“Treason against God” – some aspects of the law relating to ‘blasphemy’

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Introduction

The nature of blasphemy

To the believer in the Abrahamic faiths – Judaism, Christianity and Islam – blasphemy is a form of high treason against God; to the non-believer it is just another part of multiculturalism, of interest in terms of race relations and tolerance, or at the minimum, in terms of anthropology. There are many misconceptions about blasphemy, and this essay seeks to explore some of them.

Blasphemy is essentially rhetorical and stands for whatever a society most abhors and in turn has the power to prosecute.[1] Every society objects to some forms of expression, which are limited by custom and taste. These objections are enforced by the authorities.[2] But then are we free to blaspheme our neighbours’ religion, even if permitted to blaspheme our own religion?[3] As an example, Islamic discomfort with Salman Rushdie’s *The Satanic Verses* was intensified when it was discovered that Islam was not protected against blasphemy in England - it was only the Church of England that had such a protection as it was the established Church.[4]

Blasphemy as a concept

Blasphemy is a concept that is distinctive to Jewish Christian and Islam traditions of worship.[5] As such it is similar to the Classical Greek offence of impiety, which was behavioural in its manifestations and could include property damage, eg destruction of statues of gods.[6] In 399 BCE Socrates self administered hemlock as a permanent cure

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[1] Lawton, D *Blasphemy,* University of Pennsylvania Press, 1993, p3.

[2] Walter, Nicolas, *Blasphemy: Ancient & Modern*, Rationalist Press Association, London 1990,p 7.

[3] Webster, Richard *A Brief History of Blasphemy: Liberalism, Censorship and ‘The Satanic Verses’* Orwell Press Suffolk, 1990, p.13.

[4] Webster, note 3, p.15.

[5] Here I express my own belief that there is only one God, and any differences in matters of faith have arisen from traditions and experience, not necessarily from revelation.

[6] Lawton, note 1, p.5.

to his problems over blasphemy – though in modern terms he taught oligarchy and sedition as well as other “unconventional” beliefs.[7] Socrates’ trial for blasphemy is the most famous of all such trials, second only to that of Jesus.

Blasphemy does not require material objects for its articulation, unlike sacrilege, though the Victorian case involving Archbishop George Pell and the *object d’art* ‘Piss Christ’ is an exception, to which we shall return later in this essay. The definitions of blasphemy change as values in society change. Instead it should be seen as *an exchange in a conversation gone wrong, and a poisoned form of the hermeneutical circle for both sides feel victimised, as in the Rushdie affair*.[8] As such it could be regarded by some as high treason against the highest powers in the universe.

Blasphemy in biblical texts

The word: “blasphemy”.

The English term “blasphemy” is derived from the Classical Greek word *blasphemein* “to speak ill of “. According to *Butterworths Encyclopaedic Australian Legal Dictionary* blasphemy refers:

> “To oral or written publication of words about the Christian religion that outrage the feelings of persons sympathetic to Christianity and are so scurrilous or profane as to go beyond the limits of decent controversy.”[9]

It is submitted that this definition is limited in scope and direction, and while it may represent current jurisprudence, it is lacking in historical and biblical basis, as well as that known to canon law. According to *The Catholic Encyclopedia,* the English word “blasphemy” is derived from two Classical Greek words blaptein *to injure and feme reputation* signifying etymologically *gross irreverence towards any person or thing worthy of exalted esteem.*[10]

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[7] Levy, Leonard W. *Blasphemy: verbal offense against the sacred,* University of North Carolina, 1995, p.7.

[8] Lawton, note 1, p 5.

[9] ‘Blasphemy’, *Butterworths Encyclopaedic Australian Legal Dictionary* 2001, <http://www.lexislegal.com/aus/butterworths/tools/searchlets/dictionary.asp>, (16 July 2001).

[10] ‘Blasphemy’, *The Catholic Encyclopedia* 2001, <http://www.newadvent.org/cathen/02595a.htm>, (16 July 2001).

While etymological blasphemy may *denote the derogation of the honour due to a creature as well as of that belonging to God*[11], it is used mostly in the latter sense. In canon law it is a sin of the tongue, and as such it may be of three kinds – a) heretical by insulting God, b) imprecatory in a malediction about God, and c) contumacious when it is wholly contemptuous of God.

In canon law blasphemy is essentially a sin against the virtue of religion. St Thomas Aquinas argued that it had to be understood as a sin against the faith as by it we attribute to God that which does not belong to Him, or alternatively to deny Him that which is His.[12] As such it is to be distinguished from sacrilege[13] as it refers primarily to the violation or injurious treatment of a sacred object.

Sacrilege originally referred to the theft of something sacred; however the Latin term came to mean any injury, violation, or profanation of sacred things. In Ancient Greece it was more closely connected with treason, as the temple was regarded as the home of the protector of the state, and therefore a crime against the State.[14] It is submitted that this concept was similar to that which was developed as to the role of the Church of England.

The only direct use of "blasphemy" in the Hebrew Bible[15] occurs in *Leviticus* chapter 24, a section to which we shall return later. The Hebrew word verb translated as "blasphemy" is *bqn*, being used only here, and according to Brown and Briggs, conveys the concept of "curse"[16]. It is to be distinguished from the other root word of the same letters bqn that means "to pierce"[17], and is cognate in Aramaic,

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[11] Note 10.

[12] *Summa Theologica II Q xiii a* 3. As cited in *The Catholic Encyclopedia*, note 10.

[13] Lat. *Sacrilegium*, robbing a temple, from *sacer*, sacred, and *legere*, to purloin, *The Catholic Encyclopedia*, note 10.

[14] 'Blasphemy', *Encyclopedia Britannica* 2001, <http://www.britannica.com/eb/article?eu=15818&tocid=0&query=blasphemy>, (16 July 2001).

[15] "Hebrew Bible" is used for Old Testament, and "Christian Bible" for the New Testament in line with modern biblical scholarship.

[16] Brown, Francis, Driver, S.R. & Briggs, Charles A. *A Hebrew and English Lexicon of the Old Testament, with an Appnedix containing the Biblical Aramaic*, revised edition, (original 1907), Oxford University Press, London, 1962, p 666.

[17] This is contra to Brueggemann, Walter 'The Book of Exodus: Introduction, Commentary, and Reflections' in *The Interpreters Bible* vol 1, Abingdon Press, Nashville, 1994, p 1164.

Syriac, Akkadian, Rabbinic Hebrew and Arabic of the same meaning.[18]

The lack of use within the Hebrew Bible does not imply that its characters were not blasphemers but that such thoughts have been replaced throughout the Biblical text. This was done by the traditional keepers of the text – the Massoretes – using the literary device known as Kethibh and Qere. Essentially this meant that the text had become so sacred that corrections were made in the margins of the text, and not in the text itself, with the reader being so familiar with the biblical text that he knew where the correction was to be used as found in the margin of the scroll. The exception to this rule was the *Qere Perpetuum*, substituting "The Lord" for "YHWH"[19]. By the time the Septuagint was written – probably in the Third Century BCE – the Divine Name was no longer used, and the NAME[20] is used instead of the Tetragrammaton – ovoma. This was followed by St Jerome in his Vulgate, using *blasphemaverit.[21]* Accordingly it is submitted that anything close to blasphemy was written out of the Hebrew text, thereby overcoming the problem of blasphemy within the Hebrew Bible.

Leviticus 24

This part of the Hebrew Bible belongs to the Holiness Code – chapters 17:1- 26:46. The name was first used by A Klostermann in 1877, deriving from the essential concepts of holiness within its chapters, and includes sections on personal holiness, the sacredness of sex, and various rules of conduct.[22] Most scholars regard the Holiness Code was formulated prior to the Exile, but was used extensively during the Exile as an example for holiness for individuals' lives.

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[18] Jastrow, Marcus *A Dictionary of the Targumim, the Talmud Babli and Yerusalmi, and the Midrashic Literature*, Pardes Publishing House, New York, 1950, p 930.

[19] Weingreen J, *A Practical Grammer of Classical Hebrew*, 2nd edition, Oxford University Press, London, 1959, p 23.

[20] Mwh HaShem, which is normative term for G-d (note vowel is omitted), just as Allah is in Islam.

[21] Souter, Alexander *A Glossary of Later Latin to 600 AD*, Oxford University press, London, 1949, p?

[22] Faley, Roland J 'Leviticus' in Brown, Raymond E, Fitzmyer, Joseph, and Marphy, Roland E *The New Jerome Bible Commentary*, Geoffry Chapman, London, 1990, pp 61-79.

This is the only case law within the Hebrew Bible dealing with blasphemy, though there is another case (Naboth) in 1 *Kings* 21:10-13 but without ratio decidendi or obiter dicta, and a reference in *Job* 2:9 wherein Job's wife urged Job "to curse God" thereby ending his suffering and his life.

Leviticus 24 contains the material facts of a case involving blasphemy, following two cases demonstrating how holiness is to be observed. Verses 10-23 in turn show how holiness is defiled. Israel had been commanded in *Exodus* 22:28: *Do not blaspheme God"*[23]. Here someone has actually blasphemed God, and pending on a decision for punishment the blasphemer was placed in custody.

However there was a further problem – the blasphemer was of mixed parentage. His mother was Jewish[24] but his father was Egyptian by birth and a proselyte to the Jewish faith. So the question arose: did *Exodus* 22:28 apply to this matter in that the accused was of mixed racial origin.[25]

The matter was referred to Moses, who set about inquiring of the Lord what to do.[26] The Lord's instructions were simple – remove the prisoner outside the camp, and inflict capital punishment. All who heard the blasphemy were to act as witnesses to the stoning, each placing their hands on the accused's head, with the imposition of hands symbolising the transfer of responsibility from the people to the offender, who then becomes the victim just as does a sacrificial animal.[27]

Other biblical cases

The incidence involving Naboth is recorded in 1 *Kings* 21: 1-29. The facts of the case can be recited simply. Naboth the Jezreelite owned a vineyard near the palace of Ahab the King of Samaria, which land the King wanted for his 'veggie garden'. Ahab offered to give him another vineyard in its place or else purchase it for money. Naboth would not give up the vineyard, as he owned it by established legal and

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[23] New International Version.

[24] This is how the Jewish faith is passed on, regardless of the father's religion.

[25] The blasphemer's mother was from the tribe of Dan, and at the end of the reign of King Solomon this tribe broke away from Judah and Benjamin, to form the Northern Kingdom, known as Samaria.

[26] There are four cases where Moses makes enquiries of the Lord before making decisions, hence self authenticating- Numbers 9:6-14, 15:32-36, and 27:1-11.

[27] This case also presents the *stare decisis* for another question: is a resident alien to be counted as a fully-fledged Iralaelite in matters such as blasphemy?

religious custom, owning the same in perpetuity by virtue of the law of non-alienation of patrimony.[28] So a festival dinner was arranged by order of Ahab's wife Jezebel, and two false witnesses were planted near Naboth who charged him with "cursing God and the King"[29]. Naboth is then taken out of the city and stoned,[30] following the precedent of *Exodus* 22:28 and *Leviticus* 22:1-16.

The case of Stephen offers the narrator the opportunity to give a mini testament on God's saving history ('heilsgeschichte') up till the time of the Resurrection.[31] Stephen is stoned for 'speaking blasphemous words against Moses and God" with two witnesses for the prosecution attesting to the charge.[32]

In the Gospel narratives, Jesus is charged before the Sanhedrim with blasphemy[33], but was executed by the Romans, not on this charge but for other offences.

In conclusion, blasphemy was a capital crime in the Bible, and it is interesting to note that while Christ Himself was executed for blasphemy, the Church then used blasphemy as a charge against those denying His Divinity.

Blasphemy in English legal history

Historical background

Until the middle of 17th Century in England, the offence of blasphemy came under the jurisdiction of the ecclesiastical Courts, though the civil Courts played a pivotal role in inflicting penalties after conviction in the ecclesiastical Courts.[34] It was the Court of King's Bench that asserted jurisdiction in two stages. The first was the trial of Sir Charles Sedley for immodesty and profanity[35], made famous in Samuel

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28 The *stare decisis* to be found in *Leviticus* 25:10, 13-17, 23-24, and 34.

29 1 *Kings* 21:13.

30 That is, by people throwing stones at him, and not by administration of a substance!!!

31 *Acts* 6:8-8:3.

32 *Acts* 6:11.

33 *Mark* 14:64.

34 See Nokes, G R *A History of the Crime of Blasphemy*, Sweet & Maxwell, London, 1928.

35 *R v Sedley* (1663) 1 Keb 620.

Pepys's Diary of 1 July 1663.[36] The second stage was the Taylor case, to which we shall return.

After the Reformation

Just as blasphemy was used by the Church in polemics against pagans (eg St Augustine) so too was it an area of polemics within the Reformation. While the parties to the Reformation fought each other to a standstill, it was the Inquisition in Spain that continued to kill its victims until 1834. One side effect of the Reformation was that Protestants came to dislike the term "heresy"[37] as it was used by Catholics against them, preferring instead blasphemy.[38]

Once "heresy" declined, the need was felt for some other form of legal regulation of religious expression, blasphemy being the preferred in England, protecting the State as the Church. Heresy as well as blasphemy had originally been tried within the Ecclesiastical Courts, but with those Courts demise blasphemy fell into the jurisdiction of the Civil Courts overlapping with sedition and obscenity. Notwithstanding the *Blasphemy Act* 1698, the offence was still a common law offence. This Act disqualified from public office any person who was educated in the doctrines of Christianity, who denied the oneness of God, the doctrine of the Holy Trinity, the truth of Christianity, or the authority of the Scriptures. No prosecutions ever succeeded under this Act.

It is submitted that this Act was more an attempt at suppression of 17th Century Puritan thought - it was a time of the priesthood of she-believers as the Quakers had produced a large number of unorthodox women.

The most famous blasphemy trial in this period was that of John Taylor in 1676, as Taylor had said that *Jesus was a bastard, impostor, and a cheat.* The trial was made famous by Lord Chief Justice Hale's judgement incorporating into common law:

> "[b]lasphemy against the Christianity of the established Church as a form of sedition, an offence against God, a crime

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[36] 'Samuel Pepys', *The Encyclopedia Britannica* 2001, <http://www.britannica.com/search?query=samuel+pepys>, (07 July 2001).

[37] 'Heresy = Greek haires, an opinion, then a false opinion', *The Catholic Encyclopedia* 2001, <http://www.newadvent.org/cathen/07256b.htm>, (16 July 2001).

[38] Walter, note 2, p 24.

> against the State and His Majesty's Government and therefore punishable."[39]

It was this landmark case that set the precedent for future English cases, and made blasphemy a criminal offence at common law.

Aspects of the early historical background as summarised in the English judgement are discussed in *Bowman v Secular Society,* citing Naylor's case.[40]

The *Gay News* Case

By the 1960s England had become indifferent to blasphemy – Kingsley Amis had published a poem on the failure of Jesus Christ, with no backlash, in 1962. By 1967 the UK Parliament revoked the 1698 *Blasphemy Act*.[41] But all this was to change by 1976 as a result of the machinations of Mrs Mary Whitehouse, the head of the National Viewers and Listeners Association, known also as the "Director of Private Prosecutions".

In the June 1976 edition of *Gay News,* there was published a poem by John Kirkup entitled *The love that dares to speak its name*.[42] Kirkup was a distinguished poet and novelist, and like Salman Rushdie, was a Fellow of the Royal Society of Literature. The 66-line poem appeared in the 3-16 June 1976 edition, *Gay News* at that time having a circulation of some 20,000 copies. The poem is the erotic fantasy of a centurion standing at the foot of the Cross of Jesus Christ, imagining the possible sexual encounters with Christ's dead body.[43]

It took over three months before the blasphemous poem came to the attention of Mary Whitehouse. In November 1976 she announced that she would began a private prosecution against *Gay News*, its editor (Denis Lemon) and distributors. The Court allowed a voluntary bill of indictment for Whitehouse's private prosecution.

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[39] (1676) 1 Vent 293 86 ER 189.

[40] [1917] AC 406 as cited in *Halsbury's Laws of Australia*, <http://online.butterworths.com.au> (10 July 2001).

[41] *Criminal Justice Act* 1967.

[42] The poem derived its title from Lord Alfred Douglas' poem *Two Loves* of 1894, referring to homosexuality, which he called *the love that dares not speak its name*.

[43] Levy, note 7, p 536.

Prior to the trial, *Gay News* raised 20,000 pounds for the defence. The prosecution against the printer and illustrator were dropped as well as that against Kirkup who argued that the poem was a work of art, and not blasphemous. For the defence of Lemon was John Mortimer, creator of *Rumpole of the Bailey* while for the newspaper was Geoffrey Robertson of the TV program *Hypotheticals*. The Court Administration chose Judge Alan King-Hamilton, who was Jewish. The trial was held on 4-12 July 1977. The learned Judge directed that criminal intent was not part of the offence, nor did it have to breach the peace; instead he said that:

> "[t]he offence of blasphemous libel occurs when there is published anything concerning God, Christ, or the Christian Religion in terms so scurrilous, abusive, or offensive as to outrage …the feeling of members."[44]

Lemon was convicted, receiving a custodian sentence, and the newspaper fined. An appeal went to the Criminal Division of the Court of Appeal, which was upheld; though the prison sentence on Lemon was suspended. The matter then went on appeal to the House of Lords in November 1978 but was dismissed on a 3/2 basis. Finally it went to the European Court of Human Rights, but was dismissed in May 1982.[45]

Lord Scarman in the House of Lord's judgement had recommended that Parliament should broaden the scope of blasphemy so that every religion should have the same benefit as Christianity "to safeguard the internal tranquillity of the kingdom". His words were prophetic, once the Salman Rushdie affair became apparent. Excepting the *Gay News* case – which was the first offence in the Courts since the Gott case in 1921[46] - blasphemy is no longer an offence that is prosecuted in England.

The Satanic Verses

In essence, *The Satanic Verses'* main plot deals with the claustrophobic masculinism wherein cultural paternalism meets religious fundamentalism.[47] Salman Rushdie was doing to Islam what

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[44] *Whitehouse v Lemon & Gay News Ltd* [1979] AC 617.

[45] Levy, note 7, p 545.

[46] *R v Gott* (1922) 16 Cr App R 87. This was the last prosecution for blasphemy in the UK, but there were some overseas prosecutions: eg Anne Lennon in Australia.

[47] Lawton, note 1, p 177.

Freud had done to Moses. To Freud religion is a neurosis of humanity, so history is recast in the mode of psychoanalysis as forgotten traumas engender neurosis.

This theory is followed by Salman Rushdie who was born, not in England, but in Bombay to a Muslim family. Educated at the exclusive private school Rugby, he read Islamic studies at Cambridge, graduating in 1968. Throughout most of the 1970s he worked in London as an advertising copywriter, and his first published novel, *Grimus*, appeared in 1975. His next novel, *Midnight's Children* (1981), was an allegory about modern India, and won him international recognition His third novel *Shame* (1983), based on contemporary politics in Pakistan, was also popular. He won the Booker Prize for the last novel and elected a Fellow of the Royal Society of Literature, *The Satanic Verses* won him the 20,000 pound Whitbread Prize, and copyright sales made him a millionaire.[48]

76 pages out of total 550 pages of *The Satanic Verses* are devoted to a dream about the foundation of Islam, though Rushdie allows the inference that Satan is the real author of the whole Qur'an's 6,236 verses. In fact, the title of the book translates into Arabic as *The Satanic Qur'an*. Little wonder that the book attracted criticism. Furthermore Rushdie gives Mohammed the name Mahound, which had been used by mediaeval Christians to describe him as the agent of the devil, with Mecca named Jahilia (darkness, ignorance) and 12 prostitutes take the names Mohammed's 12 wives. As such the book stands in a long history of religious and cultural tension between Christians and Muslims, and includes Geoffrey Chaucer's *Canterbury Tales* and Edmund Spencer's *Faerie Queene*. Similar treatment is given by Voltaire in 1742, and by Dante's *The Divine Comedy*.[49]

The campaign against *The Satanic Verses* was started by Islamic politicians in India, and imported into Britain by the Islamic Foundation, leading also to the book being banned in most Islamic countries and South Africa. Then on 14 February 1989 Ayatollah Ruhollah Khomeini delivered a religious judgement (fatwa) that Salman Rushdie should die for his blasphemy, with a bounty offered for his execution. Such judgements were not unusual in the past, eg in 1570 the Pope issued such a sentence against Queen Elizabeth I; even as late as 1944 Ayatollah Ruhollah Khomeini had issued a *fatwa* against Achmed Kasravi for his attack on Shi'ism, being assassinated

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[48] 'Salman Rushdie', *Encyclopedia Britannica*, <http://www.britannica.com/eb/article>, (11 July 2001).

[49] Walter, note 2, p 21.

two years later. Even though the Ayatollah died in June 1989 the death sentence remained.[50] In 1998, after nearly a decade, the Iranian government announced it would no longer seek to enforce its *fatwa* against Rushdie.

What is significant about the whole Rushdie affair was that despite the Ayatollah Ruhollah Khomeini intentions and the race riots in Britain over the book, there was no formal legal action taken to condemn it. The Government refused to get involved, and when subsequently a private citizen sought to initiate a private prosecution against Rushdie, it was held that blasphemy laws only protected the Church of England.[51]

Blasphemy in Australia

Reception of 'blasphemy' in Australia

In essence, the English doctrine of reception was applicable from the founding of the first colony (New South Wales). It was the birthright and inheritance of the settlers so the law of England was "received" in the colony, but only so much of the law as was applicable to the circumstances of the new colony. This thinking was given the status of an Imperial Act (*The Australian Courts Act* 1828).[52] Accordingly as blasphemy was no longer an ecclesiastical offence but a common law one, it passed into the common law as received in New South Wales in 1828. Most of the discussion around this issue has been more concerned with the status of the Church of England as an established church and less about blasphemy as an offence.[53]

Of greater interest to this paper is the Act passed by the Governor and Council in 1827 "restraining the Abuses arising from the publication of Blasphemous and Seditious Libels", with the punishment of banishment for the second offence.[54] The writer was not able to find any case law under this Act, but this may be more related to personal restraints of time and money rather being indicative of judicial interventions. However there was a case about blasphemy in

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50 Walter, note 2, p 84.

51 *R v Chief Metropolitan Stipendiary Magistrate ex parte Choudhury* [1990] 3 WLR 986.

52 9 *Geo IV* c83.

53 For a fuller consideration on the status of the Church of England, see NSW Law Reform Commission (1994) *Report 74- Blasphemy* (NSWLRC Sydney), and its previously related *Blasphemy Discussion Paper* No. 24 (1992).

54 8 *Geo IV* 22.

Parramatta Quarter Sessions on 18 February 1871, to which we now turn.[55]

The Jones prosecution in New South Wales in 1871

Coleman devotes a whole chapter of his work *Obscenity, Blasphemy, Sedition: 100 years of Censorship in Australia* to the case of William Lorando Jones, who was a Unitarian and a member of the Sydney Secular Society. He argues that the case demonstrated that prosecuting people for blasphemy was so unpopular that *it was largely responsible for finally killing the idea of blasphemy as a crime.*[56] Jones regularly gave lectures in Parramatta Park on Sunday afternoon. On one occasion in January 1871 Mr Ninian Melville, Police Constable Kelly, and another preacher referred to as Dr Kingsbury, approached Jones and demanded answers to two questions – did he believe the Bible to be the Word of God, and did he believe that Jesus was the son of God. PC Kelly noted Jones' answers, and a short time later the Crown set about prosecuting Jones at the Parramatta Quarter Sessions.

The gist of the indictment was that Jones had proclaimed that the Bible was the most immoral book ever published, that it was not fit for any female to read, that Moses was a robber and murderer,[57] that the Israelites were barbarous, and that such pronouncements were a great scandal and reproach against the peace of the Queen. It is worth noting that Jones had not denied the existence of God, but did deny the divinity of Jesus Christ. The defence that Jones was engaged in proper enquiry with proper people in a proper place was denied as Jones was speaking to a 'mixed rabble' in a public domain; also his language was offensive.

Jones' defence counsel pleaded free speech – even though he thought that Jones was wrong. Without retiring the jury found Jones guilty. Judge Simpson stated that Christianity was part of the common law, so to attack it was to break the law. He then sentenced Jones to two years imprisonment and fined him 100 pounds.

There was an upsurge of adverse public opinion to the sentencing, and reactions included a petition of 2,000 signatures to the Government,

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[55] A full report was given by the *Sydney Morning Herald* on February 20 1871, reprinted in full at the NSWLRC Report 74, note 53, pp 65-73. A synchronistic text is given in Coleman, P 2nd ed. *Obscenity, Blasphemy, Sedition: 100 years of Censorship in Australia,* Angus & Robertson, Sydney, 2000, pp 86-101.

[56] Coleman, note 55, p 86.

[57] This is stated in *Exodus* 2: 11-15.

editorial comment in the *Sydney Morning Herald*, public meetings organised by the Unitarian Church, and a statement from the Attorney General describing the sentence as "excessively severe". Within four weeks Jones was released on his own recognisance of 100 pounds to keep the peace for two years.

Just prior to his release, a Bill was introduced into the New South Wales Legislative Assembly – the *Religious Opinions Bill* to amend the law relating to blasphemy, disabling any future prosecutions for blasphemy. In the second reading the Attorney General told an empty Assembly that anyone should be free to ridicule the 39 Articles of the Church of England, or the Catholic Church, but not the Holy Scriptures as they were "the basis of the common law". The Bill was defeated at the Second Reading by 17 votes to five. It is worth noting that Melville was later elected to Parliament, and Judge Simpson became Attorney General then a judge of the Supreme Court. There have been no further prosecutions for blasphemy in New South Wales since the Jones' case.[58]

The Ross prosecution in Victoria 1919

The last use of blasphemy prosecutions was in Victoria in 1919, when the editor of Ross's Magazine of Protest, Personality and Progress: 'an aggressively socialist, anti-militarist, atheist and anti-clerical publication', was charged by the Post Office and the Victorian Police with common law blasphemy as well as sending a blasphemous article through the mail. Ross was convicted of the latter offence and fined 50 pounds, but the common law action was dropped by the Crown. Soon afterwards a petition of 6,000 signatures was submitted to the Federal Government calling for the repeal of blasphemy laws, but with no success.[59]

Fr Ogle's Censorship cases in 1986 and 1987

The case involved the Chief Commonwealth Censor approving the registration of, and registering, an imported film, *Je vous salue Maria* (Hail Mary).[60] Pursuant to Regulation 13 of the *Customs Act* 1901, a film could not be registered if in the opinion of the Censorship it was

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[58] NSWLRC *Discussion Paper No. 74, Blasphemy,* p 17.

[59] Note 62, p 17.

[60] *Walter Ogle and Anor v Janet Strickland and Ors.* No. G264 of 1986 Judicial Review, <http://www/austlii.edu.au/cgi>, (17 July 2001).

blasphemous, indecent, or obscene. The applicants were priests of the Anglican and Catholic Churches, who argued that the film was blasphemous, and that they could provide evidence that it was blasphemous.

Sheppard J noted that counsel for the applicants referred to a passage from the Gospel according to *St. Matthew* (Chapter 16, verse 18) in which Christ says, in relation to Peter, "Upon this rock I will build my church". Counsel said that this passage tended to show that ministers of religion, as distinct from lay members of the Church, were in a special position and thus had an interest in maintaining the sanctity of the Scriptures beyond that of an ordinary member of the public. His Honor held that even if the Churches themselves were to ask to be heard, they would have had no relevant special interest to uphold in a court of law. The application was dismissed, and it is to be noted that there was little thought given to understand the term 'blasphemy'.

The matter was appealed to the Full Federal Court in the following February of 1987 on the grounds as to whether these priests had a *special interest*. One of the issues was that, in the absence of any threat to any proprietary or possessory interest whether they had standing to sue. This was the question for decision before the Full Court. Their Honours held that it was an offence to publish blasphemous libel, this is a common law offence and is regulated by statute: see for example *Crimes Act* 1900 (N.S.W.) s. 574 and *Crimes Act* 1958 (Vic.) s. 469AA. It was held that the priests did have standing to proceed, and the matter was referred back to the trial judge. As to the nature of blasphemy, it was held that:

> "Blasphemy is an indictable misdemeanour at common law: *R v. Ramsay* 15 Cox, C.C. 231. See also the *Blasphemy Act* 9 and 10 Wm. III Ch 32. The essence of the crime of blasphemy is to publish words concerning the Christian religion which are so scurrilous and offensive as to pass the limits of decent controversy and to be calculated to outrage the feelings of any sympathiser with or believer in Christianity: *R. v. Gott* (1922) 16 Crime App R 87. A temperate and respectful denial of the existence of God is not an offence against the law which does not render criminal the mere propagation of doctrines hostile to the Christian faith. The crime consists in the manner in which the doctrines are advocated. Whether in each case this is a crime is a question of fact for the jury: *Bowman v. Secular*

Society Limited (1917) AC 406. See also *R. v. Ramsay* (1883) 15 Cox C.C. 231.[61]"

Australian Law Reform Commission's Report on Multiculturalism and the Law (1992)

In August 1989, the then Federal Attorney–General Lionel Bowen referred to the Australian Law Reform Commission a reference on multiculturalism, and its Report was published in 1992 as *Multiculturalism and the Law,* covering 349 pages.

Only a small part of the Report deals with blasphemy in federal law. Stating that *member States agree that everyone shall have the right to freedom of thought, conscience and religion* blasphemy is then described, though not defined. Blasphemy is not a Commonwealth offence, but is picked up in Commonwealth legislation, which refers to 'blasphemous material' eg as in Customs Regulations. It was proposed that all such references be removed with submissions made to the ALRC for and against this recommendation.

The Commission recommended the creation of an offence of racist violence, as well as an offence of incitement to commit that offence. The Commission did not suggest any change to other laws protecting religious belief and practice. Presumably the States were left to deal with such matters.

The *Virgin Mary* case 1996

This case was heard before the Administrative Appeals Tribunal on 2-3 September 1996. It was held that the registration of the name "Virgin Mary's Pty Ltd" is likely to be offensive to a section of the public and is, consequently, unacceptable for registration.[62] The action was started by Sir Frank Little, at that time Catholic Archbishop of Melbourne (and who was succeeded by Archbishop George Pell before the matter was heard), and others including former Secretary for the Islamic Council of Victoria, who argued that the Virgin Mary is considered a very important and sacred individual in the Islamic faith in that Muslims believe that the Virgin Mary is the mother of the messenger Jesus Christ, who in turn is a prophet of Allah. The applicants found it "offensive", "repugnant", "disrespectful",

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[61] Re: *Rev. Fr. Walter Ogle and Rev. Fr. John O'Neill and: Janet Strickland,* <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal>, (17 July 2001).

[62] *Sir Thomas Francis Little and Ors v Australian Securities Commission Re Virgin Mary's Pty Ltd,* <http://www.austlii.edu.au/cgibin/sinocgi>, (18 July 2001).

"blasphemous" and "misleading" that a name referring to the Virgin Mary should be used in a commercial context for bar/ nightclub premises in Prahran Victoria. The Tribunal held:

> "[t]hat it was satisfied that the Virgin Mary occupies a position of particular significance in the Anglican, Roman Catholic and Islamic faiths. The veneration in which she is held in those faiths as a saint is greater than that of the other saints within the Christian religions and the Islamic religion."

The Pell - Sorrento case

On 8 Oct 1997 the Catholic Archbishop of Melbourne, Dr George Pell, commenced an action against the Council of Trustees of the National Gallery of Victoria, seeking an injunction against the display of a picture by Andres Serrano entitled *Piss Christ*. The artist had been subsidised in his commission by a grant from the United States National Endowment for the Arts program. The Archbishop failed in his actions,[63] but many members of the public were so incensed that when a young Catholic student subsequently attacked and damaged the picture, he was regarded by some as a hero. The Courts thought otherwise.

At issue was the National Gallery's proposed exhibition of a photograph showing the crucified Christ enveloped in mist which is infused with the colours of a red and gold sunset. As well as the title being offensive, the picture was immersed in urine as *urine symbolises waste, but is also a necessary bodily function; and perhaps the urine humanised Christ* according to Sorrento in evidence tendered to the Supreme Court.

The Archbishop argued that:

> "[t]he exhibiting or display of an indecent or obscene figure or representation [was] contrary to the provisions of section 17(1)(b) of the *Summary Offences Act* 1966; and
>
> (b) the common law misdemeanour of publishing a blasphemous libel by reason of the fact that the photograph is so offensive, scurrilous and insulting to the Christian religion that it is beyond the decent limits of legitimate difference of opinion and is calculated to outrage the feelings of sympathisers with or believers in the Christian religion".

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63 *Pell v Council of Trustees of the National Gallery of Victoria* [1998] 2 VR 391.

The Gallery's Director argued the belief that Mr Serrano intended his work to investigate contemporary spirituality, and that:

> "[t]he photograph is reproduced in (among other publications) a book of undoubted scholarship by an art critic of undoubted eminence, Robert Hughes in *American Visions: The Epic History of American Art*."

The Court held that there was no doubt that the picture was very offensive to Christians, but had to decide whether it should intervene. His Honour took the view that:

> "[a] plural society such as contemporary Australia operates best where the law need not bother with blasphemous libel because respect across religions and cultures is such that, coupled with an appropriate capacity to absorb the criticisms or even jibes of others, deep offence is neither intended nor taken."

In addition, apart from other difficulties, His Honour said that:

> "[I]f the offence does exist, what are its ingredients? It is clear enough that in order to amount to a blasphemous libel the matter complained of must raise the risk of a breach of the peace, perhaps general civil unrest… [t]here is no evidence before me of any unrest of any kind following or likely to follow the showing of the photograph in question."

New South Wales Law Reform Commission

In 1991 the New South Wales Attorney General the Hon. Peter Collins gave the State Law Reform Commission a reference to inquire into and report upon:

> "[w]hether the present law relating to blasphemy is adequate and appropriate in current conditions; and any related matter.[64]

noting that:

> "[t]he Salman Rushdie affair in England revived interest in the crime of blasphemy, highlighting problems with the offence… whether the offence is anachronistic in a modern society …

[64] New South Wales Law Reform Commission *Discussion Paper DP 74* (February 1992), p1.

> which is both multi-religious and secular, and which maintains a separation between Church and State."[65]

Naturally an important issue related to whether blasphemy offences impinged upon the fundamental human right of free speech.

The Law Reform Commission's first paper - DP 24 - reviewed the law in New South Wales, other States and Territories, as well as that which evolved in the English legal system. It noted that s574 of the *Crimes Act* (NSW) 1900 states that:

> "No person shall be liable to prosecution in respect of any publication by him orally or otherwise by words or matter charged as blasphemous where the same is by way of argument or statement and not for the purpose of scoffing or reviling nor of violating public decency nor in any manner tending to be a breach of the peace."[66]

The final report was published in November 1994 - Report 74 – and canvassed four options for the attention of Parliament.

The first option was to "retain the law of blasphemy in its existing mixed common law and statutory reform", with four main points expressed in submissions to the Commission –

- protection of God and of individual feelings
- protection of morality and society
- infrequency of prosecutions not a ground for abolition
- extension of protection to other religions.

The second option was to "codify the ancient offence in such a way as to meet the various objections … and produce a suitably redefined modern offence". There were six submissions in favour including one from the New South Wales Council of Churches.

The third option was the possibility of "creating a new offence/offences to replace blasphemy which would be less

[65] Note 64.

[66] *Crimes Act 1900* (NSW) s 574. Note that the *Discussion Paper* states on p 40 "there is no mention of the offence of blasphemy in the *Crimes Act* 1958 (Vic)"; however the author maintains that the offence is mentioned in s449AA of that Act. See also p 21 of *Report 74 Blasphemy* the 1994 final report, which restates that "blasphemy does not appear on the Victorian statute books".

objectionable on legal and policy grounds" with two types of replacement offences considered –

insulting and outraging religious feelings

incitement of hatred or violence on religious grounds.

Some of these have become or are becoming law as a result of the legislative programs of Commonwealth and State Parliaments eg *The Racial Discrimination Act* 1975 (Cth) or the model *Racial and Religious Tolerance Bill* (Dec 2000) in Victoria.[67]

The fourth option canvassed in the *Report* is "the abolition of the offences of blasphemy and blasphemous libel without specific replacement". The reasons for such an option were many including

blasphemy is an anachronism

blasphemy is discriminatory and anomalous in a multicultural society

that laws relating to blasphemy are deficient and uncertain

the continuance of such an offence is against free speech.

The Commission favoured the abolition of blasphemy and argued that there was no need for a "substituted or replacement offence". But s574 remains on the New South Wales Statute books.

Conclusion

It would seem that blasphemy has been a concern for thousands of years, so the present dilemma of whether to abolish it is not new. Each generation sets its own parameters of the extent of blasphemy. Perhaps one should leave it within the realm of the history of ideas,[68]

[67] <http://203.14.43.112/servlet/rwp-ps?/dpc/dpc.nsf/SearchDocs/Racial+and+religious+tolerance+paper>, (16/05/01).

[68] See Mortensen, Reid, "Blasphemy in a secular state: a pardonable sin" (1994) *UNSW Law Journal* 17 (2), pp 409-431.

and those texts relating to the offences belong more to public history rather than social ecology.[69]

[69] Harris, Bede "Case Note: *Pell v Council of Trustees of the National Gallery of Victoria*. Should blasphemy be a crime? The 'Piss Christ' case and the freedom of expression" (1998) *Melbourne University Law Review* 22 pp 217-229.