

THREATS TO FREEDOM OF SPEECH IN THE UNITED KINGDOM?

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I INTRODUCTION

Two measures in the Blair Government's legislative programme for 2005–06 appear to pose significant dangers to freedom of speech in the United Kingdom. First, in order to implement a promise in the Labour Party manifesto, a short Bill¹ has been introduced to extend the current proscription of incitement to racial hatred, featured in the *Public Order Act 1986* (UK) c 64 ('*POA*'), to cover incitement to religious hatred. More recently, following the terrorist incidents in London in July 2005, the Government has proposed a raft of new offences; the most controversial of these would criminalise the glorification of terrorism.

The two measures have much in common. They both stem from the current feverish political atmosphere. They are both of primary concern to the Muslim community, although naturally they are drafted in general terms. The object of the former is to protect Muslims from insulting and abusive speech. While groups such as the Jewish community and Sikhs constitute 'ethnic' groups for the purposes of the *POA*, and are already afforded protection from insulting or abusive speech under the current legislation, the new incitement of religious hatred offence focuses on religious rather than ethnic groups, thus extending protection to Muslims. The new terrorist offences are intended to stamp out extreme speech by Imams and other Muslim leaders encouraging or celebrating atrocities such as September 11, or the tube and bus bombings in London. Quite apart from their common background, both measures share another feature: they infringe freedom of speech without much justification.

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1 Racial and Religious Hatred Bill 2005 (UK).

II INCITEMENT TO RELIGIOUS HATRED

The incitement to religious hatred offence is introduced by amending the provisions in the *POA* which criminalise the use of threatening, abusive, or insulting words intended or likely to stir up hatred against groups. For this purpose, groups are 'defined by reference to colour, race, nationality ... or ethnic or national origin'.² Under the Racial and Religious Hatred Bill 2005 (UK) it will be an offence to stir up hatred against a group of persons defined by reference to religious belief, or lack of it.³ Abuse of Humanists or Scientologists would, therefore, presumably fall within the Bill's ambit, even if the main object of the measure is to protect Muslim communities against insults from members of the British National Party and other extremist elements. The incitement to racial hatred offence itself compromises free speech principles, but can perhaps be justified by reference to the need to protect members of vulnerable racial groups against attacks on their dignity.

Criminalising incitement to religious hatred is much more problematic.⁴ In the first place, membership of a religious community is, or ought to be, a matter of individual commitment, while we can do nothing about our racial or ethnic background. It is much less plausible to regard a vicious attack on a religious group as wounding to its members' individual dignity, than it is to treat such an attack on a racial group in this way. Second, there are no common standards to assess whether speech directed at a particular religious group is abusive or insulting. On the one hand, almost all Humanists, and most Christians, may be happy to laugh off vituperative attacks upon them for their beliefs or lack of them. On the other hand, some Muslims will most likely argue that *The Satanic Verses* by Salman Rushdie (and perhaps other works of fiction) insults God and, by implication, true believers. It is much more difficult to draw a clear line between insulting and offensive speech in the religious context, than it is in the racial. Moreover, any proscription of the former runs the risk that it will deter the publication of offensive, anti-religious speech, which any liberal society should tolerate, if it is to take freedom of speech seriously.

III ENCOURAGEMENT AND GLORIFICATION OF TERRORISM

The draft Terrorism Bill 2005 (UK) ('Terrorism Bill'), published in September 2005, creates two principal offences.⁵ Under Clause 1, it would be an offence to publish a statement which the publisher knows, believes, or has reasonable grounds to believe, will likely be understood as a direct or indirect

2 *Public Order Act 1986* (UK) c 64, ss 17–18.

3 Racial and Religious Hatred Bill 2005 (UK) s 1.

4 See generally Eric Barendt, *Freedom of Speech* (2nd ed, 2005) 189–92.

5 In changes made subsequent to the writing of this note, the government has modified some provisions in the draft Bill. In particular it will only be an offence to glorify terrorism if the words used can reasonably be interpreted as encouraging conduct which should be emulated.

encouragement of, or an inducement to, the commission or preparation of an act of terrorism. It would be irrelevant whether the statement is likely to be understood as encouraging a particular terrorist act or such acts generally, and whether any person is in fact encouraged or induced to commit such an act. Clause 2 creates the offence of glorification of terrorism. Under this clause, it will be an offence to publish a statement which 'glorifies, exalts, or celebrates the commission ... whether in the past, in the future or generally' of terrorist acts. It would clearly be an offence, for example, to enthusiastically defend the tube bombings in London as 'justifiable retaliation for Anglo-American terrorism in Iraq'. Under a particularly bizarre (and offensive) provision, it would be an offence to celebrate an act of terrorism occurring more than 20 years before publication, only if the publication relates to conduct or events which have been specified by the Home Secretary for this purpose.⁶ That means that the government might in effect tell us that we are not free to glorify terrorism in Cyprus in the 1950s or the Mau-Mau atrocities in Kenya, but (in the absence of specification) that we can celebrate the Dublin Easter Rising of 1916. The government will become the judge of acceptable history. The glorification provisions are certainly controversial and will be opposed in the House of Commons. They may be defeated in the House of Lords. In fact, both the encouragement and glorification offences are suspect on free speech grounds.

IV FREEDOM OF SPEECH AND THE ADVOCACY OF TERRORISM

If a right to freedom of speech (or 'expression' to use the term in s 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*)⁷ means anything at all, it must protect a right to disseminate radical and offensive ideas. In the context of politics, where the argument for freedom of speech is most strong, this would appear to include the advocacy, in abstract and general terms, of violence or insurrection. An example of this type of idea would be proclaiming that 'the only way to persuade the rich to share their wealth is to take to the streets and bomb their palaces'. On the other hand, there can be no serious free speech objection to criminalising a direct incitement to commit a particular crime or the provision of information about how to make a bomb or to distribute anthrax powder. In practice, a line can be drawn without too much difficulty between extremist political speech, on the one hand, and criminal incitement, on the other. Moreover, any distinction between the two can be applied relatively easily; although, as always, there will be hard cases which test lawyers and the courts. One well-known line is that drawn by the 'clear and present danger' test in the United States, which, in the classic formulation of the Supreme Court in *Brandenburg v Ohio*,⁸ allows states only to proscribe

6 Terrorism Bill 2005 (UK) cl 2(3).

7 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 June 1952).

8 395 US 444 (1969).

inflammatory speech which is intended and likely to cause imminent violence or other unlawful conduct.⁹ Under that test, incidentally, the proposed encouragement and glorification offences in the Terrorism Bill would, without doubt, be regarded as an unconstitutional abridgement of freedom of speech in the United States.

The more difficult question here is how the line *should* be drawn in a liberal society, which is concerned to ensure that its terrorism legislation does not infringe the fundamental freedom of speech. One way of putting the question is this: are there good reasons for regarding the general encouragement or glorification of terrorism as protected by a free speech or expression clause? If there are, the government would not be able to criminalise such speech, unless, of course, there were a real emergency when it was perhaps the only, or at least the most realistic, way to stop immediate violence.

We might try to answer that question by reference to the free speech rights or interests of the extremist speakers; the only way they can communicate their visceral hatred of society is to advocate terrorism. Many people would find that argument unattractive, although it should not be ignored. Nevertheless, it is better in this context to examine the interests of the public: they might have an interest in accessing the views of the extremists, in knowing who the advocates of terrorism are, and why they hold their deeply repulsive views. To understand is not to forgive, but it is perhaps necessary to understand if the public and its government are to deal intelligently with the terrorist phenomenon. I am not referring here, necessarily, to any actual curiosity on the part of the public about the supporters of terrorism, but more to an interest which we *ought* to show as intelligent citizens.¹⁰ It is this interest that underlies and supports the protection of extremist speech; it is what Brandeis J had in mind when he wrote in his famous judgment in *Whitney v California*:¹¹

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary ... They believed ... that the greatest menace to freedom is an inert people; that public discussion is a political duty ...¹²

Further, there is the danger that if extreme speech is not tolerated, it will be driven underground. Speech will no longer act as a safety-valve. The supporters of terrorism might be deterred from encouraging or glorifying it publicly, but there is no evidence that they will be prevented from counselling it in private or from participating in such activity.

Another way of approaching questions about the scope of a free speech or expression clause and whether they cover a particular type of publication is to ask why the government wishes to suppress or regulate it. If speech is prohibited because the government does not want people to accept the ideas contained in it,

9 *Brandenburg v Ohio* 395 US 444, 447 (1969).

10 See Eric Barendt, 'Interests in Freedom of Speech: Theory and Practice' in Kam Fan Sin (ed), *Legal Explorations: Essays in Honour of Professor Michael Chesterman* (2003) 175.

11 274 US 357 (1927).

12 *Whitney v California* 274 US 357 (1927) 375–8.

freedom of expression is at issue.¹³ Exceptionally strong reasons must be produced to justify its proscription; otherwise, we allow the state wide discretion to determine the content of acceptable public debate. In contrast, we can allow the state more leeway when it proscribes or regulates speech to promote some legitimate end which is unrelated to the content of the speech, for example, preserving the quality of the environment or allowing the free movement of traffic. The encouragement and glorification of terrorism are to be proscribed, because the government, understandably, does not want people to accept these ideas. The restrictions are directed at the *content* of the speech, not to foster some goals unconnected with its message. The same point applies even more clearly to the new offence of incitement to religious hatred; such speech is to be proscribed because government considers speech directed at religious groups is more dangerous than speech directed at, say, members of political parties or against environmental campaigners or businessmen.

V CONCLUSION

The arguments presented in this article do not mean that a free society must inevitably tolerate speech which advocates or celebrates terrorism. Quite apart from situations of real emergency, a government may be able to show that speech of this kind plays such a significant role in the formation of terrorist mind-sets that society would, in effect, be writing its suicide-note if the government were not to intervene. In those circumstances we should allow, albeit with considerable misgiving, restrictions on speech imposed because of its appalling content. But it is very unlikely that the United Kingdom government has any evidence to make out that case. Further, it is impossible to see how that case could be made to justify the incitement to religious hatred offence. The creation of this offence may best be supported by arguments about individual dignity, but they are relatively weak in that context. Freedom of speech is indeed under some threat in the United Kingdom. It is immaterial that those whose speech will be chilled (or prosecuted) have extremist views. Freedom of speech protects the rights of all, no matter how radical or repulsive their opinions.

13 See, eg, Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1 *Philosophy and Public Affairs* 204.