Erdogan's Wish List Come True?

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On 1 June 2023, the new Swedish anti-terrorism legislation entered into force whose primary novelty is the criminalization of membership in terrorist groups. While it thereby aligns Swedish counter-terrorism law with the EU 2017 Counter-terrorism Directive, the move has been controversial for several reasons. On the one hand, the new offense has been criticized for potentially violating Sweden's freedom of association provision. On the other hand, the legislation is widely seen as an attempt to win Erdogan's support for Sweden's still pending NATO application. This, in turn, has raised concerns that the new law is exceeding what is required by the Directive. In this blog post, I argue that because criminalizing membership in a terrorist group is required by the Directive, the introduction of the new offense is not per se a problem. However, allowing Turkey to dictate the content of Sweden's anti-terrorist law threatens to adversely affect Sweden's fundamental rights framework in the long-term.

NATO Membership At Any Cost?

Until now, the EU Counter-terrorism Directive had been only half-heartedly (and arguably insufficiently) implemented in Swedish law. In particular, back in 2019, the legislator chose not to criminalize membership in a terrorist group as required by the Directive, after the Council of Legislation in Sweden advised against doing so. The Council had voiced concern, inter alia, that such an offense might violate the constitutional right to freedom of association. Fast forward to 2023, and the Government decided chose to ignore these concerns and introduce the new offense anyway. One reason for this is that Sweden's security landscape has changed dramatically with the outbreak of the Ukraine conflict, leading to its NATO application in May 2022. The latter's outcome is currently in limbo because both Hungary and Turkey are withholding their consent. While Hungary accuses Sweden of meddling with their internal affairs for supporting the EU's the rule of law procedures, Erdogan's main reason for withholding consent is Sweden's supposedly inadequate framework for countering terrorism.

To sway Erdogan in their favor, Sweden, together with Finland, signed an agreement with Turkey in June 2022, whereby both countries promised to counter acts undertaken by the terror organization PKK. Following the agreement, Swedish politician thought they had sufficiently accommodated Turkey's demands. However, Erdogan has sent several subsequent requests to the Swedish Government, calling for tougher anti-terrorism legislation and a crack-down on what he claims is support for Kurdish groups which he considers to be terrorist entities. In this respect, while Turkey identifies the PKK as well as the PYD and the associated YPG as terrorist groups, only the PKK is on the EU (and consequently also on Sweden's) list of terrorist associations. Erdogan has also demanded the extradition of 120 claimed terrorists to Turkey and noted his disapproval of PKK flags being allowed at demonstrations. While it may be true that there is a problem with terror financing, as the Swedish security service recently stressed, Erdogan's list with the 120 claimed terrorists also seem to include critical Kurdish journalists who by any reasonable definition do not fall into the terrorism category. In light of the slow NATO application process, the question of how to respond to these requests poses a real dilemma, especially as meeting some of them would require the Swedish government to breach the international law on extradition.

Another way in which the Swedish government has sought to accommodate the Turkish demands was through the adoption of a constitutional amendment to the Swedish Basic Law in January 2023. Designed to facilitate the criminalization of membership in a

terrorist group, the amendment permits the limitation of the constitutional right to freedom of association to that end. It is questionable whether this constitutional amendment was, in fact, needed. Thus, chapter 2 § 24 in the Basic laws (Regeringsformen) on freedom of association already allowed for a limited set of derogations in the case of security concerns. Moreover, there were exceptions for military-associated violence or persecution of ethnic groups, that were never protected under this provision. Membership in terrorist groups could fall under security concerns and in certain circumstances also under military violence, although clarification of the possible derogations from the provision made is useful. Likewise, it is of concern that there was very little discussion of proportionality in the legislative assessment, which seems to be an important question concerning the need for the amendment. In the proportionality assessment pros and cons of the legislation are weighed, and this may be necessary both in the legislative process and subsequently by the judiciary. The principle of proportionality seems oddly enough to be missing in a lot of constitutional matters in Sweden, concerning everything from data protection to rigid ethics approval for research and it is all the more alarming when it concerns anti-terrorism law and the use of coercion.

Criminalizing Membership in Terrorist Groups: The Council's Concerns

While the amendment might have removed the constitutional issue with regard to criminalizing membership in terrorist groups, the introduction of the offense raises several concerns. For one, the Council of Legislation, who advised the Government not to proceed with the law, expressed a worry that legitimate resistance groups, fighting for democracy and freedom would fall within the provision, such as the ANC in former Apartheid South Africa. Arguably, the legislator could have avoided at least some of these uncertainties by complying with the Directive and following the EU terrorist list. This goes some way to addressing any potential misclassification of a resistance group. In particular, for something to constitute terrorism under the Directive (Article 3), a group must, inter alia, both use violence and possess an intention to cause destabilization and fear in the public.

Moreover, the Council also cautioned against such broadly defined offenses, which risks blurring the criminalized space and makes it difficult to know with adequate legal certainty what the law is. In this respect, there are lingering questions of how much involvement in a terrorist group is needed to constitute a criminal activity as well as how much constitutes sufficient knowledge of such activity to be held criminally liable. While broadly defined offenses are clearly problematic, it may also be difficult to define all possible scenarios in one offense.

In this setting, the Council of Legislation also warned against the idea of leaving the assessment to the courts to rule on possible mitigating factors concerning any alleged membership in a terrorist group. This reflects the fact that within Sweden's constitutional system, it is generally thought that courts should not engage in what is seen as 'politics'. While the ECHR and EU membership has slightly changed this by rendering judicial review a constitutional right when it concerns human rights or EU law, courts remain largely passive in Sweden's semi-parliamentarian system. Yet, in this particular context, courts are arguably best placed to consider such factors. It would also go some way to ensure that Sweden does not go beyond what the Directive demands simply to appease Turkey.

Erdogan's Newest Demand: Outlawing the Burning of the Koran

Another, very recent demand from Erdogan is to outlaw the burning of the Koran in Sweden. This is likely in response to the Danish-Swedish right-wing extremist Rasmus Paludan being granted permission to burn the Koran outside the Turkish embassy and in other public places, which occurred soon after Sweden had applied to join NATO. Because the police had a particularly tough security job in facilitating his right and warned about possible terrorist attacks in response thereto, they declined to grant permission to burn the script on subsequent occasions. The Stockholm Administrative District Court overruled this deci-

sion, holding that freedom of expression trumped security concerns, which the Court did not consider sufficient reasons for limiting freedom of expression. This was later confirmed by the Administrative Court of Appeal. The decision can be criticized on the ground that there is no absolute right to decide the exact place of your freedom, especially when it concerns using fire in public spaces which has a clear public safety aspect, while also being too narrowly focused without any context.

Against the backdrop of Erdogan's most recent demand, there is a real question whether this reasoning will continue to hold, or whether Sweden will reconsider its approach. In this respect, it should be clear that catering to other countries' repressive demands seems a dangerous path to take. As we can see with Sweden's choice to criminalize membership in terrorist groups, while on its own may not seem that controversial, the reasons for taking this step and the concomitant failure to refer to the Directive in doing so could lead to an overly broad conception of counter-terrorism powers. In particular, it seems that in order to achieve Turkey's consent to its NATO application, Sweden seems to have gone from under-implementation to over-implementation of the Directive. Hopefully, this political-legal farce will soon come to an end and Erdogan will approve the application as it now stands.

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