

## **Decision n° 2005-532 DC January 19<sup>th</sup> 2006**

### **Act pertaining to the fight against terrorism and containing various provisions concerning security and border controls.**

On December 23<sup>rd</sup> 2005 the Constitutional Council received a referral regarding the Act pertaining to the fight against terrorism and containing various provisions concerning security and border controls from Mr Jean-Pierre BEL et al.....Senators

### **THE CONSTITUTIONAL COUNCIL**

Having regard to the Constitution ;

Having regard to Ordinance 58-1067 of November 7<sup>th</sup> 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to the observations of the Government registered on March 24<sup>th</sup> 2003;

Having regard to the Customs & Excise Code

Having regard to the Criminal Code

Having regard to the Code of Criminal Procedure

Having regard to Act n° 78-17 of January 6<sup>th</sup> 1978 as amended pertaining to Data processing, data files and individual freedoms

Having regard to Programme and Guideline Act n° 95-73 of January 21<sup>st</sup> 1995 as amended pertaining to security;

Having regard to Act n° 2003-239 of March 18<sup>th</sup> 2003 as amended, pertaining to internal security;

Having regard to Act n° 2004-575 of June 21<sup>st</sup> 2004 as amended, pertaining to confidence in the digital economy:

Having regard to the observations of the Government registered on March 24<sup>th</sup> 2003;

Having heard the Rapporteur;

1.The Senators have referred for review by the Constitutional Council various provisions of the statute pertaining to the fight against terrorism which concern security and border controls; they argue that Sections 6 and 8 thereof are unconstitutional ; they also argue that Parliament has passed provisions which are out of place in the statute referred for review;

WITH RESPECT TO SECTION 6 :

2. I of Section 6 of the statute inserts into the Post and Electronic Communications Code a new article L 34-1-1 which introduces " in order to prevent and punish acts of terrorism" a procedure of administrative requisition of technical connection data; this procedure is to be implemented by "individually designated and duly empowered officers of the Police and Gendarmerie specially assigned to such tasks"; it will apply to all natural persons and legal entities operating a electronic communications network open to the public or providing the public with a connection making on-line communication possible via access to such a network; this procedure will be limited "to technical data concerning the identification of numbers of subscribers or of connections to electronic communication services, to collecting all subscriber or connection numbers of a designated person, to data concerning communications of a given subscriber as regards numbers and persons called, the length and date of the communications "; it will be subject to the prior approval of a person designated by the National Commission for Monitoring Security Intercepts; it will be under the control of the said Commission which will address any recommendations to the Minister of the Interior when it ascertains " a breach of the rules laid down herein or any infringement of rights and freedoms"; it will allow for financial compensation to cover the extra costs involved in meeting such requests for information;

3. II of the same Article completes Section 6 of the statute of June 21<sup>st</sup> 2004 aforementioned by a II bis which "in order to prevent and punish acts of terrorism", extends this requisition procedure to access providers and internet hosts;

4.The Senators making the referral argue that this new procedure is designed not only to prevent but also to punish terrorist offences and that as such, insofar as it is not under the supervision of the Judicial authorities, it infringes both individual freedoms and privacy; they also argue that it infringes the right of redress;

5. The technical data which Section 6 of the statute referred for review empowers the Police and Gendarmerie to requisition may already be obtained under the provisions of the Criminal Code in the framework of police operations designed to detect the commission of criminal offences, to collect evidence or

apprehend offenders; the data requisitions permitted by these new provisions are purely administrative police measures; they are not placed under the supervision of the Judicial authorities but under the sole authority of the Executive; they cannot therefore have any other purpose than to ensure public order and prevent the commission of offences; thus, by stating that these provisions are designed not only to prevent acts of terrorism but also to punish the same, Parliament has infringed the principle of the separation of powers;

6. The words " and to punish" contained in indent 2 of I and indent 2 of II of Section 6 of the statute referred for review should thus be held to be unconstitutional; any administrative authority, when aware of the commission of a crime or a felony/ indictable offence nevertheless remains under a duty to inform the Judicial authorities of said commission;

7. The words thus found to be unconstitutional may be severed from the other provisions of Section 6 of the statute referred for review; it is therefore necessary to examine whether the latter conform to rules and principles of constitutional value;

8. Firstly, Article 66 of the Constitution, according to which "No one can be arbitrarily detained. – The Judicial authority, guardian of individual freedom, shall ensure respect for this principle in the conditions provided for by law", cannot be infringed by a measure which merely institutes a procedure for requisitioning technical data.

9. Secondly, it is the task of Parliament to reconcile the prevention of breaches of law and order, necessary to safeguard rights and principles of constitutional value, and the exercising of constitutionally guaranteed freedoms, among which the right to privacy and freedom of enterprise, respectively protected by Article 2 and 4 of the declaration of the Rights of Man and the Citizen of 1789;

10. In the case in hand, Parliament has accompanied the procedure for requisitioning technical data by suitable limitations and safeguards, as indicated hereinabove, designed to ensure the necessary reconciliation between the right to privacy and freedom of enterprise on the one hand and the prevention of acts of terrorism on the other hand, which the procedure in question is intended to achieve;

11. Lastly, under Article 16 of the Declaration of 1789, "Any Society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution"; this provision precludes any major infringement of the rights of persons involved to effective redress before a court;

12. In the case in hand, the persons having the requisite locus standi are not deprived of the constitutional guarantees which the law provides to accompany administrative police measures ; their right of redress is not infringed ;

13. It therefore is clear from the foregoing that, except for the words "and to punish" found in the second indents of I and II of Section 6 of the statute referred for review, this section is not unconstitutional;

- WITH RESPECT TO SECTION 8:

14. Section 8 of the statute referred for review rewords Section 26 of the Act of March 18<sup>th</sup> 2003 referred to hereinabove; it enables Police, Gendarmerie and Customs and Excise Officers to use "fixed or mobile automatic monitoring devices for the purpose of identifying vehicles by photographing the occupants thereof wherever necessary" ...; it provides that "such devices may also be used by the Police and Gendarmerie on a temporary basis in order to preserve law and order, by decision of the administrative authorities, on the occasion of specific events or major gatherings"; it specifies that data thus collected may be processed by automatic means; it determines the conditions under which such data may be exploited and kept, depending on the outcome of comparisons made between such data and processed data concerning stolen or reported vehicles;

15. The Senators making the referral argue that these provisions, by organising a "generalised system of monitoring" which extends to the persons inside monitored vehicles, infringe Article 66 of the Constitution, the right to freedom of movement and the right to privacy; they also argue that Parliament has failed to exercise its powers to the full;

16. Firstly, by its very nature, the procedure of automatic collection of data relating to vehicles introduced by Section 8 of the statute does not infringe the rule laid down by Article 66 of the Constitution whereby no person may be arbitrarily detained nor the right to freedom of movement protected by Articles 2 and 4 of the Declaration of 1789;

17. Secondly, the device involved may be used for operations of both administrative and criminal law enforcement; it is placed under the authority of the judicial authorities when the criminal law is involved; thus, by vesting this device with the task of simplifying the punishment of offenders, the challenged section, unlike Section 6 review hereinabove, does not infringe the principle of the separation of powers;

18. Thirdly, it is the task of Parliament to reconcile on the one hand the preventing of breaches of the peace, in particular where the safety of persons and property is concerned, and the apprehending of offenders, both of which are necessary for the safeguarding of rights and principles of constitutional value, with, on the other hand, the exercising of constitutionally guaranteed freedoms, which count among their number the right to privacy;

19. When enacting the challenged provisions, Parliament intended on the one hand to prevent and punish terrorism and terrorism-related offences, and on the other hand to facilitate the detecting of crimes and offences connected with organised crime, theft and receiving of stolen vehicles and also certain Customs offences; the ultimate purpose of these provisions is to apprehend those committing such offences;

20. Recordings are erased after a period of eight days if the information obtained permitting the identification of vehicles is not found in the national data base of stolen or reported vehicles nor in the Schengen vehicle data system ; such searches are intended to focus on the features of the vehicles involved and not on photographing persons inside such vehicles; data which has not been the object of any "positive matching" can only be consulted during this period of time if required for criminal proceedings; only data which has been found to match will be kept; such data shall not be kept for more than one month, unless required for criminal or Customs proceedings; the only person authorised to access such data, within the limits set forth hereinabove, are individually designated and duly empowered officers from the Police and the Gendarmerie ; automatic processing of data thus collected will be governed by the provisions of the Act of January 6<sup>th</sup> 1978 referred to hereinabove ;

21. In view of the ultimate purpose which Parliament has striven to achieve and the guarantees provided for, the challenged provisions are such as to reconcile respect for privacy and the safeguarding of law and order in a manner which is not obviously unbalanced;

22. The arguments raised against section 8, which is not vitiated by any failure of Parliament to exercise its powers fully, are therefore to be dismissed;

#### WITH RESPECT TO CERTAINS PROVISIONS OF THE STATUTE REFERRED FOR REVIEW

23. The parties making the referral argue that the statute referred for review contains "numerous provisions foreign to the fight against terrorism"; they argue that such provisions are out of place in this statute and should be held unconstitutional;

24. Article 6 of the Declaration of 1789 states : " The law is the expression of the general will"; Indent 1 of Article 34 of the Constitution states: "Statutes shall be passed by Parliament"; Indent 1 of Article 39 of the Constitution states "The Prime Minister and Members of Parliament alike shall have the right to initiate statutes"; the right of amendment which the Constitution confers on Members of Parliament and the Government is exercised in the conditions and in compliance with the requirements provided for by Articles 40,11,44,45,47 and 47-1 of the Constitution

25. Firstly, the combination of the provisions referred to in the foregoing paragraph show that the right of amendment vested in Members of Parliament and the Government must be able to be freely exercised by each of the two Houses during the first reading of Government Bills and Private Members' Bills. This right may only be restricted at this stage in the proceedings, and with due respect for the requirements of clarity and sincerity of Parliamentary debate, by the rules governing admissibility and the requirement that an amendment be not devoid of any connection with the text tabled before the first House called upon to debate it;

26. Secondly, the wording of Article 45 of the Constitution, and in particular the terms used in indent 1 thereof, whereby " Every Government or Private Member's Bill shall be considered successively in the two Houses of Parliament with a view to passing an identical text", shows that, as reiterated by the Rules of both National Assembly and Senate, additions or amendments which may be made to a Government Bill or Private Member's Bill by Members of Parliament or the Government after the first reading must be directly connected with the provision remaining to be debated. However amendments designed to ensure compliance with the Constitution, coordination with texts under debate or to rectify any material error are not subject to such a requirement;

27. Thus additions or amendments made to a Government Bill or Private Member's Bill in conditions other than those specified above must be considered to have been passed in irregular proceedings;

28. In the case under consideration, the referred statute was only given one single reading before each of the two Houses before the meeting of the Joint Committee; those provisions which were introduced during Parliamentary debate must meet the conditions applicable to amendments passed during first reading, in particular the requirement that they be not devoid of any connection with the initial purpose of the Bill;

29. Section 19 of the statute referred, originating from an amendment passed by the National Assembly, inserts after indent 4 of section 19 of the Act of January 21<sup>st</sup> 1995 referred to above, an indent worded as follows : " Trade Union

representation within the Joint Administrative Committees competent for civil servants members of the police force in active employment may derogate from the general status of the civil service in order to adapt and simplify the management of such employees. For this purpose policemen and police sergeants constitute a single electoral college within National and Inter-Departmental Joint Administrative Committees representing officers and men of the Police force;

30. Contrary to the other provisions of the statute referred for review, Section 19 of said statute is devoid of any connection with a Government Bill which, when tabled before the first House called upon to debate it, consisted solely of measures concerning the fight against terrorism, security and border controls; hence Section 19 was passed in proceedings which were unconstitutional;

31. The Constitutional Council is not required proprio motu to examine the question of whether or not such provisions conform to the Constitution

### **DECISION :**

Article 1 - The following are unconstitutional:

- the words "and to punish" in the second indents of I and II of Section 6 of the Act pertaining to the fight against terrorism and containing various provisions concerning security and border controls
- Section 19 of the same statute

Article 2 - The remaining parts of Sections 6 and 8 of said statute are not unconstitutional

Article 3 - This decision shall be published in the Journal Officiel of the French Republic.

Deliberated by the Constitutional Council sitting on January 19<sup>th</sup> 2006 composed of Messrs and Mesdames Pierre MAZEAUD, President, Jean-Claude COLLIARD, Olivier DUTHEILLET de LAMOTHE, Valéry GISCARD D'ESTAING, Jacqueline de GUILLENCHMIDT, Pierre JOXE, Jean-Louis PEZANT, Dominique SCHNAPPER, Pierre STEINMETZ and Simone VEIL