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Decision no. 2016-611 QPC of 10 February 2017 - Mr. David P. - [Offence of habitually accessing terrorist websites]

THE CONSTITUTIONAL COUNCIL WAS ASKED TO DECIDE UPON a priority matter of constitutionality on 7 December 2016 by the Cour de cassation (Criminal Division, Decision no. 5797 of 29 November 2017), under the conditions set out in Article 61-1 of the Constitution. This matter was put forth for Mr. David P. by Mr. Sami Khankan, Esq., attorney admitted to the Nantes bar. It was recorded by the General Secretariat of the Constitutional Council under number 2016-611 QPC. It relates to compliance with the rights and liberties that the Constitution guarantees under Article 421-2-5-2 of the Criminal Code, in its drafting pursuant to Law number 2016-731 of 3 June 2016, reinforcing the provisions related to the fight against organised crime, terrorism and the financing of these, as well as improving the efficiency and the guarantees of criminal procedure.

In light of the following texts:

- the Constitution;
- Ordinance no. 58-1067 of 7 November 1958 as amended, concerning the Organic Law on the Constitutional Council;
- the Criminal Code;
- the Code of Criminal Procedure;
- the Code on National Security;
- Law no. 2004-575 of 21 June 2004 on confidence in the digital economy;
- Law no. 2016-731 of 3 June 2016 reinforcing the fight against organised crime, terrorism and the financing of these, as well as improving the efficiency and the guarantees of criminal procedure;
- 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 made on behalf of the applicant by Ms. Claire Waquet, Esq., Attorney to the Conseil d'État and the Cour de Cassation, and Mr. Khankan, Esq., registered on 2 and 13 January 2017;
 - the observations presented by the Prime Minister, registered on 29 December 2016;
- the observations in response presented for the association the Ligue des Droits de l'Homme [League of Human Rights] by the firm Spinosi et Sureau, Attorneys at the Conseil d'État and the Cour de Cassation, registered on 29 December 2016 and 13 January 2017;
- the documents produced and attached to the case file;

Having heard Ms. Waquet and Mr. Khankan, Esqs. for the applicant, Mr. François Sureau, Esq., attorney at the Conseil d'État and the Cour de cassation, for the intervening party, and Mr. Xavier Pottier, appointed by the Prime Minister, at the public hearing of 31 January 2017;

And having heard the rapporteur;

THE CONSTITUTIONAL COUNCIL DECIDED ON THE FOLLOWING:



1. Article 421-2-5-2 of the Criminal Code, as written pursuant to the Law of 3 June 2016, mentioned herein above, provides that:

"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".

2. The applicant claims that the contested provisions infringe on the freedom of communication and opinion insofar as they only punish accessing online public communication services without the joint requirement of the proof that this person is motivated by illegal intentions. These provisions also contravene the principle that offences and penalties must be defined by law and the objective of the constitutional value of accessibility and comprehensibility of the law because of the imprecise terms used. Furthermore, the principle of equality is doubly infringed. On the one hand, only certain individuals are authorised by the law to access this content because of their professions. On the other hand, accessing content encouraging the commission of terrorist acts is only punishable if it is accessed via the internet, and not via other media. Finally, the contested provisions violate the principle of the presumption of innocence insofar as that by accessing this incriminating material the person is being presumed to have the desire to commit terrorist acts.

3. The intervening party claims, for the same reasons, that the contested provisions contravene the freedom of communication and opinion as well as the principle that offences and penalties must be defined by law.

On the merits:

4. Article 11 of the Declaration of the Rights of Man and the Citizen of 1789 provides that: "The free communication of thoughts and opinions is one of the most precious rights of humanity: every citizen should speak, write, and print freely, except in regard to the abuse of this liberty in the cases determined by the law". In the current state of communication methods and in regard to the general development of online public communication services in addition to the importance of these services for participating in democratic life and the expression of ideas and opinions, this right means that one should be able to freely access these services.

5. Pursuant to Article 34 of the Constitution: "Statutes shall determine the rules concerning ... the civil rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties". On this basis, it is up to the legislature to enact rules regarding the objective of the fight against incitement and encouragement to terrorism in online public communication services that balance the objective of the constitutional value of safeguarding the public order and the prevention of infractions with the right to exercise free communication and the freedom to speak, write and print. However, the 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.

6. The contested provisions, which institute a penalty of two years of imprisonment and a fine of 30,000 euros for habitually accessing online public communication services that defend or induce the commission of terrorist acts, including images or representations of voluntary harm to life, have the objective of preventing the indoctrination of individuals who may then commit such acts.



7. First of all, on the one hand, the legislation includes all of the criminal infractions other than those established by Article 421-2-5-2 of the Criminal Code and the specific criminal procedural provisions that have the objective of preventing the commission of terrorist acts.

8. Also, Article 421-2-1 of the Criminal Code punishes the fact of participating in a group formed for or having an established agreement to prepare, as characterised by one or more material facts, an act of terrorism. Article 421-2-4 of this same Code punishes the act of offering or promising something to an individual, offering any kind of gift, present or advantage, threatening or exerting pressure on this individual for the goal of inciting them to participate in a group or agreement described in Article 421-2-1 or to commit a terrorist act. Article 421-2-5 punishes the act of directly inciting terrorist acts or publicly defending these acts. Finally, Article 421-2-6 punishes the act of preparing to commit a terrorist act when this preparation is intentionally in relation to an individual enterprise that has the goal of gravely disturbing the public order by intimidation or terror and that is characterised by the fact of possessing, searching for, obtaining or making objects or substances that create a danger to others as well as other acts such as habitually accessing one or several online public communication services that directly incite the commission of terrorist acts or defend them.

9. Within the framework of the investigation procedures relating to these infractions, the magistrates and investigators possess broad powers to undertake interception measures for correspondences issued by electronic communication, gathering technical data on connections, sound recording, the attachment of images and data capture. Furthermore, with the exception of the actions punishable under Article 421-2-5 of the Criminal Code, the specific procedural provisions relating to detentions and searches are applicable.

10. On the other hand, the legislature has also invested the administrative authority with many powers to prevent the commission of terrorist acts.

11. Also, pursuant to Section 4° of Article L. 811-3 of the Code on National Security, specialised intelligence services may resort to the techniques mentioned in Title V of Book VIII of the same Code to gather information relating to the prevention of terrorism. These services may access connection data, undertake security interceptions, make sound recordings of locations and vehicles and capture digital images and data.

12. Finally, pursuant to Article 6-1 of the Law of 21 June 2004, mentioned herein above, when the requirement in the fight against incitement to terrorist acts or the defence of such acts in Article 421-2-5 of the Criminal Code justifies it, the administrative authority may request of any publisher or host of an online public communication service to retrieve content that violates this Article. According to Article 706-23 of the Code of Criminal Procedure, the stoppage of any online public communication service may be decided by a judge sitting for urgent matters for the actions established in Article 421-2-5 of the Criminal Code when they constitute a manifestly unlawful disturbance. Article 421-2-5-1 of this same Code punishes the act of intentionally retrieving, reproducing and transmitting data that publicly defends acts of terrorism or directly incites these acts in order to knowingly evade the efficiency of the above-mentioned procedures.

13. Furthermore, in regard to the requirement of necessity for infringement on the freedom of communication, the administrative and legal authorities, independently of the contested Article, have numerous rights not only to monitor online public communication services inciting or defending terrorism and punish their authors, but also to monitor an individual who accesses these services and to question and punish this individual when this access is accompanied by behaviour that reveals a terrorist intention, even before any actions of this nature are in the execution phase.



14. Secondly, regarding the adaptation and proportionality requirements in terms of the infringement on the freedom of communication, 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.

15. While the legislature excluded punishing any access to this information "in good faith", the parliamentary work does not determine the scope which the legislature intended to apply to this exemption, given the incrimination that is instituted, as noted above, does not require that the individual undertaking of these acts be motivated by illegal intentions. Therefore, the contested provisions introduce an uncertainty on the legality of accessing certain online public communication services and, consequently, the use of the internet for searching for information.

16. It follows from the foregoing that the contested provisions infringe on the exercise of the freedom of communication in a way that is not appropriate, suitable and proportional. Thus Article 421-2-5-2 of the Criminal Code, without the need to examine the other claims, should be declared unconstitutional.

On the effects of the ruling of unconstitutionality:

17. According to the second Subparagraph of Article 62 of the Constitution: «A provision declared unconstitutional on the basis of Article 61-1 is revoked as from the publication of the decision of the Constitutional Council or at a later date stipulated in the decision. The Constitutional Council determines the conditions and the limits according to which the effects produced by the provision shall be liable to be challenged". In principle, the declaration of unconstitutionality should benefit the individual who brought up this priority matter, and the provision declared unconstitutional may not be applied in proceedings pending on the date of publication of the decision of the Constitutional Council. However, the provisions of Article 62 of the Constitution provide the Constitutional Council with the power to set the date of repeal and to defer its effects as well as to provide for the review of the effects that the provision generates before this declaration takes effect.

18. In this case, no motive should justify a delay of its effects of unconstitutionality. This should take effect from the date of the publication of this decision.

THE CONSTITUTIONAL COUNCIL RULES:

Article 1. - Article 421-2-5-2 of the Criminal Code, in its drafting pursuant to Law number 2016-731 of 3 June 2016, reinforcing the provisions related to the fight against organised crime, terrorism and the financing of these, as well as improving the efficiency and the guarantees of criminal procedure, is unconstitutional.

Article 2. - The declaration of unconstitutionality of this Article 1 shall take effect under the conditions set out in Paragraph 18 of this Decision.

Article 3. - This decision shall 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 9 February 2017, in attendance: Mr. Laurent FABIUS,



Chairperson, Ms. Claire BAZY MALAURIE, Ms. Nicole BELLOUBET, Mr. Michel CHARASSE, Mr. Jean-Jacques HYEST, Mr. Lionel JOSPIN, Ms. Corinne LUQUIENS and Mr. Michel PINAULT.

Made public on 10 February 2017.