



The Problem with Defining Terrorism and the Impact on Civil Liberties – Britain is Beginning to Create a Monster with Large Claws, Sharp Teeth and a Fierce Temper?

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Abstract

After the September 11th attacks on the World Trade Centre in 2001, the United States reacted by enacting legislation, that was hoped would fight terrorism. The events of September 11 not only caused great distress and shock to many people but the reverberations across the world caused panic. The threat of terrorism has mainly come from small groups of people regarded as “extremists” or “fanatics” pursuing political, ideological and social goals. Few of us will forget the horrific pictures of the Twin Towers collapsing amidst the dust and carnage or the grotesque television images and telephone conversations on board the doomed aircraft. So began ‘The war on terror’ and the challenge for western democracy who now have the unenviable responsibility to safeguard national security and liberty. It does appear that counter terror policy has become instinctive and not well thought out. This article will examine the changes faced by the new Terrorism Act with the notion of civil liberties and innocence.

Keywords: Terrorism Act, Civil liberties, Glorification, Terrorism in the UK

1. Introduction

At a Labour Conference on September 27 2005 Tony Blair stated “We are trying to fight 21st century crime...with 19th century methods, as if we still lived in the time of Dickens. The whole of our system starts from the proposition that its duty is to protect the innocent from being wrongly convicted. Don’t misunderstand me. That must be the duty of any criminal justice system. But surely our primary duty should be to allow law-abiding people to live in safety. It means a complete change of thinking. It doesn’t mean abandoning human rights. It means deciding whose come first.” (Full speech can be accessed at the Labour Party website (www.labour.org.uk) 2007).

On Wednesday July 7th 2005 at approximately 08.50 a.m. a series of bombs exploded on London’s public transport system. Amidst the dust, and carnage echoes of cries could be heard all around Britain, of which the reverberations of what was happening would affect the whole world. Aldgate, Liverpool Street Stations, Russell Square, Kings Cross Street as well as Edgware Road and Tavistock Square were targeted. Helpless civilians butchered to death in the name of four suicide bombers pursuing political change. People willing to sacrifice their lives in order to complete their social, ideological and political goals had again succeeded in making the world dance to their tune. The terrorist attacks killed 52 people and over 700 people were injured.

2. The Problems with the definition of Terrorism

The modern definition of terrorism is controversial; the United Nations for example has not yet accepted a definition of terrorism. The European Convention on Human Rights and the European Court of Human Rights has not developed a definition of terrorism according to Colin Warbrick “A widely accepted definition of terrorism in international law has proved elusive”(see ‘The Principles of the European Convention on Human Rights and the Response to State Terrorism’ Colin Warbrick E.H.R.L.R Issue 3 [2002] Sweet & Maxwell Ltd 2002). Article 1 of the Framework Decision on Combating Terrorism (2002) definition of terrorism should include “serious damage to a country, with the aim of intimidation and destabilizing political, constitutional, and economic structures.” (United Nations Article 1 of the Framework Decision on Combating Terrorism (2002).

The UK definition of terrorism can be found under the Terrorism Act 2000 as the use of threat of action where the action falls within subsection 2

the use or threat is designed to influence the government or to intimidate the public or a section of the public

the use or threat is made for the purpose of advancing a political, religious or ideological cause

Action falls within this subsection if it

Involves serious violence against a person

Involves serious damage to property

Endangers a person's life other than that of the person committing the action

Is designed seriously to interfere with or seriously to disrupt an electronic system.

Section 34 of the Terrorism Act 2006 amended sections 1 (1) (b) and 113 (1) (c) of the Terrorism Act 2000. As Ben Brandon states, "The principal innovation is the new definition of terrorism...the new definition is international in inspiration and effect" (see 'Terrorism, Human Rights and the Rule of Law: 120 years of the UK's Legal Response to Terrorism' Ben Brandon Crim L.R. 2004 Sweet & Maxwell 981-997).

There is no universal definition of terrorism the previous definition was contained in section 20 of the Prevention of Terrorism Act 1974 as "the use of violence for political ends including any use of violence for the purposes of putting the public, or any section of the public in fear" these powers related mainly to terrorist affairs connected with Northern Ireland.

3. Brief details of key pieces of anti-terror legislation

3.1 The Terrorism Act 2000

On September 11th 2001 members from Al-Qaeda hijacked four commercial airliners. The hijackers intentionally crashed two of the airliners into the World Trade Centre in New York and one in the Pentagon. 2, 974 lost their lives another 24 people are missing and presumed dead.

Britain responded by enacting the Anti-terrorism, Crime and Security Act 2001 this was followed by the Terrorism Act 2000 which aimed to tackle international terrorism. The conjunction of the Terrorism Act 2000 was the most important political initiative in Northern Ireland since 1969.

Some of the key changes to the Terrorism Act 2000 are structural for the first time anti-terror laws are stated in one complete code which brings together legislation for Great Britain and Northern Ireland. The legislation no longer requires renewal or re-enactment save for one exclusively relating to Northern Ireland. Parts of the pre existing legislation have been dispensed with for example the power of exclusion and the power of internment in Northern Ireland. As Walker states "Section 1 of the Terrorism Act offers some clarification"(see 'The Legal Definition of "Terrorism" in the United Kingdom Law and Beyond' Clive Walker P.L. Summer [2007] Sweet & Maxwell 331-353).

The 2000 Act did three major things first it added a number of offences to fill perceived gaps in the range of existing provisions punishing terrorist conduct. Secondly, it developed the practice of proscribing terrorist organizations introduced by the 1974 Act. And finally it provided new regimes for the detention without charge, and search and seizure. However the Terrorism Act 2000 has had its critiques for example it may be condemned as lax in comparison to its predecessor is not so much in the terms of its core elements of method, purpose and target in the circumstance of how these components are applied later in the legislation-the context.

3.2 The Prevention of Terrorism Act 2005

On 4 August 2005 the Prime Minister announced tighter regulations on anti-terror laws. The Terrorism Bill 2005 was introduced as a result to the terrorist bombings in London in July 2005. Breach of a control order without reasonable excuse is a criminal offence with a prison sentence of up to 5 years.

The main purpose of the 2005 Act was to provide the birth of control orders which imposed obligations on individuals suspected of being involved in terrorism. In *A v (FC) v Secretary of State for the Home Department* [2004] UKHL 56: [2005] 2 W.L.R. 87 it was held a control order may impose any obligations 'necessary' for preventing or restricting an individual from further involvement in terrorism. The House of Lords held that the power was a disproportionate and discriminatory response to the international terrorist threat presented to the United Kingdom. It was therefore incompatible with Arts 5 (1) and 14 of the ECHR 1950 by virtue of s 4 and s 6 of the Human Rights Act 1998. The belief was that each order would be made with conscientious thought in relation to the circumstances and the restrictions it would create would cause great distress to an individual for example restriction on movement, restrictions on communications and the requirements as a place of abode.

3.3 The Terrorism Act 2006

The Act was drafted in the aftermath of the July 7th attacks; the Act is highly controversial for a number of reasons. On August 5th Tony Blair stated, "There will be new anti-terror legislation in the autumn. This will include an offence of condoning or glorifying terrorism. This will also be applied to justifying or glorifying terrorism anywhere, not just in the United Kingdom." (Full text of the speech can be accessed at the Labour Party website www.labour.org.uk 2007).

Clause 2 now makes it illegal to publish a statement, which “glorifies, exalts or celebrates the commission...of acts of terrorism.” The wording has been criticized for being too vague however according to Charles Clarke “Our only answer to threat must be to contest and the defeat it.” (Full text of the speech can be accessed at the Labour Party website (www.labour.org.uk) 2007).

One of the purposes of the Terrorism Act 2006 was to create offences to penalize conduct which was thought would fall outside existing statutes and common law. The 2006 Act also amends the 2000 Act in important respects in particular by extending terrorist suspects for questioning by the police without charge and by enlarging police powers of search and seizure.

Under the Terrorism Act 2000 suspects can be detained for 14 days however the new piece of legislation has allowed a further 7 days detention if it is justifiable. The government argued that police should be able to arrest and investigate cases as early as possible. The government initially proposed 90-day detention first but were defeated in the House of Commons. The argument was that they needed the time for forensic testing and questioning (there is now a fierce debate with a proposal of 42 days detention).

4. Freedom of Speech and the glorification offence can they co exist together?

Following the terrorist attacks on July the 7th and the incidents on the 21st of July, the Prime Minister Tony Blair announced that a new offence glorifying terrorism would be introduced. At first the Bill contained an offence of ‘encouraging terrorism’ and another ‘glorifying’ it. However after continuous legal and political battles the proposal for a separate offence was omitted from the Bill.

The Home Secretary told us “the July events indicate that there are people in this country who are susceptible to the preaching of an argument or a message that terrorism is a worthy thing, a thing to be admired, a thing to be celebrated...What this Bill is about is trying to make that more difficult, that transition from people encouraging, glorifying, to then an act being undertaken”(Hansard Commons Draft Terrorism Bill, Written and Oral Evidence, HC 515-I, October 11 2005,Q3).

The Terrorism Act 2006 has made the “glorification” of terrorism a criminal offence, the difficulty with this provision is clear; when you outlaw freedom of speech you are violating civil liberties and this will surely result in Britain becoming less safe by silencing dissent. Edward J. Flynn states “there has also been a strong underlying message that respecting human rights while countering terrorism is not only a matter of legal obligation, but is also essential to an ultimately successful strategy”(see ‘Counter Terrorism and Human Rights: The view from the United Nations’ by Edward J. Flynn E.H.R.L.R. 2005). These new powers make us not only less free, we are also less safe when we drive dissent underground and alienate minorities. Swept up in this new anti-terror safety net could be those who protest against dictators like Zimbabwe’s Mugabe or North Korean dissidents.

The new offences of encouragement of terrorism and dissemination of terrorist publications are very broad. They do not require any intention to incite others to commit criminal acts. However ‘glorification’ became embodied in s 1(3) of the Terrorism Act 2006 as a means of defining indirect encouragement. This section applied to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts or Convention offences.

This provision covers offending speeches at meetings, sermons at places of worship, chants and placards at demonstrations, as well as printed literature, broadcasts, and material posted on the internet. The circumstances and manner which a jury must have regard in considering a statement depends on the medium of publications. By virtue of s1(4) of the Terrorism Act 2006 how a statement is understood depends on what members of the public could reasonably be expected to infer from it, this must be determined having regard both to the contents of the statement as a whole and the manner of its publication. As Lord Baroness Scotland explained “It is not an offence to incite people to engage in terrorist activities generally, or to incite them obliquely by creating in which they may come to believe that terrorist acts are acceptable...That is the gap we want to close”(Hansard, HL, Vol 676, col 455 (December 5 2005).

This has created difficulties in respect of freedom of expression. A statement published in a book, newspaper, pamphlet or magazine may be read, either in hard copy or on the Internet, by UK nationals, foreign visitors, and people abroad. By virtue of s 1 of the Obscene Publications Act 1959 it “shall be deemed obscene if its effect or the effect of anyone of the items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances.” (see ‘Blackstones Guide to The Terrorism Act 2006’ Jones, Bowers & Lodge Oxford University Press 2006).

In *R v Calder and Boyars Ltd* (1968) Cr App R 706 the Court of Appeal held that the jury should decide, whether the effect of the book was intended to deprave or corrupt a significant proportion of persons likely to read it. What constitutes a statement is not clear, the definition of a ‘whole statement’ in s 20 (6) of the Terrorism Act 2006 is limited to ‘a communication of any description, including a communication without words, consisting of sounds or images or both.’ Some contents within a book through various chapters could be regarded as encouraging acts of terrorism.

The distinction between 'direct' and 'indirect' encouragement reflects the provisions of Article 5 (2005 Council of Europe Convention on the Prevention of Terrorism). It is an offence by virtue s1(2) of the Terrorism Act 2006 subject to proof of the mental element in s1(2)(b) of the Terrorism Act 2006 to publish a statement containing such encouragement.

Under direct encouragement a person will commit the offence of publishing a statement in which it is alleged there is direct encouragement of terrorism if:

- a) he publishes, or causes another to publish the statement
- b) he intends at the time members of the public to be directly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism
- c) he is reckless as to whether members of the public will be so encouraged and
- d) the statement is likely to be understood by some or all of the members of the public to whom it is published as a direct encouragement or other inducement

For the offence to be established the 'statement must be likely to be understood by some or all of the members of the public to whom it is published' as a direct encouragement to them to commit acts of terrorism.

A person will commit the offence of publishing a statement in which it is alleged that there is indirect encouragement of terrorism under s1 if:

- a) he publishes, or causes another to publish a statement
- b) he intends at that time members of the public to be indirectly encouraged or otherwise induced by a statement to commit, prepare or instigate acts of terrorism
- c) he is reckless as to whether members of the public will be so encouraged and
- d) The statement is likely to be understood by some or all members of public to whom it is published as an indirect encouragement or inducement to them.

4.1 Criticisms

The glorification of terrorism offence was one of the most contentious clauses of the Terrorism Act 2006 in its passage through Parliament. The major cause for concern was how wide the offence could be used and the implications for freedom of expression as the Convention did not refer to the concept of 'glorification'. It does appear that the scope of these provisions is sweeping and disproportionate. It clearly fails to address the element of intent. This in turn does mean that these provisions violate the right to freedom of expression (Article 10). There is a legitimate worry that broadcasters, internet services providers, as well as organizations and individuals representing particular categories of legitimate political opinion, may engage in all manner self censorship.

Another criticism is that the right to freedom of expression will allow the prosecution and criminalization of persons for the lawful exercise of their right to hold and impart their ideologies. As a result, one author states "they would also have a wider chilling effect for society at large on its enjoyment of the right to freedom of expression, as enshrined in international human rights law" (see 'Clamping down on terrorism in the United Kingdom' by Clive Walker IJ4 5 (1137) 1 November 2006).

The Third Report of the Joint Committee on Human Rights (Third Report of the Joint Committee on Human Rights 2004) expressed concern over the glorification provision that and that it does infringe article 10. The Government declined to implement an amendment made by the House of Lords on 15 February 2006 that 'indirect encouragement' should comprise the making of a statement that the listener would infer that he or she should emulate it. The Secretary of State stated in Parliament on 15 February 2006 that s1(3) of the Terrorism Act 2006 is intended to give an 'exemplary description' of what would amount to glorification of terrorism hence those acts of glorifying terrorism but is not limited to them. The Joint Committee on Human Rights argued, "terms such as glorification, praise and celebration are too vague to form part of a criminal offence which can be committed by people speaking"(Session 2005-2006 (HL 75-I HC 561-I AT 27-28).

A jury will have the responsibility not merely finding facts but of determining and applying the standards of the community in which it lives whether the conduct is dishonest or an article is obscene and is reasonable. Section 1(1) of the Terrorism Act 2006 requires that a jury must assess the impact of statements. The jury may find that the statement 'as a whole' and the manner in which it is published constitutes both 'direct' and 'indirect encouragement.' The glorification provision applies only to indirect statements. Section 1(3) of the Terrorism Act 2006 deems certain statements as a matter of fact to be statements of the kind described factually in s1 (1) of the Terrorism Act 2006 and introduces the word 'glorifies' which is partially defined in s20 as including 'any form of praise or celebration'.

Therefore a judge will direct the jury to consider indirect if;

- a) That they have to find whether as a matter of fact, a statement amounts to indirect encouragement to some members of the public.
- b) That statements include every statement that glorifies the commission of acts and is indirectly encouraging regardless of whether it glorifies.
- c) That glorification includes any for of praise or celebration.

In *R v Brown (K)* (1984) Cr App R 123 the problems of jury decision-making was shown. While a jury may well be considering general members of the public the 'members of the public to whom the statement is published' may be too difficult to describe. Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference. The exercise of these freedoms may be subject to formalities, conditions, and restrictions. As J.J Rowe states "Use of the Terrorism Act powers will probably give rise to claims of breaches of Articles of the European Convention on Human Rights...the Terrorism Acts powers are intrusive"(see 'The Terrorism Act 2000' by J.J.Rowe, QC Crim L.R. [2004]).

Under the Terrorism Act 2006 a person's passionate expression might be interpreted as recklessness. For example, the Mayor of London, Ken Livingstone, recently invited the cleric Yusuf al-Qaradawi to speak in the UK. Much of the criticism he faced as a consequence centred on comments made by Mr al-Qaradawi made which were deemed by some to incite terrorist activities. The Sun referred to him as "A ranting Islamic rabble-rouser who supports suicide bombings by children and brutal punishment of gays"(The Sun 2005). However his supporters continued to argue Mr al-Qaradawi was an individual who promoted peace and was entitled to express his views.

If someone is calling for the end of a particular rogue regime it is not particularly relevant whether they are negligent or reckless in the way they do so. Speech offences linked to terrorism must create a stronger definition of what constitutes terrorism than that contained in the Terrorism Act. Under this offence, "a Zimbabwean who has advocated the overthrow of the regime while resident there, and who then flees for his life might, when in the UK as a refugee, be liable for prosecution. Clive Walker states "There were furious debates about whether this offence might criminalize anyone who glorified the armed opposition to the Apartheid regime in South Africa (such as the revered Nelson Mandela) and there were calls for the future prosecution of Cherie Booth, the wife of the Prime Minister Tony Blair, for stating in a speech that in view of the illegal occupation of Palestine land I can well understand how decent Palestinians become terrorists."(Full speech can be accessed at www.labour.org).

Clause 21 allows for the extension of the grounds for proscription under the Terrorism Act 2000. This will now cover non-violent organisations who 'glorify' terrorism. There are currently 25 organisations subject to proscription, including al-Qaeda, Hamas and many other groups associated with international terrorism.

'Encouragement' is redundant for those who incite murder and dangerous for those who don't. We should enforce the law that already exists before spinning new law. The new offence of 'indirect' incitement, to capture the expression of sentiments which does not amount to direct incitement to perpetuate acts of violence, but which are uttered with the intent that they should encourage others to commit, or attempt to commit, terrorist acts. Another difficulty with this provision is the impact this would have on legitimate free expression particularly as it is concerned with the expression of sentiments which do not amount to direct incitement. This seems far too wide and will cover statements whose connection to acts of terrorism may be speculative.

Accordingly, the broad scope for prosecution under such an offence is likely to have a significant chilling effect on the expression of ideas by persons who have no intention of inciting terrorism. Another difficulty with prosecuting any incitement offence is the requirement on the prosecution to satisfy a jury to the criminal standard of proof that the words used by a speaker or author, given their natural and ordinary meaning, disclosed an intention to incite the acts in question. Although this requirement often presents an evidential challenge for the prosecution in practical terms, it does appear that people will be wrongfully convicted.

It appears that this offence of indirect incitement adds nothing to the existing law. Indeed, given that indirect incitement is concerned with statements, which do not directly reveal an intention to incite, it would be therefore more difficult for the prosecution to prove that such intent exists.

Although it is intended to implement article 5 (Council of Europe Convention on prevention of terrorism) the government's belief that these measures are necessary in order to implement the Convention does not relieve the UK of its obligation to ensure that any such implementation is compatible with fundamental rights. The Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles said:

"freedom of expression is one of the essential foundations of a democratic society and applies ... not only to ideas and information that are favourably received or regarded as inoffensive but also to those that "offend, shock or disturb. It would be particularly difficult to predict the circumstances in which a message would be considered as public provocation to commit an act of terrorism and those in which it would represent the legitimate exercise of the right to

express an idea or voice criticism freely. Giving [national courts] such wide discretion could hinder compliance with the principle of legality in criminal law” (para 25, Opinion of Senor Gil-Robles, 2 February 2005).

4.2 *Amnesty International*

According to Amnesty International:

“Human rights law makes ample provision for strong counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist’s objective by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with a successful counter-terrorism strategy. It is an essential element in it”(Kofi Annan UN General Secretary Amnesty International’s briefing on the draft Terrorism Bill 2005).

Amnesty International considers that some of the Terrorism Act 2006 is inconsistent with the UK’s obligations under domestic and international human rights law and may lead to serious human rights violations. The European Court of Human Rights has made clear, the right of freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment. To meet the necessity and proportionality test, including in relation to criminalization of the making or dissemination of statements which encourage terrorism, it must be shown that the person accused intended to incite an act of violence (terrorist offence) and that the statement caused a clear and present danger that such an offence would be committed.

Furthermore, a clarification of “statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism” fails to meet the requirements of precision and clarity of the criminal law. In particular, the explanation offered that the offence extends to statements that “glorify the commission or preparation (whether in the past or in the future generally)” of terrorist acts, from which the members of the public who receive them could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated in existing circumstances is equally broad and inaccessible.

This provision fails to meet the required criterion of “necessity in a democratic society”, given its failure to address squarely the element of intent and to criminalise the publication of a statement “encouraging terrorism” only if there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. They also feel the provision does not address the element of intent. The provision does not squarely place on the state the burden of proving that the person who published (or caused another to publish) the statement intended to encourage or glorify terrorism.

This provision focuses on whether the accused knew, believed or had reason to believe that at least some of those who would receive the statement are likely to understand it as encouraging terrorism. In fact, the provision seems to reverse the burden of proof on the key element of intent: it states that it is a defence for the accused to show that he or she only published the statement in the course of provision or use of a service provided electronically or that the statement neither expressed his or her views nor had his or her endorsement, and that it was clear that it did not express his or her views.

Such a sweeping provision in criminal law, punishable by up to seven years in prison, would be clearly contrary to the very principle of freedom of expression and have a chilling effect on individuals seeking to lawfully exercise their right to freedom of expression.

4.3 *Freedom of Expression*

The right to freedom of expression is guaranteed under international law through article 19 Universal Declaration of Human Rights and article 10 European Convention on Human Rights. The synonymous term freedom of expression relates mainly to verbal speech which includes imparting, seeking, receiving ideas, and thoughts.

Freedom of expression occupies a high place in the hierarchy of rights in a democratic Society (Lord Steyn in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 125G HL).

In *R v BBC ex parte ProLife Alliance* [2003] 2 All ER 977 Lord Nicholls stated “Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts”(ex parte ProLife Alliance [2003] 2 All ER 977).

The problem it appears with the new offence of glorifying terrorism does relate to breach of deeper freedoms in a liberal state. People will now be concerned over the language they use because it may be construed as incitement to terrorism. Freedom of speech is crucial to democracy according to the British philosopher John Stuart Mill “the best test of truth is the power of the thought”(Oliver Wendal Holmes Jr 1919).

In addition to curtailing political speech, the British government has outlawed 15 militant groups, most of them Muslim.

It took a sterner attitude toward Islamists who had preached violence in the past, barring one well-known Syrian-born cleric, Omar Bakri Mohammed, from returning to the country. It secured the conviction of Abu Hamza al-Masri, the country's militant cleric, for soliciting murder and racial hatred. The problem appears is if a group of Britons were on a peaceful protest arguing loudly on a street corner about American foreign policy in Iraq, they could conceivably be prosecuted under the law. It's an extraordinarily vague statute, no two people can agree on what the law means.

According to Tony Blair "The purpose of terrorism is not only to kill and maim the innocent; it is to put despair and anger in people's hearts. It is by its savagery designed to cover all conventional politics in darkness, to overwhelm the dignity of democracy and proper process with the impact of bloodshed and of terror. The politics we represent will win and will triumph over terrorism." (Prime Minister Tony Blair 8 July 2005 Labour Party Conference www.labour.org).

The language of clause 1 was amended, at present there is nothing in the proposed definition of 'encouragement to terrorism' to require the prosecution to prove intention 'to incite further acts of terror'. The prosecution merely has to show that at the time the accused made the statement in question he or she knew or believed or had 'reasonable grounds for believing' that other members of the public were 'likely to understand it as a direct or indirect encouragement or other inducement' to commit acts of terrorism. It is also irrelevant whether any person was actually encouraged to attempt or commit an act of terrorism as a consequence of the statement being published.

The law here seeks to punish those making statements not for what effect they intended their words to have but according to what they might suspect others will make of them. Accordingly, any person who makes any statement with utterly innocent intent may nonetheless be found guilty and subject to up to 7 years imprisonment simply on the basis that he was aware or reasonably suspected others might regard his statement as encouraging directly or indirectly their own terrorist acts.

In particular, clause 1 does not specify which 'members of the public' would be 'likely to understand' the statement as incitement. If a statement were published to 1 million people, therefore, it would be an offence within the meaning of clause 1(1)(b) if the publisher were aware that one or two mentally unstable readers might regard it as 'direct or indirect encouragement' to terrorism.

If a statement were published on the Internet, it would conceivably be available to anyone in the world with a computer. In such circumstances, it would therefore become a criminal offence under clause 1 for a person to publish even the most innocuous statement so long as he or she reasonably believes or 'has reasonable ground to believe' that anyone in the world, no matter how unreasonable their interpretation, may regard it as incitement.

The incitement offences are directed at statements that seek to affect the unreasonable. Accordingly, the requirement to show intention is an essential safeguard against the manifest injustice of punishing a person for what others unreasonably understood him to mean. Without the requirement of intention, any person publishing a statement would be liable for the unreasonable interpretations of others.

Therefore, someone in the UK, for example, would be liable for prosecution to the extent that statements which they make on the internet (whether through their home pages or posting to message boards) might be thought to encourage any person in any other country with access to the internet to commit an act of terrorism. Someone making a comment on the internet in the UK would therefore be liable for the effect of their remarks on readers reasonable and unreasonable alike in such places as Afghanistan, Chechnya, Iraq or the West Bank. Clause 1 contains two safeguards. First, any prosecution under clause 1 would require the consent of the Director of Public Prosecutions or in the case of statements concerning 'affairs of a country other than the United Kingdom' the Attorney General. However, requiring the consent of a public official as a check against malicious or over-zealous prosecution seems a wholly unsatisfactory measure where the offence itself is odious to basic principles of justice.

In making people criminally responsible for the effects of their statements rather than their intention in making them, the draft offence is injurious to the key principles of criminal justice and free expression.

Therefore it does appear anyone committing any opinion to print, website or broadcast must consider the effects of their words and the effect it will have upon any who happen reads it or listens to it. It will not matter even if there is a misunderstanding, unreasonable the consequence or innocent the intent, a publisher will be liable for anything that may be read as encouragement by terrorists.

It does appear that the offence contained in clause 1 is a breach the right to free expression under article 10(2) of the European Convention on Human Rights. Specifically, although a court would agree the restrictions imposed by clause 1 on free expression pursue a legitimate aim of safeguarding national security, public safety and the prevention of crime, it is bound to find that the draft offence fails to strike a fair balance between national security considerations and the fundamental right of free expression. Specifically, the lack of any requirement on the prosecution to prove;

- (i) an intention by the maker/publisher to incite an act of terrorism;
- (ii) a likelihood that the statement will incite an act of terrorism; and

(iii) a sufficient causal nexus with an actual attempt or act of terrorism.

4.4 *The Home Office*

Together with the very broad scope of the offence ('direct or indirect encouragement') means that a court would most likely to find that the interference posed by clause 1 to legitimate free expression is disproportionate to the aims pursued and therefore not necessary in a democratic society.

The Home Office's press release states that the amendments make it clear that for an offence of glorifying terrorism to be committed, the offender must have also "intended to incite further acts of terror". However, the requirement in clause 1 remains that the accused knew or believed or had 'reasonable grounds for believing' that other members of the public were likely to understand it as a direct or indirect encouragement to commit terrorist acts, which itself is widely defined. This does not amount to intent. This clause should be amended to give clear effect to the Home Secretary's stated aim of requiring an element of intent.

The offence of encouragement in clause 1 also has failed to satisfy the requirement in Article 10 with freedom of expression be "prescribed by law" because of the vagueness of the glorification requirement, the breadth of the definition of "terrorism" and the lack of any requirement of intent to incite terrorism or likelihood of such offences being caused as ingredients of the offence.

It would be necessary to delete the references to glorification, insert a more tightly drawn definition of terrorism, and insert into the definition of the offence requirements of intent (which could include subjective recklessness instead of the objective recklessness test introduced at Commons report stage) and likelihood.

The offence would be committed by a person who publishes a statement, or causes another to publish a statement on his or her behalf, at the time knowing or believing, or having reasonable grounds for believing, that members of the public to whom the statement is or is to be published are likely to understand it as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism.

Statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism include statements which glorify the commission or preparation of such acts and "is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances".

4.5 *Case law*

The law already outlaws incitement to commit a particular terrorist act, such as the statement "Please will you go and blow up a tube train on 7 July in London?" but not a generalised incitement to terrorist acts such as "We encourage everybody to go and blow up tube trains." The Muslim cleric Abu Hamza Al-Masri was charged, on 19 October 2004, with solicitation to murder for soliciting or encouraging others at a public meeting to kill nonbelievers in the Muslim faith, and with incitement to racial hatred. The Law Commission is currently considering the law on encouragement and other offences of complicity.

The Home Office's written evidence acknowledges, that it could be argued that the description of the offence in Clause 1 of the Act is "insufficiently precise." "Glorification" is defined in the Act to include "any form of praise or celebration".

The legal certainty concern is that terms such as glorification, praise and celebration are too vague to form part of a criminal offence, which can be committed by speaking. The Home Secretary draws a distinction between encouraging and glorifying on the one hand and explaining or understanding the other. The law too, he says would not be caught by the new offence, because they do not amount to encouraging, glorifying, praising or celebrating.

The difficulty with the Home Secretary's response is that his distinction is not self-executing: the content of comments and remarks will have to be carefully analysed in each case, including the context in which they were spoken, and there will be enormous scope for disagreement between reasonable people as to whether a particular comment is merely an explanation or an expression of understanding or goes further and amounts to encouragement, praise or glorification.

The final source of uncertainty about the scope of the offence stems from the lack of any requirement in the definition of the offence that there be an intention to incite the commission of a terrorist offence, and that the statement must cause a danger of a terrorist offence being committed. As presently drafted, the state of mind which must be proved by the prosecution is knowledge or belief that members of the public are likely to understand the statement as a direct or indirect encouragement or other inducement to acts of terrorism, or having reasonable grounds for such belief.

This arguably falls short of a requirement of a specific intention to incite the commission of a terrorist offence. The only reason given by the Home Secretary for not including a requirement of intent in the definition of the offence is that this would make it more difficult to secure convictions for the offence.

5. Recommendations

The first concern is whether the phrase “fomenting, justifying or glorifying terrorist violence in furtherance of particular beliefs” is sufficiently precisely defined, bearing in mind the likely impact on legitimate public debate about the causes of terrorism, and therefore on freedom of expression.

Compatibility with article 10, however, will depend on the precise wording of the restriction in question, and in particular whether it is sufficiently precisely defined to ensure that it does not disproportionately stifle legitimate debate. In February 2000 the Home Secretary published a discussion paper inviting debate on how the Government should strike the balance between security and liberty in the context of the present threat from international terrorism, and responding to the Report of a Committee of Privy Counsellors under the chairmanship of Lord Newton of Braintree on the operation of the Anti-terrorism, Crime and Security Act 2001.

The Joint Committee on Human Rights decided to hold its own inquiry into the human rights issues raised by the Home Office discussion paper. The Committee considers that long-term derogations from human rights obligations have a corrosive effect on the culture of respect for human rights.

On 25 February 2004 (Counter- Terrorism Powers: Reconciling Security and Liberty in an Open Society 2004) the Home Secretary published a discussion paper, the discussion paper invited a wide-ranging public debate on how the Government should seek to strike the balance between security on the one hand and liberty on the other in the present context of a heightened threat from international terrorism.

6. Conclusion

Terrorism is the defining issue of the present time. It raises political, legal, social and other issues of great difficulty. Terrorism of the modern kind has been manifesting itself since the 1960s and the 1970s. Accordingly the bombing of the World Trade Centre in New York in 2001 was not a one off event. There is not to doubt that the operation of human rights legislation can be both a source of unity and disunity. There is that tension between regarding a commitment to fundamental human rights as a unifying ideal and the core values around which a democratic and just society should be built, and the pragmatic implications of human rights legislation on state power and the state’s relations to individuals in the pursuit of national protection and security.

The Human Rights Act that provides a systematic concern with fundamental values, and more informed public discussion about them; that ensures corresponding changes in methods and approaches to making, interpreting and applying the law as a whole.

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