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**Conference on Anti-terrorism legislation in Europe since 2001  
and its impact on freedom of expression and information**

**General Report prepared by Sandra Braman**

Executive Summary

Discussions during the conference expressed concern about the effects of anti-terrorism laws on freedom of expression, culminating in these recommendations:

- (1) Governments should review *the texts of anti-terrorism laws* to make sure that they are clear and precise. Formulations that are vague and overbroad may not meet the requirements of legal certainty.
  - (A) **Limitations on government power** All limitations on government powers must be articulated in as much detail as are the powers themselves. Such detail is necessary to provide standards against which operationalisation of broad human rights principles in laws and legal practices can be judged.
  - (B) **Incitement** "Incitement" and related terms must be defined in a way that identifies those links between intention, risk, act, danger, and imminence that are being criminalised. Provisions criminalising "indirect" incitement significantly expand the range of activities of concern and are likely to be challenged as overbroad, vague, and not meeting the requirements of legal certainty.
  - (C) **Access to information** The Council of Europe Convention on access to official documents should include the requirement that requests be responded to in a timely manner, cover a broader range of officials, and include a stronger review process. This is of particular importance for the media. Decisions to deny access to information must be based on the content or nature of the information itself, not the type of information it is or the institutional source. The need to restrict access to state secrets must be balanced with the need to serve the public interest.
- (2) Legal controls over *the implementation of anti-terrorism laws* need to be strengthened.
  - (A) **Respect limits as well as powers** Ensure that protections against abuses of the law as well as the powers granted by the law are respected.
  - (B) **Procedural requirements** All procedural requirements must be followed.
  - (C) **Independent judiciary** An independent judiciary must have the power to review implementation of anti-terrorism laws.
  - (D) **Interdependence of rights** It is often necessary to exercise the right to privacy, the right of association, and the right of access to government documents and other information in order to have freedom of expression. All of these must be respected during the implementation of anti-terrorism laws.

- (3) An *independent, ongoing monitoring* process must be established. Reliable data about the effects of anti-terrorism laws on freedom of expression and access to information are needed in order to assess whether those measures meet the tests of necessity in a democratic society and proportionality.
- (4) Better *education* for all involved parties - from law-makers to professional journalists to citizens who also produce and use the news - will help reduce the gap between law and practice and ensure that the law is implemented correctly.
- (5) When making, implementing, analysing, or evaluating the effects of any law, *decision-making must be transparent*.

## General Report

The conference took place in Amsterdam on 17 and 18 November 2008 on "Anti-terror legislation in Europe since 2001 and its impact on freedom of expression and information." Representatives from national authorities, the media and civil society, as well as independent experts discussed the impact of anti-terror legislation in Council of Europe member states on freedom of expression and access to information in those countries. Participants acknowledged the need to balance two complementary rights - to be protected against possible harm from terrorism, and to be protected against possible harm from insufficient flows of necessary information.

Conference discussions focused particularly on the issues of incitement to and glorification of terrorism, access to information and state secrets, protection of sources, and surveillance. The role of international standards was also examined, particularly those of the Council of Europe: the Guidelines of the Committee of Ministers of the Council of Europe on media in times of crisis (2005), the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism (2002), the Council of Europe Convention on the Prevention of Terrorism (2005), and related case law of the European Court of Human Rights. A report by David Banisar, Speaking of terror: A survey of the effects of counter-terrorism legislation on freedom of the media in Europe, provided an overview of laws across Council of Europe countries and of the issues raised by those laws. Additional examples of the consequences of using these laws were provided by the experts attending the conference.

### Trends and Concerns

Several factors affect the nature of anti-terrorism laws. There are many gaps between law and practice. Practice is often influenced by informal, private, and/or cultural social forces that may be as strong as, or stronger than, the effective power of the law. A range of explanations, from lack of knowledge of the law by authorities to insufficient oversight, was offered for these gaps.

Forces both in and outside Europe are encouraging the harmonisation of laws across European countries. Whether harmonised at the level of text or not, fundamental legal concepts such as "incitement" are defined and understood very differently across jurisdictions. Positive developments, including the spread of access to information laws, it should be noted, are also underway.

Participants in this conference agreed that news is necessary for anti-terrorism efforts because it keeps citizens informed about the nature of possible dangers and what their governments are doing about those threats. Thus those concerned about fighting terrorism should also be working to strengthen freedom of expression. Currently, however, many anti-terrorism laws as implemented restrict freedom of expression and thus undermine anti-terrorism efforts. The Banisar document and conference participants reported on negative effects that include decisions not to communicate because of fear, other forms of self-censorship at the individual and group levels, damage to the democratic process, economic loss and the destruction of organisations.

The effects of anti-terrorism laws on freedom of expression are not limited to professional journalists who work for established media organisations. Every citizen who gathers, processes, distributes, and/or discusses information dealing with shared matters of public concern is affected by anti-terrorism laws. News is exchanged through interpersonal, networked, community, and organisational channels beyond those of the traditional media. Citizens also provide resources essential to the functioning of professional media organisations today. Those who read the news are also vulnerable under current anti-terrorism laws and must be protected against abuses of those laws.

Current Legislation in Council of Europe Countries Concerns about a number of issues raised by legislation currently in place were identified.

Limitless expansion of government power Government powers have been expanded, but the limits to those powers have not always been identified and/or clearly defined. The following features of current laws make this possible.

Legal uncertainty Key terms, such as "incitement," are so poorly defined that they may not always meet the legal requirements. The United Nations Human Rights Committee in 2008 called for a revision of the UK Anti-Terrorism Act of 2006, for

example, because that legislation was held to be overbroad and too vague. Uncertainty has been made worse by the use of related additional terms such as "apology," "glorification," and "extremism." The proportionality of anti-terrorism laws must be evaluated.

Broadening of scope It is possible to develop standards against which to judge claims of direct incitement or related activities, but it is not possible to establish such standards for indirect incitement. For this reason, laws that go beyond the well-established concept of direct incitement to also include indirect incitement are likely to be challenged on grounds of over-breadth, vagueness, and inability to meet the legal standard.

Procedural detail key A key conclusion of the Banisar report, confirmed by conference participants, was that the level of detail in a law matters. The more detail specified in a law, the more operational effort and resources go to its implementation. Where a broad principle is stated without additional detail, implementation may remain at rhetoric level only. Detail is needed in two places. First, rights to be protected under an anti-terrorism law (limits to the law) need to be presented in as much detail as the powers granted. Second, procedures to be followed when implementing the law must also be spelled out in detail.

Reservations on rights Conference participants also discussed recent trends expanding the reservations, or restrictions, on protections for freedom of expression. There was concern that lawsuits are being filed that go beyond the situations justifying restrictions on that right. Limits on photography are being exercised without legal foundation. Interpretation of the law can overturn longstanding practice and understanding of the law.

Interactions with other legal developments The effects of anti-terrorism laws interact with those of other laws and regulations. As noted by this group of experts, three types of interactions affect the influence of anti-terrorism laws on freedom of expression: (1) Anti-terrorism laws can be used as "Trojan horse" legislation to serve purposes other than those of fighting terrorism. (2) Anti-terrorism laws complement, expand upon, or sometimes conflict with laws dealing with cybercrime. (3) The right to freedom of expression cannot be separated from rights to privacy, association, and access to information.

Gap between law and practice Numerous examples were provided of instances in which existing law was not adhered to. A range of explanations, from insufficient knowledge of the law by practitioners and legal authorities to insufficient oversight, was offered for this gap.