

richard steyn

Editor-in-Chief of The Star, Richard Steyn argues for a sensible approach towards the thorny issue of free speech in the new South Africa

IN his recent book *Protecting Human Rights in a new South Africa*, Albie Sachs writes that the country's 'articulate, technically-experienced and battle-scarred media people' should lead the way in solving the dilemma of free speech in the new society.

If my battle- (emphasis on the battle-, not bottle-) scarred colleagues are leading the way on this important question, I must have missed it. So far the discussion over freedom of speech has been deafeningly muted. The occasional liberal to put his head above the parapet has trotted out the conventional belief that the defence of liberty is never more necessary than when unpopular or offensive opinions are under attack, and that to yield an inch will mean the end of free speech as we know it.

These views are grounded in John Stuart Mill's well-known argument that open discussion is essential to the discovery of truth. They find most famous expression in the American constitution, which holds that Congress shall make no law abridging freedom of speech or of the Press.

The ANC for its part, through spokesmen such as Sachs, goes half-way with Mill. It promises to protect both the right of free speech and the right of freedom of information in a new society.

But the pronouncements of ANC leaders are gain-said by their followers at the grassroots, who show little tolerance of dissenting views and threaten or beat up journalists who report unpalatable news.

Certain views will be outlawed

The ANC also qualifies the right to free speech in several respects. Depending upon whom one listens to, an ANC-led government will not allow the propagation of "racism", "fascism" or "ethnicity". It will be an offence to publish racially offensive views or to incite racial, ethnic, gender or linguistic hostility.

What this means is anybody's guess. It could mean, I suppose, that political parties such as the CP will be circumscribed, that official witch-hunts could be conducted against those who argue, for instance, that tribalism is a significant political factor or that integration leads to social distress. It could affect serious academic research into ethnic or racial differences – a prospect to dismay anyone who believes that the path to truth lies in the honest expression of conflicting views.

The PAC and Azapo's views are similar to the ANC's, except that they would go further and outlaw such transgressions as "regionalism", "sexism" or "tribalism" as well. As one speaker at a recent conference on the freedom of the Press put it, "we don't want to restrict freedom, but we don't want to allow dangerous freedom", an attitude that would warm the hearts of the PW Botha school of free speakers.

As the 'Groot Krokodil' once declared, "We are

only interested that the news media should not write or talk in such a way as to encourage people to irresponsible deeds or which creates the impression that the State is weak or cannot maintain order".

What PW Botha and his soulmates across the political divide actually believe in, of course, is not freedom with responsibility, but responsibility without much freedom.

Sachs's own views on freedom of speech are worthy of note. In an interview with *Index on Censorship*, he argues that the starting point is freedom and any limitations on free speech will have to be justified.

"The assumption is that we are going to allow everybody to talk. It is better that it all come out", he says.

Nonetheless, he adds, "We will study very carefully what other democratic countries have done when it comes to racial defamation and incitement to racial hostility, and try to distil from that some form of common minimum factor whereby the limits are set. There is very strong feeling among members of the ANC on this question".

A further pointer to the ANC's views may be found in its recently-published draft Bill of Rights, which protects free speech and recognises Press freedom, subject to the right of reply (a thorny issue, which requires separate discussion elsewhere). But the draft bill qualifies these rights by saying that the State may legislate to prohibit the circulation or possession of material which incites racial, religious, gender or linguistic hatred, or which insults anybody on those grounds.

Now this could mean banning the AWB swastika, closing down *Die Patriot* or prohibiting the display of Inkatha posters – who knows? The wording is disturbingly vague and open to various interpretations.

Yet the liberal approach to free speech is not beyond criticism either. As a valuable new study by the British writer Simon Lee (see footnote) points out, free speech can be extremely costly, and our ideas about it are some two hundred years out of date.

Freedom of speech is under threat

Freedom of speech, he says, is under threat not only from a variety of extraneous sources – governments, politicians, newspaper managements, advertisers and even journalists – but also from the woolly-headedness of those who profess to believe in it.

The Voltairean approach – I disapprove of what you say, but I will defend to the death your right to say it – is ritually intoned by people who have no intention of defending, to the death, the right of Eugene Terreblanche to deliver racial insults, of Salman Rushdie to satirise the God of Islam, or of anti-Semites to denigrate Jews. And, why should they?

Many people have died recently in exercising or defending their right to free expression. A Muslim

Imam and his aide were killed in Belgium for speaking out against the death threat to Salman Rushdie. In Northern Ireland, people have died for expressing Loyalist or IRA views.

In this country, youths have died for merely wearing T-shirts bearing an unpopular political slogan. Hundreds of black people have died for having the wrong political views.

There are times, of course, when free speech is worth defending at almost any price; but there are other times when it is more prudent to keep silent, as Salman Rushdie and others have found to their cost. In deciding these questions, the Voltairean view is not much help as it leads to impractical absolutist defences of free speech that people don't really mean and that allow them to dodge the really difficult questions.

In reality, the right to free speech is never absolute. As Lee observes, no one stands at the top of a hill where there is absolute freedom of speech. Nor do we begin a slide down the slope as soon as we impose limitations upon free speech. There are, even in the freest countries, all kinds of limits upon speech, such as the laws of defamation, obscenity, contempt of court, national security, invasion of privacy etc, all of which restrict the right of free expression.

What is more, most modern conventions on human rights recognise that the general right to speak freely is subject to limitations designed to secure due recognition and respect for the rights and freedoms of others. People should not feel free to make racially demeaning remarks about others. Their right to free speech has to be balanced against the right of others not to suffer insults.

Other models qualify freedom

When considering the ANC's argument for outlawing racism and fascism in the new South Africa, several important documents need to be borne in mind, among them the Universal Declaration of Human Rights, the European Convention of Human Rights and the Basic Law of Federal Germany. All of these endorse the right to freedom of expression, but qualify that freedom by recognising that people have a right to respect, and to be protected against, the advocacy of racial and religious hatred. In arguing, therefore, that it is entitled to insist on certain limitations on free speech in any new constitution, the ANC has the weight of modern international law on its side.

Yet the ANC's approach need not be inimical to liberals. There is a middle course between the two attitudes that is quite capable of being defined and protected by law. There is a case to be made for outlawing racial incitement or the fostering of racial hatred (we have such a law at present, even if it is seldom invoked).

Racial incitement, as Lee observes, has no redeeming social features. Unlike pornography, which is motivated largely by money, racism is the product of

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hate. Liberals need not mourn its demise.

I would hope, however, that the definition of racism in a new constitution is narrowly drawn, and confined to calculated expressions of contempt, insult or incitement. Sachs speaks of a minimum limit and I would support that. We should outlaw only that which is genuinely inflammatory or intended to be demeaning and insulting, not that which is merely unpalatable or offensive to some ears. Given our history, to prosecute every racial insult or racist political remark will probably heighten ill-feeling rather than reduce it.

A useful precedent for South Africa may be found in recent legislation in New South Wales, Australia, where the Anti Discrimination (Racial Vilification) Amendment Act 1989 makes it unlawful for a person by public act to indicate hatred towards, contempt for, or severe ridicule of, a person or group of persons on grounds of race.

There are no hard-and-fast rules

There is, however, a public interest defence in New South Wales for an act, done reasonably and in good faith, for academic, artistic, scientific and research purposes or for other purposes in the public interest. Prosecutions under the Act can only be brought by the attorney-general and the court can order an apology to be tendered where necessary.

This may be a more sensible approach. The fact is there are no hard-and-fast rules when it comes to freedom of speech. The debate is not an all-or-nothing one. Lines have to be drawn, but they do not have to be engraved in concrete. It all depends on time and circumstance, and the choice is not always easy.

Freedom of speech will always clash with other values and how that clash is resolved will differ from society to society. We should also remind ourselves of the truth of the remark that the price of freedom of religion, or of speech or of the Press, is that we have to put up with, and even pay for, a good deal of rubbish.

Let us not waste energy, therefore, on theoretical arguments that bear little relevance to South Africa in the 1990s – a country whose racial sores have been festering for decades and whose cure will require special and sympathetic treatment.

We should draw on experience elsewhere and settle on a system that ensures the maximum circulation of ideas and information, tolerates dissenting and even offensive opinion, and drives out only those views which are regarded by reasonable men and women as having no redeeming social or other value whatsoever. ●

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