, and that the only necessary intent is the intention to publish the blasphemous material. The essence of the offence is, therefore, the publication of material calculated to outrage and insult a Christian's religious feelings.

Following the decision in *Lemon* the Law Commission explored the topic exhaustively, and in a *Working Paper*⁵ offered a comprehensive critique of blasphemy and other related offences. This provoked an exceptionally heavy response from over 1800 organisations, groups, and individuals together with 175 petitions bearing a total of 11,770 signatures. Subsequently, in 1985, the Commission laid its final report⁶ before Parliament, together with a draft Bill, proposing (inter alia) the abolition of the offence of blasphemy without any replacement. This was the recommendation of the majority of the Commission. The minority view, expressed in a *Note of Dissent* from Sir Ralph Gibson and Mr Brian Davenport, QC, approved the abolition of the existing offence, but preferred that it be replaced by a new offence that would free the law from its perceived defects of uncertainty, undue harshness and restriction to Christianity, and extend its scope to cover the major religions (not just Christianity) in our society. This

1. GS Misc. 286 (February 1988)

2. (1979) 1 All E.R. 898 (See also (1978) 3 All E.R. 175).

3. *ibid.* p.421.

4. *ibid.* p.927.

5. *Offences against Religion and Public Worship*, Working Paper No. 79.

6. Law Com. No.145.

proposal echoed Lord Scarman's opening remarks in his judgment in *Lemon*, when he said that 'there is a case for legislation extending (the offence) to protect the religious beliefs and feelings of non-Christians.' 'The offence' he said 'belongs to a group of criminal offences designed to safeguard the internal tranquillity of the kingdom. In an increasingly plural society such as that of modern Britain it is necessary not only to respect differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt'.⁷

After the publication of the Law Commission's Report, the Archbishop of Canterbury invited the Bishop of London to reconvene the Group, which had already advised him on his earlier submission to the Commission, to consider this final Report. It is this Report,⁸ in so far as it relates to blasphemy, that is the concern of this article.

The Archbishop's Group in effect endorsed the Law Commission's minority view, and proposed a new offence the essence of which would be constituted by an intention to publish material with the purpose of wounding or outraging religious feelings; the emphasis being upon the deliberate causing of such outrage. In so proposing, the Group adopted the rationale for the new offence put forward in the Note of Dissent, namely, 'that it should be the duty of all citizens, in our society of different races and of people of different faiths and of no faith, not purposely to insult or outrage the religious feelings of others' and that 'adherence to a religion, with the reverence which goes with it . . . (should) be recognised by the State as deserving of such protection as the State can give without impairment of the rights of others'.⁹ The Group expressly approved certain features of the proposed offence: (a) the protection of persons from public insult and humiliation because of their religious beliefs, (b) protection for those professing adherence to religions generally and not limited to Christians or members of the Church of England only, (c) that the offending material would have to be 'grossly abusive or insulting', (d) that publication to the public at large by any means of communication would be within the offence, but publication by an ordinary private spoken word would not be, (e) that the right of private prosecution would not exist, and (f) that no requirement of, or reference to, causing a breach of the peace would form part of the offence.¹⁰

On the question of intention or *mens rea* the Group, while accepting the Note of Dissent's requirement that a person should have to have the intention of wanting to outrage the religious feelings of the persons involved, entered the caveat that this should not be the sole purpose of the accused, but could be one of his purposes.

On whether or not 'religion' should be defined the Group reached a clear conclusion. In the Note of Dissent, Sir Ralph Gibson and Mr Davenport, had suggested possibilities for defining the term; for example, major religions

7. (1979) 1 All E.R. at p. 921.

8. GS Misc.286.

9. Law Com. No.145 pp 41 and 42.

10. GS Misc. 286 p.4.

could be listed in the new statute with power to add to the list, or reference could be made to religious groups having places of worship certified under the Places of Worship Registration Act 1855; or, of course, the term could be left undefined. It was this last possibility that appealed to the Group. The best approach, it concluded, 'would be for the new offence neither to define nor list the major religions represented in this country.' They thought it would be more desirable 'to let the jury decide whether the case is one which involves religion, if necessary after hearing expert evidence.'¹¹

The Law Commission's Report remains on the table, and the offence has not lost its appeal. The film, 'The Last Temptation of Christ', has provoked much opposition and calls for a prosecution for blasphemy. The Director of Public Prosecutions has decided not to prosecute; but it is still open to a private individual to do so. The matter was recently raised in the House of Lords¹² and elicited from Earl Ferrers the response that the Government had no plans for altering the law; the Law Commission had not, he said, reached unanimous conclusions. 'We do not believe there is sufficient consensus of opinion for a change in the law' he asserted. Lord Paget's contribution to the exchange was to declare that 'the blasphemy laws were obsolescent nonsense.'

The existing law would, therefore, seem to be here to stay until a Government is prepared to take action; this seems remote. Nevertheless the topic deserves and needs serious and dispassionate consideration, and we are indebted to the Law Commission and the Archbishop's Group for their work in exposing so painstakingly and critically every aspect of the subject.

The basic question is, of course, do we need an offence of blasphemy? And if so, why?

In both its Working Paper and its Report the Law Commission dealt carefully and thoroughly with the possible justifications for the crime. They are, the protection of (a) religion and religious beliefs, (b) society, (c) individual feelings and (d) public order. All the members seem to have found the most persuasive arguments to be those concerned with the protection of religious believers from suffering offence to their feelings. They quoted the Earl of Halsbury who, in the House of Lords, had declared that 'blasphemy is an act of violence to the mind and spirit and deeply spiritual feelings of very large numbers, millions and millions, of people capable of entertaining such feelings. It is an assault upon the mind and spirit just as much as mayhem is an assault upon the body.'¹³ But the majority were not finally convinced by this justification and properly asked, why should freedom of speech be curtailed in this specific area because particular publications are thought to be grossly insulting to the feelings of others? A possible answer lies in the sacred nature of religious beliefs. But again the Commission asks, why should special reverence or treatment be afforded to what is deemed sacred?

11. *ibid.* pp 14 and 15.

12. 10 October 1988.

13. Law Com. No.145 p.20.

Mr John Spencer has put the same point forcefully.¹⁴ 'We do not generally accept' he has written 'that the mere risk of hurting other people's feelings is enough to make it a crime for someone to say what he wants, unless he forces his words on the attention of the unwilling. What is so special about religious feelings which potentially justifies a crime of blasphemy consisting of any publication of blasphemous matter, even where the blasphemer did not thrust it into the believers' unwilling ears?' The question needs an answer.

The reply of the Archbishop's Group is to accept the rationale of the proposed new offence offered in the Note of Dissent and quoted above. The Note says that there is, or should be, a duty of all citizens 'not purposely to insult or outrage the religious feelings of others', and expresses the wish that the State should protect 'adherence to religion with the reverence for the sacred which goes with it.' But again the question must be put, why? The Note says that the purpose would not be 'to protect the believer's feelings, as of right, or as essential, or even as important for his own spiritual well-being', rather 'it would be for the protection of all adherents of religion in the interests of society as a whole.'¹⁵ This, it is suggested could bind believers and non-believers in common cause.

The Archbishop's Group, in pursuing the justification further, admits that there is evidence to suggest that our society is more secular, with less reverent or spiritual consciousness amongst the body politic, that it once was, but asks, 'even if this is the case, what is the merit in gratuitously allowing our society to become less hospitable to the religious values, beliefs and feelings which some members hold sacred?' 'It is the cumulative effect of such behaviour (i.e. the publication of blasphemous material) which would undermine the sense that some things are sacred and society would lose the capacity for reverence. So if the existing common law offence were to be abolished without a replacement offence being enacted, Parliament would be giving a signal that religion is a matter of indifference to today's society.'¹⁶ 'We feel' they say, 'that the public debasement of Christian imagery, besides being deeply offensive to many Christians, may lead to a blindness to the things of the spirit and be seen as a corruption of the mind with regard to what we believe to be the most important features of human life.'¹⁷

Lord Scarman in *Lemon*, spoke of the need to safeguard 'the internal tranquillity of the kingdom.'¹⁸

The emphasis in all these attempted justifications is in the end, it seems to me, on what is beneficial to society. The question, therefore, remains, why should society treat religious views and feelings as something special? Mr Spencer analyses this concept of 'special', and says it seems to rest on a double assumption:

14. 1981 Crim.L.R.810 at p.815.

15. Law Com. No.145 p.42.

16. GS Misc. 286 p.10.

17. *ibid.* p.19.

18. (1979) 1 All E.R. at p. 921.

'first, that religious feelings are superior in quality to other human feelings and therefore more deserving of protection, and secondly, that religious people are more easily and more deeply hurt than others, and need a sort of egg-shell rule to protect them.'¹⁹ Believers would probably not want to adopt the second assumption, but they would insist on the first. Religious views and feelings are, they would argue, of a different order from other beliefs and attitudes; they are concerned with ultimate truths and values, and have a sanctity that deserves a special reverence. But this cuts little ice with Mr Spencer, and rightly so because we have still not answered the question, why should the State by law protect these views even if they do have a special quality? 'If', he asks 'the attack is not obscene, or indecent, or likely to cause a breach of the peace or incite to racial hatred, what reason can justify its being a criminal offence when it is no crime so to vilify any other set of beliefs – by extreme political literature, say, or by scurrilous attacks on the view that the world is round (or flat) or that man is (or is not) descended from the apes?'²⁰ In the end, he suggests, the only really honest answer is that given by some of those who replied to the Commission's Working Paper, namely that 'the public good requires the maintenance of their religion'. This he clearly finds unsatisfactory. But surely it is here, that the only real justification can be found. And isn't that, despite their language and emphasis on the individual Christian's feelings, what the Note of Dissent, the Group and Lord Scarman are really saying? Religious beliefs and feelings matter to society; they should, therefore, be protected. It seems to me that we have come round to the very rationale that has been rejected or ignored, the protection of society.

If society thinks that religious beliefs and feelings are special because they are an essential or important feature of social life, and are of peculiar concern to society as a whole, and takes the view that to allow blasphemous attacks upon them is likely to weaken this aspect of social life, there is a clear and tenable justification – whether one agrees with it or not – for the offence. The issue is not, therefore, in the end legal but political. The questions are, how does society see itself, and what does it consider to be special and in need of protection? Such questions are answered through our political processes. Of course, the legal contribution is essential to any careful analysis of the issues, but it is not lawyers *qua* lawyers who can determine how society perceives itself and its social structure. At present the Government takes the view that there is no wide-spread desire for change, certainly not for abolition of blasphemy without any replacement.

This line of argument is, of course, irritating and frustrating to many minds, but it is difficult to see how else such a matter can be handled. Whatever the evidence may suggest as to the increasing secularisation of English society we still, in all sorts of ways, maintain a Christian structure for much of our public, social and cultural life. Of course it can be argued that that in itself does not

19. 1981 Crim. L.R.810 at pp.815 & 816.

20. *ibid.* p.812.

require an offence of blasphemy, and it may be that if we were to start *de novo* we might not invent one. But we are not so starting. The Christian faith is part of the warp and woof of our society and, like other aspects of its life, still thought to be worthy of protection. To abolish the offence now might well, as the Archbishop's Group fears, weaken what is still perceived to be a vital strand in our social life. And there is force in Lord Devlin's warning that 'a State which refuses to enforce Christian belief has lost the right to enforce Christian morals.'

Now the drift of this justification for the offence is clearly to give Christianity a special place in our society. This does not mean that to outrage other religious views or feelings is less offensive: it makes the point that such other religions are not so embedded in our social life. Historically this is so. Nevertheless it is open to us to say that today the essential and special religious character of our society is not confined to Christianity. We are, we could say, a 'religious society'; that with the influx of the major religions our society, whatever the particular religion, is 'religious' in character. All genuine religious beliefs contribute to that. This could justify extending the offence to other religions. If other religions remain outside the offence there are still laws relating to obscenity, race relations and public order to deal with attacks on the beliefs and feelings of their adherents.

The Archbishop's Group drew attention in its Report to another aspect of the matter which it thought had not been adequately dealt with by the Law Commission. The Commission placed much emphasis on freedom of speech but made no reference, the Group says, to freedom of religion. Yet this is clearly recognised in the United Nations Universal Declaration of Human Rights and the European Convention on Human Rights. Freedom of expression, argues the Group, carries with it duties and responsibilities, and so can be legitimately circumscribed for the protection of the reputation and rights of others, among whom are religious believers. The Group, therefore, concludes that it would be both practicable and possible to make provision for an offence that 'while extending some protection to all religions, would avoid excessive restriction on freedom of speech'.²¹ Such protection, the Group thinks, would be a safeguard of the freedom of religion.

Blasphemy is, as the Law Commission discovered, a highly sensitive issue and so there is all the more reason for careful analysis and sober reflection on the questions that are raised. Whether one agrees or disagrees with the views of the Law Commission or the Archbishop's Group, the subject has been fully exposed to view and for that we should be very grateful. We now have the opportunity to make up our own minds, fully aware of the issues, considerations and questions that have to be faced.

21. GS Misc. 286 p.6.