

**Policy Department C
Citizens' Rights and Constitutional Affairs**



**HUMAN RIGHTS CONCERNS RELEVANT TO
LEGISLATING ON PROVOCATION OR INCITEMENT TO
TERRORISM AND RELATED OFFENCES**

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**Directorate-General Internal Policies
Policy Department C
Citizens Rights and Constitutional Affairs**

HUMAN RIGHTS CONCERNS RELEVANT TO LEGISLATING ON PROVOCATION OR INCITEMENT TO TERRORISM AND RELATED OFFENCES

BRIEFING PAPER

Résumé:

This briefing note will first explain the international human rights law framework relevant to provocation to terrorism and related offences, particularly public provocation, with a focus on freedom of expression. It will make reference to relevant international case law and policy and highlight legislation and cases in selected EU Member States. It will then give a brief analysis of the human rights implications of the Commission proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism.

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HUMAN RIGHTS CONCERNS RELEVANT TO LEGISLATING ON PROVOCATION OR INCITEMENT TO TERRORISM AND RELATED OFFENCES

This briefing note will first explain the international human rights law framework relevant to provocation to terrorism and related offences, particularly public provocation, with a focus on freedom of expression. It will make reference to relevant international case law and policy and highlight legislation and cases in selected EU Member States. It will then give a brief analysis of the human rights implications of the Commission proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism.

1. INTERNATIONAL HUMAN RIGHTS LAW FRAMEWORK

“The right to freedom of expression is universally recognised as a cherished human right and to respond to terrorism by restricting this right could facilitate certain terrorist objectives, in particular the dismantling of human rights.”¹

Legislation which criminalises incitement to, glorification of or *apologie* for terrorism will interfere with the right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights². The right to freedom of expression is fundamental to the functioning of democratic society:

“...it is vital – however disagreeable – in a democratic society for us to know what our fellow citizens think and to develop our own capacities for critical response. We cannot know what others think when the government silences them.”³

It does, however carry with it certain duties and responsibilities and it may not be used to destroy the rights of others⁴. International human rights law itself prohibits advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.⁵

Freedom of expression is not an absolute right and may be legitimately interfered with in carefully prescribed circumstances. In order to assess whether or not any interference would be permissible or would amount to a breach of the right to freedom of expression, a set of four basic tests must be applied:

1. Is it prescribed by law?
2. Can it be justified by reference to Article 10(2) ECHR?
3. Is it necessary and proportionate?
4. Is it discriminatory?

These four tests are reflected in the application of human rights law as relevant to the criminalisation of incitement to, glorification of or *apologie* for terrorism. These tests apply both

¹ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005.

² And in Article 11 of the EU Charter on Fundamental Rights and Freedoms and Article 19 of the International Covenant on Civil and Political Rights

³ “Viewpoint Absolution and Hate Speech”, Eric Heinze, *Modern Law Review* (2006) 69(4) p. 554

⁴ Article 17 ECHR

⁵ Article 20.2 ICCPR

to European and national legislation and, on a case by case basis, to the implementation of that legislation in Member States. If legislation is so broad as to be inherently open to abuse, it will not be human rights compliant.

1.1. Legal certainty

Any restriction on freedom of expression must be expressly established by law. The principle of legal certainty means that any law creating an offence which would interfere with freedom of expression must be sufficiently clear and precise for a person to be able to judge whether or not their speech would amount to an infringement of the law⁶. European law harmonising criminal law in Member States is at one remove from implementation but both the European law and the implementing laws must be sufficiently closely drafted as to ensure legal certainty in the implementation.

It is notoriously difficult to establish legal certainty in legislating to criminalise forms of expression. The difficulties in defining terrorism itself add to the problem of establishing legal certainty. One of the concerns about the original Council Framework Decision was that it was excessively broad as it included an offence that could include the destruction of property (including an information system) resulting in major economic loss.⁷ This uncertainty was exacerbated by a provision prohibiting incitement to such activities.⁸

These provisions leave the legislation open to abuse – it is conceivable, for example, that a person who makes available a message to the public with the intent to incite people to petition their government for a change in the law through bombarding the government with emails to the extent that the government computer system would collapse resulting in great financial cost to the government could find themselves being prosecuted under this legislation. The lack of legal certainty could allow this legislation to be used to curb non-violent forms of opposition and protest across the European Union. While the implementation of the Council of Europe Convention on the Prevention of Terrorism is a matter of choice for Member States, the Framework Decision imposes an obligation on all Member States to ensure that the offences included in the Framework Decision are reflected in national law. If steps are not taken to enact legislation implementing the Framework Decision, its provisions will be read into national law in such a way as to make the law compatible with the State's obligations under the Framework Decision⁹. This means that, unlike the Council of Europe Convention, the wording of the Framework Decision may be read directly into a Member State's criminal law and must, therefore, achieve a higher level of precision if it is to be considered to be human rights compliant.

The European Court of Justice has found that the Framework Decision on the European Arrest Warrant and Surrender Procedures between States¹⁰ fulfils the requirement for legal certainty because the offence of 'terrorism' it contains is not a harmonisation measure but rather refers to definitions in national law¹¹. In legislation aimed at harmonisation of Member State substantive

⁶ ECtHR, *Sunday Times v United Kingdom*, 26 April 1979, para 49.

⁷ EU Council Framework Decision 2002/475/JHA, 13 June 2002, art. 1(d)

⁸ EU Council Framework Decision 2002/475/JHA, 13 June 2002, art. 4(1)

⁹ Case C-105/03 Pupino [OJ C 193, 06.08.2005, p. 3](#)

¹⁰ The European Arrest Warrant (EAW) is a system which allows EU Member States to transfer suspects and convicts within the EU without using complex extradition procedures – for a full explanation see *Alegre and Leaf*, 'European Arrest Warrant: A solution ahead of its time?' JUSTICE 2003.

¹¹ Case C-303/05, *Advocaten voor de Wereld* [OJ C 140 of 23.06.2007, p.3](#) paras 52-54

criminal law, however, the requirement of legal certainty would apply equally to the European legislation and to national implementation of that legislation.

Offences which go beyond direct provocation or incitement to criminalise conduct in terms such as ‘glorification’ or ‘promotion’ of terrorism are vague, open to abuse and likely to be in breach of the right to freedom of expression.

1.2. Justification

Freedom of expression may be curtailed in accordance with Article 10(2) ECHR on the grounds of national security and public order. Prohibiting public provocation to terrorism may be justified by the need to protect national security, however

“expression may be punished as a threat to national security only if a government can demonstrate that:

(a) the expression is intended to incite imminent violence;

(b) it is likely to incite such violence; and

(c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”¹²

It is the nexus between intent and the objective danger that an offence would be committed which can provide a justification for criminalising public provocation in a human rights compliant fashion. The text of the proposed Framework Decision provides for intent but the requirement for causing imminent danger of an offence being committed is not sufficiently clear as to be human rights compliant.

1.3. Necessity and proportionality

International human rights law requires that any interference with a human right be both necessary and proportionate. Interference with freedom of expression will be deemed to be ‘necessary’ only if it fulfils a ‘pressing social need’¹³; legislation that is simply ‘reasonable’ or ‘desirable’ will not be considered as a ‘necessary’ interference¹⁴. Under the European Convention on Human Rights, Contracting States have a certain margin of appreciation in deciding whether or not a curb on freedom of expression through legislating to prohibit speech which seeks to incite or provoke terrorist acts is necessary according to the circumstances and laws of each country. The approach of EU Member States in relation to curbs on freedom of expression imposed through the criminal law is extremely variable reflecting the wide difference in legal and cultural contexts to be found in the EU.

The abolition of double criminality¹⁵ in relation to offences of a terrorist nature in mechanisms such as the European arrest warrant means that Member States can cooperate with each other on the basis of national terrorism offences without the need for harmonisation across the EU. Those

¹² Principle 6 – Johannesburg Principles on National Security, Freedom, of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996) – adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg.

¹³ ECHR - *Ceylan v Turkey* [GC], no 23556/94, para 32, ECHR 1999-IV

¹⁴ ECHR - *Handyside v UK*, no 5493/72, para 48, Judgment of 7 December 1976

¹⁵ Double criminality is the requirement that countries can only cooperate in relation to offences which are criminalised in both countries.

Member States which have specific offences of provocation or incitement to terrorism will therefore be able to pursue suspects and cooperate with other states across the European Union. The Council of Europe Convention on the Prevention of Terrorism is open to signature for all EU Member States who feel that it is necessary to legislate for such offences but to date only 5 EU Member States have ratified the Convention¹⁶. It seems doubtful whether legislation prohibiting public provocation to terrorism at EU level is, in fact, necessary in such circumstances.

The Europol EU Terrorism Situation and Trend Report 2007 states that:

“The small number of suspects arrested for dissemination of propaganda may indicate the lack of legal basis and difficulty in investigating these types of crimes.”¹⁷

It may be, however, that many Member States do not see the necessity for criminal proceedings to combat this phenomenon.

It is difficult to see why legislation criminalising public provocation to terrorism is necessary and proportionate at the EU level. Criminalisation of forms of expression is the harshest form of curbing freedom of expression - to impose this regime at EU level is unlikely to be a proportionate response.

1.4. Discrimination

There is an inherent danger in legislating to criminalise expression that such legislation will be used in a discriminatory fashion although the legislation is not discriminatory on its face.

Differentiations made in the Europol EU Terrorism Situation and Trend Report 2007 between different types of terrorism and ‘extremism’ indicate that terrorist activities are viewed in different lights depending to some degree on the perpetrators. There is a danger that legislation prohibiting public provocation to terrorism may be used to suppress unpalatable extremist views which, while unpleasant, may not create a real danger of imminent violence. The European Court of Human Rights makes it clear that:

“32...[Article 10 ECHR]...is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’....

...

34. The Court recalls, however, that there is little scope under Article 10.2 of the Convention for restrictions on political speech or on debate on matters of public interest (...). Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries....”¹⁸

2. ECHR CASE LAW

¹⁶ Bulgaria, Denmark, Finland, Romania, Slovakia.

¹⁷ EU Terrorism Situation and Trend Report 2007, p.3

¹⁸ Ceylan v. Turkey [GC], no 23556/94, para 32, ECHR 1999-IV

The Council of Europe Guidelines on Human Rights and the Fight against Terrorism 2002 are silent on the issue of freedom of expression which may be an indication of the difficulties in identifying a line of universal application. There is, however, a broad range of case law of the European Court of Human Rights relating to the right to freedom of expression and provocation or incitement to terrorism and related offences in particular circumstances¹⁹. Each case turns on its particular facts which highlight the importance of local and national circumstances in an assessment of whether or not a particular interference is necessary and proportionate.

A number of general principles can be gleaned from the case law. In deciding whether or not an interference amounts to a breach of Article 10, the following points must be considered:

- potential impact of the publication (i.e. mass media or limited circulation)
- nature of the publication (i.e. whether poetic or academic or journalism)
- nature of the person making the statement (e.g. terrorist suspects)
- context in which the statement is made (e.g. if statement is contemporaneous with acts of violence).
- whether the statement actually incites people to violence
- the nature of the penalty.

These points will be applied on a case by case basis which is difficult to legislate for. The following brief selection from extensive case law provides an illustration of the approach of the Court:

- **Brind and others v UK**²⁰ – An order for broadcast journalists to refrain from sending broadcast matter which consisted of or included statements expressing or supporting the views of several terrorist groups was found to be proportionate to the aim of combating terrorism in the UK at that time.
- **Surek and Ozdemir v Turkey**²¹ – The conviction for publishing declarations of terrorist organisations and disseminating separatist propaganda through the media of the editors of a review which published an interview with the leader of the PKK, an illegal organisation was found to be a violation of Article 10 ECHR. Particular weight was given to the fact that the interviews taken as a whole were not considered to incite violence and to the need for the public to be exposed to alternative views on the situation in South Eastern Turkey.
- **Ekin Association v France**²² – A ban on a book containing a political article by the Basque national liberation movement was found to be a violation of Article 10 ECHR as the Court found that the content of the book did not pose such a danger to public safety and public order as to merit a ban.
- **Muslum Gunduz v Turkey (No 1)**²³ – The conviction of a leader of an Islamist sect for statements made during the course of a television discussion in which he denounced the political system of Turkey as aiming to destroy Islam and stated that religion and

¹⁹ A number of Council of Europe publications compile relevant case law extensively, e.g. CODEXTER (2004) 19: Collection of Relevant Case Law of the European Court of Human Rights Related to 'Apologie du Terrorisme' and 'Incitement to Terrorism'.

²⁰ ECHR Application number 18714/91; 09/05/1994 – inadmissible

²¹ ECHR Application number 23927/94; 24277/94; Judgment 08/07/1999

²² ECHR Application number 39288/98; Judgment 17/07/2001

²³ ECHR Application number 35071/97; Judgment 04/12/2003

democracy were contradictory concepts was a violation of Article 10 ECHR as it was not 'necessary', particularly in the light of the fact that the statements were made in the context of a discussion where other viewpoints were put forward.

- **Erdogdu and Ince v Turkey**²⁴ – The conviction of the applicants for disseminating propaganda against the indivisibility of the State in publishing an interview in a monthly review was held to be disproportionate and a violation of Article 10 ECHR. The Court did, however, stress that, in situations of conflict and tension the 'duties and responsibilities' of media professionals in the exercise of freedom of expression take on a special significance.

As can be seen from this brief selection of the case law, any limitation on freedom of expression must be narrowly construed on a case by case basis so as to have the minimum impact on the enjoyment of the right. It would be very difficult to introduce criminal legislation on provocation to terrorism on the EU level in a way that is sufficiently narrowly drawn as to fulfil the requirements of necessity and proportionality. Limitations on freedom of expression which do not involve criminal convictions (such as orders banning publication, media complaints mechanisms or the closure of websites) are more likely to be a proportionate response.

3. MEMBER STATES' LEGISLATION AND CASE LAW

EU Member States take many different approaches to public provocation or incitement to terrorism as well as a number of related offences such as 'glorification', 'justification' or '*apologie*'²⁵. Offences which go beyond direct incitement or provocation to imminent violence are open to abuse and may not be human rights compliant. While in some EU Member States the trend of the legislature is to create ever broader offences relating to terrorism, the courts in a number of Member States faced with cases involving incitement to terrorism or related offences have tended to construe the offences as narrowly as possible.

UK

The UK Terrorism Act 2006 includes offences of 'Encouragement of terrorism'²⁶ and 'Dissemination of terrorist publications'²⁷ and specifies that these offences apply in relation to internet activity. These offences are very broadly drawn and include both direct and indirect encouragement. These provisions have been widely criticised²⁸ in particular because they do not require 'intent' that criminal acts would occur as a result of the statements made. It is unlikely that such provisions would meet the test of legal certainty.

In a recent case in the UK, the Court of Appeal²⁹ quashed the convictions of a group of students who had been convicted under s.57 of the UK Terrorism Act 2000 for possessing CD's containing extremist propaganda for the purpose of inciting each other to go to Pakistan to train with a view to possibly going to fight holy war in Afghanistan. The Court of Appeal applied a

²⁴ ECHR Application number 25067/94; 25068/94; judgment 08/07/1999

²⁵ For an extensive overview of national legislation see *Apologie du terrorisme* and '*incitement to terrorism*', Council of Europe 2004

²⁶ Section 1

²⁷ Section 2

²⁸ See for example Liberty – <http://www.liberty-human-rights.org.uk/issues/6-free-speech/terrorism-act-2006/index.shtml>

²⁹ *Zafar and others v R* [2008] EWCA Crim 184, 13 February 2008

narrow construction of the offence alleged and could not find a clear enough connection between the possession of the articles (CD's containing extremist propaganda) and incitement to the commission of an act of terrorism. The fact of the original conviction, however, shows the risk inherent in legislation that is broadly drawn.

Spain

The Spanish Penal Code criminalises '*apologia*³⁰' (justification) of terrorism and '*enaltecimiento*³¹' (glorification). It also criminalises acts which discredit or humiliate the victims of terrorism³².

In a Judgment of the Supreme Court³³ on a case brought by the Association of Victims of Terrorism seeking to overturn the acquittal of a group of musicians who had been accused of an offence under Article 578 of the criminal code for a song which talked about the Guardia Civil as targets of ETA, the Court found that a narrow reading of the provision was necessary in order to comply with Article 10 of the ECHR and that the accused had been properly acquitted on the facts of the case.

Germany

In Germany a recent case³⁴ limited the offence of campaigning for a terrorist group, both in terms of sentence and in terms of the scope of the offence. The case involved the distribution of audio and video messages from Al Quaida leaders on the internet in which they called for holy war and justified terrorist attacks. The court narrowed the construction of the offence so that actual recruitment to a terrorist organisation would be required. It also reduced the possible sentence from ten to five years.

Italy

The Italian Constitutional Court has ruled that incitement can only be punished when there is an "actual risk" that the incited person will commit the offences provided for in Article 302 of the Criminal Code imminently. If there is no actual risk, or if there is a long interval between the alleged incitement and the actual commission of the offence, this will amount to 'lawful incitement' protected by Italian constitutional provisions on freedom of expression³⁵.

4. CONCLUSION

The Council of Europe has recognised that:

³⁰ Article 577 CP

³¹ Article 578 CP introduced by the Ley Organica 7/2000 of 22.12

³² Article 578 " El enaltecimiento o la justificación por cualquier medio de expresión pública o difusión de los delitos comprendidos en los artículos 571 a 577 de este Código o de quienes hayan participado en su ejecución, o la realización de actos que entrañen descrédito, menosprecio o humillación de las víctimas de los delitos terroristas o de sus familiares, se castigará con la pena de prisión de uno a dos años.."

³³ Judgment of 17 July 2007, Number 656/2007

³⁴ StB 3/07, of 16 May 2007

³⁵ '*Apologie du terrorisme*' and '*incitement to terrorism*', Council of Europe 2004, p.41

“There is an obvious and well-recognised danger in criminalising the expression of ideas and opinions we do not like, by connecting or even identifying them with criminal offences³⁶.”

EU Member States address the issue of provocation to terrorism and related offences in different ways tailored to their particular circumstances. Member States can cooperate on such offences on the basis of the European Arrest Warrant without the need for EU harmonisation of the offence. EU Member States may choose to implement the Council of Europe Convention on the Prevention of Terrorism if they judge that there is a need to do so. There is therefore no pressing social need for such legislation at EU level and to introduce such legislation would have a disproportionate impact on the enjoyment of the right to freedom of expression in the European Union. Furthermore it would be very difficult to draft such legislation in a way that is sufficiently precise so as to fulfil the requirement of legal certainty at EU level.

Recommendations

- There is no need for further legislation at EU level on provocation or incitement to terrorism
- Legislation on provocation or incitement to terrorism must provide a direct link between intent to incite and the likelihood of the imminent commission of a terrorist act
- Legislation on provocation or incitement to terrorism should be narrowly construed

³⁶ Ibid. p. 48