Misuse of anti-terror legislation threatens freedom of expression

April 12, 2018

Council of Europe

<https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression>

When terrorism spreads, states are often tempted to restrict fundamental freedoms for the sake of fighting it and preventing further attacks. Terrorism constitutes a serious threat to human rights and democracy and action by states is necessary to prevent and effectively sanction terrorist acts. However, the misuse of anti-terrorism legislation has become one of the most widespread threats to freedom of expression, including media freedom, in Europe.

A disturbing trend in Europe

The issue is not new. Since the nineteenth century, Europe has been hit by terrorist attacks perpetrated in the name of anarchist, revolutionary, autonomist or reactionary ideologies. Despite this long history, governments usually give little consideration to past experiences when designing counter-terrorism policies. Hasty reactions often results in the absence of any human rights impact assessment of counter-terrorism measures implemented in the past, thus ignoring the lessons of history, including the fact that restrictions to freedom of expression have never demonstrated their efficiency in fighting terrorism.

Laws criminalising offences such as “encouragement of terrorism” and “extremist activities” as well as offences of “praising”, “glorifying”, or “justifying” terrorism have proliferated in Council of Europe member states. Apology of terrorism is widespread, especially online, and must be combatted. But counter-terrorism legislation may become a dangerous tool for freedom of expression when it is used to limit or silence legitimate reporting or criticism. It can also be problematic when the offences are not clearly defined or too wide and may lead to unnecessary or disproportionate restrictions to the right to freedom of expression.

The danger of abuses of anti-terrorism laws

My predecessors have for instance repeatedly warned against the dangers, arbitrariness and abuses of anti-terrorism laws to stifle freedom of expression in Turkey, where several provisions of the Turkish Criminal Code relating to terrorism and the Anti-Terrorism Law continue to generate some of the most serious violations of freedom of expression in the country. They had notably observed that in many instances the legitimate exercise of freedom of expression had been criminalised as propaganda for terrorism or as proof of membership of terrorist organisations, notably in cases where no other material evidence exists of any link with a terrorist organisation and in the absence of any call or apology for violence. For example, a petition signed by academics calling for the end of violence in south-eastern Turkey continues to result in many terrorism-related sentences being handed down by Turkish courts. In a [Memorandum](https://rm.coe.int/ref/CommDH(2017)5) on freedom of expression and media freedom in Turkey published last year, my predecessor expressed once more concerns at the extensive use of crimes relating to terrorism and the concept of “incitement to violence”, which was systematically interpreted in a non human-rights-compliant manner.

The risk of catch-all label

In France, a provision criminalising the “apology of terrorism” was first introduced in the press law of 1881. Under its current version resulting from the counter-terrorism law of 2014, it is punishable by up to five years in prison and a fine of up to 75.000 Euros, increased to seven years in prison and a fine of up to 100.000 Euros if the offence is made online. According to the Ministry of Justice, the number of persons sentenced for apology of terrorism has risen exponentially, from 3 persons in 2014 to 230 in 2015 and 306 in 2016, with a one-year prison sentence on average. This provision has been used in a wide variety of cases, including to sentence convinced supporters of ISIS calling to further terrorist attacks, as well as to prosecute a vegan activist, who was handed a seven-month suspended sentence, following a Facebook post celebrating the death of a butcher in a terrorist attack.

Violence and the threat to use violence with the intention to spread fear and provoke terror is the defining component of the concept of “terrorism”. The variety of cases dealt with under provisions criminalising apology of terrorism highlights one potential danger of the use of catch-all label to punish statements that do not contain these elements but incite to other forms of violence or simply are non-consensual, shocking or politically embarrassing.

Lack of clear concepts

In recent months I could witness how problematic the implementation of counter-terrorism legislation was. Firstly, the terms used are often vague or unduly broad and fail to clearly define notions such as glorification or propaganda.

Spain is a case in point. The conviction for glorifying terrorism of several twitter users and rappers following provocative statements or lyrics have recently sparked controversy. Sentences were based among others on Article 578 of the Spanish Criminal Code which foresees penalties for “glorifying terrorism” or “humiliating the victims of terrorism or their relatives.” This provision was broadened in 2015, with a view to increasing sanctions when such conducts occur via the internet. At that time, [five UN experts](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597) had raised concerns about these amendments to the Criminal Code as they “could criminalise behaviours that would not otherwise constitute terrorism and could result in disproportionate restrictions on the exercise of freedom of expression, amongst other limitations”, noting that the definition of terrorist offenses were too broad and vague. Article 578 has increasingly been used since 2015, with a reported chilling effect on freedom of expression. According to [Amnesty International](https://doc.es.amnesty.org/ms-opac/recordmedia/1@000030148/object/38826/raw), 84 persons have been convicted in application of this Article between 2015 and 2017, while only 23 persons had been convicted between 2011 and 2013 based on this provision.

The Russian Federation is another country where the use of counter-terrorism and anti-extremism legislation has affected freedom of expression over the last few years, and in particular media freedom and access to information. In June 2012, the Venice Commission [established](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)016-e) that the Russian law on combating extremist activity, which also lists the “public justification of terrorism and other terrorist activity” among the actions that are deemed to constitute “extremist activity” or “extremism”, had been flawed by broad and imprecise wording granting too wide discretion in its interpretation and application, thus leading to arbitrariness. Since then, its scope has been extended even further. According to [data](http://www.cdep.ru/userimages/sudebnaya_statistika/2018/k3-svod-2017.xls) from the Supreme Court of the Russian Federation, in 2017 there were at least 650 criminal prosecutions and sentences against individuals who expressed views deemed to contain a terrorist or extremist element. In parallel, civil society has been ringing alarm bells about the constant increase in administrative sanctions affecting thousands of individuals, bloggers and media outlets for using materials that the authorities consider to be extremist. Against this background, the Supreme Court’s amendments to its Ruling on “Judicial Practice in Criminal Cases on Crimes of an Extremist Nature” adopted on 20 September 2018 is a step in the right direction as they narrow down criminal liability and set further requirements for an act to be considered as a crime.

The United Kingdom also belongs to the numerous states that have taken or are about to take measures criminalising expression in the name of national security. In a recent [alert](https://go.coe.int/7ou53) submitted to the Council of Europe Platform, media freedom advocates raised alarm over the Counter-Terrorism and Border Security Bill arguing that it will have a significant negative impact on media freedom in addition to other freedoms. The Bill would notably criminalise watching online content that is likely to be helpful for terrorism, without a terrorist intent being required, a provision which might impede the work of investigative journalists and academics. The UN [Special Rapporteur](https://www.ohchr.org/Documents/Issues/Terrorism/SR/OL-GBR-7-2018.pdf) on the promotion and protection of human rights and fundamental freedoms while countering terrorism has also criticised portions of the Bill as disproportionately broad or invasive.

Secondly, legislation aimed at countering terrorism and extremist violence is frequently adopted following accelerated procedures and/or in the direct aftermath of terrorist attacks marked by shock, anxiety, a sense of emergency and of a necessary united front against the threat, leaving little space for thorough and peaceful discussions on the human rights impact and safeguards. This also increases the risks of misuse either for political or for what could be called ‘populist’ reasons, to send a signal to the population that the authorities are strong on the counterterrorism front and do their utmost to prevent terrorist attacks. Finally, by curtailing legitimate political debate, this response plays into the hands of the terrorists by installing an atmosphere of fear among society.

Another approach needed: protecting freedom of expression

Before adopting any new counter-terrorism measures, member states should pay attention to existing human rights standards and notably ensure that these measures are compatible with Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights, which guarantee the right to freedom of expression.

In its [General Comment No. 34](https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf) published in 2011, the UN Human Rights Committee underlined in that respect that “such offences as ‘encouragement of terrorism’ and ‘extremist activity’ as well as offences of ‘praising’, ‘glorifying’, or ‘justifying’ terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities.” It echoes the 2007 [Guidelines](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ae60e) of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis, according to which “Member states should not use vague terms when imposing restrictions of freedom of expression and information in times of crisis.”

The [Joint Declaration](https://www.osce.org/fom/154846) on Freedom of Expression and Responses to Conflict Situations adopted in 2015 also insisted on the need for States to “refrain from applying restrictions relating to ‘terrorism’ in an unduly broad manner. Criminal responsibility for expression relating to terrorism should be limited to those who incite others to terrorism; vague concepts such as ‘glorifying’, ‘justifying’ or ‘encouraging’ terrorism should not be used.” In addition, the [Joint Declaration](https://www.osce.org/fom/237966?download=true) on Freedom of Expression and Countering Violent Extremism adopted in 2016 stressed that “everyone has the right to seek, receive and impart information and ideas of all kinds, especially on matters of public concern, including issues relating to violence and terrorism, as well as to comment on and criticise the manner in which States and politicians respond to these phenomena” and that the concepts of “violent extremism” and “extremism” should not be used as the basis for restricting freedom of expression unless they are defined clearly and appropriately narrowly. Similar recommendations were made by the OSCE Representative on Freedom of the Media in two Communiqués on the impact of laws countering extremism on freedom of expression and freedom of the media ([2014](https://www.osce.org/fom/125186?download=true)) and on free expression and the fight against terrorism ([2016](https://www.osce.org/fom/261951?download=true)).

While taking into account the particular problems linked to the prevention of terrorism, the European Court of Human Rights has clearly stressed in its case-law, including in the cases of [Association Ekin v. France](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-68342-68810) (2001) and of [Belek and Velioğlu v. Turkey](http://hudoc.echr.coe.int/eng-press?i=003-5191087-6425338) (2015), that views expressed which cannot be read as an incitement to violence or be construed as liable to incite to violence should be covered by freedom of expression.

Four steps to counter misuses of anti-terrorist laws to restrict freedom of expression

Terrorism poses a real and serious threat to people’s lives and is a menace for human rights and democracy. States have therefore a duty to protect society against terrorists and to take measures to prevent and punish terrorist activities effectively. However, this duty is counterbalanced by the obligation to uphold human rights in the fight against terrorism. A number of steps are needed to achieve that difficult balance:

* The relevant national law must be formulated with sufficient precision to enable media actors and others to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Existing legislation must thus be reviewed and the notions used should be clearly defined.
* Any restriction on freedom of expression must be strictly necessary to protect national security and proportionate to the legitimate aim pursued. Anti-terror legislation should only apply to content or activities which necessarily and directly imply the use or threat of violence with the intention to spread fear and provoke terror. Any other type of content or activities should be addressed in the context of the duties and responsibilities that the exercise of freedom of expression carries with it, as defined by Article 10 paragraph 2 of the European Convention on Human Rights.
* Anti-terror and security laws should not unduly interfere with the right of the media to impart information of public interest and the right of people to receive it.
* All persons imprisoned because of the legitimate criticism they have expressed should be freed and the criminal records of those who have been convicted for such reports should be cleared.

The idea according to which restrictions to freedom of expression may be an efficient tool to combat terrorism results in an overly wide application of concepts such as terrorist propaganda, glorification or apology of terrorism, including to contents that clearly do not incite to violence. This misconception should be eliminated as undermining human rights is precisely one of the aims pursued by terrorism, which can in no way be eradicated by sacrificing the very principles and values of our democratic societies. On the contrary, pluralistic and democratic debates are of utmost importance, as a free society can thrive only through free expression and the exchange of ideas.