

EU versus intellectual freedom?

In a bid to synchronise hate crimes, the EU is seeking unity amongst members states against the denial of historical injustices. Is this the EU versus member states' appreciation of intellectual freedom? Luigi Cajani explains.



On 27 January 2014 the European Commission published a [report](#) on “the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law”. The underlying [Framework Decision](#), adopted in November 2008 (with implementation that had been expected before November 2010), aims at homogenising the criminal legislation of member states on two issues. First, as declared in its title, the report targets racist or xenophobic behaviour, “publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin” (art. 1 § 1 a). Second, it refers to the crime of denial: “publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes” (art. 1 § 1 c, d), a reference not only to the Holocaust but a wide array of international crimes.

The gestation of this Framework Decision was very long – seven years – because of the differences among member states with regard to freedom of expression, a principle defended by the United Kingdom amongst others. Outside diplomatic circles, great concern was expressed by historians' associations worldwide because of the particular danger the measure against denialism bears for historical research. Such a measure would open the door to political and juridical censorship above all when deciding upon a legal definition for historical events other than the Holocaust.

Before the Framework Decision was adopted, the General Assembly of the International Committee of Historical Sciences (ICHS) approved in 2007 a motion expressing great alarm for this possible intrusion of the law into the field of historical research, inviting all affiliated organizations to thoroughly discuss the matter with their members. The ICHS then held a special session of the international congress of historical sciences on the issue in 2010. A few days before the 2007 meeting, the American Historical Association issued a [statement](#) on the Framework Decision affirming that any scientific research may only be assessed by experts of the same research field. If a historian should distort evidence, the only measure to be taken against him, by colleagues specialized in the same field, should be his exclusion from academic posts and, in extreme cases, from publications. The statement concluded: "If any other body, especially a body with the right to initiate legal proceedings and impose penalties, seeks to influence the course of historical research, the result will inevitably be intimidation of scholars and distortion of their findings."

Italian historians had already protested in January 2007 against a proposed bill criminalizing the denial of the Holocaust in Italy along the lines of the Framework Decision. The [Società Italiana per lo Studio della Storia Contemporanea](#) (SISSCO) launched a [petition](#) affirming that such a law would be dangerous, useless and counterproductive because it would provide deniers with "the opportunity to present themselves as defenders of freedom of expression". In its effort to impose historical truth, the state would expose the truth at the risk of losing all legitimacy, undermining "confidence in the free confrontation of stances and in free historiographical and intellectual research". Moreover, laws criminalizing incitement to violence, incitement to racial hatred and the praising of crimes against humanity already exist. The petition concluded with the assertion that civil society alone is empowered to struggle against Holocaust denial by means of "a cultural fight, by ethics and by steadfast policy". In the face of such opposition, the Ministry of Justice modified the bill by eliminating all references to Holocaust denial and instead imposing tougher penalties upon those who "disseminate ideas of racial superiority". The bill was never tabled for discussion at the Italian parliament and eventually forgotten.

In October 2008 the French association [Liberté pour l'histoire](#) also protested and petitioned against the Framework Decision, expressing concern "about the retrospective moralization of history and intellectual censure", and affirming that "history must not be a slave to contemporary politics nor can it be written on the command of competing memories". As the association explained, "in a free state, no political authority has the right to define historical truth and to restrain the freedom of the historian with the threat of penal sanctions".

The report by the European Commission analysed point by point the measures taken by member states. Whilst the regulations against racism and xenophobia have generally been met by national legislation, crimes of denialism have not been implemented by many member states. After the adoption of the Framework Decision some states, such as the United Kingdom, Ireland, Sweden, Denmark and the Netherlands, have maintained that their general regulations against racism and hate speech also cover denialism, even if it not explicitly mentioned. Other member states, like Greece and Italy, are currently reviewing how to implement the Framework Decision.

On 15 October 2013 the Commissione Giustizia of the Italian senate [approved a law](#) to include into the penal code (under the heading “Incitement to commit a crime”) the crime of “denial of the existence of crimes of genocide or crimes against humanity or war crimes”, with a penalty of between one and five years imprisonment. In this very short wording one must pay attention to the absence of any reference to appropriate authorities (national courts, international courts, or parliaments) entitled to define an historical event as a crime of that sort, leaving wide room for incertitude and abuse. The day following the passage of the law was the anniversary of one of the most appalling episodes of the persecution of the Jews in Italy, the raid of the Roman ghetto in 1943. During the commemorative ceremony held in the Roman Synagogue, President of the Republic Giorgio Napolitano voiced his desire for accelerated approval of the law. The Commissione Giustizia was thus entrusted with a deliberative procedure allowing for the law’s immediate approval. This would have been followed through had the party Movimento 5 Stelle not stopped the procedure asking the law to undergo regular debate in the senate, which was successfully scheduled a few days later. During this interval the debate on laws against denial flamed anew in the press, and SISCO published again an [appeal](#), repeating the arguments of the previous appeal of 2007 as well as pointing out that the haziness of the proposed law’s text could interfere with freedom of research on crimes such as those in Cambodia by the Khmer Rouge, those in Argentina during the Dirty War, those in Srebrenica, and so on. Condemnation was also expressed by the [Union of Criminal Defence Barristers of Italy](#).

This widespread criticism meant that, after presentation of the law to the senate in October 2013, debate was suspended and the law eventually sent back to the Commissione in February 2014, where it is still pending. The Commissione meanwhile organized a hearing with experts both in favour and against.

This mobilization of historians and jurists against the Framework Decision is on point, but it is not a guarantee that the outcome can be predicted, given the European political landscape. In fact, the European Commission regrets in the conclusions of its report that “a number of member states have not transposed fully and/or correctly all the provisions of the Framework Decision, namely in relation to the offences of denying, condoning and grossly trivialising certain crimes”, and insists on the necessity of a “full and correct legal transposition of the existing Framework Decision”. In order to achieve this, the European Commission announces that it “will engage in bilateral dialogues with member states during 2014 with a view to ensuring full and correct transposition”. After that, a firmer action is envisaged. A final footnote states the following: “Ref. Article 10 of

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Protocol No 36 of the Treaty of Lisbon. Infringement procedures for Framework Decisions are not possible before 1 December 2014". This is a reference to how the Treaty of Lisbon, by introducing infringement procedures for Framework Decisions, gives power to the European Commission to open procedures against member states failing to comply with the moral suasion of "bilateral dialogues". All in all, the wording of the report gives the impression that the European Commission is not willing to give much space to exceptions inspired by respect for the legal traditions of member states. The outcome will depend on the reaction of these members states.

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Published on: June 19, 2014