

FRENCH LEGISLATION AGAINST TERRORISM : CONSTITUTIONAL ISSUES

by Olivier DUTHEILLET de LAMOTHE

Member of the Constitutional Council

November 2006

In 1986, France was the first country to experience a new form of Islamic terrorism, which was not yet de-territorial, being related to Lebanon, Iran or Algeria.

France, to its misfortune, encountered Islamic terrorism relatively early. “From all of misfortune comes some good”, according to a French saying : the State was forced to sharpen its swords against terrorism before the other European countries. France has been confronted early on with a form of terrorism that, as it realized, was different in nature from internal political and territorial terrorism like Corsican and basque terrorism.

1. The French response to terrorism

1.1. The French response to terrorism is not military as it was during the war in Algeria during which France declared states of emergency and practiced administrative detention on a large scale.

The French response is not either an emergency legislation based

on a temporary derogation to the European Convention of Human Rights, as it has been practiced in the United Kingdom.

The French response to terrorism is judicial. Legislation against terrorism is a special branch of criminal law, introducing permanent derogations from common criminal procedure as regards for example the length of police detention, the length of remand, the composition of the courts etc...

1.2. This choice results from the conclusions of analysis of a number of cases involving France : de-territorial terrorism seems to be born of the encounter between an offer and a demand. An ideological offer emanating from radical Islamism, but also a demand on the behalf of a group of youths craving to come to blows with a society they feel to be unjust. The Head of the French intelligence service (the DST) explains that "*The French jihadist is less cultivated, younger and more radicalized*", concluding that the recruiting force is no more dangerous than the candidates themselves, i.e. young hotheads.¹

This choice results also from a political analysis. Assimilating counter-terrorist action to a war increases risk in a strict perspective of calculated interests, because it provides terrorists with additional recognition and publicity. The recourse to unlimited force feeds resentment and hatred against democracies. Declaring war on terror too hastily is most likely to hand the first set to those one wishes to combat. The American concept of the war on terror thus appears not only displaced but also counterproductive, in the sense that it is not a war and even less a crusade.

¹ Interview with Pierre de Bousquet in *Le Monde*, 25 May 2005.

This choice also results from the French judicial culture, which is characterized by strong continuity between the initial police work and that of the magistrates. The judicial option will only work where the judicial system is capable of playing the central role required of it. The interface between intelligence and judicial logic implies a strong cooperation between policemen and magistrates. This explains the central role played by the “juge d'instruction” (investigating magistrate) and, to a lesser degree, by the counter-terrorist prosecutor.

1.3. France has been able to conserve a judicial treatment of terrorism through regular adaptation of the law. It has reacted on a case-by-case basis to enrich its legislative arsenal with whatever provisions proved to be necessary. In this respect, France has shown the sort of pragmatism that is usually attributed to Common Law countries. It has not hesitated to introduce procedural techniques typical of American judicial culture when necessary, such as allowing offenders to “turn Queen's evidence”, which is absolutely contrary to our culture. In the same way, recognising that weakening borders makes the distinction between what is national and international more difficult, French legislature authorized the judicial police to employ techniques that were previously limited to espionage.

As a result, the basic law against terrorism which is the statute of September 9, 1986, after the terrorist attack of 1986, has been completed and adapted by five statutes since :

- The statute of July 22, 1996, following the terrorist attack during the summer of 1995 ;

- The statute of November 15, 2001 following the World Trade Center attack ;
- The statutes of March 18, 2003 and March 9, 2004 adapting criminal law not only to terrorism, after the change of government in 2002 ;
- And, finally, the statute of January 23, 2006, directly inspired by the British experience.

All these statutes except one, the statute of November 15, 2001, were referred to the Constitutional Council. So there is an important case law related to the legislation against terrorism, which concerns, on one side, the criminal offences, and, on the other side, the rules of procedure.

2. Criminal offences regarding terrorism

As regards offences of terrorism, French legislation presents two specificities.

2.1. The definition of offences of terrorism

Acts of terrorism are defined by criminal law as the combination between a criminal offence already defined by the criminal code, like murder for example, and the link of this criminal offence with an individual or collective undertaking aiming at seriously disrupting law and order by intimidation or terror.

This definition by two elements - a common criminal offence in relation with an undertaking aiming at seriously disrupting law and order by terror - has been challenged before the Constitutional Council. The referral argued that this definition was too subjective and too vague to be constitutional and that it was not conform to article 8 of the Declaration of Human and Civic Rights according to which : "*Only punishments which are strictly and clearly necessary may be provided for by law*". The Constitutional Council ruled that this definition of the offences of terrorism was worded in terms sufficiently precise to meet this constitutional criterion (Décision N° 86-213 DC, 3 September 1986, recueil p. 122) .

2.2. The second specificity of the French legislation is a preventive approach of criminal offences.

The 1986 statute introduced the offence of "association de malfaiteurs en relation avec une entreprise terroriste" - criminal conspiracy in relation with a terrorist undertaking. This resulted from police shock after an attack at Orly airport on 15 July 1983. Intelligence services were aware that an Armenian extremist group, the ASALA, was preparing an attack, but it did not have the legal basis needed to arrest them before they went into action. The 1986 statute made this possible thanks to the preventive incrimination of conspiracy. This incrimination was not challenged before the Constitutional Council.

In practice, the majority of persons detained in France for terrorist

offences are detained under the preventive incrimination of conspiracy which appears today as the main legal tool to fight terrorism.

Taking the example of the Padilla case, it is likely that, in France, the police would have transferred the file to the counter-terrorism prosecutor, indicating their suspicions and requesting Padilla's detention for criminal conspiracy in relation with a terrorist undertaking. The prosecutor would then have launched an investigation into this preventive offence, leaving the police free to continue working on the case without any danger of an attack.

3. Rules of procedure

3.1. Judicial organisation

The basic statute of 1986 did not create a special court for terrorist cases but decided to concentrate and to specialize judicial means to fight terrorism inside a single court having a national competence.

The Tribunal of Paris, le Tribunal de Grande Instance de Paris, has a national competence for terrorist cases, which led to the specialization of :

- 8 magistrates inside the prosecution service ;
- 8 judges inside the investigation service.

As regards terrorist crimes, the Criminal Court is not composed of a popular jury, as for ordinary crimes, but only of professional magistrates.

The Constitutional Council has ruled that : "*It is legitimate for the*

legislature, which is empowered to determine the rules of criminal procedure by article 34 of the Constitution, to provide for rules of procedure that differ according to the facts, the situations and the persons to whom they apply, provided the differences are not based on unjustified forms of discrimination and the litigants enjoy equal guarantees, in particular as regards respect for defence rights". As regards in particular the trial court for terrorist crimes, the Constitutional Council has ruled that it was legitimate to replace the popular jury by professional magistrates to avoid pressures and threats which could alter the serenity of the court (Décision N° 86-213 DC, 3 September 1986, recueil p. 122).

This centralization and specialization have proved in practice very effective. It turned out that the personality of the specialized investigating magistrates, who have since taken on a high-profile in the French media and even abroad, was a decisive factor in the success of a certain number of cases. One of the secrets to the effectiveness of counter-terrorist action is the personal bond between the various actors, especially policemen and magistrates. The specific profile of the counter-terrorist magistrate derives its effectiveness from being both a judge and in permanent contact with the police, thus accumulating great personal knowledge and experience in such matters. The judge may also receive information through informal discussions with the police.

3.2. Derogatory rules of procedure

Legislation against terrorism is characterized by rules of procedure which derogate to common rules.

3.2.1. The first derogatory rule is the period during which a person may be held for questioning by the police. This period is normally of 48 hours (24 + 24 hours). The 1986 statute has extended this period to 96 hours (4 days) for terrorist offences. The 2006 statute has extended this period to six days in two specific cases : if there is a serious risk of an imminent terrorist action or if the necessities of international cooperation demand it.

The Constitutional Council has ruled that such a period *“does not excessively violate individual freedom, since the scope of these provisions extends to investigations into specific offences imposing special investigations on account of their seriousness and complexity, the extended period allowed for holding for questioning is subject to a reasoned written opinion from a judge, to whom the suspect must be presented, medical checks on the person held are provided for, the general rules of the Code of Criminal Procedure providing for judicial review where persons are held for questioning are applicable, and the provisions challenged are drafted in sufficiently clear and precise terms to avert the risk of arbitrary action”* (Décision N° 2004-492 DC, 2 March 2004, recueil p. 66).

The legislation sets at 72 hours the first intervention by the advocate. However the Constitutional Council has ruled that by requiring the State prosecutor to be informed of the classification as terrorist offences of facts warranting the deferment of the first intervention by an advocate where a person is held for questioning, *“the legislature necessarily intended that that judicial officer should review the classification. The initial assessment of the criminal investigation police*

officer regarding the deferment of the intervention of an advocate while the person is held for questioning is accordingly subject to judicial review and cannot determine the subsequent course of proceedings” (same Décision).

3.2.2. Terrorist offences require specific inquiry powers as regards for example :

- Vehicle searches on a requisition by the State prosecutor ;
- Searches in business and residential premises and seizure of evidence at night ;
- The interception, recording and transcription of correspondence via telecommunications ;
- The installation of technical facilities for the capture, transcription, transmission and recording of words spoken by one or more persons in public or private places or vehicles, or the image of one or more persons in a private place, without their consent.

The Constitutional Council has ruled that the detection of the perpetrators of terrorist offences justifies such inquiry powers, provided the authorization for their use is issued by the judicial authority and appropriate procedural guarantees are provided for.

3.2.3. The 2006 statute, directly inspired by the British experience, has introduced three new means to combat terrorism :

First, video surveillance : it will be possible, to prevent terrorism, to install cameras in the streets, in public places and in sensitive private places like religious centers.

Second, a procedure of administrative requisition of technical connection data. This procedure will be limited to technical data concerning the identification of numbers of subscribers or of connections to electronic communications services and to data concerning communications of a given subscriber as regards numbers and persons called, the length and date of the communication excluding its content. This requisition procedure is extended to access providers and Internet hosts.

The statute also enables police officers to use fixed or mobile automatic monitoring devices for the purpose of identifying vehicles by photographing the occupants wherever necessary. It specifies that data thus collected may be processed by automatic means and determines the conditions under which such data may be exploited and kept, depending on the outcome of comparisons made between such data and a national data base concerning stolen or reported vehicles.

The Constitutional Council has ruled that *“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”*. After examining carefully the conditions of these new procedures, the Council has estimated that Parliament has accompanied those procedures by suitable limitations and safeguards properly designed to ensure the necessary reconciliation between the right to

privacy, on the one hand, and the prevention of acts of terrorism, on the other hand (Décision n° 2005-532 DC, 19 January 2006).

To conclude, the French experience shows that two conditions are essential for the legislation against terrorism to be effective.

The first condition is permanent adaptation, which is especially important in the fight against radical Islamic terrorism. The de-territorialized, particularly de-formalized Islamic terrorist raises a challenge for institutions, which are static by nature. This explains the importance of fluidity between institutions in the rapidity of responses, circulation and implementation. Globalisation induces a sort of homothetic relation between forms of terrorism and the institutions that fight it. Counter-terrorism bodies, now need flattened flow charts, shortened perhaps even unhierarchic chains of command, and networking operations that copy those of terrorists organizations.

The second condition is a good interface between intelligence agencies and the judiciary which requires good communication in both directions, both to provide a solid judicial relay for intelligence work and, in the opposite direction, to ensure appropriate analysis of information gleaned from judicial proceedings. This interface between intelligence and judicial logic has to be doubled by a strong synergy between policemen and magistrates.

