

Politics from the pulpit

RELIGIOUS LEADERS, ELECTIONEERING & THE LAW

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Limmud 2016

Since Victorian times, British election law has made it illegal for candidates to threaten voters with 'spiritual injury' – "vote for me or go to Hell". Catholic and Muslim clerics have fallen foul of it. But what is the place of religious leaders in electoral debate, does politics belong in the pulpit, and should the law be changed?

INFLUENCE: THE LEGAL FRAMEWORK

The key electoral offences

The Representation of the People Act 1983 lists a number of criminal offences ('corrupt and illegal practices') relating to election campaigning. Most of them have been re-enacted, word-for-word, on a regular basis since the 19th century. Among the most significant are:

- Financial malpractice
- False statements of fact
- Corrupt withdrawal from candidature
- Ballot box offences
- Bribery
- Treating (bribery but with pies and things)
- Undue influence

Undue influence

A person shall be guilty of undue influence if he, directly or indirectly, by himself or by any other person on his behalf, makes use of or threatens to make use of any force, violence or restraint, or inflicts or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting; or if, by abduction, duress or any fraudulent device or contrivance, he impedes or prevents, or intends to impede or prevent, the free exercise of the franchise of an elector.

Representation of the People Act 1998, s 115

The European Convention on Human Rights

ARTICLE 9: Everyone has the right to freedom of thought, conscience and religion; this right includes [...] freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10: Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority [...] The exercise of these freedoms, since it carries with it duties and responsibilities, 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 [...] the prevention of disorder or crime [or...] for the protection of the reputation or rights of others.

PROTOCOL 1, ARTICLE 3: The [state] undertake[s] to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Interference with human rights

The state may only interfere with the exercise of human rights if the interference has a proper purpose and is proportionate. The test of proportionality has four components: (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (2) whether the measure is rationally connected to the objective; (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (4) whether the impact of the right's infringement is disproportionate to the likely benefit of the impugned measure.

Per Lord Reed in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, [2014] 1 AC 700 at [74]; and Aharon Barak (2012), *Proportionality: Constitutional Rights and Their Limitations* (Doron Kalir, trans), Cambridge University Press

INFLUENCE: THE PAST

The priest's role

In considering what I call here undue clerical influence, it is not my intention in any way to detract from the proper influence which a clergyman has, or by a single word to lessen its legitimate exercise. We cannot forget its wholesome operation [...] The Catholic priest has, and he ought to have, great influence. His position, his sacred character, his superior education, and the identity of his interests with his flock ensure it to him; and that influence receives tenfold force from the conviction of his people that it is generally exercised for their benefit.

In the proper exercise of that influence on electors, the priest may counsel, advise, recommend, entreat, and point out the true line of moral duty and explain why one candidate should be preferred to another, and may, if he think fit, throw the whole weight of his character into the scale; but he may not appeal to the fears, or terrors, or superstition of those he addresses. He must not hold hopes of reward here or hereafter, and he must not use threats of temporal injury, or of disadvantage, or of punishment hereafter. He must not, for instance, threaten to excommunicate, or to withhold the sacraments, or to expose the party to any other religious disability, or denounce the voting for any particular candidate as a sin, or as an offence involving punishment here or hereafter. If he does so with a view to influence a voter, or to affect an election, the law considers him guilty of undue influence. As priestly influence is so great, we must regard its exercise with extreme jealousy, and seek by the utmost vigilance to keep it within due and proper bounds.

Fitzgerald J in *Longford* (1870) 2 O'M & H 7

Meanwhile in County Meath...

It is contended that the right of the clergy-of the bishops and clergy in a Catholic community to direct their flocks in questions of faith and morals embraces also the power to determine what is the province of faith and morals.

[...] I cannot understand how in any case the election of a member of Parliament could be held to be a question of moral obligation, or that the conduct of a voter in respect of it could be a sin. For it does not necessarily follow that the candidate will vote for measures affecting moral and religious questions [...] The moral responsibility may attach to a member of Parliament himself, but we have no evidence of theological opinion that the person who committed authority to him by his vote would be guilty of a sin.

[...In this case] it is certain that the [statements] made [by the Bishop] with such authority and energy must have produced a most powerful impression on the minds of a Catholic community.

[...] Having spent my life in Ireland, I well know the weight which a since member of the Roman Catholic Church attaches to what emanates from his clergy – the credence he desires to give to their teaching, the trust he reposes in their guidance, and the sanctity with which he regards their sacred office – and I cannot entertain a shadow of doubt that the powerfully-written pastoral [letter from] the Bishop of Meath was calculated, in this Roman Catholic constituency, to seriously interfere with the free will of the electors in the exercise of their franchise at the late election.

O'Brien and Andrews JJ in *Meath South* (1892) 4 O'M & H 130

What is prohibited?

[T]he classic example of spiritual injury [is] a threat that, if something happens, the maker of the statement or a parish priest would ensure that so-and-so never received communion, was unable to receive the Eucharist or became excommunicated from the church.

Commissioner Straker QC in *Rehman v Khan* [2015] EWHC 4168 (Admin) at [44]
(*But is that really the classic/ main example? –GW*)

From 19th century Catholics to 21st century Muslims

[E]lection cases involving allegations of spiritual influence have been very rare since 1900. Even before that time, cases of spiritual influence in mainland Britain were few and far between.

[...Some principles emerge from the Irish cases.] The first is that, while clergy of all religions are fully entitled, as are all citizens, to hold and to express political views and to argue for or against candidates at elections, there is a line which should not be crossed between the free expression of political views and the use of the power and influence of religious office to convince the faithful that it is their religious duty to vote for or against a particular candidate.

It does not matter whether the religious duty is expressed as a positive duty – ‘your allegiance to the faith demands that you vote for X’ – or a negative duty – ‘if you vote for Y you will be damned in this world and the next’. The mischief at which [the law] is directed is the misuse of religion for political purposes.

[...] The second thing we get from the Irish cases is that the question of spiritual influence cannot be divorced from a consideration of the target audience. Time and again in the Irish cases it was stressed that the Catholic voters were men of simple faith, usually much less well educated than the

clergy who were influencing them, and men whose natural instinct would be to obey the orders of their priests (even more their bishops).

This principle still holds good. In carrying out the assessment a distinction must be made between a sophisticated, highly educated and politically literate community and a community which is traditional, respectful of authority and, possibly, not fully integrated with the other communities living in the same area.

[...] If the principles [...] are applied, it is quite open to a court to find that there has been undue spiritual influence even in the Britain of May 2014. Equally, in applying those principles, it is irrelevant which religion is engaged, provided that the tests are met.

[...] On 16 May 2014 (6 days before the election) the *Weekly Desh*, a [local] newspaper published in Bengali and in English [...] carried a letter. The letter was solely in Bengali and no English version appeared in the paper.

The letter was signed by 101 imams and other religious leaders and scholars [...F]or 101 prominent clerics and scholars to sign a letter in a single London borough [...] is a serious matter and the letter was intended to be taken seriously.

[The salient parts of the letter read: "Be united against injustice: make Lutfur Rahman victorious [...] It is essential that someone is elected as Mayor of the Tower Hamlets Borough [...] who [...] will not discriminate on the basis of language, colour and religious identities. We observe that some people are targeting the languages, colours and religions and attempting to divide the community by ignoring the cohesion and harmony of the citizens [...] We consider these acts as abominable and [...] condemnable. As a cognisant group of the community and responsible voters and for the sake of truth, justice, dignity and development we express our unlimited support for Mayor Lutfur Rahman and strongly call upon you, the residents of Tower Hamlets, to shun all the propagandas and slanders and unite against the falsehood and injustice."]

[This document] is a pastoral letter, remarkably similar [to that distributed in *Meath South* in 1892]. In other words it is a letter from an influential cleric – in this case 101 influential clerics – informing the faithful as to their religious duty. As with the Bishop, the imams' message is clear; our religion is under attack, our enemies despise us and wish to humiliate us; it is your duty as faithful sons and daughters of the [Church][Mosque] to vote for candidate X: only he will defend our religion and our community.

[...] This brings one back to the target audience [...A] high proportion of the Bangladeshi population of Tower Hamlets were traditionalist, conservative and strongly religious. The letter was deliberately pitched at Bengali speakers (to the exclusion of English speaking Bangladeshis) and lined up a very large number of very senior clerics to sign it. There can be no doubt

that the target audience would take advice about their religious duties from so many senior clerics and scholars very seriously indeed. A sophisticated metropolitan readership might smile patronisingly on the earnest strictures of the Bishops of the Church of England but many traditionalist and pious Muslim voters of Tower Hamlets are going to accept the word of their religious leaders as authoritative.

Though it is true to say that the world has moved on considerably since 1892, there is little real difference between the attitudes of the faithful Roman Catholics of County Meath at that time and the attitudes of the faithful Muslims of Tower Hamlets. To some extent the proof of the pudding is in the eating [...] If those responsible for the imams' letter had not thought that it would have a significant influence on the votes of the Bengali-speaking devout Muslim voters of Tower Hamlets, they would not have gone to the considerable trouble of organising the letter and obtaining 101 signatures to it. One cannot put a document of that kind into the public domain and then say 'I didn't think it would have any effect.' If that were the case, why do it?

Commissioner Mawrey QC in *Erlam and another v Rahman* [2015] EWHC 1215 (QB) (Tower Hamlets) at [148]-[162], [546]-[565]

INFLUENCE: ABROAD

Israel: celebrity endorsement

Freedom of choice election means not merely the physical freedom to cast a ballot in the booth, but also, and principally, the complete freedom to go through the voting process as a free person, both psychologically and intellectually. Therefore, any act that may reduce or eliminate, either directly or indirectly, the voter's freedom of thought and his ability to give genuine expression to his preferred plan of action and his philosophy in accordance with his independent judgment – because of a favour that inhibits his freedom or because the opinions of others have been imposed on him – violates the basic principle of freedom and independence of choice. Hence, acts such as these are fundamentally improper.

[...] Bribery is viewed extremely negatively, in Jewish law and tradition. We already find in the Scriptures how negatively our ancestors viewed the act of bribery, which they condemned in absolute terms as follows [in Deuteronomy 16:19]: "Thou shalt not wrest judgment; thou shalt not respect persons; neither shalt thou take a gift; for a gift doth blind the eyes of the wise, and pervert the words of the righteous."

[...] In a society, there are individuals [...] well-accepted and admired by the public, who exert vast influence over their followers and admirers [...] They call out to their followers to motivate their admirers to heed their cry and act accordingly. Public figures such as these are sought after and coveted by

candidates. Candidates seek to gain their support so that they will influence their followers to vote for them.

There is nothing improper in community or public leaders identifying themselves with a certain candidate and seeking to advance his interests, [even] if for this purpose they appeal to their followers in order to influence them to vote on behalf of such a candidate.

However, allying oneself with such public figures, which is proper so long as it occurs against an ideological background and on the basis of a belief that it is for the best interest of the public at large, either because of the candidate's talents or because of the substance and practical content of the message that the candidate carries with him, becomes improper if it rests on favours given directly to the public figure for his own behalf or for that of his group.

The rabbi of a Hassidic sect may address his flock with the command that they vote for a certain candidate. Such an appeal may well be influenced by the fact that the rabbi is himself convinced either rightly or due to mistake or illusion that the candidate is a God-fearing person, and that his platform promises that he will act for the advancement of religious [...] institutions. A candidate who turns to such a rabbi and convinces him, either by virtue of promises to make good on his intentions in the future, or that he will demonstrate his generosity and righteous behaviour in the past, has not thereby acted improperly. On the other hand, if the rabbi's support is obtained in exchange for the promise of a substantial benefit for the rabbi or his followers, such as support for their institutions and the like, then the alliance is tainted by corruption.

Similarly, there is nothing improper with a widely-admired artist or athlete urging his supporters to support a certain candidate because of his support for cultural or athletic institutions, or because the candidate's ideological platform contains a promise to assist such institutions. However, if the call to the admirers is influenced by the promise of a substantial benefit to that person or his followers in return for their vote, then the alliance is improper, and the influence exercised over the voters is the product of election bribery.

The Israeli Supreme Court's Levin J in *Flatto-Sharon v State of Israel* CrimA 71/83 (1984) at [16], [19] and [33]

Canada: restriction of opinion polling

[V]oters have the right to choose the information that they want to rely on in deciding how to vote. If a voter wants to vote strategically, he may rely on poll results to make his decision.

[...The government's argument for restricting the publication of opinion polls] suggests that Canadians will become so mesmerised by the flurry of

polls appearing in the media that they will forget the issues upon which they should actually be concentrating. This reasoning cannot be countenanced. Canadian voters must be presumed to have a certain degree of maturity and intelligence. They have the right to consider the results of polls as part of a strategic exercise of their vote. It cannot be assumed that in so doing they will be so naïve as to forget the issues and interests which motivate them to vote for a particular candidate.

[...] Many polls are released in the course of an election campaign, which belies the suggestion that any one poll could be perceived as authoritative. These opinion polls yield differing results even when conducted contemporaneously [...] I cannot accept, without gravely insulting the Canadian voter, that there is any likelihood that an individual would be so enthralled by a particular poll result as to allow his or her electoral judgment to be ruled by it.

[I cannot accept that] a measure which decides that information which is desired and can be rationally and properly assessed by the vast majority of the voting electorate should be withheld because of a concern that a very few voters might be so confounded that they would cast their vote for a candidate whom they would not have otherwise preferred. That is to reduce the entire Canadian public to the level of the most unobservant and naïve among us.

The Canadian Supreme Court's Gonthier and Bastarache JJ in *Thompson Newspapers v Attorney-General of Canada* [1998] 1 SCR 877, [1998] 4 LRC 288 at [2], [101] and [128]

INFLUENCE: THE FUTURE

Factors to consider

- Is the threat contingent on the result of the election (eg. a leader unfriendly to the religious group in question), or on the individual's vote (eg. if every vote for an undesirable candidate is said to be sinful)?
- Is the threatened outcome purely spiritual (eg. eternal damnation) or within the speaker's control (eg. excommunication)?
- Is the speaker threatening spiritual *injury* or simply outlining their religion's doctrine?
- Is speaker motivated by the characteristics of the candidate (eg. an urge to vote for a fellow Muslim) or by their policies (eg. an urge to vote for whoever would re-criminalise abortion)?
- Is the speaker naming candidates or are they only identifying issues and leaving their congregants to join up the dots?
- What if the speaker urges their congregants not to vote at all? At this election? At all elections?
- Do any of these factors make any difference?

Discrimination against the religious?

The fact that attempts to persuade which would be unchallengeable if voiced by a layperson, or by a religious leader in clearly secular terms, are capable of [breaking the law] if voiced in religious terms (in particular by reference to religious obligation) is clearly capable of amounting to an interference with [the right to freedom of religion]. The articulation of such views will, by definition, involve the manifestation of a religious belief and so any interference requires justification (and, in light of the fact that criminal offences are at issue), strong justification.

Lutfur Rahman's appeal (by way of judicial review) from *Erlam*

On authority and susceptibility

The letter [from the imams of Tower Hamlets] did not [...] threaten any punishment (whether here or hereafter) for Muslim voters who failed to support Mr Rahman's candidacy, nor did it threaten exclusion from the religious community. At most, it sought to persuade Muslim voters [...] that good Muslims should vote for Mr Rahman. In this respect, it is difficult to see why it should be regarded any differently from a letter from a group of doctors urging voters to vote for or against a particular candidate or party so as to protect the NHS.

[...] It is an accepted part of the electoral process that candidates will seek endorsements from people (including actors, comedians or sports stars) who they perceive to be authoritative in the eyes of some section or other of the voting community. For example, Russell Brand is no doubt regarded as "authoritative" by some sections of the voting public. But, even if it could be shown that some people were likely to find him very persuasive, it would be odd to suggest that his endorsement of the Labour Party was improper or corrupt.

[...T]he susceptibility of those upon whom influence is brought to bear is [not] relevant to the question of whether the offence has been committed. If a threat of (say) ex-communication were made with the relevant intention, the offence would have been committed; and it would be no answer that the threat was unlikely to achieve its intended effect. By the same token, there is nothing to indicate that an offence is more likely to be committed simply because those listening are susceptible to clerical influence.

Opinion on the law of 'undue spiritual influence' dated 8 May 2015: Martin Chamberlain QC, instructed by Reverend Dr Giles Fraser

Not just Muslims and not just religion

Trupti Patel, president of the Hindu Forum of Britain, hasn't been shy to rally her people to vote for one particular party. In an open letter on the forum's website, Patel attacks Labour and the Lib Dems for insulting Hinduism by supporting legislation to outlaw caste discrimination. "Only the Conservative party has stated that if they are in a majority government, then this piece of unwanted legislation will be repealed," she says, adding: "In these elections, the very honour of your faith is in danger of being undermined." In short, vote Tory.

[...] Should religious leaders have the same freedom of political expression as non-religious leaders? [...] Or are we religious types so uniquely gullible and easily led – and our leaders so manipulative – that a law is necessary to silence us from expressing political opinions?

[Commissioner] Mawrey QC [in *Erlam*] uses [a] trope of the 'thick Irish' and applies it directly to Muslims. How is this not an echo of the racist assumptions of the 19th century? And here we reach the nub of it: this is a judgment steeped in the history and prejudices of English cultural superiority. [The law against spiritual influence] was created to deal with the fear that unruly Irish Catholics [...] being uneducated and superstitious [...] would listen [...] to their clergy.

Those who have defended this law have done so because they believe it is a way of keeping politics and religion apart. The standard line has been that it is OK for a priest to express his voting intentions, but not to sermonise his or her congregation to do the same. It has been assumed that what is prohibited is the use of hellfire and damnation to bully the idiot faithful.

[...] Now I think there is a big question about why such things should be illegal. I mean, if I think voting for an out-and-out racist party would be a sin (and I do), and that sins have eternal consequences (and I do), then I don't see why I shouldn't be able to say such a thing in a free society. And from the pulpit too. There will be plenty of people out there who will tell me I am talking nonsense. And that's fine – this is the sort of debate that makes a free society free.

[...] Furthermore, if the Tory party can arrange for 5,000 small business leaders to say 'vote Tory', why can't the imams organise a letter to say 'vote Rahman'? [...] Indeed [...] the business leaders [...] were threatening 'consequences' – telling us the economy will go to hell in a handbasket if we don't vote the right way. Why is this not undue influence?

Reverend Dr Giles Fraser: 'The Lutfur Rahman verdict and the spectre of "undue spiritual influence"', *The Guardian*, 29 April 2015; and 'Is it one rule for the Hindus and another one for the Muslims?', *The Guardian*, 15 May 2015

No change

The potential for spiritual leaders, through their pronouncements, to abuse the convictions of religious voters is unique and does not exist in relation to statements by other authorities such as the media, business or other special interest groups whose statements seek to persuade people to vote for a particular candidate. The latter's statements can be readily dismissed by any voter as opinion, whereas those of spiritual leaders may cause religious voters to believe they have no real choice in how they should vote.

In the Tower Hamlets case, the Election Court heard how a voter was seen crying outside a polling station after allegedly being told by a supporter of Lutfur Rahman that it was "un-Islamic" not to vote for Rahman [...] The potential for spiritual influence to be exercised in society may be increasing, and it is important that the legislation unambiguously protects voters of any faith from having their religious beliefs manipulated in order to prevent them freely exercising their vote.

Bullying a voter by asserting that they will 'burn in hell' for not supporting a candidate is ultimately no different from threatening physical violence or from an employer threatening to sack a worker. Freedom of worship and the right to vote are important and hard-fought British liberties. Britons should be able to exercise both those liberties without injury or intimidation.

Eric Pickles MP: *Securing the ballot: report of Sir Eric Pickles' review into electoral fraud* (2016)

A proposed solution

Does threatening harm in the afterlife have a place in the modern law? While Commissioner Mawrey [QC in *Erlam*] was keen to stress that actionable undue influence by statements from religious figures involves crossing a line, it is not at all clear where [the current law on spiritual influence] draws that line. Modern day electorates are subjected to a range of opinions, pronouncements, admonishments, and warnings from various sections of the community. Plainly the political opinion of community or business leaders is not and should not be prohibited from being expressed. Similarly a member of the clergy may express political as well as religious views, and is protected in doing so by articles 9 and 10 of the European Convention on Human Rights.

Undue influence in our view seeks generally to proscribe 'improper' pressure (of a form short of that which is itself illegal pressure [such as blackmail]) with a view to preventing the improper use of religious or other influence or authority so as to manipulate voting. We have concluded that the offence of undue influence should be redrafted to cover intimidation, deception and other *improper* pressure.

We do not consider it practicable to create a catalogue of relationships capable of giving rise to undue influence, nor a catalogue of improper forms of pressure. We propose instead to proscribe intentionally seeking to cause a voter to vote in a particular way or not at all by applying (1) pressure involving the commission or threat of committing an illegal act; or (2) pressure which a reasonable person would regard as improperly impeding the free exercise of the franchise.

We think that the introduction of a “reasonable person” test above will enable campaigners, the police, prosecutors and courts to distinguish proper campaigning (which includes persuading, warning, arguing, all of which involve pressure, which the voter must decide on) from improper infringements on the exercise of the franchise (which eliminate or restrict the choice of the voter).

The Law Commission: *Electoral Law: an interim report*, 4 February 2016, paras 11.36-11.50

GW 25.12.16