

Blasphemy through British (post) colonial eyes: The Indian Criminal Code : From a history of sustained paternalism to the genesis of hate crime

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This chapter considers an interesting twist and alternative view to many orthodox historical studies of blasphemy which tend to concentrate on blasphemy in a European context, and upon histories of blasphemy with reference to the isolated legal systems of individual countries.[1] Such a view can create a history of steady (if uneven) progress of European jurisprudence towards liberalisation and imagined or actual repeal of the blasphemy law within a context of tolerant modernised society. However, such stories create an unconscious (and occasionally conscious) Orientalism whereby the rest of the world appears to interrupt a liberal rational progress or even to consciously derail it. This conception of the West sees secular Europe as having modernised beyond religious strife to a condition of rational tolerance, a situation only destabilised by the migration of ex-colonial populations to “mother” countries. This interpretation is often trapped into viewing the “off stage” phenomenon of international events, around blasphemy, as precisely a consequence of this change. Such a history, of course, contains significantly overdrawn generalisations and assumptions, but often remains persuasively insistent upon an overall narrative of separate, if uneven, development, or as Peter Berger (1999) puts it: Europe becomes the exceptional case.

This chapter offers something of a corrective to this particular view by noting how an individual legal solution, the Indian Penal Code of 1860 and its subsequent revisions, explicitly created for a colonial context, has come to be a touchstone and inspiration for blasphemy reform, and occasionally the restatement of such laws, in a number of subsequent chronological contexts in Britain. As such, it also indicates that scope exists for a much wider investigation of the role played (imaginary or otherwise) by the Indian Penal Code’s blasphemy provisions in reform and abolition discussions in a variety of countries.

Historical context

Blasphemy cases in nineteenth-century Britain were isolated episodes. It was precisely this episodic nature that influenced the attitudes of a whole generation of legal scholars and lawyers. The landscape around religious offence had been shaped in the early part of the nineteenth century by religious dissidents who predominantly owed their inspiration, and the threat they constituted, to Jacobin traditions spawned by the French Revolution. Almost all of these cases were products of political radicalism and the influence of individuals who both influenced and imbibed ideas from the French Revolution. Chief amongst these was Thomas Paine, but he was followed by a significant number of individuals who carried this particular torch into the 1840s.[2] Blasphemy and its associated libel laws were thus seen by establishment sympathisers as necessary to protect the church-state relationship, which itself was a cornerstone of English attitudes to protecting the political stability and the prosperity of the nation. The Hale Judgement (1675) ostensibly argued that

a verbal, or written, attack upon the Church of England (established by law) was an attack upon the Laws of England. Therefore, blasphemy could be considered to be an attack upon the security of the state. This mindset lasted credibly until the middle of the nineteenth century. Arguably, it also shaped the attitudes of defendants who, as noted, gravitated to the ideas of the French Revolution.

The nature of this church-state relationship had been forged in the years after the English Revolution and reflected a determination to ensure that church and state were never separated again. The power of this relationship seemed further justified in the 1690s when the first and only execution of a blasphemer took place in 1695; England and Scotland were besieged by political threats and a resulting obsession with national security. Thus, the execution had a providential element to it.[3] When the ruling elites felt especially nervous and under threat, the force of the law would be used unflinchingly to protect social and cultural order and prevent the undermining of religion and morality wherever this raised its ugly head. This meant that Jacobin critics could justifiably view laws against blasphemy as a tool of oppression. Moreover, they demonstrated their republican virtue by asserting that authority was in the business of curtailing access to liberating knowledge by ruthlessly censoring speech and publication. As a result, many scarcely fought shy of indicting such laws as destructive of free discussion, the wider spirit of enquiry and the welfare of the population (Nash 1999, 75–104).

From an establishment perspective, it was easy to see these laws as an effective bulwark against the worst excesses of the French Revolution and its socially levelling ideology and morality. Such issues were repeated in the later campaigns in the 1840s against the equally rationalist outlook of Robert Owen's social missionaries. This culminated in the prosecution of George Jacob Holyoake for blasphemy in August 1842. This was the last blasphemy prosecution in England in the first half of the nineteenth century, alongside almost contemporary cases in Scotland (Nash 1999, 93–97).

Up to this point, blasphemy laws in England and Scotland had clearly been an instrument of government, and a species of coercion to prevent forms of dissidence from spreading and taking hold. Yet, unwittingly, the seeds of a major shift in thinking had seemingly started in what was an especially unlikely setting. It was in the decade immediately following Holyoake's prosecution that blasphemy laws, in an entirely different context, were conceived of as having a wider, more subtle and potentially more benevolent purpose. It is noteworthy that this occurred in a colonial situation, and we should equally be aware of the potential expediency that significantly drove the progress of the measure. In India, in this particular instance, the British found themselves removed from the role of preventing the upsurge of radical Jacobin-style criticisms and direct action. In India, things were manifestly different. India had majority religions, which were not Christian, and therefore British interests viewed themselves as mediating between competing religious tendencies rather than ensuring the outright supremacy of one of them.

Working out a colonial law – the Indian penal code

The First Law Commission for India, which completed deliberations in 1837, had sought to codify and make coherent what many see as a range of conflicting jurisdictions, laws and policies. These were also the product of considerable evolution over time. The resulting investigation and subsequent deliberations proposed an Indian Criminal Code, which sought to assist in the quick and efficient governance and regulation of the Indian subcontinent. Although completed in 1837, the enactment of this Code stalled, and the date for its implementation lapsed in the face of disagreements in both Westminster and the subcontinent. Some believed it would lie forever on the statute book, waiting in vain for the political will to drive it forward (Verma 1987, 169). Eventually, it

was revived and dusted down through the work of the Second Indian Law Commission of 1853 under the leadership of Sir Barnes Peacock (Colaiaco 1983, 101).

Most historians cite Lord Macaulay as the architect of this new Criminal Code. Some consider his construction of the Code to be a masterwork enactment of utilitarian principles, one that was conceivably both groundbreaking and farsighted. As we are well aware, British Imperial confidence sustained a considerable shock as a result of the Indian uprising in 1857, and the government used this emergency to wrest control from the East India Company. This pushed mechanisms and policies that would centralise and streamline control of the agenda of colonial governance. Thus, the Indian Penal Code rapidly again became of considerable importance and potentially a tool of wider agendas of governance. It was a vital part of the restructuring that the Colonial Office sought, and its aim to impose the desired greater levels of control over the Indian subcontinent. The tension running through late eighteenth-century philosophies of British rule over India strongly emphasised the enforcement of order and a doctrine of state necessity, which Mithi Mukherjee characterised as Hobbesian (2010, 60).[4]

The sudden imposition of more obviously direct rule produced a legal solution which some viewed as clearly drawn from the laws of England, and thus bound to mirror British legal philosophies. James Fitzjames Stephen thought it an attempt to offer the laws of England to India in the form stripped of anomalies and irregularities, something further enhanced by his enthusiasm for legal codification (Colaiaco 1983, 99–121). However, even in England, legal philosophies had not been definitive and different conclusions could still be drawn (Verma 1987, 169), meaning clear rationality could not always be satisfied. Significantly, they were considered to be “shortened, simplified, made intelligible and precise”. This is also suggested by Mukherjee who notes that the British legal philosophy contained elements of “the universality and rationality of an impersonal law”, something that explicitly ran through most conceptions of Common Law. In the imperial context, in the Indian subcontinent, this was replaced by a conception of equity, which Mukherjee suggests was “grounded in the ‘conscience’ of the monarch, that is, the person of the monarch” (Mukherjee 2010, 73–74). This fitted with the colonial ethos of arbitrating over subject communities with differing religious beliefs. As Mukherjee concludes, “the rather subtle mutation of justice into equity in colonial India went hand-in-hand with the transfer of power from the East India Company to the British Crown” (Mukherjee 2010, xxi). Only a neutral foreign power could mediate between otherwise irreconcilable warring communities. Yet, intriguingly, Mukherjee also suggests that an underlying part of this benevolence was a recognition that the duty of colonial governance was ultimately to prepare such a nation for eventual self-rule – something that also emerged later in the thought of James Fitzjames (Colaiaco 1983, 120; Mukherjee 2010, xxii–xxiii, 74–75).

The concept of equity, which found its expression in the Indian Penal Code of 1860, had developed as a judicial remedy in the British law in response to what Mukherjee describes as the “tyranny of form in the common law courts”. This principle was found to be effective as a way of bypassing awkward situations created by the Common Law and had been instigated to persuade litigants to do right and to act according to the conscience. This conception of equity certainly seems to have been at work in the blasphemy provisions of the 1860 Indian Criminal Code. This focussed the Code’s response to the offence in paragraphs 295 and 298. These are worded (in the original) as follows:

295. INJURING OR DEFILING PLACE OF WORSHIP WITH INTENT TO INSULT THE RELIGION OF ANY CLASS.—Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punishable with

imprisonment of either description for a term which may extend to two years, or with fine, or with both.

298. UTTERING WORDS, ETC., WITH DELIBERATE INTENT TO WOUND RELIGIOUS FEELINGS.

Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.[5]

Once we examine these provisions, we can see that obvious elements of the equity principle are evident. The law is intended as a catchall, offering universal coverage of a remarkably diverse set of individuals, religions and circumstances. Interestingly, the 1900 edition of the Code has notes relating to the case law that alludes to action taken concerning the controversial herding of cows and bulls, and the actual offence taken by Hindus as a result of this particular event. Such case law had decided that “animate objects” did not constitute the sacred within the meaning of the laws. In this, one might conclude that a determined focus upon everyday situations and equity transcended partial and abstract ideas of protecting the amorphous concept of the sacred. It also deliberately sidestepped the obvious issue of defining religion. This decision, as we shall see, paid dividends for a colonial power, but would cause issues in other, later, circumstances. It also had within it a conception of religious tolerance, and of the importance of public order, in its description of individuals attracting the attention of such a law through acting deliberately, maliciously and with intention.

Individuals who were the potential victims of the breach of such laws were clearly intended to be treated equitably by such laws, whatever their faith or belief. No single religion was to receive a special, enhanced or established status under this law, a situation that was starkly ironic given the legal situation in England itself where the law protected only the Established Church.[6] It is also noteworthy that the commission in charge of this Criminal Code had the foresight to include a narrative of real-life situations, with its acknowledgement of objects being placed in the sight of persons and of sound occurring in the hearing of similar persons.

However, with closer examination, the statement that the Indian Penal Code of 1860 represented a distillation of the laws of England is simply not true in the case of the blasphemy laws that it introduced to the Indian subcontinent. Indeed, the English blasphemy provisions of the 1698 statute (9 & 10 William c 32) seem almost diametrically opposed to the philosophy behind the blasphemy provisions of the Indian Criminal Code. The English blasphemy statute was part of a string of security (some might argue panic) measures aimed at safeguarding the regime of William III (1689–1702). Its blasphemy statute sought to protect the confessional status of a country needing to counter external Catholic threats. The Indian Criminal Code’s blasphemy provisions, in contrast, expressed the overarching perspective of a paternal power that sought to protect all religions from internecine battles – although both, it should be born in mind, had strong public order preoccupations and provisions. Mukherjee notes that J.S. Mill, whilst still a utilitarian, stuck closely to a Hobbesian style maintenance of order, one which unrelentingly saw the Indian society as still rooted in a state of nature. This remained something of a contrast with later liberal approaches to the Empire that focus upon Mill’s quest for individual rights which seemed applicable, at least to him, only in Britain (Mukherjee 2010, 61).

The penal code – blasphemy legislation in practice

Even beyond the Indian Penal Code, the perception that English legal provisions were protecting the Indians from themselves and their irrational tendencies would still appear, sometimes from the unlikeliest of sources. In 1878, James Fitzjames Stephen described the nature of England's relationship with Indian governance as a Hobbesian system driven by fear of how close the state of nature remained. For Stephen, justice stopped military force from being arbitrary, but force enabled justice to be more than a simplistic ideal.[7] Above all, the apparent welfare of Indians themselves required this use of force which prevented indigenous concerns from coming into conflict with one another. In most respects, this echoed the Indian Criminal Code's blasphemy provisions, all of which used British neutrality as a virtue in providing a compulsory level playing field for all of India's religious population. This fitted well with utilitarian ideals, but also with the Hobbesian view of law in India expressed by J.S. Mill. The good of India was provided by the stringent policing of religious differences sustained by linking legislation against religious crimes to public order. More cynical voices, such as the liberal historian of the empire, Sir John Seeley, saw in the law an embodiment of principles of divide and rule which had ensured the British held sway over a subcontinent with deep divisions (Mukherjee 2010, 91).

Indeed, it might be said that the Indian Criminal Code's blasphemy provisions did not do anything other than reinforce such ideas. The legislation notably did nothing to define religion, nor were religions recognised by the state by name. The provisions instead concentrated upon ensuring the behaviour of individuals and groups was regulated under a catchall of preventing offence. Religious places and objects were defined and protected – but all was in the interest of public order rather than accepting any idea of the sacred. This is somewhat at odds with Mukerjee's suggestion that ensuring divisive conflict was central to the preservation of British colonialism

it was precisely within the splits and cracks between the communities of India that colonialism would locate itself; and it was by maintaining and consolidating differences and fostering conflicts between communities, while claiming to stand above them, that colonialism would justify its presence in India.

(Mukherjee 2010, 91–92)

Indeed, if we were to look at the eventual history of the Indian Penal Code in subsequent states that inherited its logic, a pan-religious approach to public order was overturned. The modern state of Pakistan adopted the Indian Penal Code provisions 295 and 298 from the 1860 version (covering defiling places and uttering words with deliberate intent to wound religious feelings). It also adopted revisions made in 1927 (295-A, 296 and 297) which covered "deliberate and malicious acts intended to outrage religious feelings of any class", the safeguarding of religious assembly and the protection of burial places from trespass. These were adopted for the Pakistan Penal Code of 1947 and inherited the pan-religious/public order intentions of its predecessor. In Pakistan, this pan-religious approach to policing blasphemy was superseded with subsequent legislation passed in 1980, 1982, 1984, 1986, all which aimed at providing enhanced protection for the Muslim religion by name (Qaiser 2017, 41). Such a trajectory seemed to be predicated upon a country establishing a separate identity from its past as part of a wider colonial conglomerate.

The Indian Penal Code in British political and legal discourse

However, from Western European perspectives, a fondness remained for the apparently inclusive logic which the Indian Penal Code represented. This was partly due to the fact that the British establishment was indecently quick to believe its own publicity, seeing the Indian Penal Code as the apogee of British Colonial legal achievement. It epitomised apparent fairness, vision beyond petty colonial expedients and was seemingly prescient in its appreciation of blasphemy-related public order problems (Colaiaco 1983, 103–105). When such thorny issues would arise in England around blasphemy, it became a significant part of the argument to invoke the Indian Penal Code as offering all or part of the solution.

But seeking to move, extrapolate and reimagine the Indian Penal Code as the possible solution to the immediate woes of other societies was fraught with danger. Since the isolated and groundbreaking case against George William Foote in England in 1883/4 (which ended English Law's insistence that religion was part and parcel of the law of the land), there was considerable and concerted opposition to the Common Law of Blasphemous Libel and the Statute Law (9 & 10 William C.32). This was largely because the case against Foote was arguably mismanaged by the government almost from the start. In a strictly legal context, it resulted in a successful prosecution and conviction. However, it was, what the contemporary world would describe as, a public relations disaster. It gave a lasting cause célèbre to secularists in England who rapidly convinced liberal allies of the partial and damaging nature of the law that remained (Marsh 1998; Nash 1999). The law was tested again by determined individuals who were convicted for blasphemy on several occasions, bringing still further embarrassment to the government and legal circles.

What would be significant about these Edwardian cases was that they instigated a concerted campaign for repeal of the blasphemy laws. The arguments, at least to the liberally minded, seemed rather compelling. Blasphemy looked to be an anachronism in most people's eyes, and it appeared to be, as opponents unceasingly declared, contrary to the spirit of the age. Such a phrase seemed especially apt when the antiquity of the laws was borne in mind, alongside the partial protection they offered only to the Anglican Church established by law. These pressures pushed both proponents and opponents of the law into thinking ahead about what reform might eventually look like in their contemporary world, but they were subsequently to pursue different agendas.

At the end of 1913 when a particular flurry of blasphemy cases against Edwardian socialists with anarchist connections had, for the moment, come to an end, the Home Secretary was confronted by a memorandum from the committee for the repeal of the Blasphemy laws. This pointed out the anomaly of protection merely for the Anglican version of Christianity. This suggested a movement towards the Indian Penal Code solution might be an effective interim measure. In a counter move, arguments that the British context was different were not slow in coming forward. The file passed to the Home Secretary had, on the cover, a note from one of his civil servants pointing out that there was scarcely any clamour from "Jews, Hindus or Mohammedans" in England for protection from having their beliefs outraged. Given this, there seemed scarcely any argument for denying, to Anglican believers, the protection of such laws that did exist.[8]

Nonetheless, by 1914, deliberations around this issue went considerably further, and the Attorney General Sir John Simon sent the Home Office a lengthy memo in which several courses of action to alter the blasphemy laws were contemplated. Both his proposed solutions dealt with the issues intent on producing public order solutions. One was to rely on local police byelaws surviving from the middle of the nineteenth century (the Town Police Clauses Act of 1848). The other was to embrace what Simon called the Indian precedent.[9] This he acknowledged carried with it the problem of defining religious sentiments, but Simon felt confident that the careful direction of judges would prevent problems from arising. This attitude further displays the initial confidence that

was evident in senior legal circles about the efficiency and equity of the Indian Criminal Code solution to the problem of blasphemy.

This logic would also start to filter through into subsequent petitions calling for blasphemy repeal. In 1924, the Society for the Abolition of the Blasphemy Laws appeared before the Home Secretary, Arthur Henderson, noting that the partiality of the law protecting merely one religion gave the power of prosecution, judge and jury to this individual. Moreover, such a partial law would protect, as the secularist leader Chapman Cohen argued, “fanatical Protestant blackguard” attacks upon Catholicism whilst offering no protection to this offended group, nor to the “Jewish or Mohammedan” faiths. As such, this was inequitable and seemed to have been used as a method of pressing for an Indian Penal Code solution.[10]

By 1929, when a similar deputation spoke to subsequent Home Secretary, J.R. Clynes, the alternative of the Indian Criminal Code solution was offered more overtly. The deputation insisted the application of the law was muddled, inconsistent and capable of almost arbitrary interpretation. One member of the deputation, Graham Wallas, suggested that parliament should consider creating laws relating to preservation of the peace that could be used to protect all religions. In reply, the Home Secretary declared himself sympathetic to the cause of reform but failed to commit government to act. But the Home Office was perennially preoccupied with the public order implications of blasphemy cases, and it remained most anxious that its ability to act in such instances was preserved and not tampered with in any way. Whilst the old statutory provisions, it was admitted, would remove grievances concerning the onesidedness of the law, this course should only be followed if the public order provisions could be safeguarded.[11] After the failure of efforts at reform in 1929, the following year saw a more sympathetic government – a concerted effort in which the wording for a repeal bill modelled upon Indian Criminal Code models emerged from the Home Office. These closely resembled the Indian Criminal Code provisions 295a (an addition from the recent 1927 revision of the Code) and 298, but the wording more obviously concentrated upon matters surrounding publication, with a related, but subordinate, appreciation of public order. Fines were also reduced in significance from those stated in the Indian Penal Code.[12]

The Home Office sought to tackle the numerous problems posed by the 1929 repeal bill through amendment. This involved either retaining the power to prosecute in cases where a breach of the peace occurred or seeking to create a new offence which would criminalise assaults upon all religious feeling, underpinned by the power to imprison rather than merely fine offenders. To assist with this, the Indian Penal Code (Section 295 a and Section 298), the Metropolitan Police Act of 1839 (Section 54: 12 & 13) and parts of the Good Rule and Government Byelaws which legislated against language which posed a threat became useful models. Yet the Director of Public Prosecutions, J.A. Stainton, anticipated trouble in the provisions which sought to protect religion of any kind, although it was not made clear whether this objection was to the law being extended beyond the Anglican denomination or beyond Christianity itself.[13]

When the bill reached its Committee stage, it sought to prevent the actions of an individual “outraging the religious convictions of any other person”. This had been self-consciously modelled upon the very recent revision of the Indian Penal Code of 1927. One of the relevant clauses, 295A, had moved away from words like “outrage” to now readily recognise the power of publications by concentrating on the idea of feelings being wounded. The amendment also argued that the protection of all religions should be strongly linked to the question of breach of the peace. This, however, could not be done, so the report argued, without sweeping away all existing laws, ecclesiastical, common or statute related to blasphemy.

Religion and secular law – a problematic relationship

In the discussion that followed, it became crystal-clear that attempts to define religion were becoming an insurmountable stumbling block. The phrases “religion” and “religious convictions” were clearly an essential part of the offence, and the Committee admitted that this “has no very precise meaning. Is it for instance to be an offence to attack Mormonism or the Agapemonites?”[14] An alternative course of action, which amounted to producing a list of religions defended by name, was quickly realised to be impractical. Interestingly, this was not considered problematic because it was discriminatory, but instead because it would create endless debate around decisions both who to include and who to exclude. The third suggested option was to leave religion entirely undefined, thus making it a matter for juries to solve as each individual case arose. This last suggestion must have been rhetorical, given the fact that rejection of the previous provisions indicated the inherent dangers of wielding such power. Allowing this to be an ongoing concern, alive in the judicial system, must have seemed more alarming still.

Solving all this also led into dangerous waters, since it was argued that unqualified attempts to define religion would mean that the “draftsman by a stroke of the pen would have to solve a question which has been the subject of theological controversy for centuries”. [15] This began to signal that the options and suggestions on offer at this time would scarcely create a long-term solution, and this began to stifle the argument for reform. If the government was to spend this amount of time constructing alternatives to the existing status quo, it was only going to do so if a long-term solution was forthcoming.

In trying to solve this issue, the Director of Public Prosecutions, J.A. Stainton, had tried to use the Indian Penal Code to create a solution. In doing so, he tried to define the term “blasphemous” to encompass the using words and publishing content which would outrage and provoke breaches of the peace. More liberal versions sought to distinguish between attacking and impugning religious convictions, and merely impugning them in the course of potential breaches of the peace. [16] However, all these attempts at change tried to borrow from the Indian Penal Code the descriptions of how religion was actively assaulted, but expressed minimal interest at best in following through its offering protection of all religious beliefs. It would be easy to describe this latter aspect as the apparent logic of the Indian Criminal Code – the so-called equity described earlier. But importantly such logic did not exist for those in 1930 who accepted a need to liberalise the law, but anxiously worked hard to prevent extending its coverage to other religions. [17]

Intentional or accidental blasphemy

The consideration of the Indian Penal Code also drew attention to another area whereby it had diverged and become incompatible with English law. The Indian Penal Code’s provisions had made considerable capital out of the idea of intention in its blasphemy provisions. In this context, to an authority wielding external power over native communities, something it was clearly not a participant in, seemed easily unproblematic. This attitude could solidify when the preservation of public order remained uppermost in the minds of colonial governors. The Home Office, when asked to consider what the Indian Penal Code could offer in this area in 1930, instinctively found it ill-fitting to domestic British circumstances. Since 1884 (after Justice Coleridge had pronounced judgement in the Foote case), the Common Law of blasphemous libel had concentrated upon the manner of expression as being the true test of offensiveness. It was not entirely clear what this meant in practice. Nonetheless, civil servants in 1930 felt sure that they did know. Successive challenges to

the blasphemy law by determined atheist objectors had persuaded them that a law should protect “fair criticism” whilst preventing “outrageous attack”. They also felt that adopting and incorporating the Indian Penal Code’s use of the concept of intention would dangerously disrupt the law and widespread understanding of it. Moreover, further discredit of the law would still further aggravate the sensibilities of those who had already expressed a willingness to try the limits of the law and to transgress them. As one commented:

The ordinary law is that a man is held to intend the natural consequences of his acts. Any clause requiring a jury to look beyond the natural consequences of the acts proved in evidence, and to look into the mind of the prisoner would be a considerable departure from the present law and would lead to great difficulty in its application.[18]

Once the whole question of extending the laws beyond Christianity came on the agenda, alongside the challenge to mens rea, it was no surprise to find civil servants and senior government figures baulking at the prospect of revising the law. Despite some degree of public enthusiasm for the Indian Penal Code blasphemy provisions, enthusiasm for its adoption in administrative circles in 1930 was minimal.

The end of British blasphemy law

Discussion around reform of the blasphemy law in Britain really only came onto the agenda 60 years on, in the 1990s, after the three separate pressures of the Salman Rushdie case, Britain’s increasing multiculturalism and the pressing need to harmonise with the European law. The result of this was the establishment of the House of Lords Select Committee, which eventually reported in 2003.[19] Many of the problems encountered in 1930 now appeared to be significantly amplified and to have been joined by a plethora of new problems that were scarcely envisaged then. During the course of the National Secular Society giving verbal evidence to the Select Committee, it was made aware of an apparent enthusiasm for using the Indian Penal Code as a template for legislation that equalise religions before the law.[20] The Home Office indicated in the Report that it had a duty to examine what went on in other jurisdictions. Thus, turning the page once again to the Indian Penal Code, and its seemingly undiminished allure, was once again inevitable. As a riposte to this, beyond the recapitulation of previous failed attempts during the twentieth century to borrow such precedents, there was equally hard-hitting and poignant evidence offered.

The Executive Director of the London-based International Humanist and Ethical Union, Babu Gogineni, spoke vehemently against the impact the blasphemy provisions of the Indian Penal Code had wrought upon his country. He professed himself “appalled that legislators in the UK may be seeking inspiration from Indian legislation as regards the issues of blasphemy and religious hatred”. [21] Whilst admitting that the law was seemingly more advanced than the UK’s, and thus seemed seductive as a solution, Gogineni strongly argued such attraction was illusory. He noted how the law had been misused to silence those who sought to investigate and expose religious frauds. Its lingering presence after partition also meant that it had been effortlessly bolstered and used against writers and artists in the newer states. This phenomenon clearly indicated that the idealisation of the Indian Penal Code’s blasphemy provisions had been profoundly misplaced:

In India, the presence of 295 and 298 on the Statute Book has unquestionably resulted in infringements of the rights of citizens as regards the free exercise of their freedom of expression—many books have been banned under this or related provisions; playwrights harassed and films censored. Some of the people who have been victims of this law are respected academics.[22]

Gogineni then pointed out that Article 18 of the Universal Declaration of Human Rights and the 1981 United Nations Declaration on Freedom of Religion offered far safer and more effective protection for religious believers.

When this Select Committee came to submit its final report, it was unable to recommend a specific course of action to the government of the day. However, it was a slightly close call. In its final report, it spent some time indicating how instinctively it had deliberated over the Indian Penal Code as a conceivable solution. It acknowledged the awkwardness that attended imperial powers in their construction of such laws whilst also acknowledging that they had a job too:

The rationale underlying the Indian laws was neither antipathy to freedom of speech as such nor the protection of religious freedom, but the maintenance of public peace and tranquillity in a country where religious passions were considered to be easily aroused and inflamed. A distinguished Indian commentator (Soli Sorabjee, the Attorney-General) has recently written that the British did not want a religious riot on their hands and were not really concerned about the religious tenets of those who professed them. However, setting aside the culture gap, there seems little reason why the text (the Indian Penal Code) should not form a starting point for a restatement of principles.[23]

Going further, the report expressed a sincere hope that something could be salvaged from its investigation of the Indian Penal Code's blasphemy provisions:

Thus it might be hoped that a formulation could be found which would also comply with the European Convention (on Human Rights). If there is nothing technically wrong with the law, the problem may be the manner of its enforcement. In India, the offences have been used to found actions to suppress writings on political grounds, which are always brought by the Executive. In the UK every safeguard is in place to prevent politically based prosecutions.[24]

Yet it remained mindful of the comments of the Indian Attorney General Sorabjee and actively quoted his attempts to prevent the Indian Penal Code becoming a blueprint for incitement to religious hatred laws:

Experience shows that criminal laws prohibiting hate speech and expression will encourage intolerance, divisiveness and unreasonable interference with freedom of expression. Fundamentalist Christians, religious Muslims and devout Hindus would then seek to invoke the criminal machinery against each other's religion, tenets or practices. That is what is increasingly happening today in India. We need not more repressive laws but more free speech to combat bigotry and to promote tolerance.[25]

The Report also noted that transferring the Indian Penal Code blasphemy provisions to a British context produced significant irresolvable problems. Noting the opposite point made by the National Secular Society that the Indian Penal Code blasphemy provisions protected "religious feelings", the Report concluded:

Beliefs are matters of fact, and were at one time reviewed by the courts under the Test Acts, which then required that undergraduates at Oxford and Cambridge had to be communicant members of the Church of England. Feelings, on the other hand, are subjective. "Given that religion itself is so difficult to define, then defining hurt to religious feelings is still more demanding".[26]

When further legislation was envisaged and finally enacted (in the shape of the 2006 Racial and Religious Hatred Act), it spoke precisely about hatred which went some distance beyond the

offending of religious feelings.[27] Perhaps, ironically, this series of departures did have the Indian Penal Code's emergency public order agenda in mind. A need to respond made the Act jump over the previously impossible hurdle of defining religion. It left this as a matter for the courts, but supplied a supplementary note that listed a considerable number of the major religions but equally noted that the list should not be regarded as definitive.[28]

The lessons of these problems nonetheless appear to have reached beyond Britain. Although Ireland's 2009 defamation law which rejuvenated blasphemy in the country, there did at least appear to be recognition of how dangerous the legal recognition of religious feelings might conceivably be.[29] Recognising that the unsavoury could actively shelter and flourish under such a law, Section 36 subsections 4a and 4b of the Defamation Act sought to withdraw the law's protection from cults, organisations whose "principle object of which is the making of profit" or those deemed to "employ oppressive psychological manipulation".[30]

Conclusion

The Indian Penal Code's blasphemy provisions were constructed by a ruling power over a religious landscape it considered with a degree of condescension. Yet the legislation has retained and seems to retain a Janus face. Denounced as authoritarian and a sophisticated piece of Orientalism by one school of thought, it becomes an accidental piece of farsighted enlightenment utilitarianism for the other. Perhaps this was the reason why so many would reach for it as a panacea for all religious ills. For societies locked into protecting one religion, the abstract freedom the Indian Penal Code seemed to offer appeared almost gratuitous in its allure. Yet when hard facts soon made their presence felt, it became obvious that these provisions did not solve any of the inherent problems associated with defining religion. Moreover, a glance at the provisions in action showed that such a solution was, to all intents and purposes, imposed and was not required to pass the sanction of consultation. The definition of religion was forced upon the ethnic and religious groups of India as the law saw them in 1860.[31] Even a glance at societies separated from India by partition would reveal that it was human will that could alter laws in newer states, whatever the historical reputation such laws enjoyed for their apparent wisdom and effectiveness.

There is also something of an irony in the 1860s creation of "religious feelings" which, at the time, could be interpreted as carrying a note of condescension. Whilst Christianity was considered a religious belief, the gap between this and more obviously indigenous religions was emphasised through the use of the word "feelings". Whilst modern commentators were sometimes drawn to the apparent utility of such a conception of religious feelings, nineteenth-century legislators clearly thought that they knew the difference. Feelings were an acceptable idea for governors who had no interest in the detail of the religions of specific peoples they governed.

Nonetheless, enthusiasm for the Indian Penal Code's blasphemy provisions would still entice the concerned and those who were occasionally desperate for solutions to changed circumstances. The impetus to pursue blasphemy in court was often the urge to seek the preservation of public order, and the endurance of the British Raj, which itself nurtured such aspirations, sometimes served to promote and vocally encourage such hopes. Yet, ultimately, such enthusiasm would founder upon the problem of defining religion and of ascertaining the idea of intention behind any defendant – something that had been condescendingly possible in a colonial context. A further piece of condescension, the idea of religious feelings, also led to the Indian Penal Code's blasphemy provisions failing to make the transition to Britain. "Wounded feelings" put the issue firmly in the

hands of the offended individual, and such a law would have revolved around demonstrating the capacity to wound held by texts and utterances. Such proceedings could have been profoundly damaging for belief systems – both those who chose to proceed in such a way and those proceeded against. Ultimately, any Western conception of religious feelings would have to wait until the pull of mainstream religious denominations had weakened by the end of the twentieth century.

Notes

1 I must here plead guilty to having indulged both of these tendencies in producing *Blasphemy in Britain 1789 to the Present* (1999) and *Blasphemy in the Christian World* (2007). The first of these resolutely produced a history of the offence in one country. As a result, this was rich in detailed archive work, but its remit prevented it from entering wider debates with the depth that might be wished for. The second acknowledged such debates and attempted to work meaningfully on these, invariably at the expense of sustained detail.

2 For more on this, see Nash (1999 and 2007), Levy (1993), Wiener (1969).

3 For more on the execution of Thomas Aikenhead and blasphemy and providentialism more widely in the English context, see Nash (2008 and 2017).

4 See also Colaiaco (1983, 108) for James Fitzjames Stephen's similar judgement.

5 O'Kinealy (1900) *The Indian Penal Code*, 295, 298–299.

6 The special and unique protection offered by the Common Law of *Blasphemous Libel* for the Anglican Church was confirmed in 1833. In this instance (the Gathercole case), an accusation of blasphemy committed against a Catholic religious institution was ruled inadmissible in court. The juxtaposition of this partial, but unsurprising, judgement can be contrasted with the principle of equity and a conscious desire not to discriminate between religious groupings evident in the Indian Penal Code. For this, see Bonner (1934, 64).

7 J.F. Stephen letter to *The Times* 4 January 1878.

8 Home Office Papers (hereafter HO) 45 10665/216120/83. 9 HO 45 10665/216120/86.

10 HO 45 10665/217459/21.

11 HO 45 10665/217459/32.

12 HO 45 10665/217459/42 Letter 13 February 1930 J.A. Stainton to Sir John Anderson.

13 HO 45 24619 217459/42 Memo from Director of Public Prosecutions to Under Secretary of State SS Home Office.

14 HO 45 24619 217459/43 Report on Committee Stage of the Bill to Amend the Blasphemy Laws 1930.

15 HO 45 24619 217459/43 Report on Committee Stage of the Bill to Amend the Blasphemy Laws 1930.

16 HO 45 24619 217459/42 Letter 13 February 1930 J. A. Stainton to Sir John Anderson GCB Home Office.

17 HO 45 24619 217459/42 Letter 13 February 1930 J. A. Stainton to Sir John Anderson GCB Home Office.

18 HO 45 24619 217459/42 Letter 13 February 1930 J. A. Stainton to Sir John Anderson GCB Home Office.

19 It should be noted that the author gave evidence to this committee on behalf of the National Secular Society, and during deliberations, reiterated much of the material already outlined before this point in this chapter about previous considerations of the Indian Penal Code. However, it was emphasised that the potential legislative situation had become still more complicated than the vastly different one that civil servants in 1930 quite readily fled from.

20 This was envisaged both as a new blasphemy law and as a potentially more far-reaching law of incitement to religious hatred. House of Lords Select Committee on Religious Offences Report 2003, Memorandum from the National Secular Society article 3.

21 House of Lords Select Committee on Religious Offences Report 2003, Memorandum from the National Secular Society article 3. Statement of Babu Gogineni.

22 House of Lords Select Committee on Religious Offences Report 2003, Memorandum from the National Secular Society article 3. Statement of Babu Gogineni.

23 House of Lords Select Committee on Religious Offences Report 2003, Memorandum from the National Secular Society. Chapter 4: Blasphemy: The Options. Section 52.

24 House of Lords Select Committee on Religious Offences Report 2003, Memorandum from the National Secular Society. Chapter 4: Blasphemy: The Options. Section 52.

25 House of Lords Select Committee on Religious Offences Report 2003, Memorandum from the National Secular Society. Chapter 4: Blasphemy: The Options. Section 52.

26 House of Lords Select Committee on Religious Offences Report 2003, Memorandum from the National Secular Society. Article 53.

27 See <http://www.legislation.gov.uk/ukpga/2006/1/contents> (accessed 2 November 2019).

28 Lucinda Maer (6 November 2009), The Racial and Religious Hatred Act 2006

House of Commons Library, Standard Note: SN/PC/03768 Section 1.1.

29 For an overview of the Irish situation before the 2018 referendum and the abolished the 2009 blasphemy law see Mcgonagle 2017.

30 Republic of Ireland Defamation Act 2009. Section 36, subsections 4 a and b.

31 On the construction of Hinduism in the context of British colonialism, see, for instance, Llewellyn 2005.

Bibliography

Berger, Peter L. 1999. *The Desecularization of the World : Resurgent Religion and World*. Eerdsman Publishing.

- Bonner, Hypatia Bradlaugh. 1934. *Penalties upon Opinion*. Watts and Co.
- Colaiaico, James A. 1983. *James Fitzjames Stephen and the Crisis of Victorian Thought*. Macmillan.
- Levy, Leonard. 1993. *Blasphemy: Verbal Offense against the Sacred from Moses to Salman Rushdie*. Knopf.
- Llewellyn, J. E. 2005. *Defending Hinduism. A Reader*. Routledge.
- Marsh, Joss Lutz. 1998. *Word Crimes: Blasphemy, Culture and Literature in Nineteenth Century England*. Chicago University Press.
- McGongale, Tarlach. 2017. "A draft obituary for the offence of blasphemy in Ireland". In Temperman, Jeroen and András Koltay eds. *Blasphemy and Freedom of Expression. Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre*, 456–479. Cambridge University Press.
- Mukherjee, Mithi. 2010. *India in the Shadows of Empire: A Legal and Political History 1774–1950*. Oxford, Oxford University Press.
- Nash, David. 1999. *Blasphemy in Britain 1789 to the Present*. Ashgate.
- Nash, David. 2007. *Blasphemy in the Christian World*. Oxford University Press.
- Nash, David. 2008. "To prostitute morality, libel religion and undermine government.' Blasphemy and the strange persistence of providence in Britain since the seventeenth century". *Journal of Religious History*, 32(4): 439–456.
- Nash, David. 2017. "The use of a martyred blasphemer's death: the execution of Thomas Aikenhead, Scotland's religion, the enlightenment and contemporary activism". In Kilday, Anne-Marie and Nash, David eds. *Law Crime and Deviance Since 1700*, 19–36. Bloomsbury.
- O'Kinealy, James. 1900. *The Indian Penal Code*. S.K. Lahiri & Co.
- Qaiser, Julius. 2017. *Ahmadi and Christian Socio-Political Responses to Pakistan's Blasphemy Laws*. Langham.
- Verma, B. L. 1987. *Development of Indian Legal System*. Deep and Deep Publications.
- Wiener, Joel. 1969. *War of the Unstamped: Movement to Repeal the British Newspaper Tax, 1830–36*. Cornell University Press.