



ISLAMIST LAWFARE: BRIEFS AS WEAPONS OF MASS DISRUPTION

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The 2009 Christmas-day bombing attempt on a commercial flight to Detroit was not the first time that terrorists have used briefs as a weapon. A recent presentation in Philadelphia by Daniel Huff, director of the Legal Project of the Middle East Forum, detailed the use of lawsuits by Islamic organizations as a method of silencing criticism and chilling free speech. “Lawfare” is the wrongful use of a legal process to silence and punish free speech critical of radical Islam, terrorism, or its sources of financing. Lawfare also seeks to enact or reinstate blasphemy laws, especially as applied to Islam and its prophet, Mohammad. Libel, defamation, and “hate speech” suits have been pressed in the United States, Great Britain, and elsewhere, with the intent of inflicting great expense on terrorism researchers, their sponsors and publishers. For those who publish primarily on the Internet, however, there may be a preemptive legal strategy available that strikes a blow at the heart of Islamist lawfare.

The problem is that Islamist groups, coordinated by the Organization of the Islamic Conference, seek to use legal actions to silence views critical of Islam. This tactic is complementary to the use of violence against those who publish materials viewed as anti-Islamic or heretical, such as the cartoons of the prophet that appeared in the Danish newspaper *Jyllands-Posten* on September 30, 2005¹ or the film *Fitna* by Dutch legislator Geert Wilders. These legal actions have been filed in many jurisdictions, but the liberal libel laws of Great Britain have given rise to a phenomenon known as “libel tourism” and the prosecution of suits against authors whose only connection to Britain is the sale of a few books through Amazon.co.uk, Amazon.com, and excerpts on the U.S. websites. Libel defendants are required to prove themselves innocent under British law, thus defendants must pay exorbitant legal fees, including those of winning plaintiffs. Judgments from UK courts are enforced in the rest of the European Union, and may also be enforced in the United States—subject to limitations, such as New York’s Libel Tourism law.²

Examples of the use of lawfare abound, and are not limited to Islamist issues. Holocaust deniers, climate change opponents, proponents of “intelligent design” education, fringe pseudo-religious organizations, and neo-fascists have all used law suits to attempt to silence and bankrupt opponents. Islamist groups, however, are actively seeking expansion of laws—particularly in Europe and within the United Nations framework—that would make any criticism of Islam actionable. Couched in seemingly neutral terms, proposals for such statutes may attract support from liberal thinkers who are unaware that the proposed rules actually will chill or entirely squelch free speech and debate.

Fortunately, there may be a partial solution available for those willing to publish materials exclusively on the Internet. Several states in the United States have adopted statutes to protect free speech against meritless legal

¹ <http://upload.wikimedia.org/wikipedia/en/7/75/Jyllands-Posten-pg3-article-in-Sept-30-2005-edition-of-KulturWeekend-entitled-Muhammeds-ansigt.png>

² [http://www.casp.net/statutes/ny-stat\(2009\).pdf](http://www.casp.net/statutes/ny-stat(2009).pdf)

attack. These laws are known as Strategic Litigation Against Public Participation (SLAPP) statutes; the broadest of these is the California anti-SLAPP law, Ca. Civ. Proc. Code § 425.16. Under this law, a person who is sued may move to dismiss the suit if that suit is based on any “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue.” The statute further states that such an act may be “any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.”

Because both Federal and California courts have recognized that a valid contract may be established through the Internet, and because digital signatures are valid under both United States and California law, a web site, blog, or similar publication may enact terms and conditions precedent to use and access. One such common condition is that the Internet user consents to exclusive jurisdiction, venue and application of the law of a particular nation and state. Thus, if access to a website, document, or transaction is governed by an effective contract— stating that California will be the controlling law, jurisdiction and venue for any dispute— those directly accessing the publication may be effectively blocked in any attempt to bring lawfare actions elsewhere. Other terms, such as a prohibition on access to the published information in jurisdictions having standards of free speech protection lower than California’s, and on republication of the information, may provide other grounds for avoidance of suit. (Of course, lawfare plaintiffs will still try, and it may involve expensive legal proceedings to have their suits moved from, for example, London to San Francisco, but under most recognized standards of international law, we should expect the courts in Britain to respect such a contract.)³

The California legislature is now considering an additional act that would prohibit enforcement of foreign defamation judgments when the foreign country’s legal system does not “provide at least as much protection for freedom of speech and the press as provided by both the United States and California Constitutions.”⁴ The Free Speech Protection Act, which provides many of the same protections, has been introduced in Congress.⁵

In open societies, it may be impossible to prevent all uses of the legal system for illegitimate ends. Access to independent courts is, after all, one of the bedrock principles of civil society. Almost every judicial system, however, recognizes and attempts to prevent “forum shopping” through the use of jurisdictional rules. While the United States works to shield its citizens from lawfare suits brought in foreign courts, and the individual states work to limit a strategic lawsuit against public participation (SLAPP) action, other nations should be supported in their efforts to prevent libel tourism. The United States is proof, in most respects, that only with a vigorous public debate and free press are the most difficult political issues solved. Courts and attorneys, both here and abroad, should uphold that fundamental proposition.

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³ It may be necessary for the publisher or author to choose to have his or her website actually hosted by a company located in California in order that jurisdiction and venue will actually attach. However, in practice, this requirement is easily satisfied, given the large number of reputable firms providing Internet services in California.

⁴ http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0301-0350/sb_320_bill_20090616_amended_asm_v97.html

⁵ http://online.wsj.com/article/SB121599561708449643.html?mod=googlenews_wsj