Protection of freedom of expression

Geoffrey Bindman questions the motives behind the government's sudden concern for free speech

The government's consultation paper on human rights invites 'more general guidance' on balancing freedom of expression with the need to protect national security, safety, and protecting individuals from harm. The Attorney-General, Suella Braverman QC has said that the proposed changes would 'strengthen the right to freedom of expression and preserve space for wide and vigorous democratic debate' (*Daily Telegraph*, 14 December 2021). That seems a worthy aim.

At the same time, however, the government is promoting its Online Safety Bill to restrict the dissemination of objectionable material on social media sites. It also promises new restrictions on public protest and limits on the scope of judicial review. So, the message is mixed.

And why the concern about freedom of expression? The current law already strikes the necessary balance. Article 10 of the European Convention on Human Rights, embodied in UK domestic law by the Human Rights Act 1998 (HRA 1998) states that the right to freedom of expression 'shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. Its exercise may be 'subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder and crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'. Section 12 of HRA 1998 instructs judges to exercise particular care where freedom of expression is at risk. And it is important to emphasise that only restrictions 'prescribed by law' are permitted.

In *Handyside v UK* [1976] ECHR 5493 the court declared 'the protection of Art 10 is not lost just because language is offensive, provocative or insulting'. In *Sunday Times v UK* [1979] ECHR 6538, para 49, (1979) 2 EHRR 245, the court said freedom of expression includes 'not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative, provided it does not tend to promote violence. Freedom to speak only inoffensively is not worth having'.

But left unaddressed is much of the growing pressure by individuals and interest groups to suppress opposing views. The government's concern is clearly with the pressures on freedom of expression popularly labelled 'woke' or 'cancel culture', which may result in 'no platforming'. The Online Safety Bill already proposes action to restrict harmful speech on social media. What more is needed?

Much of the pressure has involved race and political difference. And much of it takes place in private spheres far outside the scope of legal regulation. Racial discrimination was first outlawed by the Race Relations Act 1965. Discrimination was defined as 'less favourable treatment', made unlawful if on the grounds of 'colour, race, or ethnic or national origins'. The law has evolved over the years and is now contained in the Equality Act 2010. Its main concern has been with the social and economic damage caused by discrimination, whether by refusal of services, or by denial of employment or housing on racial grounds.

Racist speech is unlawful when it crosses the threshold of criminal liability imposed by the offence of incitement to racial hatred, introduced in the Race Relations Act 1965 but now located in the Public Order Act 1986. The underlying principle is that speech should only be curtailed by law when it promotes violence or, as in the case of defamation or public safety, other serious harm.

But what if expression is curtailed not by law but by the decisions of individuals or institutions? Or individuals or institutions seek to change those decisions? 'No-platforming' is the denial of the right to speak and express particular views at meetings. For most educational institutions there is already legal regulation. The Education Act 1986, s 43, requires universities and colleges to secure freedom of speech within the law for members, students, employees and visiting speakers. That duty is only overridden if what the speaker is likely to say breaks the law, eg by inciting racial hatred or violence.

Pressure to suppress racist speech is entirely understandable but should the law prohibit mere abuse? The playground taunt 'sticks and stones may break my bones but calling names won't hurt me' may be a useful guide to where the legal line should be drawn. That does not mean that calling names or comparable abuse must be approved or tolerated in private or public debate. Or indeed that the law should restrict private organisations in rules of behaviour to which members agree.

The recent investigation by the Equality and Human Rights Commission into allegations of antisemitism in the Labour party throws light on the link between anti-discrimination law and freedom of expression. The investigation was launched in response to 'over 220 complaints identified in different sources'. Of these, 58 were investigated together with 12 put forward by the Labour Party itself. Details are available of only two of these cases because they were the only ones in which the Commission found an individual (acting as the Party's agent) had broken the law. For this finding the Commission did not claim unlawful discrimination but relied on Art 26 of conduct in relation to a protected characteristic (ie race) which has the purpose or effect of violating another's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for that person. While this provision seems in conflict with the interpretation of Art 10 described earlier, it enabled the Commission to conclude that the protection of Art 10 was overridden in the particular circumstances.

For completeness it should be added that the EHRC investigation also covered the Labour Party's procedures for investigating complaints, not the subject of this article. It made two findings of unlawful discrimination in that aspect of its investigation. The EHRC report has been subjected to detailed criticism (see *How the EHRC got it so wrong*, Verso Books, May 2021). The Labour Party did not exercise its right to challenge any of the findings of unlawful conduct against it.

The background to the EHRC investigation of the Labour Party was a rift between party members over the Israel-Palestine conflict. Criticism of Israel is seen by some as antisemitic and racist. That view is the source of many of the complaints. Is it far-fetched to suppose that the government's claimed desire to strengthen freedom of expression is influenced by an opportunity to exploit Labour's embarrassment? Otherwise, it is hard to understand why the government should feel that existing safeguards of freedom of expression are inadequate. NLJ

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