Excesses of Counter-Terrorism and Constitutional Review in France: The Example of the Criminalisation of the Consultation of Websites

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In the span of three years, France has adopted no less than five new counter-terrorism laws in November 2014, November 2015, June 2016, February 2017, and October 2017. As in other countries, this surge in counter-terrorism legislation has been prompted by a rise and reconfiguration of the terrorist threat (notably with regards to Foreign Terrorist Fighters (FTFs)), and in turn by the United Nations' call for the adoption by states of new measures, in particular broad criminal offences. In order to address the threat of FTFs, impede radicalisation and recruitment, and pre-empt the commission of terrorist acts, Security Council Resolution 2178 (2014) and other international instruments have pushed for the creation of new terrorist offences and the criminalisation of all sorts of preparatory acts. The adoption by states of extensive counter-terrorism legislation has inevitably given rise to tensions between far-reaching measures and constitutional and human rights standards, which are sometimes seen as hindering the fight against terrorism.

An illustrative example of these frictions is provided by the short-lived criminalisation by France of the mere consultation of online materials that promotes terrorism. Introduced in June 2016, the controversial provision was declared unconstitutional in February 2017, immediately reintroduced with minimal modifications, and again invalidated by the Constitutional Council in December 2017. This provision, and its back and forth trajectory, are an illustrative example of the excesses to which can lead overly-restrictive counter-terrorism legislation, as well as of some shortfalls of the constitutional review of legislation in France.

Adoption and Invalidation of the Criminalisation of Websites Consultation: A Tale in Two Acts

In June 2016, the following provision was introduced in the French Penal Code:

'The act of habitually accessing online public communication services that exhibit messages, images or representations that directly encourage the commission of terrorist acts, or defend these acts, when this service has the purpose of showing images or representations of these acts that consist of voluntary harm to life is punishable by two years of imprisonment and a fine of €30,000.

This Article is not applicable when they are accessed in good faith from normal professional activity that has the objective of informing the public, conducting scientific research, or for use as evidence in court.'

(translation taken from the English version of Constitutional Council Decision no. 2016-611 QPC of 10 February 2017, para 1)

On 10 February 2017, the Constitutional Council issued a decision repealing this provision, holding it unconstitutional for excessively infringing on the freedom of communication. It noted that

'the contested provisions do not require that the individual habitually accessing online public communication services intend to commit terrorist acts, nor do they require proof that this access is accompanied by the desire to adhere to an ideology expressed by these services. Thus these provisions punish by a two-year prison term the simple act of accessing several times an online public communication service, no matter the intention of the individual, when this

access does not fall within normal professional activity that has the objective of informing the public, conducting scientific research, or for use as evidence in court' (para 14).

Just after being invalidated, a slightly modified version of the provision was reintroduced in a governmental bill adopted on 28 February 2017. Using language from the Constitutional Council, the renewed provision added a requirement that the consultation of terrorist websites 'is accompanied by the desire to adhere to an ideology expressed by these services', but fell short of requiring terrorist intent. Invited to assess again the constitutionality of the measure through a preliminary ruling procedure (see below), the Constitutional Council invalidated it once more. In response to an almost identical provision, it issued an almost identical decision on 15 December 2017. It found the new condition of adhesion to terrorist ideology to be insufficient (para 14), and noted that the added safeguard that consultation is done 'without legitimate reasons' actually led to uncertainties as to the scope of the provision (para 15).

The Tension Between Far-Reaching Counter-Terrorism Measures and Constitutional Standards

In essence, and as eloquently argued by lawyer François Sureau, the criminalisation of the consultation of terrorist websites without requiring intent to engage in terrorist activities amounted to a crime of thought, and could not be reconciled with basic constitutional principles such as the right to liberty and freedom of thought. Although particularly far-reaching, the attempt of the French government to enact this provision illustrates a larger trend seen in many countries towards the adoption of sweeping counter-terrorism measures aiming to reach behaviours that are increasingly far removed from actual criminal conduct.

The measure also illustrates a notable trend in the counter-terrorism field towards over-legislating. Governments tend to respond to new risks and attacks with new legislative provisions, without assessing the extent to which existing measures could be sufficient. This was noted by the Constitutional Council which pointed out that a plethora of provisions already in place were available to address online radicalisation, including surveillance, administrative measures, orders to remove of terrorist content, and criminal provisions that can be applied before terrorist acts are committed as long as terrorist intent is demonstrated (paras 7–12 of 2016-611 QPC and paras 6–12 of 2017-682 QPC). In this context, the Constitutional Council found that the criminalisation of the consultation of terrorist websites did not meet the threshold of necessity for restrictions to fundamental freedoms (para 13 of 2016-611 QPC and 2017-682 QPC).

Finally, the path of the provision illustrates a certain tension between law-makers and processes of constitutional review, with law-makers attempting to circumvent the boundaries that are drawn by constitutional and judicial limits. In the case at hand, it is rather bold for the French government and parliament to have reinstated a provision a few weeks after it was declared unconstitutional. A comparable example was seen in the United Kingdom, where legislation on citizenship stripping was modified following a Supreme Court decision preventing the deprivation of British citizenship of an individual that would have been rendered stateless (case of Al-Jedda, 2013), so as to allow for citizenship deprivation when there are 'reasonable grounds for believing that the person is able, under the law of [another country], to become a national of such country' (Immigration Act 2014; see 'Citizenship Removal Resulting In Statelessness', Report of David Anderson, April 2016).

Modes of Constitutional Review of Legislation in France: Optional or Posterior

Ideally, constitutionally-sensitive legislation such as counter-terrorism legislation should undergo an assessment of its constitutional compatibility prior to being enacted and implemented. However, in the French system, prior constitutional review of ordinary legislation is only optional. Under Article 61 of the French Constitution, new legislation 'may be submitted to the Constitutional Council prior to promulgation by either the President of the Republic, or the Prime Minister, or the President of either House, or sixty Members of the Parliament or sixty Members of

the Senate', and in practice this is far from systematic. With regards to the latest counter-terrorism legislation of October 2017, French President Macron had expressly declared that he would not submit the law for prior constitutional review.

After it is adopted, the constitutionality of legislation can be challenged before the Constitutional Council through a procedure of preliminary rulings ('question prioritaire de constitutionnalité', abbreviated 'QPC'). Introduced in 2008, it allows individuals to argue that a provision applied to them in ongoing legal proceedings should be repelled on the ground of its infringement to fundamental rights guaranteed by the Constitution. It is through this procedure that the criminalisation of the consultation of websites was repelled. However, the QPC procedure should not be seen as a sufficient approach, as it comes with a number of shortcomings. First, QPCs can only be raised in the context of specific proceedings, if and when a contentious provision is applied to a particular case. Second, QPCs are only submitted if an affected party raises the issue. It can thus take months or years before the unconstitutionality of a provision is recognised by the Constitutional Council. Third, the invalidation of provisions by the Constitutional Council is not retroactive, and only takes effect from the date of the decision. Prior to its first invalidation in February 2017, it appears that the provision criminalising the consultation of terrorist online content resulted in the conviction of individuals in at least two instances, whose convictions were maintained despite the later invalidation of the basis for them. Presumably, no QPC was raised during their trial.

The criminalisation of remote behaviours, such as the consultation of terrorist websites, and the circumvention of constitutional limitations are one exemplification of the excesses of counter-terrorism legislation in recent years. In this context, constitutional standards have a clear role to play to curb governmental and legislative action in line with fundamental rights. However, procedures need to be strengthened in order to ensure that new measures are more systematically reviewed. A clearer commitment to constitutional values in counter-terrorism would not only ensure a better protection of individual rights, but also reinforce the normative status of institutions that should aim at the protection of all fundamental freedoms, while signaling an understanding that excessive violations of these freedoms in the fight against terrorism often are both unnecessary and ineffective.

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