Our illiberal Terrorism Act

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> No argument, we may suppose, can now be needed, against permitting a legislature or an executive ... to prescribe opinions to [the people], and determine what doctrines or what arguments they shall be allowed to hear. ... Though the law of England, on the subject of the press, is as servile to this day as it was in the time of the Tudors, there is little danger of its being actually put in force against political discussion, except during some temporary panic, when fear of insurrection drives ministers and judges from their propriety ...
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> — *John Stuart Mill, On Liberty (1859)*

Last week I criticised former Home Secretary Suella Braverman's call to police to "use the full force of the law" against pro-Palestinian demonstrators who "invite support for Hamas", display Hamas flags, or even use chants like "From the river to the sea, Palestine will be free." I argued that this illiberal attitude toward the expression of political opinion — even odious opinion — made a mockery of the Tories' previous passionate insistence, when presenting their Higher Education (Freedom of Speech) Bill, that freedom of speech is "the absolute cornerstone of Western democracy ... the beating heart on which all freedoms do rest".

But Braverman was right about one thing: though her policy is, in my humble opinion, both morally and politically wrong, it is indeed legally permissible. That is because the UK law on which Braverman was relying — the Terrorism Act 2000 and its successors — is radically illiberal: it criminalises many kinds of nonviolent political speech, and it contradicts everything that we ought to have learned from John Stuart Mill. I will argue here, following Mill, that this law needs urgently to be revised. (But I'm not holding my breath about that happening.)

The Terrorism Act 2000 begins with an extraordinarily broad definition: "terrorism" is any

> use or threat of action ... [that] is designed to influence the government [of any country] or an international governmental organisation or to intimidate the public or a section of the public, and ... is made for the purpose of advancing a political, religious, racial or ideological cause

that

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

That definition potentially includes thousands of individuals and groups that are not ordinarily regarded as "terrorist", especially if one interprets broadly the clauses (b) and (e). It also manifestly includes the military forces of any nation that is currently engaged in armed conflict, though there seems to have been a tacit policy not to apply it to govermental bodies.

The Act goes on to give the Secretary of State the power to proscribe any organisation that he believes is "concerned in terrorism": this includes not only committing, participating in, or preparing for acts of terrorism, but also "any form of [glorification,] praise or celebration" of acts of terrorism whenever

> there are persons who may become aware of it who could reasonably be expected to infer that what is being glorified, is being glorified as —
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> (a) conduct that should be emulated in existing circumstances, or
>
> (b) conduct that is illustrative of a type of conduct that should be so emulated.

Thus, an organisation can be proscribed, not for any *actions* in furtherance of terrorism, but simply for *speech*.

But this is not all. Once an organisation has been proscribed, it becomes a criminal offence for anyone to

- "belong or profess to belong" to the organisation;
- "invite support" for the organisation;
- organise a meeting "to support" the organisation or "to be addressed by a person who belongs or professes to belong to" the organisation; or
- "wear an item of clothing, or wear, carry or display an article, in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of" the organisation, and this irrespective of intent.

A 2019 amendment took these prohibitions one step further, and also criminalised

- "expressing an opinion or belief that is supportive of" the organisation, if "in doing so [one] is reckless as to whether a person to whom the expression is directed will be encouraged to support" the organisation.

All these, except perhaps membership, are clearly crimes of *speech* — or to put it more precisely, crimes of *advocacy of ideas*.

But what precisely is meant by "support"? Almost everyone (except perhaps some radical libertarians) would agree that, in a democracy, the government may legitimately prohibit its citizens from providing *material* support — such as money or weapons, or recruiting combatants — to an armed organisation whose aims contradict the government's foreign or domestic policy. And this is indeed criminalised in the Terrorism Act. But the Terrorism Act goes far beyond this, to criminalise the expression of *ideas* that "support", in some undefined way, the proscribed organisation.

I may "support" Chelsea by wearing their color (blue) and singing their chants along with fellow supporters on the streets of London, but that does nothing to help their players score goals. Similarly, I may "support" Hamas by waving its flag and chanting its slogans, but that does nothing to help them commit terrorist acts. This kind of "support" for Hamas may indeed help it to increase its public standing and prestige, but that is exactly the kind of *political* advocacy that ought to be addressed by counter-advocacy — explaining to people why Hamas' actions are both evil and counterproductive to the Palestinian cause — not by suppression and criminalisation.

In our system of law, a crime must be defined "with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, the consequences which a given course of conduct may entail". Furthermore, the courts have recognised that "there is no more 'chilling effect' upon freedom of communication ... than uncertainty as to the lawfulness of one's actions", since ambiguity induces people to self-censor beyond what the law requires, to steer clear of potentially dangerous gray areas.

So the Terrorism Act takes pains to define precisely many terms, including "dwelling", "road" and "vehicle". But the meaning of the key term "support" is never once elucidated. Alas, that omission didn't trouble the Court of Appeal, which held that the word "support" should be given its "ordinary meaning", which is "clear and easily comprehensible". It stressed that "the 'support' in question may be practical or tangible, but it need not be".

And yet, the Court of Appeal contradicted itself in explicating this supposedly "clear and easily comprehensible" meaning. On the one hand, it observed, near the beginning of its decision, that

> It was common ground before the judge that holding views supportive of a proscribed organisation was not conduct falling within section 12(1)(a) *nor was expressing intellectual or moral support for such an organisation* [other than wearing the uniforms, etc.]

[emphasis mine]. But when the Court set out in detail its interpretation of the word "support", it said the exact opposite:

> The Oxford English Dictionary's definition of the noun 'support' includes the provision of assistance, of backing or of services to keep something operational ... But the dictionary definition also includes encouragement, emotional help, mental comfort, and the action of writing or speaking in favour of something or advocacy. In everyday language, support can be given in a variety of ways, and ... it is for a jury to decide whether the words used by a particular defendant do or do not amount to inviting support. In its ordinary meaning, "support" can encompass both practical or tangible assistance, and [also] what has been referred to in submissions as intellectual support: that is to say, agreement with and approval, approbation or endorsement of, that which is supported.

These latter kinds of "inviting support" are clearly *advocacy of ideas*.[1] The Court went on to explain why, in its view, such speech may legitimately be criminalised:

[1]Here I have sloughed over a distinction that the Court of Appeal may have been trying, tacitly and

> From the point of view of the proscribed organisation, both types of support are valuable. An organisation which has the support of many will be stronger and more determined than an organisation which has the support of few, even if not every supporter expresses his support in a tangible or practical way. The more persons support an organisation, the more it will have what is referred to as the oxygen of publicity. The organisation as a body, and the individual members or adherents of it, will derive encouragement from the fact that they have the support of others, even if it may not in every instance be active or tangible support. Hence ... it is a [*sic*] perfectly understandable that Parliament, in legislating to give effect to the proscription of a terrorist organisation, prohibits the invitation of support for that prohibited organisation without placing any restriction upon the meaning of the word 'support' ...

This is exactly the type of reasoning that would have appalled John Stuart Mill.

Imagine that the Terrorism Act had been in force in the 1960s, 70s and 80s, before the end of apartheid in South Africa. The African National Congress would easily qualify, under that law, as "terrorist": its armed wing, Umkhonto we Sizwe, was involved in the early 1960s in sabotage of government facilities, and in the 1980s in bombings that killed both police and civilians. In fact, in 1987 Prime Minister Margaret Thatcher explicitly labelled the ANC a "terrorist organisation":

> A considerable number of the ANC leaders are Communists ... When the ANC says that they will target British companies, this shows what a typical terrorist organisation it is.

It would then be left purely to the discretion of one of Thatcher's ministers — presumably instructed by the Prime Minister herself — to decide whether the ANC would be proscribed or not.

Now suppose, as is not unlikely, that the ANC had been proscribed. It would then become a crime for anyone to urge "support" for the ANC, even if he also condemned attacks against civilians; to invite an ANC member to speak at a public meeting, even in the context of a debate with opposing views; or to publicly display the ANC flag. Are prohibitions of this kind worthy of a democratic society?

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inarticulately, to make: between *expressing* support for a proscribed organisation, which is concededly lawful, and *inviting* support (from others) for that organisation, which is a crime. Perhaps such a distinction is tenable with regard to casual everyday conversation: I might express support for an idea or organisation without any goal of persuading my friend to support it. But anyone who writes an article or gives a speech expressing support for an idea or organisation is *necessarily* implicitly inviting his readers or hearers to support that same idea or organisation, at least in the "intellectual" sense highlighted by the Court of Appeal — otherwise, what would be the point of writing or speaking publicly about a controversial issue? Moreover, the gap (to the extent that there is one) between "expressing support" and "inviting support" was further narrowed by the 2019 amendment quoted above.

In the United States, with its written constitution and its no-weasel-words First Amendment, vast swaths of the Terrorism Act would be grossly unconstitutional. As far back as 1969, the U.S. Supreme Court made clear, in the case of *Brandenburg v. Ohio*, that all political speech — even the advocacy of violence or other unlawful conduct — is protected by the First Amendment unless it is aimed at inciting *imminent* lawless action. The rationale is simple: If an orator harangues an enraged mob and says "kill the Jews", there is a serious danger that the mob might carry out the suggestion before anyone had an opportunity to present counterarguments. But if someone publishes an article or a tweet with the same vile message, sane people have ample opportunity to respond.

Of course, there is no guarantee that sane people will always *succeed* in dissuading potential murderers, just as there is no guarantee that free people in a democracy will always make wise decisions. It might therefore be considered more efficient, in order to prevent extreme evils, simply to prohibit the expression of selected pernicious ideas. That was, indeed, the approach taken by the medieval Catholic Church — as well as by our own government well into the nineteenth century, with offences such as blasphemy and seditious libel — and it is exactly what Mill and others argued forcefully against. An eloquent defense of Mill's position — and of the political philosophy of liberalism in general — was given recently by the conservative *New York Times* columnist David French.

Finally, there is a powerful practical argument against censorship, and it concerns the question: Who decides? Advocates of censorship implicitly imagine *themselves* to be the Wise Ones charged with deciding which ideas may be expressed publicly and which may not. Indeed, they typically call for the suppression only of *specific* ideas that they find pernicious: "support of terrorism" for some, "support of Israeli apartheid" for others. But to justify these specific proposals of censorship, they give arguments that would justify the suppression of pernicious ideas *in general* — where what counts as pernicious is in the eye of the beholder. History has repeatedly shown that the advocates of censorship often become its next victims, when their opponents come to power.

Defending free speech consistently and even-handedly is of course no guarantee that one's opponents will follow suit; but it does, at least in a democracy, strengthen one's moral authority and political credibility. Inconsistency, by contrast, invites (justified) allegations of hypocrisy and (unjustified) calls to widen the ambit of censorship in the interest of "fairness" — as several American university presidents have recently learned to their sorrow.

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