

Decision no. 2018-706 QPC
of 18 May 2018

Mr. Jean-Marc R.
[Offence of endorsing terrorist acts]

THE CONSTITUTIONAL COUNCIL WAS ASKED TO DECIDE UPON a priority matter of constitutionality on 6 March 2018 by the Cour de Cassation (Criminal Division, Decision no. 400 of 27 February 2018), under the conditions set out in Article 61-1 of the Constitution. These questions were raised on behalf of Mr. Jean-Marc R. by the firm SCP Waquet, Farge, Hazan, Attorneys at the Conseil d'Etat and the Cour de Cassation. It was registered by the General Secretariat of the Constitutional Council under number 2018-706 QPC. It relates to compliance with the rights and liberties that the Constitution guarantees under Article 421- 2-5 of the Criminal Code, in its drafting pursuant to Law number 2014-1353 of 13 November 2014, reinforcing the provisions related to the fight against terrorism and Articles 422-3 and 421-6 of the same Code.

In light of the following texts:

- the Constitution;
- Ordinance no. 58-1067 of 7 November 1958 concerning the Organic Law on the Constitutional Council;
- the Criminal Code;
- Law of 29 July 1881 on the freedom of the press;
- Law no. 2008-776 of 4 August 2008 on the modernisation of the economy;
- Law no. 2012-409 of 27 March 2012 on scheduling related to carrying out penalties;
- Law number 2014-1353 of 13 November 2014 reinforcing the provisions related to the fight against terrorism;
- the Regulation of 4 February 2010 on the procedure applicable before the Constitutional Council for priority matters of constitutionality;

In light of the following items:

- the observations filed on behalf of the applicants by the firm SCP Waquet, Farge, Hazan registered on 28 March 2018;
- the observations presented by the Prime Minister, registered on 28 March 2018;

- the documents produced and attached to the case file;

After having heard Ms. Claire Waquet, Esq., attorney at the Conseil d'État and the Cour de cassation, for the applicant, and Mr. Philippe Blanc, appointed by the Prime Minister, at the public hearing of 2 May 2018;

In light of the following items:

- the post-hearing submission filed on behalf of the applicant by the firm SCP Waquet, Farge, Hazan registered on 2 May 2018;
- the post-hearing submission presented by the Prime Minister, registered on 16 May 2018;

And having heard the rapporteur;

THE CONSTITUTIONAL COUNCIL WAS ASKED TO DECIDE ON THE FOLLOWING:

1. A priority matter of constitutionality must be considered as relating to the provisions applicable to the dispute at the time it was raised. Therefore, the Constitutional Council is asked to decide on Article 422-3 of the Criminal Code, in its drafting resulting from the Law of 4 August 2008 mentioned above, and Article 422-6 of the same Code, in its drafting resulting from the Law of 27 March 2012, mentioned above.

2. Article 421-2-5 of the Criminal Code, as written pursuant to the Law of 13 November 2014, mentioned hereinabove, provides that:

“The act of directly provoking terrorist acts or publicly endorsing these acts is punishable by five years’ imprisonment and a fine of €75,000.

“These penalties are increased to seven years’ imprisonment and to a fine of €100,000 when these actions were committed by using an online public communication service.

“When these actions are committed through the written or audio-visual press or through online public communication, specific provisions of the law governing these matters are applicable in terms of determining the responsible individuals”.

3. Article L. 422-3 of the same code, in its drafting resulting in the Law of 4 August 2008, provides that:

“Natural persons found guilty of any of the offences provided for under the present title also incur the following additional penalties:

“1° Forfeiture of civic, civil and family rights, pursuant to the conditions set out under Article 131-26. However, the maximum period for the forfeiture is raised to fifteen years in the event of a felony and to ten years in the event of a misdemeanour;

“2° Prohibition, pursuant to the conditions set out under Article 131-27, to hold public office or to undertake the professional or social activity in the course of which or on the occasion of the performance of which the offence was committed. However, the maximum temporary prohibition is increased to ten years, or for crimes established in Sections 1° to 4° of Article 421-3, Article 421-4, the second subparagraph of Article 421-5 and Article 421-6, to practice a business or industrial profession, as manager, administrator, management or oversight in any way whatsoever, directly or indirectly, on the individual’s own behalf or on behalf of another, in a business or industrial company or a commercial business. These prohibitions from practicing may be cumulative;

“3° Prohibition of residence, according to the terms set out under Article 131-31. However, the maximum period of the prohibition is raised to fifteen years in the event of a felony and to ten years in the event of a misdemeanour”.

4. Article 422-6 of the same code, in its drafting resulting in the Law of 27 March 2012, provides that:

“Natural or legal persons convicted of act of terrorism shall in addition incur the complementary penalty of confiscation of all or part of their property or, subject to the good-faith rights of ownership, property that they have free access to, whatever their nature, movable or immovable, severally or jointly owned”.

5. The applicant, on the one hand, holds that the provisions punishing endorsing acts of terrorism infringe on the principle of legality of offences and punishment, in that the legislature did not sufficiently delineate the scope of application of this offence. In addition, the applicant believes that these provisions violate the freedom of expression, in that they incriminate behaviour without requiring that the individual manifest a terrorist intent and without requiring a risk be proven that it will lead to terrorist acts. Finally, the main and additional penalties punishing this offence infringe on the principles of the necessity and proportionality of punishments.

6. Consequently, the priority matter of constitutionality focuses on the terms *“publicly endorsing these acts”* appearing in the first subparagraph of Article 421-2-5 of the Criminal Code, in section 1° of Article 422-3 of the same code, on the terms *“to hold public office or a professional or social activity in the course of which or on the occasion of the performance of which the offence was committed, the maximum temporary prohibition being increased to ten years, or,”* appearing in Section 2° of the same Article, in Section 3° of the same Article, as well as in Article 422-6 of the same code.

– On the claim of infringement on the principle of legality of offences and penalties:

7. According to Article 8 of Human and Civic Rights of 1789, *“no one may be punished except by virtue of a Law drawn up and promulgated before the offence is committed, and legally applied”*. Pursuant to Article 34 of the Constitution: *“Statutes shall determine the rules concerning... the determination of crimes and offences as well as their applicable penalties”*. Pursuant to Article 34 of the Constitution, as well as the principle of legality of offences and penalties according to Article 8 of the 1789 Declaration, the legislature is under the obligation to determine the scope of criminal law and to define crimes and offences in sufficiently clear and precise terms to avoid arbitrariness;

8. The contested provisions of Article 421-2-5 of the Criminal Code punish public endorsement of terrorist acts. This offence occurs when several events are present

9. On the one hand, the incriminating behaviour must include favourably judging a crime expressly qualified under the law as an *“act of terrorism”* or the person who committed it. On the other hand, this behaviour must be made material through words, images or actions that have a public character, which is under circumstances that reflect the person’s will to make them public.

10. Therefore, the contested provisions of Article 421-2-5 the Criminal Code are not ambiguous and are sufficiently precise to avoid arbitrariness. Thus, the claim of infringement on the principle of legality of offences and penalties should be set aside.

– On the claim of infringement of the principles that punishment must be necessary and proportional:

11. Article 8 of the 1789 Declaration provides that: "The law must prescribe only the punishments that are strictly and evidently necessary... ". Article 61 of the Constitution does not grant the Constitutional Council general powers of assessment and judgement of the same nature as those belonging to the Parliament, but only grants it the competence to decide on the constitutionality of the contested laws on which it is asked to decide. If it is necessary to inflict penalties related to an offence under the legislature's power of assessment, it falls on the Constitutional Council to ensure that there is no manifest disproportionality between the offence and the penalties incurred.

. Regarding the contested provisions of Articles 421-2-5 and 422-3 of the Criminal Code:

12. The contested provisions of Article 421-2-5 of the Criminal Code punish public endorsement of terrorist acts by five years' imprisonment and a fine of 75,000 euros. By increasing this punishment to seven years' imprisonment and a fine of 100,000 euros when the crime has been committed using an online public communication service, the legislature took into account the particular importance of spreading the prohibited messages that this communication method allows, as well as its influence on indoctrinating individuals who may commit terrorist acts.

13. The contested provisions of Article 422-3 of the Criminal Code institutes additional punishments that may be pronounced against natural persons found guilty of one of the offences established in Title II of Book IV of the same code, among which is included the crime of public endorsement of terrorist acts. Also punishable, for a maximum time frame of 10 years, is the prohibition on civic, civil and family rights, the prohibition to hold public office or to undertake the professional or social activity in the course of which or on the occasion of the performance of which the offence was committed and the prohibition on residence.

14. In terms of the nature of the punishable behaviour, the penalties thus established, which are pronounced based on the circumstances of the offence and the person committing it, are not manifestly disproportionate. The claim of infringement on the principles of the necessity and proportionality of penalties by the contested provisions of Articles 421-2-5 and 422-3 of the Criminal Code should thus be set aside.

. In terms of Article L. 422-6 of the Criminal Code:

15. Article L. 422-6 of the Criminal Code institutes, against individuals "*convicted of act of terrorism*", an additional penalty of all or part of their property being confiscated or, subject to the good-faith rights of ownership, property that they have free access to.

16. On the one hand, though the crime of publicly endorsing terrorist acts is established in Article 421-2-5 of the Criminal Code appearing in Chapter I, entitled "*Acts of Terrorism*", of Title II of Book IV of the same code, the legislature did not expressly define

this offence as being an act of terrorism. The additional penalty of confiscation established by Article 422-6 is thus not applicable to individuals found guilty of publicly endorsing terrorist acts.

17. On the other hand, in terms of the gravity of the offences of terrorist acts, to which it is applicable, the additional penalty of confiscation established by Article 422-6 is not manifestly disproportionate.

18. Consequently, the claim that Article 422-6 of the Criminal Code infringes on the principles of the necessity and proportionality of penalties should thus be set aside.

– On the claim of infringement on the freedom of expression and communication:

19. According to Article 11 of the 1789 Declaration: "*The free communication of ideas and of opinions is one of the most precious rights of man: any citizen may therefore speak, write, and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law*". Article 34 of the Constitution provides that: "*Statutes shall determine the rules concerning ... civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties*". On this basis, the legislature has the right to institute penalties for the abuse of the right to exercise freedom of expression and communication if it infringes on public order and the rights of others. It also has the right to enact rules regarding the objective of the fight against the incitement and encouragement to terrorism, that balance the objective of the constitutional value of safeguarding the public order and the prevention of offences with the right to exercise free communication and the freedom to speak, write and print. However, freedom of expression and communication is all the more precious in that the exercise thereof is a condition of democracy and one of the guarantees that other rights and freedoms are respected. It follows that infringement on the exercise of this freedom must be appropriate, suitable and proportional to the objective sought.

20. Firstly, by instituting the crime of publicly endorsing terrorist acts, the legislature sought to prevent such acts from being committed and to avoid broadcasting expressions endorsing acts that have the goal of seriously causing disturbance to the public order by intimidation or terrorism. In so doing, the legislature sought the objective of the constitutional value of preventing attacks on the public order and offences, whose objective is the fight against terrorism.

21. Secondly, on the one hand, public endorsement through broadly distributing dangerous ideas and expressions that they support, itself causes disturbances to the public order. The judge decides based on the personality of the person committing the offence and the circumstances of this latter, specifically the gravity of the disturbances to the public order.

22. On the other hand, for the reasons established in paragraph 9 of this decision, the incriminating facts are precisely defined and do not create uncertainty in terms of the legality of the behaviour that may fall under the definition of the crime.

23. Finally, because it is included in the Criminal Code, the contested crime does not include specific procedural guarantees for press offences as established in the Law of 29 July 1881 mentioned above, terrorist acts, the endorsement of which is punished, are offences of a particular seriousness that may inflict harm on individuals or property.

24. Consequently, for these reasons and those established in paragraphs 12 to 14, the infringement by the contested provisions on the freedom of expression and communication is necessary, appropriate and proportional to the objective sought. Thus, the claim of infringement on this freedom should be set aside.

25. It follows from the foregoing, that the contested provisions of Articles 421-2-5 and 422-3 of the Criminal Code and Article 422-6 of the same code, which do not infringe on any other right or freedom guaranteed by the Constitution, should be declared constitutional.

THE CONSTITUTIONAL COUNCIL DECIDES:

Article 1. – The following provisions are constitutional:

- The words "*or to publicly endorse these acts*", as appearing in the first subparagraph of Article 421-2-5 of the Criminal Code, in its drafting from Law number 2014-1353 of 13 November 2014 reinforcing the provisions related to the fight against terrorism;
- Section 1°, the words "*to hold public office or a professional or social activity in the exercise of which or on the occasion of the exercise of which the offence was committed, the maximum time frame of the temporary prohibition being raised to ten years, or*" provided for under Section 2°, as well as Section 3° of Article 422-3 of the same code, in its drafting from Law no. 2008-776 from 4 August 2008 on the modernisation of the economy;
- Article 422-6 of the same Code, in its drafting from Law no. 2012-409 of 27 March 2012 on scheduling related to carrying out penalties.

Article 2. – This decision will be published in the *Journal officiel* of the French Republic and notified under the conditions provided for in Article 23-11 of the Ordinance of 7 November 1958 referred to herein above.

Deliberated by the Constitutional Council in its session of 17 May 2018, in attendance: Mr. Laurent FABIUS, Chairperson, Ms. Claire BAZY MALAURIE, Mr. Michel CHARASSE, Mr. Lionel JOSPIN, Ms. Corinne LUQUIENS, Ms. Nicole MAESTRACCI and Mr. Michel PINAULT.

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