

**Decision**

**on**

**Possible criminal proceedings in the case of Jyllands-Posten's Article "The Face of Muhammed"**

**1. Introduction**

This Memorandum contains a brief on the Director of Public Prosecutions' considerations on whether there is basis for instituting criminal proceedings in the case of Jyllands-Posten's article "The Face of Muhammed" published on 30 September 2005.

The matter is being considered as a result of complaints submitted against the decision by the Regional Public Prosecutor of Viborg on 6 January 2006 in which he decided to discontinue the investigation pursuant to section 749(2) of the Danish Administration of Justice Act with regard to a report filed by a private person with the Chief of Police of Aarhus.

In his decision the Regional Public Prosecutor stated that in assessing what constitutes an offence under both section 140 and section 266 b of the Danish Criminal Code, the right to freedom of expression must be taken into consideration and that on an overall assessment of the article he does not find that there is a reasonable presumption that a punishable offence to be prosecuted by the public has been committed.

Several complaints have been submitted to the Director of Public Prosecutions about the Regional Public Prosecutor's decision. The complaints have been submitted by a number of organisations and individuals.

In the complaints, it is claimed that offences have been committed under both section 140 and section 266 b of the Danish Criminal Code, and that in the present concrete case, regard for the right to freedom of expression and the right of the press to cover current events cannot provide grounds for not considering the article to fall within the scope of the above-mentioned provisions.

**2. The Article in Jyllands-Posten**

The article in Jyllands-Posten was published in the newspaper's Friday issue on 30 September 2005 and was advertised on the front page of the newspaper with one of the drawings from the article. The drawing was accompanied by text explaining that the newspaper had invited members of the Danish Newspaper Illustrators' Union to draw Muhammed as they see him; that 12 of about 40 had responded to the invitation; and that the drawings are published under the illustrators' names. Furthermore, the front-page text states that "Some Muslims reject modern, secular society. They demand a special position, insisting on special consideration of their own religious feelings. It is incompatible with

secular democracy and freedom of expression, where one has to be ready to put up with scorn, mockery and ridicule."

The article, which was published on page 3 in the "KulturWeekend" section, is entitled "The Face of Muhammed" and laid out as a three-column text section surrounded by twelve drawings. The introduction to the article is headed "Freedom of expression", and from the by-line it appears that the article is written by Flemming Rose, culture editor. The introduction to the article is as follows:

"The comedian Frank Hvam recently admitted that he did not dare openly "to take the piss out of the Koran on TV". An illustrator who is to portray the Prophet Muhammed in a children's book wishes to do so anonymously. As do the Western European translators of a collection of essays critical of Islam. A leading art museum has removed a work of art for fear of reactions of Muslims. This theatre season, three satirical shows targeted at the President of the USA, George W. Bush, are playing, but not a single one about Osama bin Laden and his allies, and during a meeting with Prime Minister Anders Fogh Rasmussen, Denmark's Liberal Party, an imam urged the government to use its influence over Danish media so that they can draw a more positive picture of Islam.

The cited examples give cause for concern, regardless of whether the experienced fear is founded on a false basis. The fact is that the fear does exist and that it leads to self-censorship. The public space is being intimidated. Artists, authors, illustrators, translators and people in theatre are therefore steering a wide berth around the most important meeting of cultures in our time – the meeting between Islam and the secular society of the West, which is rooted in Christianity."

The following section with the heading "The Ridicule" is an extract from the article:

"Some Muslims reject modern, secular society. They demand a special position, insisting on special consideration of their own religious feelings. It is incompatible with secular democracy and freedom of expression, where one has to be ready to put up with scorn, mockery and ridicule.

It is therefore no coincidence that people living in totalitarian societies are sent off to jail for telling jokes or for critical depictions of dictators. As a rule, this is done with reference to the fact that it offends people's feelings. In Denmark, we have not yet reached this stage, but the cited examples show that we are on a slippery slope to a place where no one can predict what self-censorship will lead to."

In the last column of the article under the heading "12 illustrators", it says: "That is why Morgenavisen Jyllands-Posten has invited members of the Danish Newspaper Illustrators' Union to draw Muhammed as they see him." Furthermore, it says that twelve illustrators, whose names are mentioned, have responded to the invitation and that their drawings are published.

The twelve drawings are as follows:

Drawing 1: The face of a man whose beard and turban are drawn within a crescent moon, and with a star, symbols normally used for Islam.

Drawing 2: The face of a grim-looking bearded man with a turban shaped like an ignited bomb.

Drawing 3: A person standing in front of an identity parade consisting of seven people, including a caricature of Pia Kjöersgaard [translator's note: leader of the Danish People's Party] and five men wearing turbans. The person in front of the line-up is saying: "Hmm ... I can't quite recognize him ... "

Drawing 4: A bearded man wearing a turban, standing with a halo shaped like a crescent moon over his head.

Drawing 5: Five stylised female figures wearing headscarves, with facial features depicted as a star and a crescent moon. The caption reads: "Prophet! You crazy bloke! Keeping women under the yoke!"

Drawing 6: A bearded man wearing a turban, standing with the support of a staff and leading an ass with a rope.

Drawing 7: A man with beads of sweat on his brow, sitting under a lighted lamp and looking over his left shoulder as he draws a man's face with a head covering and beard.

Drawing 8: Two bearded men wearing turbans and armed with a sword, a bomb and a gun, running towards a third bearded wearing a turban. He is reading a sheet of paper and gesturing them to hold off, with the words: "Relax folks! It's just a sketch made by an unbeliever from southern Denmark."

Drawing 9: A teenage boy with dark hair, dressed in trousers and a striped top printed with the text "The Future", standing in front of a blackboard, and pointing with a pointer at the Arabic text written on it. The text "Mohammed, Valby School, 7A" is written in an arrow pointing at the boy.

Drawing 10: A bearded man wearing a turban and carrying a sword, standing with a black bar covering his eyes. Standing at his sides are two women wearing black gowns, with only their eyes visible.

Drawing 11: A bearded man wearing a turban, standing on clouds with arms outspread, saying: "Stop, stop, we ran out of virgins!" Waiting in front of him is a row of men in tatters with plumes of smoke over their heads.

Drawing 12: A drawing of a man wearing glasses and a turban with an orange in it. The turban bears the words "Publicity Stunt". The man is smiling as he shows a picture portraying a "matchstick man" with a beard and wearing a turban.

### **3. The Director of Public Prosecutions' Assessment**

#### **3.1 Introduction**

The question of whether there is basis for instituting criminal proceedings in this case entails an assessment of whether the article in Jyllands-Posten must be considered a criminal offence under the provisions of section 140 and/or 266 b of the Danish Criminal Code. These provisions contain a restriction on the right freely to express opinions and must therefore be interpreted with due regard for the right to freedom of expression.

According to section 77 of the Danish Constitution, any person shall be at liberty to publish his ideas in print, in writing, and in speech, subject to his being held responsible in a court of law. Censorship and other preventive measures can never be re-introduced. The general opinion is that this provision contains a protection of formal freedom of expression, including a prohibition against prior restraint. The provision does not protect substantive freedom of expression, that is to say the content of the expressions.

Article 10 of the European Convention on Human Rights (ECHR) does, however, protect formal as well as substantive freedom of expression.

According to Article 10(1) everyone has the right to freedom of expression. Article 10(1) also comprises expressions that may shock, offend or disturb. As the exercise of the freedom of expression carries duties and responsibilities, under Article 10 (2) it may i.a. be subject to restrictions and penalties as prescribed by law and which are necessary in a democratic society, i.e. be proportionate to the legitimate aim pursued.

The European Court of Human Rights (the Court) has held several times that freedom of expression is the foundation of a democratic society. In case of conflicts between the right to freedom of expression and protection of other rights comprised by ECHR, the freedom of expression of the press in particular carries great weight if it concerns a subject of general interest, as the press fulfils a central function in a democratic society.

Consequently, the Court attaches decisive importance to the regard for the freedom of expression when assessing the justification of interference with expressions that may offend religious feelings. However, at the same time, the Court has stated that there is a duty as far as possible to avoid expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.

In cases concerning the balance between the right of freedom of expression and the protection of religious feelings, the Court, according to its practice, leaves a wider margin of appreciation to the individual State, because in this area the national authorities also act to safeguard freedom of religion, another fundamental principle of the Convention, cf. Article 9.

On the other hand, the Court has also stated that persons who exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.

As the Court's assessment is always made relative to the a State's specific interference with the right to freedom of expression, and in the light of the contents of the expressions and the context in which they have been made, it is not possible from the case law of the Court to infer a certain state of law regarding how the Court would weigh the regard for freedom of expression in relation to expressions that can offend religious feelings.

### **3.2. Section 140 of the Danish Criminal Code**

Section 140 of the Danish Criminal Code provides that any person who, in public, mocks or scorns the religious doctrines or acts of worship of any lawfully existing religious community in this country shall be liable to imprisonment for any term not exceeding four months.

The provision belongs to the rules of criminal law, the interpretation of which varies depending on what is generally considered accepted usage or other form of expression in Danish society. In this connection, it should be noted that a direct and informal form of debate is not unusual in Denmark, where even offensive and insulting expressions of opinion are widely accepted.

It should also be noted that when adopted in 1930, section 140 of the Danish Criminal Code was intended to afford protection of the most serious offences against religious feelings and was furthermore implied in subsequent discussions by the Danish Parliament in 1973 and 2005 regarding the necessity for this provision. This has been reflected in practice as well, as since 1930 only three prosecutions have been brought for violation of this provision and the most recent of these cases from 1971 led to acquittal.

An assessment of the above described drawings and the article in relation to the provision of section 140 of the Danish Criminal Code entails a decision on whether they represent mockery or scorn of Islam's religious doctrines or acts of worship.

The other objective conditions in section 140 of the Danish Criminal Code must be considered as having been met, as violation, if any, of section 140 of the Danish Criminal Code has been made against "any lawfully existing religious community in this country". The article and the drawings were shown "in public" as they were printed in a daily newspaper, and the form of mockery or scorn, if any, by written expressions in a newspaper article and by drawings in the same is comprised by section 140 of the Danish Criminal Code.

As regards the question of whether the article contains mockery or scorn of "religious doctrines or acts of worship", it should first be noted that the expressions cover the internal and external religious life of a religious community; that is, the doctrines (a creed, if any, and the central texts of the religion) and the institutions, practices, persons and things (ritual acts, etc.) by which the acts of worship of the community take place. However, according to the legislative material in preparation of the Criminal Code, the concepts do not comprise religious feelings which are not tied to the society's religious doctrines or acts of worship, including doctrines of an ethical or a social nature, or the like.

The concept "mockery" covers ridicule and is an expression of lack of respect or derision of the object of mockery. "Scorn" is an expression of contempt for the object that is scorned. It must be assumed that these words imply ridicule or contempt with a certain element of abuse, just as it appears from the legislative material of the Criminal Code that punishment can be incurred only in "serious" cases.

The religious writings of Islam cannot be said to contain a general and absolute prohibition against drawing the Prophet Muhammed.

The basic assumption must be that, according to Hadith (the written narratives of the life of the Prophet and guidelines for the conduct to be shown by Muslims) in Islam, there is a prohibition against depicting human figures, which also includes depicting the Prophet Muhammed. Not all Muslims comply consistently with the ban on depiction, as there are pictures of Muhammed dating from earlier times as well as the present. However, in these cases the Prophet is depicted respectfully, in some instances without facial features.

It cannot then be assumed that a drawing of the Prophet Muhammed in general will be contrary to the religious doctrines and acts of worship of the religion as practised today, although certain groups within the religion comply fully with the ban on depiction. For that reason alone, a drawing of the Prophet Muhammed cannot in itself constitute a violation of section 140 of the Danish Criminal Code.

The drawings in question, which according to the headline illustrate "The Face of Muhammed", are not, however, where some of them are concerned merely a depiction of the Prophet Muhammed, but a caricature of him.

Depending on the circumstances, a caricature of such a central figure in Islam as the Prophet Muhammed may imply ridicule of or be considered an expression of contempt of Islamic religious doctrines and acts of worship. An assessment of whether this is the case must be seen in the light of the text accompanying the drawings.

In the article it is stated that fear of Muslim reaction in a number of concrete cases has led to self-censorship and to artists, authors and others avoiding expressing themselves about the cultural meeting between Islam and the secular, Western societies rooted in Christianity. The next paragraph states first, that some Muslims reject the modern, secular society, who demand a special position, insisting on special consideration of their own religious feelings. It then continues: "It is incompatible with secular democracy and freedom of expression, where one has to be ready to put up with scorn, mockery and ridicule. It is certainly not always agreeable and pleasant to watch, and it does not mean that religious feelings should be made fun of at any price, but that is a minor consideration in the present context."

In the following section it appears that on this basis Jyllands-Posten has invited members of the Danish Newspaper Illustrators' Union to draw Muhammed as they see him.

Based on this text, the basic assumption must be that Jyllands-Posten commissioned the drawings for the purpose of in a provocative manner to debate whether, in a secular society, special regard should be paid to the religious feelings of some Muslims.

The drawings, referred in paragraph 2 above as drawing 1, drawing 3, drawing 4, drawing 6, drawing 7, drawing 9, drawing 11 and drawing 12, are either neutral in their expression or do not seem to be an expression of derision or spiteful ridiculing humour. Therefore, in the opinion of the Director of Public Prosecutions, these drawings cannot be considered to be criminal offences under section 140 of the Danish Criminal Code.

Drawing 5 and drawing 10 deal with the position of women in a Muslim society and thus concern social conditions in those societies and the lives of the members of those societies. On this basis the drawings cannot be considered to contain expressions about Islamic religious doctrines or acts of worship and are consequently not punishable offences under section 140 of the Danish Criminal Code.

The two armed figures in drawing 8 can be seen to be an illustration of an element of violence in Islam or among Muslims. The standing man who could be a depiction of Muhammed, however, denies there is any reason for anger and speaks soothingly, which must be taken to be a rejection of violence. Neither can this drawing thus be considered an expression of mockery or scorn of Islamic religious doctrines or acts of worship, cf. section 140 of the Danish Criminal Code.

Drawing 2, showing the face of a grim-looking man with a turban shaped like an ignited bomb, can be understood in several ways.

If Muhammed is taken to be a symbol of Islam, the drawing can be understood to mean that violence or bomb explosions have been committed in the name of Islam. The drawing can therefore be seen as a contribution to the current debate on terror and as an expression that religious fanaticism has led to terrorist acts. Understood in this way, the drawing cannot be considered to express contempt for the Prophet Muhammed or the Islamic religion, but as an expression of criticism of Islamic groups who commit terrorist acts in the name of religion. On this basis, the drawing is clearly not a violation of section 140 of the Danish Criminal Code.

The drawing can also be taken to depict the Prophet Muhammed as a violent person and as a rather intimidating or scary figure.

The historical descriptions of the Prophet's life show that while propagating their religion, he and his followers were involved in violent conflicts and armed clashes with persons and population groups that did not join Islam, and that both many Muslims and others lost their lives in that connection.

Even against this historical background, a depiction of the Prophet Muhammed as a violent person must be considered an incorrect depiction if it is with a bomb as a weapon, which in the context of today may be understood to imply terrorism. This depiction may with good reason be understood as an affront and insult to the Prophet who is an ideal for believing Muslims.

However, such a depiction is not an expression of mockery or ridicule, and hardly scorn within the meaning of section 140 of the Danish Criminal Code. The concept scorn covers contempt and debasement, which in the usual meaning would not comprise situations depicting a figure as shown in drawing 2, regardless of how it is illustratively to be understood or interpreted.

Also taking into account that, according to the legislative material and precedents, section 140 of the Danish Criminal Code is to be interpreted narrowly, the affront and insult to the Prophet Muhammed, which the drawing may be understood to be, cannot accordingly with the necessary certainty be assumed to be a punishable offence under section 140 of the Danish Criminal Code.

No matter whether the purpose of publishing the drawings according to the text in the article was to express “scorn, mockery and ridicule” with the intention of debating whether special considerations should be made for the religious feelings of certain Muslims in a secular society, this intention, if it exists, is not found to have been expressed in the drawings in such a manner that it constitutes a violation of section 140 of the Danish Criminal Code.

For the sole reason that the matter cannot be considered to be a punishable offence under section 140 of the Danish Criminal Code, there is no cause to assess separately whether punishment in the case would, in such event, be considered a violation of Article 10 of ECHR. There has thus not been any cause to assess whether interference by way of punishment would be a "necessary interference in a democratic society"; that is to say whether the interference pursued a proportionate legitimate aim, cf. Article 10(2) of ECHR.

On this basis the Director of Public Prosecutions does not find grounds for changing the decision made by the Regional Public Prosecutor of Viborg and therefore concurs in the decision pursuant to section 749(2) of the Danish Administration of Justice Act to discontinue the investigation in the case with respect to violation of section 140 of the Danish Administration of Justice Act.

### **3.3. Section 266 b of the Danish Criminal Code**

Under section 266 b(1) of the Danish Criminal Code any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, scorned or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.

Like section 140 of the Danish Criminal Code, section 266 b should be subject to a narrow interpretation out of regard for the right to freedom of expression.

The object of protection in section 266 b of the Danish Criminal Code is a group of people – belonging to a majority or a minority – who are scorned or degraded e.g. on account of their religion – contrary to section 140 of the Danish Criminal Code where the object of protection is the religious feelings connected with religions doctrines and acts of worship.

The fact that in the opinion of the Director of Public Prosecutions there is no violation of section 140 of the Danish Criminal Code does not rule out that section 266 b of the Danish Criminal Code may be violated.

There is no doubt that the drawings in Jyllands-Posten constitute a "statement or other information" and that it was made "publicly", cf. section 266 b(1) of the Danish Criminal Code.

The question is whether the article and the drawings "insult" or "degrade" Muslims on account of their religion.

The concept "scorn" in section 266 b(1) is understood i.a. to be degrading expressions or expressions of ridicule. This concept must be considered to encompass the same meaning as the expressions

"mockery" and "scorn" in section 140 of the Danish Criminal Code. The expression "degraded" in section 266 b(1) of the Danish Criminal Code is not defined in any detail in the legislative material of the Criminal Code, but was inserted by an amendment of the law in 1971, when it was simultaneously indicated that this expression was chosen in preference of another proposed wording in order to make greater allowance out of regard for the freedom of expression. It appears from the literature that expressions, although they are not scornful, may be degrading. It must, however, also be assumed that degrading expressions which are not scornful must be gross to a certain extent.

The text section of the article does not refer to Muslims in general, but mentions expressly "some" Muslims, i.e. Muslims who reject the modern, secular society and demand a special position in relation to their own religious feelings. The latter group of people must be considered to be comprised by the expression "a group of people" as mentioned in section 266 b, but the text in the article cannot be considered to be scornful or degrading towards this group – even if seen in the context of the drawings.

As mentioned in point 3.2 above, according to the heading, the drawings in the article depict Muhammed. The drawings that must be assumed to be pictures of Muhammed depict a religious figure, and none of them can be considered to be meant to refer to Muslims in general. Furthermore, there is no basis for assuming that the intention of drawing 2 was to depict Muslims in general as perpetrators of violence or even as terrorists.

The drawings depicting persons other than Muhammed do not contain any general references to Muslims. Furthermore, the depiction of Muslims in these drawings is not scornful or degrading. Not even when the drawings are seen together with the text section of the article is there any basis to assume that the drawings make statements referring to Muslims in general.

Accordingly, the Director of Public Prosecutions does not find that in the case of the article "The Face of Muhammed" there has been any violation of section 266 b of the Danish Criminal Code.

Based on this the Director of Public Prosecutions also concurs in the decision to discontinue the investigation with regard to violation of section 266 b of the Danish Criminal Code.

#### **4. Conclusion**

As it appears from point 3.2 and 3.3. above, the Director of Public Prosecutions does not find basis for changing the decision made by the Regional Public Prosecutor of Viborg and therefore concurs in the decision pursuant to section 749(2) of the Danish Administration of Justice Act to discontinue the investigation with regard to section 140 of the Danish Criminal Code as well as section 266 b of the Danish Criminal Code.

Although there is no basis for instituting criminal proceedings in this case, it should be noted that both provisions of the Danish Criminal Code – and also other penal provisions, e.g. about defamation of character – contain a restriction of the freedom of expression. Section 140 of the Danish Criminal Code protects religious feelings against mockery and scorn and section 266 b protects groups of persons against scorn and degradation on account of i.a. their religion. To the extent publicly made

expressions fall within the scope of these rules there is, therefore, no free and unrestricted right to express opinions about religious subjects.

It is thus not a correct description of existing law when the article in Jyllands-Posten states that it is incompatible with the right to freedom of expression to demand special consideration for religious feelings and that one has to be ready to put up with “scorn, mockery and ridicule”.

Henning Fode