"White man's burden": criminalising free speech

While the recurring publication of the 'Danish cartoons' of the Prophet Mohammed continues to provoke anger in the Muslim world and a defence of 'free speech' in the West, a proposed EU law on "public provocation" to terrorism could criminalise widely held political views – but it has barely raised a murmur.

by Ben Hayes

In November 2007 the European Commission submitted a proposal to add three new criminal offences to the 2002 EU Framework Decision on terrorism [1]. If agreed by governments, EU countries will be obliged to criminalise "provocation", "recruitment" and "training" for terrorism. Charges of "recruitment" and "training" will need to show a direct link with terrorist groups or activity (as defined in 2002), but the "provocation" offence is extremely broad, as it does not require a direct encouragement to commit terrorist acts but applies to any statements which create a "danger" of such acts being committed. According to the proposal:

> *public provocation to commit a terrorist offence" means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of [a terrorist offence as defined in the Framework Decision], where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.*

As *Statewatch* pointed out in its analysis of the proposal, the wording of this definition is clearly likely to result in the criminalisation of the expression of political views (for example on the situation in Middle East or on certain conflicts within Member States), ***even if that expression does not in any way include the advocacy of terrorism to support those opinions*** [2]. It will be enough that the authorities deem that there is a "danger" that this will happen, an actual terrorist offence as a consequence is expressly not necessary for the Framework Decision to apply.

The origins of the proposal

All three offences in the proposed Framework Decision are taken from the text of the 2005 Council of Europe convention on the prevention of terrorism [3]. This Convention started life in 2003 in a working group established by Council of Europe Justice ministers to consider the harmonization of laws on incitement to terrorism and the act of "justifying terrorism", which was already illegal in Spain (where prosecutions for the crime of "apologia" have been extensive) and France (where prosecutions for "apologie" are extremely rare). After the Madrid bombings in March 2004 the Council of Europe mandated a far-reaching Convention addressing "public expressions of support for terrorist offences and/or groups"; "the instigation of ethnic and religious tensions which can provide a basis for terrorism"; "the dissemination of "hate speech" and the promotion of ideologies favourable to terrorism".

The Council of Europe already had some experience in this area, having adopted in 2003 a Protocol to the "Cybercrime Convention" (of 2001) concerning the "criminalisation of acts of a racist and xenophobic nature committed through computer systems", which addresses the dissemination of "racist propaganda" over the internet [4]. However, while this Protocol contains an opt-out based expressly on established national principles concerning freedom of expression, there is no opt-out in the terrorism Convention agreed in 2005. There is at least a "safeguards" clause (in article 12) which obliges states to respect "freedom of expression, freedom of association and freedom of religion", "proportionality" and the prohibition of "arbitrariness or discriminatory or racist treatment". But in the EU proposals, even these limited safeguards have been dropped.

The EU negotiations

The EU proposals are a recipe for an overbroad offence encompassing political opinion and giving prosecutors enormous discretion in deciding when and if to bring cases for "public provocation" to terrorism. So bereft of human rights safeguards is the Commission's proposal that the member states are considering introducing some of their own – a first for EU decision-making. The EU Council presidency describes the Commission's proposal as "very delicate… situated on the borderline of fundamental rights and freedoms such as freedom of expression, assembly or of association and the right to respect for family life" [5]. It is therefore "essential", suggests the presidency, "that the right balance is struck", as in the Council of Europe Convention. Of course, if the CoE Convention strikes such a delicate balance, why bother tinkering with it at all?

The solution proposed by the presidency is the insertion of a recital in the preamble to the draft Framework Decision based on article 12 of the Council of Europe Convention. However, as a recital, it will be of limited effect because member states are only obliged to align their national legal systems with the substantive obligations in the actual articles of the text. In opposition to the Commission proposal, Sweden – supported by other unnamed EU member states – has proposed a new article based on the draft EU Framework Decision on racism and xenophobia, which (like the CoE Cybercrime Protocol) contains an express opt-out allowing member states to abstain from enacting "measures in contradiction to fundamental principles relating to freedom of association and freedom of expression and assembly, in particular freedom of the press and the freedom of expression in other media".

The limits to free speech

Jyllands-Posten, the Danish newspaper that commissioned the cartoons depicting the Prophet Mohammed as, among other things, a terrorist, argued – provocatively and erroneously the eyes of many – that its actions addressed an important issue of self-censorship in the media:

The modern, secular society is rejected by some Muslims. They demand a special position, insisting on special consideration of their own religious feelings. It is incompatible with contemporary democracy and freedom of speech, where you must be ready to put up with insults, mockery and ridicule [6].

While newspapers in many countries reprinted the cartoons, it is notable that the overwhelming majority of media organisations in the UK, USA, Canada and elsewhere chose not to. In doing so, they tacitly acknowledged the limits to free speech. As A. Sivanandan has put it:

> *Europe holds that freedom of speech is the very basis of western democracy and cannot therefore be compromised or watered down. It is an absolute.*
>
> *But that is a fallacy. No freedom is an absolute. Every freedom carries with it its own responsibility. The right to freedom of speech*

does not, as Oliver Wendell Holmes, the great American judge said, give you the right to falsely cry 'fire' in a crowded theatre [7].

Indeed, laws criminalising holocaust denial and incitement to racial hatred show very well the limits to free speech in western democracies. The *status quo* is an uneasy compromise based on the principles of respect for minority communities and social cohesion. Here the media occupies a crucial position, particularly when it comes to moderating the so-called "clash of civilisations". Aidan White, Secretary-General of the *International Federation of Journalists*, has warned that:

journalists need to be more conscious than ever about the dangers of media manipulation by unscrupulous politicians and racists [8].

Index on censorship

What began in Denmark as an exercise in counter-self censorship – albeit one of extremely dubious judgment, to say the least – quickly exploded into a politically charged issue seized upon by both sides of the 'debate'. Exactly the same thing happened last year when Oxford University's Student Union chose to hold a debate on free speech involving David Irving and Nick Griffin. Last month the Archbishop of Canterbury provoked a similar storm when his views about Sharia Law in Britain were seized upon by other champions of free speech in the media. Yet for all the limits on free speech, all three examples show that freedom of expression is alive and well for cartoonists, racists, Archbishops and, for the time being at least, those that they offend.

The new EU proposals will radically alter the *status quo* by criminalising speech that *may* provoke terrorism, even if where it does not directly advocate acts of terrorism. Because the EU's definition of terrorism is so broad, the scope for criminalisation is enormous. "Terrorism" was defined in EU law in 2002 as:

seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

To suggest that the Palestinians, Lebanese, Iraqis or Afghans have the right to resist occupation and aggression through armed struggle could easily be construed as public provocation to terrorism. Advocates of direct action against corporations, government policies and intergovernmental organisations like the EU may also fall foul of the new laws.

Those who argue that the new laws are necessary argue that they are necessary to deal with "preachers of hate" and "Jihadi" websites. On the other hand, since incitement to murder and incitement to terrorism (included in the 2002 EU Framework Decision) are criminal offences, why not let the courts decide if that what people are guilty of? It seems reasonable for states to attempt action against websites that directly encourage atrocities such as '9/11' and the Madrid and London bombings, however futile the uncontrollable nature of the web may render this exercise, but it is patently absurd to use them as a justification for the introduction of new offences criminalising people for their political beliefs or opinions

The limits to permissible thought

In November 2007, Samina Malik, the 23-year-old self-professed "lyrical terrorist", was convicted under section 28 of the UK Terrorism Act 2000 for the possession of material that is "likely to be useful to a person committing or preparing an act of terrorism". The articles in question included the "terrorist manuals" she had downloaded from the internet and poems she had written about "Jihad". After five months in prison on remand, Ms Malik was acquitted of the more serious charge of "possessing an article for terrorist purposes" under section 58 of the Act. So despite the jury finding no evidence to suggest that she ever actually intended to carry out an act of terrorism, she was given a suspended sentence for having even entertained the idea.

On 13 February 2008, the Court of Appeal quashed the earlier section 58 convictions of five young Muslim students for downloading extremist literature. The Court decided that while there was no doubt the men had possessed extremist literature, there was no proof that they ever intended to do anything with it. This demand for legal certainty exposes the inherent flaws in the EU proposals – they seek to criminalise the possession of a "dangerous" opinion. Christopher Hitchens recently defended the author Martin Amis of racist attacks on Muslims, saying "the harshness Amis was canvassing was not in the least a recommendation, but rather an experiment in the limits of permissible thought". As John Pilger and others asked in a letter to the *Guardian* newspaper following the conviction of the "lyrical terrorist", is the right to "experiment with the limits of permissible thought" now only accorded to people who have the correct skin colour, religion and academic background? [9]

Footnotes

1. COM (2007) 650, 6.11.07. See SEMDOC website: http://www.statewatch.org/semdoc/503.html

2. See Statewatch News online, November 2007: http://www.statewatch.org/news/2007/nov/03eu-com-terror-plans.htm

3. Council of Europe Convention on the Prevention of Terrorism of 2005 (CETS No.: 196)

4. Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS No.: 189)

5. Council doc. 6761/08, 20.2.02.

6. "Muhammeds ansigt", Jyllands-Posten, 30.9.05

7. "Freedom of speech is not an absolute", interview with A. Sivanandan, Race & Class, July 2006.

8. "Journalism and Combating Intolerance: Those Cartoons and a Challenge to Free Expression and Quality Media", Aidan White, http://www.ifj-asia.org/page/white_danish_cartoons.html

9. "Race, class and freedom of speech", Iain Banks, Caryl Churchill, Lindsey German, Michael Kustow, Adrian Mitchell, Andrew Murray, John Pilger, Michael Rosen, Guardian, 7.12.07.

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