The long struggle to bury speech crimes in the English-speaking world

Anthony Lester and Zoe McCallum look at how the ghost of the English Court of the Star Chamber has been used to suppress free speech.

We British take pride in our vibrant culture of liberty - a political and philosophical heritage we trace back to Milton, Wilkes, Paine, and John Stuart Mill, as well as George Orwell and EM Forster. Yet until recently, our legal system lacked a coherent framework for balancing free speech against other values. From a strictly legal point of view, free expression was a freedom, rather than a legal entitlement. It was what was left over after criminal and civil law restraints on free expression had been given effect; and it too easily fell victim to measures to maintain public order.

Nowhere was this more evident than in the 15th to 17th Century English Court of Star Chamber, where under the guise of keeping the peace, the King's men denied defendants legal counsel, examined witnesses secretly and meted out cruel and arbitrary sentences. It was the Star Chamber, building on the work of medieval ecclesiastical courts, that developed vague and overbroad speech crimes whose ghosts haunted our law long after that court's abolition in 1641.

In the last decade, parliament has repealed seditious, blasphemous, obscene and defamatory libel. It has also abolished the common law crime of scandalising the judiciary. Although these laws were outmoded and obsolescent, there was enough life in them to make it necessary to kill them. As recently as 2012, the attorney general of Northern Ireland took legal action to prosecute Peter Hain MP for "scandalising" a judge by criticising him in his political memoir (though following public criticism, the prosecution was dropped).

Abolition was also important because of the danger these offences still pose to freedom of speech, debate and criticism in countries of the former British Empire. It was that danger that caused the American framers of their constitution to include the First Amendment to the Bill of Rights to protect free speech. There are many parts of the Commonwealth where bad old English common law crimes, buttressed by broad and vague codified versions, are used to suppress dissent and dampen public debate.

Seditious Libel

'Seditious libel' was originally the offence of inciting disorder by expressing contempt towards a political authority. It was based on the assumption that rulers had the right to command the obedience of their subjects. As developed by the Star Chamber, truth was no defence and the perpetrator's intention was irrelevant. There was no requirement to consider whether any harm had been caused by the libel.

Over time, judges qualified the offence to ensure it would be used only where there was a specific threat to public safety, rather than merely a threat to a political authority's reputation. Yet it was still periodically invoked against those who sought to alter the existing order though writings and speeches. In 1792, Thomas Paine was convicted for seditious libel on the ground that his work, The Rights of Man, brought the King into hatred and contempt. Aldred was convicted of sedition in 1909, for publishing an article advocating Indian independence from the Empire.

Now abolished in the UK, seditious libel remains in the criminal codes of India, Pakistan, Bangladesh, Burma, Sri Lanka, Malaysia, Singapore and Brunei, where political opponents of those in power risk similar treatment to that of Aldred and Paine. In Malaysia in 2000, the former Vice President of the National Justice Party was charged with sedition. He had alleged that the ruling party had incited the massacres of ethnic Chinese during the Sino-Malay violence in 1969. In India in 2012, Aseem Trivedi, a political cartoonist, was charged with sedition for a series of cartoons criticising corruption. The charges were later dropped following a public outcry – but as long as the crime lingers, the threat of its use will chill political debate.

An absurd misuse of the offence occurred in Spring 2014 when students from Jammu and Kashmir were booked by the Meerut police for cheering for Pakistan rather than India during a closely fought cricket match. The Hindu newspaper carried a powerful editorial under the heading "Abuse of Sedition Law". It noted that: "Cricket between India and Pakistan incites great passion in both

countries and among the followers of the two teams, patriotism often gets unduly mixed up with the love for the game. However, for its sheer perversity and unreason, the action of the Meerut police in booking a group of students from Jammu and Kashmir on a charge of sedition beats all previous examples of the misuse of the penal provision… invoking [the law] for the minor expressions of views that may be contrary to conventional notions of patriotism is an unacceptable affront to India's democracy". The charge of sedition was dropped, but charges of promoting enmity between different groups, and causing mischief remained. Some 67 Kashmiri students were expelled from their university campus and sent home to Kashmir.

Blasphemous Libel

'Blasphemous libel' was originally based on the belief that the Established Church and secular State must stand and fall together. It can be traced to Taylor's Case in 1676, in which the judge decreed that Christianity was "part and parcel of the laws of England", so that "to reproach the Christian religion [was] to speak in subversion of the law". In a modern secular society, the crime is not needed to protect public order. We do need laws to prevent violent and prejudiced attacks against members of minority religions. But we can achieve that protection through incitement laws that protect religious believers, rather than through blasphemy laws that protect religious beliefs.

In 1979, the House of Lords upheld a conviction for blasphemous libel brought against the editors and publishers of Gay News. The magazine had featured an illustrated poem depicting Christ engaged in gay oral sex on the cross. Lord Scarman suggested that rather than abolish the law, it should be extended to protect other religions. He argued that the common law had been designed to safeguard the "internal tranquillity of the kingdom" and it was all the more relevant "in an increasingly plural society such as that of modern Britain [where] it is necessary not only to respect the differing religious beliefs, feelings and practices of all but to protect them from scurrility, vilification, ridicule and contempt".

In the wake of the Gay News case, the Law Commission for England and Wales undertook a review of the law. Its report accepted that "where members of society have a multiplicity of faiths or none at all, it is invidious to single out the…established religion for protection". The majority recommended abolition of blasphemy laws without replacement. However, two commissioners, Mr Justice Ralph Gibson and Brian Davenport QC, published a note of dissent, favouring a new religious incitement law applicable to all religions.

A few years later, a Muslim challenged the refusal to permit him to conduct a private prosecution against Salman Rushdie and the publishers of The Satanic Verses. The novel caused deep offence, was banned in a number of countries and led to mass protests. The applicant argued that the blasphemy offence should be applied to protect Islam against gross insult. His application failed. Although the law was discriminatory in protecting only the Anglican faith (and the Jewish bible as part of that faith), the court in effect recognised that it would be divisive to extend the law as Lord Scarman had suggested.

The Muslim Council of Britain pressed Tony Blair's government to legislate to make incitement to religious hatred a crime. While there was a law forbidding incitement to racial hatred, which protected Jews as an ethnic group, Muslims had no equivalent protection. The government feared that the unpopularity of the invasion of Iraq would lose them Muslim votes at the General Election. The Home Secretary wrote to mosque leaders at the outset of the Election. His letters accused the Conservatives and Liberal Democrats of blocking attempts to change the law and promised that Labour would enact new legislation. The Racial and Religious Hatred Bill was introduced in 2005.

Happily, the House of Lords introduced safeguards requiring the prosecution to prove a specific intention to incite religious hatred. And they included the so-called English PEN clause, which provides that nothing within the law is intended to restrict "discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of its adherents, or proselytizing or urging adherents of a different religion or belief system to cease practising their religion or belief system". The amendments were narrowly approved by the Commons, with the result that the offence is virtually unenforceable.

Regrettably, the common law offence of blasphemy still has not been abolished in Northern Ireland. This is so despite the fact there is a broader offence of incitement to religious hatred in that country. And elsewhere in the Commonwealth, free speech continues to fall victim to overbroad blasphemy laws. In Pakistan in the 1980s, Zia-ul-Haq's military dictatorship added new offences punishable by death for defiling the name of the Holy Prophet or performing acts which could outrage the feelings of Muslims. These laws are frequently invoked to settle personal vendettas, or used by Islamist extremists as a cover to persecute religious minorities. They are enforced by mob-rule and intimidation.

In India, Penguin Press withdrew a best-selling and critically acclaimed book offering an alternative history of the Hindu religion. A case was brought against the publisher in 2011, claiming that publication violated the Indian Penal Code's prohibition against "deliberate and malicious acts intended to outrage religious feelings". After fighting the case for four years, Penguin India abandoned the lawsuit and agreed to cease publishing and pulp all remaining copies of the book. Its author, professor Wendy Doniger, published a statement arguing that Penguin India had been "defeated by the true villain of this piece – the Indian law that makes it a criminal rather than civil offence to publish any book that offends any Hindu, a law that jeopardises the safety of any publisher, no matter how ludicrous the accusation bought against the book".

Defamatory Libel

Defamatory libel was the common law offence of causing harm to the reputation of another person. It was another favourite of the Star Chamber. In an article from 1913 describing the records of the court, Edward P. Cheyney charted the fate of a miscreant who was fined, whipped, had his ears cut off, his nostrils split and his cheeks branded with the initials "F" and "A" to denote he was a 'false accuser.' He was then sent to the work-house, where he was sentenced to remain for the rest of

his life. His only crime was harming the reputation of various noblemen, by accusing them of murdering the Duke of Buckingham. Other commoners were indicted and similarly sentenced for libels ranging from singing scurrilous verses about a neighbour to laughing out loud at a reading of a defamatory verse.

Like seditious and blasphemous libel, the offence was notoriously vague. Commentators disagreed about whether it was necessary for the accused to have intended to defame. Only “serious” defamations were regarded as criminal – but this requirement, which was for a jury to assess, was standardless and heavily weighted against the defendant. Parliament introduced legislation in 1843 to provide a partial defence where the accused could prove that the libellous words were true – but a complete defence also required proving a public benefit to publication. The law permitted conviction even when the defendant honestly and reasonably believed that what he had published was true.

As with blasphemous libel, views differed as to whether it was more desirable to abolish or to reform the offence of criminal libel. In the last few years, and following on from the UN Human Rights Committee’s recommendation that States should consider decriminalising defamation, criminal libel laws have been abolished in many parts of the world. This is not because free expression is necessarily better protected by civil rather than criminal defamation law. It is true that civil law involves fines rather than imprisonment, and that it avoids the stain of conviction that haunts the accused long after their sentence. Yet as Justice Brennan observed in his landmark judgment for the American Supreme Court in New York Times v Sullivan, the burden and standard of proof is far easier to surmount in civil law than are the rigorous requirements of the criminal justice system. For media organisations, fear of high awards of compensation under a civil action may be markedly more inhibiting than criminal prosecution carrying a more limited fine.

When the Law Commission examined defamatory libel in 1985, they concluded that a new and tailored offence remained necessary. Their rationale was that civil law would be ineffective against certain cases of defamation. One concern was that in the absence of legal aid for civil actions, there would be no remedy for the victim of a serious libel where the defendant had no money to pay compensation. A second consideration was that unlike civil law, the purpose of the criminal law is to protect society as a whole. A criminal offence reflects that damage to society occurs wherever libel victims are hampered in performing functions of public importance.

Those concerns did not persuade and criminal defamation was abolished with no apparent harm to the public interest. Parliament has also carried out much needed reforms of the civil law of defamation to strike a fair balance between the protection of a good reputation and freedom of expression.

The Star Chamber was abolished in 1641, but its ghost lives on in the penal codes of some Commonwealth countries, where criminal libel offences are used to attack those who highlight incompetence or wrongdoing. In January this year, Bloomsbury India was threatened with a

criminal defamation case in relation to a book about a failing state-owned airline. The action was filed a minister in the Congress Party-led government, widely blamed for wrecking the national carrier when he was India's aviation minister. Bloomsbury decided to withdraw all copies of the book and tender an apology rather than take their chances with India's overbroad penal provision.

The ghost of the Star Chamber also lived on in the 1643 Licensing Order, in which parliament required authors to have a licence approved by the government before their work could be published. A year later, John Milton publishes his polemical tract, Areopagitica, in which he eloquently attacked the Order. Freedom of the press was not achieved until 1695, but the tract laid the foundations of later thought in such authors as John Locke and John Stuart Mill. It also influenced the framers of the First Amendment to the American Bill of Rights, including its prohibition against prior restraint and pre-publication censorship.

A quotation from Areopagitica is displayed in the New York public library: "A good book is the precious lifeblood of a master spirit, embalmed and treasured up on purpose to a life beyond life". The ghost of the Star Chamber should be laid to rest and Milton's words translated into action across the world.

Anthony Lester QC is a barrister and Liberal Democrat member of the House of Lords. He has argued many leading cases on free expression in Europe and England and has been instrumental in the abolition of a number of antiquated speech offences and the campaign to reform the English law of libel. Zoe McCallum is Parliamentary Legal Officer to Lord Lester QC.

Published on:April 28, 2014