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POTENTIAL NONSENSE: RESERVATIONS ABOUT AN ASPECT OF THE CRIME AND DISORDER BILL

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“The question of legislation against religious discrimination,” said the Home Secretary in a recent speech¹, “is a big area ... It is a difficult, sensitive and complicated matter ... Because of the complexity of the matter and the pressures on our parliamentary programme I should make clear that we have no immediate plans to legislate on this.” His next words, as if he believed himself to be moving entirely logically from one point to another, were: “We *do* have immediate plans to legislate on racial violence.” A few moments later, as if explaining and indeed rectifying the earlier non-sequitur, he acknowledged that there were people in his audience who would wish the new proposed legislation on racial violence to refer to religion: “I know that some of you would like us to extend the definition of the offence to include religion. We have issued a consultation paper which sets out in full the detail of our proposals and this has been widely distributed ... I would encourage you to respond to that consultation setting out your views. All responses will be looked at carefully.”

In point of fact the consultation paper was not circulated widely – very few Muslim organisations, for example, received a copy. Further, it does not appear that all responses were carefully considered. On the contrary, the Home Office has shown no sign of paying respectful attention to those who have urged that there should be a reference to religion and/or to culture in the proposed new legislation. Recommendations and requests on this point have all been dismissed out of hand.

The new legislation, the Home Office says², is “to deal with the specific problem of racial crime because of the scale of that particular problem and the impact it has on society.” It adds that “an attack motivated by *religious hostility as opposed to racial hostility* [emphasis added] would of course be covered by the existing law.” In other words, attacks motivated by religious hostility will attract lighter penalties than attacks motivated by so-called racial hostility. In consequence, there will be many anomalies and injustices over the coming years and the new law will be frequently brought into disrepute. This article outlines six main sets of reservations and concerns. It then suggests a solution, involving a simple and straightforward amendment to the Crime and Disorder Bill currently under consideration.

Six Concerns

The first concern arises from the Government’s use of the term ‘racial’. The term appeared 62 times in the consultation document. (Which was itself only eight brief pages in length – not, alas, the full or detailed coverage which the Home Secretary claimed in his speech.) The adjective ‘racial’ qualified ‘element’ twelve times, ‘harassment’ seven times, ‘motivation’ or ‘motive’ seven times, ‘crime’ six times, and ‘incident’, ‘violence’ or ‘offence’ five times each. The adverb ‘racially’ appeared four times. Twice it qualified ‘motivated’ and twice it qualified ‘aggravated’. At no stage did the consultation document define the words ‘racial’ or ‘racially’, its fundamental key terms.

In the Bill itself, however, the Government does provide an explanation, though not a definition³. Here, the adjective ‘racial’ is used to qualify the noun ‘group’. A ‘racial group’, the Bill says, is ‘a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins’. By extending the term racial to concepts of nationality, citizenship and national origins, the Bill gives legal respectability to assumptions which exist only, if they exist anywhere, in the minds of the most bigoted and most ignorant of people – though can *anyone* truly believe that persons with different citizenships belong to different racial groups?! It is extraordinary and deeply worrying that the British legal system is proposing to define non-British people, and people whose “national origins” are outside Britain, as *racially* different from everyone else.

The essential problem, however, is that ‘racial groups’ do not in fact exist. There is no basis in science, that is to say, for supposing that the human species consists of different races or racial groups, each identifiable through signs such as skin-colour, hair texture, facial features and so on. The belief that racial groups exist, each having its own cultural characteristics and physical appearance, was developed by scientists in the past in order to legitimise colonialism,

conquest and slavery. Also it was used as an underpinning of anti-Semitism, leading in due course to the Holocaust. The belief is now, however, totally discredited and has been disowned by all reputable scientists.⁴ Biologically, the human species shares a common gene pool. There is much more genetic variation within each so-called racial group than between groups. Since racial groups exist not in objective science but in subjective perceptions, themselves fashioned by patterns of conflict and prejudice, the concept is a wholly inadequate basis for law-making, and therefore for law enforcement.

Racial groups do not exist, but racism does. As a belief-system, racism includes the notion that racial groups do exist, and that all human beings belong to one racial group or another, each with its own genetic and cultural features. It is surely wholly unsatisfactory for new legislation to be based on ideas and terminology which make good sense only to racists.

Second, emphasis on the concept of racial group (whether or not extended to mean a national or citizenship group as well) will inevitably lead to ludicrous situations throughout the criminal justice system. Supposing defendants were to argue that their alleged crime did not have a racial element since in their perception the victim did not belong to a racial or national group different from their own? Or supposing the police or the Crown Prosecution Service argued this, even before the case came to court? There would then be extraordinary and unedifying debates, both in private and in public, about how dark a victim's skin needs to be in order for a racial element to be *prima facie* present; or how much different the victim's facial structure needs to be, or how different their pronunciation of English needs to be, from certain norms; or from the facial structure or accent of the defendant. "I didn't attack him because he's a different race or national origin, your honour," someone might say. "Just look at him. His skin is no darker than mine, nor are his lips thicker than mine, and his hair is just the same. And listen to him. He's got a funny accent, but I wouldn't call it foreign. No definitely the offence wasn't racial or national, your honour. The fact is, I just don't like Muslims."

The judge would presumably rebuke such a defendant, but would be unable, if the claims about the victim's physical appearance and accent were sustainable, to hand down a heavier sentence under the new legislation. The law would be a grotesque laughing stock. A court *could*, of course, rule that Muslims are essentially non-British, and therefore are 'a group of persons defined by ... national origins'. In the case of white converts to Islam, it could deem them to have 'association with members of a racial group' (Clause 22, 1, (a) of the Bill). All offences against Muslims would then be definable as racially aggravated, if the offender demonstrated hostility towards Islam at the time of the offence. But this would be at totally unacceptable costs to social cohesion, and would reflect an appallingly ignorant and insulting view of Islam as a world faith.

Third, it is increasingly the case that even racists do not believe that racial groups exist, or do not believe that the construct of race is helpful. For it is clear, if one reads racist literature, that crude biological racism (often known also as 'colour racism'⁵) has a much lower emphasis nowadays than hostility based on differences of culture and religion. Literature which calls for "the removal of all synagogues, mosques and temples from our Christian land"⁶, for example, cannot be construed as reflecting biological racism *and nothing else*. But such discourse almost certainly influences or motivates the kind of criminal behaviour against which the Government wishes to act. It would be absurd if defendants were able to argue, with a view to securing a lower penalty for a vicious assault on a worshipper at a synagogue, mosque, gurdwara or mandir, that their hostility had not been racial but 'only' religious or cultural.

Fourth, there will be other absurd anomalies as well. For in practice, in order to avoid at least some of the anomalies evoked above, courts will no doubt adopt case-law definitions created in the wake of the Race Relations Act 1976. It has been established through case-law that Jews, Sikhs, Irish and Travellers are ethnic or national groups, and that discrimination based on hostility towards them is accordingly unlawful. If indeed courts extend the term 'racial' to refer to these groups, as the Crime and Disorder Bill seems to envisage and to encourage, several injustices will immediately arise. For instance, the law of the land will deem that spraying graffiti on a Jewish synagogue or a Sikh gurdwara is a more serious offence than spraying precisely the same graffiti on a Muslim mosque or a Hindu mandir.¹⁷ There will be higher penalties for attacking a Jewish man wearing a kippah or a Sikh man wearing a turban than for attacking a Muslim woman wearing hijab. Or for desecrating a Roman Catholic church frequented mainly by Irish people than for desecrating any other Roman Catholic church. Or, in England, for attacking a Glasgow Rangers supporter ('persons defined by reference to national origins') than for attacking someone whose corresponding loyalties lie with Arsenal or Manchester United. If Muslim youths from Slough attack Sikh youths from Southall they will face higher penalties than will Sikh youths from Southall who attack Muslim youths in Slough.

Fifth, such anomalies are not only unjust and not only therefore bring the law into disrepute. Also, they send out messages (a phrase twice used in the Home Office's consultation document of autumn 1997) that some minorities in British society are less worthy of protection against violence and criminal damage than others. The unacknowledged motivation behind the Government's proposed new legislation appears to be a desire to appease sections of the African-Caribbean community, particularly in London. Now certainly there have been some horrific offences

committed against African-Caribbeans, and almost certainly these have been motivated by crude biological racism. Solidarity with the victims of such racism is essential. But also there have been horrific offences committed against people perceived essentially to have a different culture or religion. Also here the law must show solidarity. Otherwise there will be a situation of divide-and-rule, with different oppressed minorities set in competition with each other for society's sympathy, protection and support.

Sixth, the proposed new discourse sets England and Wales at odds with the rest of the European Union. Other European languages do not contain a phrase closely corresponding to the English word 'racial group', as it is used in the Crime and Disorder Bill. EU policy documentation conceptualises the task facing European societies in this context as addressing 'racism, xenophobia and anti-Semitism', not as addressing something adequately described as 'racial'. The Euro-abbreviation 'raxen' (short for racism and xenophobia) is strange to English ears and eyes. But it valuably refers to both physical and cultural markers of difference without attempting the absurd task of separating out, as the Home Office seeks to separate out ("an attack motivated by religious hostility *as opposed to* racial hostility") the two sets of markers from each other.

A Proposed Solution

There is surely an entirely straightforward solution to the problems which this article has highlighted. It has two aspects. On the one hand, a key term in the legislation should be 'racist' not 'racial'. Second, the term 'cultural and religious hatred' should be added to the legal discourse. A summary of the legislative intention would then read as follows: *The Government intends to take action against behaviours (assault, malicious wounding disorderly or threatening behaviour, harassment, criminal damage) which are motivated or influenced by racism, or by hostility towards the ethnic, cultural, religious or national identity of the victim, as perceived by the perpetrator.* The new offences would be known as 'common assault', 'malicious wounding', 'intentional harassment', 'criminal damage', and so forth, *aggravated by racism or by cultural or religious hatred*. It would be entirely straightforward to amend the Crime and Disorder Bill in accordance with such terminology.⁸

Conclusion: Possible Objections

Since the Government has not attempted to explain or defend its use of the term 'racial group' it is impossible to know to what extent the omission of the concepts 'culture' and 'religion' from the Crime and Disorder Bill is deliberate. It is also difficult to anticipate what the Government's objections may be to the proposals made in this article. The objections which the Government *maybe* minded to advance include the following:

- (a) that reference to culture and religion could involve a watering-down of the Government's manifesto commitment, and insufficient solidarity with the victims of biological racism;
- (b) that there could be prosecutions outside the spirit of the proposed legislation, for example for sectarian violence, family feuds, hooliganism at international sporting events, or gang warfare;
- (c) that the term 'cultural or religious hatred' is too imprecise for legal definition by the courts;
- (d) that the inclusion of the terms 'cultural' and 'religious' in the criminal law would lead to pressure for amendments to anti-discrimination legislation in the civil law, of a kind which the Government does not, however, wish to countenance.

All four of these possible objections are readily answerable. It is a matter of regret and disappointment that the Government appears hitherto to have avoided all debate of them. If it refuses to amend the Bill it will guarantee a complex, divisive and bitter legacy.

Robin Richardson is co-director with Angela Wood of the Insted Ltd educational consultancy. He was previously director of the Runnymede Trust, and was the drafting editor of the Trust's report *Islamophobia: a challenge for us all*. This article is based in part on Insted's submission to the Home Office in response to the consultation paper on racial violence. A copy of the full submission is available from Insted Ltd, The Old School, Kilburn High Road, London NW6 5XA, telephone 020 7372 0965.

¹ Speech at the House of Commons, 22 October 1997, at the launch of the Runnymede trust's report entitled *Islamophobia: a challenge for us all*

² Letter to consultees dated 16 December 1997

³ Clause 22 (2)

⁴ As long ago as 1950 Unesco issued its authoritative Statement on Race about consensus amongst scientists. Amongst other things the Statement explicitly recommended that the term 'racial group' should never be used.

⁵ The terms cultural and biological racism appear particularly in the work of Tariq Modood. There is an excellent introduction to Modood's ideas in a special issue of the journal *Patterns of Prejudice*, volume 30 number 1, January 1996.

⁶ This is typical racist discourse in the 1990s. It is quoted in the Runnymede Trust report (note 1).

⁷ It was reported on 18 March that the Government intends amending the Bill to include criminal damage such as desecration and the spraying of graffiti.

⁸ Clause 22 (1) would begin "an offence is aggravated by racism or by cultural or religious hatred for the purposes of sections 23 to 25 below if ..." Corresponding changes would then be needed in 22 (1) (a) and 22 (1) (b).