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Banning Broadcasting – A Transatlantic Perspective

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Introduction

Both Britain and the United States share a common legal heritage. Perhaps more important they share a common politico-legal allegiance to values supporting freedom of the press, freedom of speech, freedom of religion and the right to due process of the law. The predictable result is that many controversial legal issues, even if approached from very different starting points, are likely to yield up a somewhat similar range of solutions. It is the occasions when this does not happen which highlight the fundamental differences between the two systems and reveal something striking about their underlying values.[1] The Home Secretary's ban on broadcasting words spoken by a member of a restricted organisation in Northern Ireland appears to be just such a case.

One striking difference between the constitutional systems of the United Kingdom and the United States is that, since the landmark decision in *Marbury v Madison*,[2] the Supreme Court of the United States has established the right to review the constitutionality of legislative and executive action. In stark contrast it would be unthinkable for an English court to strike down an Act on the ground that Parliament had exceeded its authority. As Lord Reid stated in *Pickin v British Railways Board*:[3]

'For a century or more both Parliament and the courts have been careful not to cause conflict between them. Any such investigation as the respondent seeks [to review the validity of a private act of Parliament] could easily lead to such a conflict . . . [T]he whole trend of authority for over a century is clearly against permitting any such investigation.'

This difference in approach has long excited comment and debate. Critics of the decision in *Marbury* have asked whether in a representative democracy the judiciary, which is unelected and therefore less politically accountable than either the President or Congress in the United States, should invalidate legislative or excutive action. Some American commentators have even asked whether the experience of other countries demonstrates that judicial review, in the sense in which that term is used in the United States, is unnecessary.[4] This invites a consideration of how well does that British system function without judicial review by a Supreme Court? Is Britain more restrictive of civil liberties, particularly as they concern the media, than the United States? If so, is this because of the lack of judicial review? Are there other constitutional options which would have equivalent effect?

What gives an added interest to some of these considerations is the inevitable impact of Britain's membership of the European Community on its domestic law. The European Court of Justice's decision in *R v Secretary of State for Transport, ex p Factortame Ltd*[5] has for the first time presented the spectacle of an English Act of Parliament being held to be ineffective under Community Law, at least as against nationals of other member states. The European Convention on Human Rights, couched as it is in broad terms not unlike the American Bill of Rights, seems increasingly to be entering the British legal consciousness.[6] Is an era foreseeable when some form of European judicial review will not sound so far-fetched or remarkable?

This article seeks to raise some of these issues in the context of the British Government's decision to prohibit radio and television networks from airing interviews or statements by members of certain Northern Ireland organisations, or by allies and sympathisers of such organisations (the Broadcasting Ban or Ban). From an analysis of that Ban some conclusions are drawn about the nature of judicial review.

2. The Broadcasting Ban

A The Home Secretary's orders

The Broadcasting Ban was imposed on 19 October, 1988. It took the form of two virtually identical orders issued to Britain's two broadcasting networks, the British Broadcasting Corporation (BBC) and the Independent Broadcasting Association (IBA). The orders prohibit both organisations from airing any words spoken by a person who is a member of a restricted organisation.[7] The list of restricted organisations includes the Irish Republican Army (IRA), the Irish National Liberation Army (INLA), Cumann na m Bann (the women's movement), Fianna Eireann (the youth movement), Saor Eire (Free Ireland), Ulster Freedom Fighters (UFF), Red Hand Commando, Ulster Volunteer Force (UVF), Sinn Fein, Republican Sinn Fein, and the Ulster Defence Association (UDA).

The Government offered two justifications for the ban. First, it believed that members and supporters of restricted organisations were making offensive statements on the air. The then Home Secretary, Douglas Hurd, in explaining the Ban stated:

'When you had a bomb outrage, and there are pictures or bodies of distressed and weeping relatives,

and the next thing that happens on the screeen in people's living rooms, is somebody saying, "I support the armed struggle" or "They deserved it" – that I think is not only offensive, but it's wrong and it's perfectly reasonable to remove that."[8]

The Government felt that the public should be insulated from such statements. The other reason, which did not emerge until a few weeks later, was that the Government wanted to deprive the restricted speakers of 'stature'.[9] The Government believed that those who were allowed to speak on radio or on television gain an aura of authority by their appearance. In the debate on the ban the Home Secretary argued that: 'direct access gives those who use it an air and appearance of authority which spreads further outward the ripple of fear that terrorist acts create in the community'.[9]

The orders provided for certain exemptions. The ban did not apply to words spoken, 'by or in support of a candidate at a parliamentary, European Parliamentary or local election pending that election'. In addition, it did not apply to words spoken 'in the course of proceedings in Parliament'.[10] The terms of the Home Secretary's ban did not expressly refer to the European Parliament or foreign legislatures but the BBC Guidelines interpreted the ban as including these bodies. Similarly, the BBC Guidelines stated that statements made in judicial proceedings were caught by the Ban. In practice, this would not be likely to affect the reporting of proceedings in Britain since radio and television broadcasts of court proceedings are not currently permitted.[11] It might, however, affect the reporting of proceedings in the United States where broadcasting of proceedings is not uncommon.

B The Media's interpretations

After the ban took effect, the British media struggled to determine the meaning and the limits of its prohibition. This difficulty was compounded by the fact that the orders were broadly worded and many of the restricted organisations were legal, some members being elected officials. Could elected officials who belonged to restricted organisations be interviewed on matters within the scope of their elected duties? Could elected officials speak out on the issues generally? An interesting example is provided by a local elected official, who was a member of Sinn Fein, who wanted to comment on the Ban's impact. She wished to state that the Ban was preventing her from speaking out on important public issues such as the closure of a hospital. The IBA concluded that it should not air the statement.[12]

As a response to these difficulties of interpretations the Home Secretary issued a letter on 24 October, 1988 clarifying the Ban's meaning and scope. Although the letter was not made public and the Home Office refused to release a copy of the clarification, some insight into the letter's content can be gleaned from BBC and IBA statements issued after, and in the light of, the clarification. Both the BBC and IBA believed that the Home Office would allow broadcasters to show some statements made by elected officials, whether or not those officials were members or supporters of a restricted organisation, provided that the statements did not proclaim support for one of the restricted organisations.[13] Nevertheless, confusion remained over exactly what statements were exempt. The IBA believed that a statement by an elected offical who ran for office on the ticket of a restricted organisation would be precluded. It reasoned that one who was elected on a Sinn Fein ticket would be presumed to be speaking on behalf of the Sinn Fein when discussing public issues.[14] The BBC interpreted the ban more narrowly. Its position was that a councillor could express opinions on local matters so long as the councillor did not express support for a restricted organisation or its aims.[15] Both the IBA and BBC agreed that a Sinn Fein councillor who appeared on behalf of a council to explain the council's position would be allowed to speak.

The clarification letter also provided greater insight into the Home Office's objectives in implementing the Ban. It seems that it was principally concerned about giving members or supporters of restricted organisations direct access to television and radio. In other words, the government did not want such individuals actually being shown making statements on the media. Indirect access, however, was permissible. Broadcasters could quote verbatim from statements so long as they did not transmit the statements being made by the makers themselves. In addition, broadcasters could show a picture of a person and provide a summary of what was said.[14]

Whether the clarification letter of 24 October dealt with the question of who would be deemed a 'supporter' of a restricted organisation is unclear. Under a literal interpretation of the orders, broadcasters could not directly air any statement of support of any of the restricted organisations. The identity of the speaker would not appear to matter unless the statement fitted within one of the exceptions already enumerated. Accordingly, if President Bush chose to denounce the Ban as having an injurious impact on free speech, and as being repressive of the restricted organisation, it is arguable that the statement could not be directly aired. The same would be true if an academic issued a similar denunciation. The BBC and IBA, however, did not interpret the ban this literally or broadly and ultimately interpreted it as applying only to statements explicity supporting restricted organisations.[15]

Questions remain, however, about what would happen if a world leader went further and actually did express support for a restricted organisation's objectives. For example, suppose that a prominent United States senator, in the context of criticism of the Ban and its impact on free speech, proclaimed that Sinn Fein had a legitimate cause and objectives, and that it should be given direct access to radio and television to express those views. An IBA offical unhesitatingly stated that the senator's statements could be directly aired. A BBC official was not so sure.

Even after the clarification, the BBC and IBA

interpreted the Ban as extending to statements made in documentaries. This view is supported by the second clarification letter of 9 November 1988 which explicitly envisages that archive material may be caught by the restrictions. Accordingly, even a speaker who has been dead for some time may be covered by the Ban. The BBC was concerned that it might even be prevented from directly airing a programme showing a group singing Irish rebel songs. Their guidelines interpreted the ban to mean that 'genuine performances' were permissible but the same songs sung by demonstrators would not be.[16]

3. Legality of the Broadcasting Ban

A America

It is interesting to contemplate what would have happened if the President or Congress had imposed a similar ban in the United States. Almost certainly it would have been struck down as an impermissible restraint on freedom of speech and freedom of the press under the First Amendment to the Constitution. The Ban suffers from numerous constitutional defects. For example, it is arguably invalid as being overbroad in its application. Even if the Ban could be supported on the grounds that Northern Ireland is beset by terrorism the Ban goes too far because it is not limited to speech by terrorists. As has been seen, it extends even to statements by legal political parties and by elected officials whether or not they are speaking about terrorism or terrorist incidents. It also extends to statements made by world leaders, academics and others. A further basis for invalidity in the States would be that it is unconstitutionally vague. The interpretation of its broad terms has led to difficulty which has not been entirely dispelled by subsequent statements from the Home Office. As the Labour MP Michael Foot put it in the course of debate, '. . . there is already complete confusion in the BBC and IBA, as well as elsewhere, about what can and cannot be reported. If they ask how to resolve the confusion, the absurd answer is that they must apply to the government.'[17]

A further basis for declaring the Ban to be invalid is that the purpose to be achieved is not sufficiently compelling and the means used are not legitimate. Although even the First Amendment is qualified to some extent, as in the case of obscenity, there is no doubt that political speech is subject in the United States to the highest level of judicial scrutiny.[18] In these terms the justification given for the suppression are inadequate and thus the need for restriction is not sufficiently compelling.

The fact that the Ban would have been struck down in the United States does not, by itself, suggest much about the impact of judicial review generally. It is quite possible that, even if Britain had a system identical to that of the United States, including a written constitution and separation of powers, it might still uphold the Ban. A constitution, like any written document, is open to interpretation. It is precisely this point which is often stressed by those opposing Britain's adoption of some form of written Bill of Rights. The combination of Parliamentary supremacy with the existence of two large parties who doubtless see themselves as being the parties of government in the foreseeable future strengthens resolve in some quarters not to yield up ultimate political power to unelected officials with what may be a wide mandate to impinge on the political process.

It would be difficult to argue, however, that the existence of judicial review does not at least partially influence the American approach to something like the interview Ban. Although difficult to measure or test empirically it probably serves to help create a climate of opinion which pervades both the government and public reaction to legislative measures. There must be many public proposals, of which the Ban might be an example, which would be not so much rejected as not even seriously considered by politicians in the United States. It perhaps represents the difference between a society that sees certain freedoms as 'rights' rather than highly valued privileges.

In the United States judicial review has served as a check on the political process. That checking function, however, cannot be attributed entirely to the existence of judicial review. Judicial review is effective because a written constitution provides express protection for free speech and a free media and provides that the judiciary is not regarded as subordinate either to Congress or the President. Each branch of Government is regarded as separate and equal.[19] Congress does have primary law-making authority, and the courts are expected to respect that authority, but no branch of government is above the Constitution. If Congress passes a law which conflicts with the Constitution, the judiciary is expected to give effect to the constitution rather than the law.[20] Moreover, the judiciary has reserved to itself final authority to say what the constitution means, and to decide whether a law conflicts with it.[21]

The judiciary's independence is rooted in the constitution itself, which grants federal judges life tenure and guarantees against diminution in salary.[22] This contrasts with the less clear and formal constitutional arrangements for judicial tenure in the United Kingdom. The result is to encourage United States judges to take a more independent and detached view than either the Congress or the President. They are not enmeshed in the day-to-day problems of government. Their duty is to give effect to the Constitution's language and values and to decide whether the government's action unduly impinges upon those values. From this vantage point, the judiciary might disagree with the government's conclusion that some governmental action, like the imposition of an interview ban, was necessary and that it did not unduly impinge upon constitutionally guaranteed freedoms. In the United States the judiciary has disagreed with and overturned a politician's assessment of a situation on many occasions.[23]

Of course it would be unrealistic to claim that a system of judicial review, like that existing in the United States, will always succeed in limiting govern-

mental abuse. As Lord Scarman pointed out in the course of debate in the House of Lords: 'The first ten amendments to the American Constitution did not save the American Negro from slavery for eighty two years nor from discrimination for nearly another eighty two years'.[24] As a recent example, British academics have expressed concern over the decision in *Bowers v Hardwick*[25] which permits a prosecution for homosexual conduct between consenting adults in a private bedroom. Such a situation would seem *prima facie* to be protected under the right to privacy and would of course be impossible to prosecute in the United Kingdom by virtue of the Sexual Offences Act 1967. On the other hand American academics point to early freedom of speech decisions that were similarly restrictive, and have since been rejected, as evidence that the United States may eventually reform its position on homosexuality and privacy.

The reason for these perceived failures is obvious. A constitution, like any written document, can suffer from vagueness or ambiguity. This is particularly true of the Bill of Rights. Most of its provisions are framed in the most general of terms and so inevitably have to be interpreted. The First Amendment on free speech is an example of lack of precision. Although it is couched in absolute terms, 'Congress shall make no law, abridging the freedom of speech . . .' the Supreme Court has held that it is not absolute. Obscenity is a clear example. Thus even freedom of speech may be overcome by a sufficiently compelling Governmental interest and it is the delicate task of the Court to weigh that balance. Such issues must be resolved relying on general principles such as the purposes and policies underlying the First Amendment. Naturally there can be enormous scope for disagreement in such an area. The general nature of most constitutional provisions, and the need for interpretation, is amply revealed in the way students study courses in constitutional law and criminal procedure. Students do not spend long hours poring over the Constitution and contemplating the intricacies of its language and structure. Instead they purchase casebooks hundreds of pages long filled with judicial decisions interpreting the Constitution. In many instances students contemplate questions that have evolved so far away from the Constitution's terminology that its language seems almost superfluous. For example the 'right to privacy' is a right deduced from the Constitution by judicial decisions rather than one expressly enumerated in the instrument itself.[26]

A further area of difficulty, which flows directly from the fact that interpretations can legitimately differ, centres on the issue of nomination to the Supreme Court. Many correctly perceive that judicial results are heavily affected by who is doing the judging and who had done the appointing. The most controversial recent instance of this was the nomination of Judge Robert Bork in 1987. His public disagreement with the holding in *Roe v Wade*[27] led supporters of that decision to fear that he would help overturn it and so institute a less liberal abortion law. Almost certainly this was a factor in his failure to obtain the nomination. Another example is provided by President Nixon's appointments to the Supreme Court. During the 1950s and 1960s the Supreme Court took the lead in expanding civil rights and protecting the rights of defendants and suspects in the criminal justice process. President Nixon, concerned about the perceived 'liberal bent' of the Court, appointed justices whom he believed would be more conservative on so-called 'law and order' issues.[28] In subsequent years, the Supreme Court moved to restrict many of the earlier criminal decisions.

Such problems as the inherent ambiguity of constitutions and the selection of judges are undoubtedly real problems that can perhaps never be solved in an entirely satisfactory way. Nevertheless it would clearly be absurd to think that judicial review need only proceed along lines identical to that of the United States. Constitutional instruments can be drafted more precisely in the light of past experience. In the last resort, a constitution can even be changed or modified as the United States itself has done. Amendments to the Constitution have been passed since its original ratification, some of these amendments actually constituting what is often called the Bill of Rights. As regards the selection of judges, the spectacle of the proceedings accompanying the nomination of a Supreme Court justice might well strike a British observer as somewhat bizarre but even this procedure might well serve purposes that are not immediately apparent. The questioning which nominees experience from several democratically elected representatives perhaps does ensure that candidates, even if not elected, are subject to greater democratic scrutiny than is ever the case in the decisions of an English Lord Chancellor. Part of the effectiveness of any constitutional court may also be based on the fact that it is, rather than is not, at least politicised to some extent. Many constitutional questions, in the last resort, can in substance be political questions in a legal cloak. It may not therefore, quite contrary to the expectations of judicial appointment in the United Kingdom, be harmful that there is an overt political element in the appointment of Supreme Court judges. Clearly this is an argument which cannot be carried to extreme limits, but in the experience of the United States it certainly would be difficult to assert that the Constitution has ever been completely subverted, so far, by political manipulation. A further point might be made in the context of an article about judicial control of the media. A striking feature of the interviewing of nominees is that it received full live coverage on radio and television channels which reflects the high level of public interest. A candidate's performance is closely monitored by the public whose reaction must be thought to have at least some effect on the candidate's eventual selection or rejection. There is therefore a special way in which the media in the United States influences the making of the lawyers, and so the law, as well as being controlled by the law itself.

Despite its flaws and perceived failures, the system of judicial review in the United States has limited the power of government and has in many instances enhanced the protection given to individual rights.

In the field of broadcasting the scope for judicial intervention is more limited than in some European countries because of the different way in which the media is structured. In particular, the media in the United State has always been in the hands of private operators. Nevertheless, Federal Courts have reviewed decisions of the Federal Communications Commission and upheld such matters as the right to reply, the constitutionality of access to the media for election candidates and a probable First Amendment right of cable operators to oppose a monopoly on the grant of cable lines.[29] All this has been played against a backdrop of decisions in which the right to freedom of political speech, and the right of access to such information, has been regarded as being worthy of the utmost protection. It would on balance, be difficult to claim that it has restricted more than it has liberated.

B The United Kingdom

Under English law no direct challenge to the constitutionality of the Ban is possible. The only path which the judiciary could have taken to overturn the Ban is through the mechanism of administrative law, namely on the basis that the Home Secretary had acted outside the powers conferred on him by the Broadcasting Act 1981.

In *R v Secretary of State for the Home Department ex p Brind*[30] a group of journalists did indeed challenge the Ban on the grounds that the minister's action was *ultra vires* and contrary to the United Kingdom's treaty obligations under the European Convention on Human Rights. Both the Divisional Court, the Court of Appeal and the House of Lords unanimously rejected the application for judicial review of the Home Secretary's orders. This would appear, at first sight, to be an unpromising foundation for claiming that judicial review in the United Kingdom is about to enter a new phase of activism. To concentrate only on the ultimate disposal of the case may, however, be somewhat misleading.

Counsel for the Home Office in the case conceded that the power conferred by the Broadcasting Act 1981 was not limitless or completely unreviewable by the courts despite the broad terms in which the minister's powers are granted. That, in itself, is a significant concession. What is not so clear is the threshold at which judicial intervention would take place. Suppose the Home Secretary purported to issue a ban on all broadcasting of party conferences held by Britain's opposition parties. Or, to employ a marginally less extreme example, suppose he banned television broadcasts by the Labour Party unless its leaders made statements condemning organisations such as Sinn Fein. The latter example, though distinguishable, is perhaps not so far removed in principle from the present Ban. In both cases affected parties could surely test the legality of such orders by the *ultra vires* doctrine. Would it now be that far-fetched to suggest that they had some prospects of success?

One very striking feature of the case is the way in which the argument was presented by the applicants. The main thrust of their attack was that the Home Secretary had acted in Contravention of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees freedom of expression, with the result that the directives were outside his powers under section 29(3) of the Broadcasting Act and clause 13(4) of the BBC Licence and Agreement. They further claimed that the directives were disproportionate to the mischief at which they were aimed and were unreasonable so as to amount to an unlawful exercise of the Secretary of State's powers. Neither of these lines of argument is entirely novel, but the emphasis placed upon them does perhaps mark a significant step in a new direction. It seems probable that the litigation was conducted with a clear intention to prepare the ground for an application at a later stage to the European Commission or to the European Court of Human Rights.

The House of Lords rejected both these arguments deciding that the European Convention was not part of English domestic law and that although there was a presumption that Parliament had intended to legislate in conformity with such an international treaty to which the United Kingdom was a signatory, there was no such ambiguity or uncertainty in the wording of section 29(3) of the 1981 Act and there was no presumption that his discretion had to be exercised in accordance with the Convention. Further, that to apply the doctrine of 'proportionality' would involve the court in substituting its own judgment for that of the Secretary of State and it was impossible to say that the Minister's modest restrictions had exceeded the limits of his discretion or that he had acted unreasonably.

Much of the criticism applied by commentators to the Court of Appeal's decision in *Brind* is applicable to the decision of the House of Lords. Certainly section 29(3) is 'silent' on the matter of the European Convention, but why should this 'silence' be regarded as an unambiguous exclusion of the Convention? To adopt Professor Jowell's criticism of Gibson LJ's judgment in the Court of Appeal,

'This approach wholly reverses the settled presumption relating to the consistency of statutes with treaty obligations, and it is hard to comprehend why "silence," which, by definition, speaks not at all, should instruct this reversal. Indeed there is impressive authority to the contrary, establishing that, in the absence of clear words, powers that are *prima facie* unfettered and silent are subject to an implied limitation that they must be exercised consistently with treaty obligations.'[31]

This seems, with respect, a telling point that none of their Lordships address. As the influence of European institutions increases in the United Kingdom, will the English Courts' approach to this issue change also?

The rejection of the test of 'proportionality' may also be less decisive than it appears. Commentators have cogently argued that this principle, well known in European jurisprudence, is neither novel nor dangerous.[32] It is hard to see why proper application of

the principle would result in courts second guessing officials on the merits of policy. The essence is that of gross excess in an official's actions which is arguably a strand in the traditional *Wednesbury*[33] test of unreasonableness. Moreover there are hints even in the speeches of the House of Lords in *Brind* that further development of this doctrine has been interrupted rather than blocked completely. Lord Roskill, for example, after citing Lord Diplock's reference in *Council of Civil Service Unions v Minister for the Civil Service*[34] to the 'possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community,' rather guardedly asserts that the present case is not one in which that first step can be taken. Nevertheless he states that, 'so to hold in the present case is not to exclude the possible future development of the law in this respect.'[35] Lord Acker also, although firmly rejecting the rest of 'proportionality', 'unless and until Parliament incorporates the Convention into domestic law,' at least acknowledges that this is, 'a course which it is well known has a strong body of support.'[36] 'Proportionality' may therefore be wounded after *Brind* but can hardly be accounted dead.

C Europe

What would be the outcome of an application to the European Court under the European Convention of Human Rights is unclear. On balance, it seems unlikely that the Ban could be successfully challenged on this basis. By American standards, the Convention contains gaping exceptions that significantly restrict its effectiveness. The exercise of the freedoms guaranteed may be subject to such restrictions as are necessary, 'in the interests of national security, . . . public safety, for the prevention of disorder or crime, for the protection of health or morals . . .' Further, even if the European Court ruled adversely to the government the ruling would have no immediate effect on English domestic law. As Lord Denning put it in *R v Chief Immigration Officer, ex p Bibi*,[37] 'Treaties and declarations do not become part of our law until they are made law by Parliament.' If there was any doubt, the decision in *Brind* makes clear that the Convention is not part of English domestic law and is certainly not directly enforceable in a domestic court by an aggrieved party. The conventional view is that Parliament should implement any European court decision by passing relevent legislation. This may take some time to effect and in the context of Northern Ireland it is not unknown for the British government to derogate from its obligations under the treaty.

Nevertheless, the lack of formal machinery for enforcement may mask the real effect of the Convention. The European Court's decision in *Sunday Times v UK*[38] that an injunction granted by the House of Lords violated Article 10 of the Convention led to the enactment of the Contempt of Court Act 1981. Similarly, a finding that the then existing arrangement for telephone tapping breached Article 8 of the Convention led directly to the passing of the Interception of Communications Act 1985.[39] These reactions may be less swift and efficacious than judicial review in the United States but they are clearly very significant in shaping British Law.

Even if the Convention is not directly incorporated into English domestic law it may soon have what one might call a 'direct–indirect' effect. The European Court in Luxembourg, deciding matters of European Community Law, is likely increasingly to act with an awareness that the European Convention on Human Rights reflects norms and values current throughout the member communities. In so far as some of its decisions may directly affect domestic law in the United Kingdom a time is foreseeable when, even if in a somewhat diluted sense, the Convention may impinge directly upon domestic law.

The justification of the Ban

The concern over judicial review in the context of the Broadcasting Ban might be superfluous if, to put it at its lowest, there was not a *prima facie* basis for doubting its propriety or value in a country which claims to value freedom of speech.

A central argument of the government was that media interviews gave an appearance of authority to the speaker, and that members and supporters of restricted organisations have used this status to heighten the fear associated with terrorism.[40] This justification hardly sustains the Ban. Many of the restricted organisations are legal organisations, and some of their members are democratically elected officials. These officials might speak out on many issues that have nothing to do with terrorism, and with no intent to frighten the population. They may, for example, want to voice an opinion of some legal issue (such as whether a hospital ought to be closed), or on some political matter (such as the Northern Ireland problem generally) without encouraging or promoting terrorism. Moreover, why should these officials, or any speaker for that matter, not have the status of the media behind them when they speak out on an issue? Why should the media not be able to use direct statements as part of documentaries on the Northern Ireland problem?

A cynic might argue that the government was not as worried about frightening statements as it was about controlling public opinion on the Northern Ireland issue. Douglas Hurd perhaps implicity confirmed this statement when he noted, '[t]errorists themselves draw support and sustenance from having access to radio and television, and from addressing their views more directly to the population than is possible through the press.'[41] After the Ban, the government's view continued to receive full coverage by the media, but members or supporters or restricted groups will be covered in a more limited way. If the government is correct in concluding that those who have direct access are accorded more respect and authority, then the government has created for itself an advantage in its efforts to influence public opinion.[42]

A second justification offered by the government was that members of restricted groups sometimes made offensive statements. But are such statements, as that the victims 'had it coming' or that the cause of Sinn Fein is just, really in bad taste and offensive, or are they part of legitimate public debate, or are they both? Moreover, who should resolve this issue? If the statements had been truly offensive, the media could have declined to show them. Furthermore, the statements, if shown, would surely have an adverse effect on public opinion? On the other hand, if the public did not view statements as offensive, but rather as legitimate public debate, then what was the government trying to accomplish by banning them? Might it have been trying to manipulate public opinion by quashing dissent? The 'offense' justification would, in any event, fail to sustain such a far-reaching ban. The government could simply have prohibited the airing of 'offensive' statements and given some guidance as to what this meant, difficult and unattractive though this might have been.[43]

The government might argue that the Ban's impact is mitigated by the fact that individuals are given indirect access to television and radio. Exactly this point was made by the Home Secretary during the debate on the Ban in the House of Commons when he said:[44]

'Opposition Members continue to claim that this is a major incursion upon the right of freedom of expression. As I have made clear tonight, that cannot be so because broadcasters remain free to report the activities of those organisations and the actual words used by their representatives.'

But, if indirect access is equivalent to direct access, why was the Ban necessary? The government's own statements acknowledge that the right to direct access was important.

It was true that the Ban did not affect the print media. Television and radio, however, probably have a far greater impact on public opinion than the print media because more people watch television and listen to radio than read the newspaper. In addition, television and radio can have a far greater impact because they allow the viewer or listener actually to see or hear the speaker. Indeed, that was the Government's concern.

The future

It can hardly be denied that in Britain individual liberties, particularly the free expression of the media, are more tightly constrained than in the United States. It would be impossible to be sure whether the discrepancy between the level of rights provided in Britain and the United States is attributable to the absence of judicial review, at least as it is understood in the United States. What is clear, however, is that the British system gives politicians broad control over fundamental rights, including freedom of speech and of the press, subject only to political constraints. Faced with difficult problems politicians may see a solution, or at least the appearance of doing something, in the restriction of individual liberties. As Professor Barendt has put it:[45]

'. . . in an era where broadcasting is so influential in determining elections and shaping public opinion (or at least believed so to be), we would be right not to leave its arrangement entirely to politicians and their appointees. Judges may not have much experience in media policy, and they have their own prejudices as much as anyone. But unlike party politicians, they have no occasion to shape the basic rules of broadcasting law to suit their own needs.'

An independent judiciary, backed up by some form of judicial review, might be more protective of individual liberties. This appears to have been the experience in the United States. When there has been a failure to vindicate individual rights, the American citizen at least appears to be no worse off than a citizen under the British constitution.

All constitutions change and develop with time. Perhaps unwritten constitutions even have a greater capacity for absorption and change. In the past, and still today, nothing could be starker than the contrast between Parliamentary sovereignty in the United Kingdom and judicial review in the United States. How much longer will the sharpness of this distinction continue? Already in the field of European Community legislation national sovereignty is being eroded, indeed the sacrifice of sovereignty for economic and political stability within Europe is arguably one of the foundations of European integration. Lawyers in the United Kingdom are more than ever influenced by European modes of legal thought and by the European Convention on Human Rights in particular. The *Brind*[46] case is a symptom of that movement. It may not, so far, have proved a victory for those who seek something like a system of judicial review in Europe. On the other hand, the climate of judicial thought, the presentation of such a case, and the lack of finality in the disposition of the fundamental questions which the case raises may signal the beginning of the end of an era. The constitutional system of Britain and the United States may still be profoundly different, but judicial review may become an area where Britain and Europe may start to move in a new direction. The *Brind* case, concerning as it does the central right of freedom of speech and the media, may turn out to be an important catalyst in that process.

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NOTES

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1. For discussion of the differences between the British and American legal systems, see P Atiyah and R Summers, *Form And Substance in Anglo-American Law*, 1987.
2. 5 US (1 Crouch) 137 (1803).
3. [1974] AC 765 at 788.
4. See, Rotunda, Nowak and Young, *Treatise On Constitutional Law*, (1986) sections 1.2, 1.4; Tribe, *American Constitutional Law*, 2d ed 1988, section 3.2, at 25 n.10.
5. [1991] 3 All ER 769, CJEC; [1991] 1 All ER 70.
6. A point graphically made by the history of the litigation following the Home Secretary's restrictions on broadcasting in Northern Ireland.
7. The IBA order stated that:
   1. In pursuance of section 29(3) of the Broadcasting Act 1981, I hereby require the Independent Broadcasting Authority to refrain from broadcasting any matter which consists of or includes –
      any words spoken, whether in the course of an interview or discussion or otherwise, by a person who appears or is heard on the programme in which the matter is broadcast where –
      (a) the person speaking the words represents or purports to represent an organisation specified in paragraph 2 below, or
      (c) the words support or solicit or invite support for such an organisation other than any matter specified in paragraph 3 below.
   2. The organisations referred to in paragraph 1 above are –
      (a) any organisation which is for the time being a proscribed organisation for the purposes of the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978, and (b) Sinn Fein, Republican Sinn Fein and the Ulster Defense Association.
   3. The matter excluded from paragraph 1 above is any words spoken – (a) in the course of proceedings in Parliament, or, (b) by or in support of a candidate at a parliamentary, European Parliamentary or local election pending that election.
      IBA Order (19 October, 1988) [hereinafter IBA Order]. The BBC order was substantially identical except that it did not contain the exemption for 'proceedings in Parliament', BBC Order (19 October, 1988 [hereinafter BBC Order]. The BBC interpreted its order as including that exemption, BBC Guidelines, 2 (1988) (issued in light of a Home Office letter clarifying the original orders; available from BBC) (hereinafter BBC Guidelines).
8. *International Herald Tribune*, 20 October, 1988, at 2, col 3.
9. 139 Parl Deb HC (6th ser) 1082 (1988).
10. This exemption was expressly stated in the order issued to the IBA, but not in the order issued to the BBC. IBA Order, supra note 7, para 3. Nevertheless, BBC guidelines interpreted the order as including this exemption of the Westminster Parliament, BBC Guidelines, supra note 2 at 3. The Home Secretary similarly interpreted the order, House of Commons, 139 Parl Deb HC (6th ser) 1076 (1988).
11. Section 41 Criminal Justice Act 1925. The position in England is considered in 'Cameras at the door of the court,' *New Law Journal*, Vol 140, p 548 (1990).
12. Interview with David Glencross, IBA's Director of Television, (23 November, 1988) [hereinafter Glencross Interview]. See also 139 Parl Deb HC (6th ser) 1084 (1988).
13. Broadcasting and Terrorism: Home Secretary's Direction (25 October, 1988). IBA internal document, prepared by R Hargreaves, the IBA's Chief Assistant for Television. Telephone conversation with Anonymous BBC Official [hereinafter Anonymous Interview].
14. The BBC interpreted the order and clarification in the following way: [O]ne of the main changes in the guidance note is that reported speech in programmes is not now restricted. Programmes can quote Gerry Adams and people like him *whatever they say*. They can be quoted verbatim or in paraphrase regardless of whether their words support, invite support or urge support for an organisation affected by the order. This means that our newsreaders, presenters, correspondents, reporters and any other like editorial people in programmes can freely be allowed to quote and refer to what the restricted organisations and their people say (subject of course to normal legal restraints, like defamation). Comments of support for any of the organisations from any source can be quoted. This eased interpretation applies also to contributors such as political commentators from outside, MPs [Members of Parliament], academic experts, foreign figures and others. While none of these can be allowed to speak words of support of their own they can quote any of the organisations or any other source for purposes of explanation and argument. The central restriction applies in full force therefore only to the organisation and people who made the supportive comments in the first place. As before, pictures showing someone speaking but with the words given in voice-over are permitted. BBC Guidelines, at 2. The IBA agreed. IBA Revised Guideline at 1.
15. Anonymous Interview, supra note 13; Glencross Interview, supra note 12.
16. The BBC interpreted the order to mean that 'Irish rebel songs in genuine performances will be all right. In certain circumstances though they could be restricted, for instance, if sung by demonstrators,' BBC Guidelines, at 4.
17. 137 Parl Deb HC (6th ser) 1096 (1988).
18. See *First National Bank of Boston v Bellotti* 435 US 765 (1978).
19. See, *Tribe*, supra note 4, at 18–400.
20. *Marbury v Madison* 5 US (1 Cranch) 137, 176–177 (1803).
21. *Id at* 177.
22. US Constitution, Article III, 1.
23. See e.g. *Virginia State Bd of Pharmacy v Virginia Citizens Consumer Council, Inc*, 425 US 748 (1976); *New York Times Co v United States*, 403 US 713 (1971); *Brandenburg v Ohio*, 395 US 444 (1969) (per curiam).
24. HL Hansard 23 May, 1990, col 911.
25. 478 US 186 (1986).
26. *Griswold v Connecticut* 381 US 479 (1965).
27. 410 US 113 (1973).
28. See, Lamb, Judicial Restraint on the Supreme Court, in *Supreme Court Activism And Restraint*, S Halpern and C Lamb (eds) 1982.
29. *Red Lion Broadcasting Co v FCC* 395 US 367 (1969); *CBS v FCC* 453 US 367 (1981): *Preferred Communications v City of Los Angeles* 106 S Ct 2034 (1986). For a comparative approach, see, The Influence of the German and Italian Constitutional Courts On Their National Broadcasting Systems, [1991] PL 93.
30. [1991] 2 WLR 588.
31. [1989] PL 149 at 153.
32. *Id at* 155.
33. *Wednesbury Corporation v Ministry of Housing and Local Government* [1965] 1 WLR 261.
34. [1985] AC 374 at 410.
35. [1991] 2 WLR 588 at 594.
36. *Id at* 606.
37. [1976] 1 WLR 979 at 984.
38. (1979) 2 EHRR 245.
39. See *Malone v Metropolitan Police Commissioner* [1979] Ch 344.
40. 139 Parl Deb HC (6th ser) 1082 (1988). (Statement of the then Home Secretary, Douglas Hurd).
41. See Michael, Attacking the Easy Platform, 138 *New Law Journal* 786 (1988). Mr Hurd also declared that the Ban was designed to 'deny this easy platform to those who use it to propagate terrorism.' *Id.*
42. In addition to the Government's influence being greater because it has limited other sources of information, the voice of government, generally perceived as speaking for the populace, is a powerful means of shaping public opinion. Welch, The State as a Purveyor of Morality, 50 Geo. Wash. L. Rev. 540 (1988); M. Yudof, *When Government Speaks: Politics Law and Government Expression in America.* 193 (1983).
43. For example, the United States Government has the right to prohibit certain types of obscenity. On the other hand, pro-

viding guidance as to what constitutes obscenity can be difficult. See *Miller v California*, 413 US 15 (1973) (setting out Constitutional guidelines for obscenity statutes). On offensiveness, See *Brockett v Spokane Arcades, Inc*, 472 US 491 (1985) (offensiveness must be assessed under the standards of the community).

Certain bans on speech deemed offensive, however, have been struck down by the United States courts. See *American Booksellers Ass'n v Hudnut*, 771 F.2d 323 (7th Cir. 1985).

44. 139 Parl Deb HC (6th ser) 1079, col 1.
45. [1991] PL at p 115.
46. *Supra*, note 30.