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Blasphemy, religious insults and hate speech against persons on the grounds of their religion

Opinion¹

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Jaume BARTUMEU CASSANY, Andorra, Socialist Group

A. Conclusions of the Committee

The Committee on Legal Affairs and Human Rights welcomes the report presented by the Committee on Culture, Science and Education.

Events in recent years, and in particular the case of the cartoons depicting the prophet Muhammad in 2005, re-opened the debate on blasphemy, religious insults and hate speech against persons on the grounds of their religion. The Committee supports the draft recommendation proposed by the rapporteur, Ms Sinikka Hurskainen. Nonetheless, it would like to make a few amendments and clarifications, relating primarily to the case-law of the European Court of Human Rights.

B. Proposed amendments to the draft recommendation

Amendment A

At the beginning of paragraph 1, replace "The Parliamentary Assembly recalls its Resolution 1510 (2006) on freedom of expression and respect for religious beliefs and affirms that freedom of expression is a fundamental cornerstone of democracy. This freedom is" by:

"The Parliamentary Assembly recalls its Resolution 1510 (2006) on freedom of expression and respect for religious beliefs and reiterates its commitment to the freedom of expression (Article 10 of the European Convention on Human Rights (ECHR) and the freedom of thought, conscience and religion (Article 9 ECHR), which are fundamental cornerstones of democracy. Freedom of expression is"

Amendment B

After the second paragraph, add the following new paragraph:

"In multicultural societies it is often necessary to reconcile freedom of expression and freedom of thought, conscience and religion. In some instances, it may also be necessary to place restrictions on these freedoms. Under the European Convention on Human Rights, any such restrictions must be prescribed by law, necessary in a democratic society and proportionate to

¹ Doc 11296 presented by the Committee on Culture, Science and Education.

the aims pursued. In so doing, States enjoy a margin of appreciation as national authorities may need to adopt different solutions taking account of the specific features of each society; the use of this margin is subject to the supervision of the European Court of Human Rights.”

Amendment C

Delete paragraph 3 and replace it with the following:

“With regard to blasphemy, religious insults and hate speech against persons on the grounds of their religion, the state is responsible for determining what should count as criminal offences within the limits imposed by the case-law of the European Court of Human Rights. In this connection, the Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. A distinction should be made between matters relating to moral conscience and those relating to what is lawful, matters which belong to the public domain, and those which belong to the private sphere. Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.”

Amendment D

In paragraph 7, after “the Court accepts a wider margin of appreciation”, reword the end of the sentence as follows: “on the part of Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion”

Amendment E

Replace paragraph 8 with the following paragraph:

“However, the Assembly stresses that this margin of appreciation is not unlimited and that any restrictions on the freedom of expression must comply with the case-law of the European Court of Human Rights. Freedom of expression – guaranteed under Article 10 of the European Convention on Human Rights – is of vital importance for any democratic society. In accordance with the Statute of the Council of Europe, common recognition of democratic values is the basis for membership of the Council of Europe.”

Amendment F

In paragraph 10, replace "must ensure that" by "should ensure that".

Amendment G

In paragraph 13, replace the last sentence with the following:

“Restrictions on the wearing of religious symbols in public areas may interfere with the right to manifest one’s religion (Article 9 ECHR) and the right to education (Article 2 of Protocol No. 1 ECHR). However, these rights may sometimes be subject to certain justified limitations. The challenge facing the authorities is how to strike a fair balance between the interests of individuals as members of a religious community in ensuring respect for their right to manifest their religion or their right to education, and the general public interest or the rights and interests of others.”

Amendment H

After paragraph 16.2.3, add the following sub-paragraph: “are reviewed in order to decriminalise blasphemy as an insult to a religion”.

Amendment I

Before paragraph 16.3, add “encourage member states to sign and ratify Protocol No 12 to the ECHR (CETS No 177);”.

Amendement J

At the end of sub-paragraph 16.5.1., delete “which would be incompatible with this Convention;”

Amendment K

After paragraph 16.6, add the following new paragraph “invite member states to take more initiatives to promote tolerance.”

C. Explanatory memorandum by Mr Jaume Bartumeu Cassany, rapporteur

1. In multicultural societies, freedom of expression (Article 10 of the European Convention on Human Rights (ECHR)) and freedom of thought, conscience and religion (Article 9 ECHR) occasionally have to be reconciled. In some instances, it may also be necessary to place restrictions on these freedoms. Under the European Convention on Human Rights, any such restrictions must be prescribed by law, necessary in a democratic society and proportionate to the legitimate aims pursued. In so doing, States enjoy a certain margin of appreciation, as national authorities may need to adopt different solutions taking account of the specific features of each society; the use of this margin is subject to the supervision of the European Court of Human Rights.

2. It would therefore be useful to take a brief look at some of the principles enshrined in the European Convention on Human Rights as interpreted by the European Court of Human Rights. In addition, the work of the Venice Commission² and the Committee of Experts for the Development of Human Rights (DH-DEV)³ have recently shed valuable light on these issues.

- Freedom of expression and religious belief

3. As the Committee of Experts for the Development of Human Rights has pointed out⁴, the Court has repeatedly stated that members of a **religious community must tolerate** the denial by others of their religious beliefs⁵.

4. In the case of **unjustified insulting attacks** on objects of religious veneration the Court recognises the possibility of the Contracting States to take measures to restrict the freedom of opinion⁶. The Court recognised for example that, in the absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions, states have a **wider margin of appreciation** when regulating freedom of expression in connection with moral or religious issues compared to interferences with political speech⁷. However, this margin can never be unrestricted.

5. For the purposes of balancing the competing rights and interests, it may be helpful to **distinguish between public and private spheres**. In the public sphere, state authorities must strictly respect the prohibition of discrimination, which is an expression of the state’s neutrality in cultural and religious matters. In this regard, the state may be required to make a distinction to ensure in practice equal enjoyment of rights by all individuals. In the private sphere, state authorities should refrain from

² See CDL-AD(2007)006, European Commission for Democracy through Law (Venice Commission), Preliminary report on national legislation in Europe concerning blasphemy, religious insults and incitement to religious hatred, adopted on 16 and 17 March 2007, IV. Provisional conclusions.

³ Committee of Experts for the Development of Human Rights (DH-DEV) subordinate to the Steering Committee for Human Rights (CDDH). See, in particular, Reports GT-DH-DEV A (2006)008, Human Rights in a Multicultural Society: Hate speech, 9 February 2007; GT-DH-DEV B (2006)004, Human Rights in a Multicultural Society: The wearing of religious symbols in public areas, 9 February 2007; and DH-DEV (2007)002 Activity report: Human rights in a multicultural society, 9 February 2007.

⁴ See GT-DH-DEV A (2006)008, §§ 46-50.

⁵ *Otto-Preminger-Institut v. Austria* judgment of 20 September 1994, §47; *Aydin Tatlav v. Turkey* judgment of 2 May 2006, §27.

⁶ *I. A. v. Turkey* judgment of 13 September 2005, §27.

⁷ See also *Wingrove v. United Kingdom* judgment of 22 November 1991, §58.

any interference unless certain conduct is contrary to human rights standards or poses a serious threat to the physical or psychological well-being of the person⁸.

6. Lastly, foreshadowing the report I shall soon be presenting before the Assembly, entitled “Decriminalising defamation”, in which I look at the question of offending religious sensitivities, hate speech and revisionism⁹, I feel it essential to point out the need to **avoid mixing questions falling under the sphere of moral conscience and those which relate to lawfulness**. While some editorial stances or choices may shock the moral values of part of the readership or audience, it does not necessarily follow that such choices are unlawful.

- **Hate speech**¹⁰

7. This concept is used by the European Court of Human Rights as an element to be taken into consideration when judging whether interferences with the right to freedom of expression are necessary in a democratic society. It must be stressed that **certain expressions are not protected by this provision** (see Article 17 ECHR¹¹). By way of example, in the *Norwood* case, the Court applied Article 17 in the context of an attack on the Muslim community. It concerned a photograph of the Twin Towers in flame, with the caption ‘Islam out of Britain – Protect the British People’ and a symbol of a crescent and star in a prohibition sign. The Court, agreeing with the assessment made by the domestic courts, considered that:

“The words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant’s display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14. It follows that the application must be rejected as being incompatible *ratione materiae* with the provisions of the Convention, pursuant to Article 35 paras 3 and 4.”¹²

8. In accordance with the recommendation of the European Commission against Racism and Intolerance (ECRI)¹³, public incitement to violence, hatred or discrimination, public insults and defamation or threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin should be **criminal offences**, where such acts are committed intentionally. Furthermore, legislation in this regard should be **applied** resolutely and consistently.

- **Freedom of thought, conscience and religion**

9. Here too, it should be pointed out that the right to freedom of thought, conscience and religion as such is **absolute**. In contrast, the right to **manifest** one’s religion or beliefs may be subject to **certain limitations** if those are prescribed by law, follow a legitimate aim and are proportionate to that aim (Article 9.2 ECHR).

10. Restrictions on the wearing of religious symbols in public areas may interfere with the right to manifest one’s religion (Article 9 ECHR) and the right to education (Article 2 of Protocol No. 1 ECHR). However, these rights may sometimes be subject to certain justified limitations. The challenge facing the authorities is how to strike a fair balance between the interests of individuals as members of a

⁸ For further details, see DH-DEV (2007)002, §21.

⁹ See Doc. 11305, Decriminalising defamation.

¹⁰ With regard to the definitions of hate speech, see GT-DH-DEV A (2006)008 and PACE Doc. 11320, Combating anti-Semitism in Europe, Opinion of the Committee on Legal Affairs and Human Rights.

¹¹ Article 17 of the Convention states: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”.

¹² *Norwood v. United Kingdom*, No. 23131/03, Decision of 16.11.2004. See also GT-DH-DEV A (2006)008, §72.

¹³ See ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, CRI(2003)8, 13 December 2002.

religious community in ensuring respect for their right to manifest their religion or their right to education, and the general public interest or the rights and interests of others¹⁴.

- **Legislation in member states concerning blasphemy, religious insults and incitement to religious hatred**

11. The state is responsible for determining what should count as criminal offences within the limits laid down by the case-law of the European Court of Human Rights.

12. In its provisional conclusions, the **Venice Commission**¹⁵ “notes that practically all Council of Europe **member States** have enacted legislation to combat incitement to hatred, which includes religious hatred. Most States provide for specific, more stringent or severe provisions relating to incitement to hatred through the mass media. Religious insults are a criminal offence in a little more than half the member States. “Negationism” is an offence in certain countries. Blasphemy is an offence in only a minority of member States and where it is one, it is, nowadays, rarely prosecuted”¹⁶.

13. The Venice Commission also notes that “as the European Court of Human Rights has pointed out, domestic courts are well placed to enforce rules of law in relation to these issues and to take into account the facts of each situation”¹⁷.

14. I do not believe that **blasphemy** as an insult to a religion should be a criminal offence. As indicated above, a distinction should be made between matters relating to moral conscience and those relating to what is lawful, matters which belong to the public domain, and those which belong to the private sphere. Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world. My position thus concurs with that of the Council of Europe Commissioner for Human Rights¹⁸.

15. Lastly, it should be borne in mind that legislative matters cannot alone settle all the issues we are considering. As the rapporteur, Mme Hurskainen, so rightly points out, there is a need for greater understanding and tolerance among individuals of different religions. Member states should therefore be invited to take more initiatives to promote **tolerance**.

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Secretariat of the committee: Mr Drzemczewski, Mr Schirmer, Ms Maffucci-Hugel, Ms Heurtin, Ms Schuetze-Reymann

¹⁴ See GT-DH-DEV B (2006)004 and *Leyla Şahin v. Turkey*, judgment of 10 November 2005 (Grand Chamber). See also PACE Doc 10670, Women and religion in Europe.

¹⁵ See CDL-AD(2007) 006, IV. Provisional conclusions.

¹⁶ *Ibid*, § 41.

¹⁷ *Ibid*, § 45.

¹⁸ See also, the viewpoint” of the Council of Europe Commissioner for Human Rights, of 11 June 2007: “Do not criminalise critical remarks against religions”.