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Actualités de la répression et de la prévention du terrorisme par le droit pénal français

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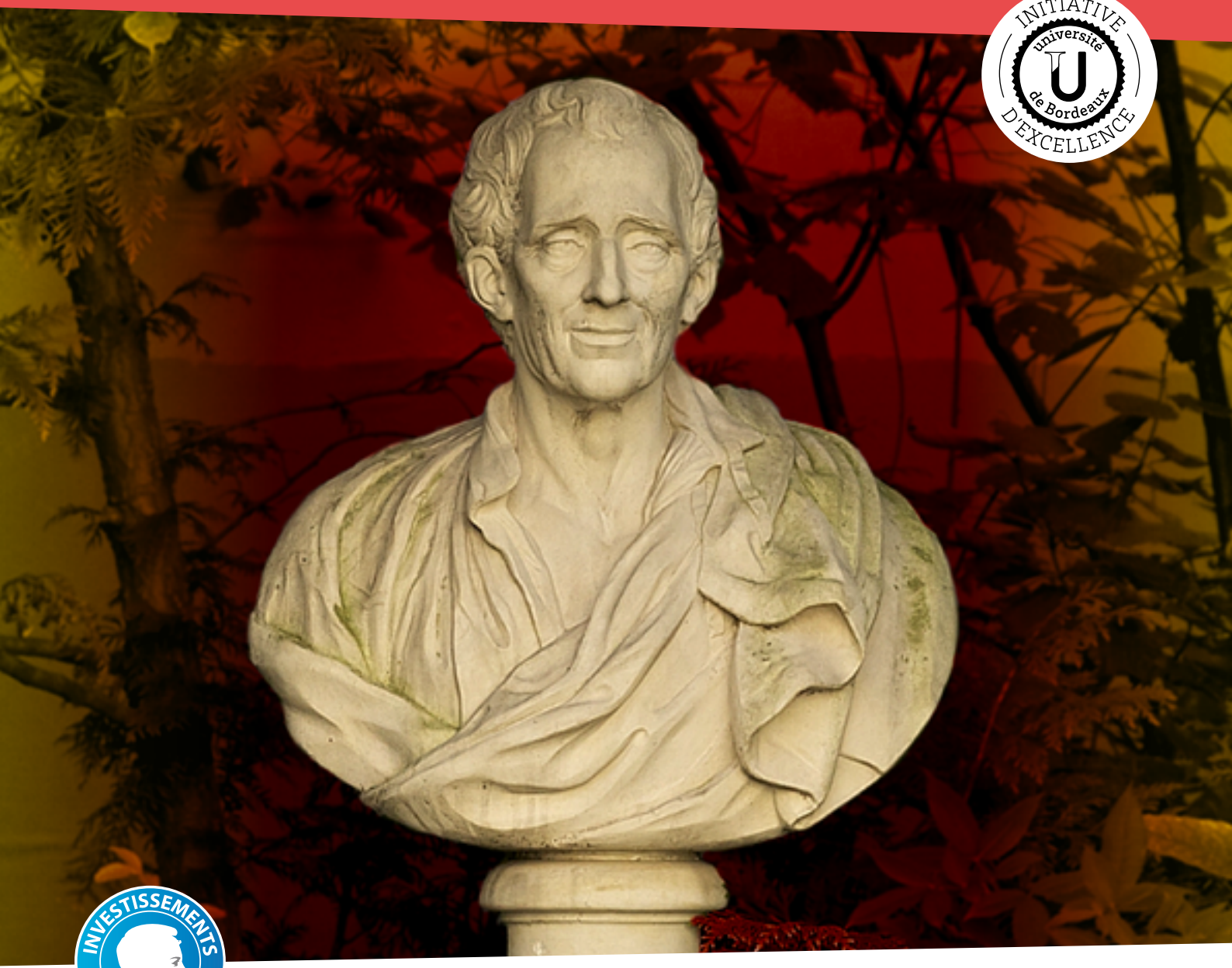

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Criminal law

Latest developments in the repression and prevention of terrorism under French criminal law

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Even before France became *"Charlie"*, Law No. 2014-1353 of 13 November 2014 reinforcing provisions on the war on terror was adopted following a fast-track procedure instigated on 9 July 2014 (1). Defined under French law by the subjective link with an "*individual or collective enterprise, the purpose of which is to seriously disturb public order by intimidation or terror*" (2), terrorism does not require that the acts performed be objectively of such a nature as to achieve that aim, much less that it actually be achieved. Terrorism appears as no less than a threat to the very foundations of the rule of law and is the subject of strong disapproval in society. But beyond the risk created by the terrorist acts themselves, this *"ideological use of terror for political purposes"* (3) is particularly pernicious in that it brings with it the risk of an overreaction in terms of national security. In wishing to combat terrorism, liberal democracies may be tempted to sacrifice some of their basic principles. The trap is well-known and often examined, but it does not pose any less of a threat to the French legal system. Public opinion in support of the adoption of laws displaying an aim of fighting terrorism is indeed always strong, and it is found in parliamentary assemblies (4). Thus the Law of 13 November 2014 has not been referred to the Constitutional Council (5). We will therefore have to wait for potential *questions prioritaires de constitutionnalité* (QPC: priority preliminary ruling on the issue of constitutionality) in order to be certain of the legislation's compliance with French Constitution. As the QPC may give rise, where necessary, to the repeal of unconstitutional provisions already in force, we can only regret the risk of legal uncertainty generated by the absence of any *a priori* review of this piece of legislation (6).

The ink was barely dry on the *Journal officiel* before France was violently hit by the attacks that took place between 5 and 7 January 2015. Voices were immediately raised, calling for a Patriot Act *à la française*. Whilst it is true that, unlike other States, France has never endowed herself with such obviously excessive provisions of ordinary law, it seems difficult to argue that she has remained indifferent to the threat of terrorism. For twenty years, regardless of political cycles, French criminal law has a growing number of specific provisions pursuing the stated objective of ever broader, more severe and more effective criminal law enforcement (7). Despite this, the events that unfolded in January precipitated the discussion of a new bill on intelligence (8), currently being debated by the French Parliament, again following a fast-track procedure.

The multiplication of specific provisions relating to terrorism carries with it the risk of developing an "emergency" criminal law. This then raises the issue of the emergence of a "criminal law of the enemy". Although French doctrine seems unreceptive to the theoretical justification developed by German Professor Günther Jakobs (9) and indeed would appear to take an interest in it purely to denounce the dangers thereof (10), French law does not appear to be any less threatened by the growing assertion as to the need for security. While nobody in France denies that terrorists are people or seeks to exclude such individuals from the scope of the rule of law, we are nevertheless witnessing the creation of a set of derogatory rules. In addition to the requisite severity of the criminal justice response to acts that appear to be particularly serious, there are specific procedural rules that tend to ensure effective enforcement. However, while French legislation has

never compromised with the prohibition of evidence obtained under torture or introduced detention without judicial oversight, the desire to combat terrorism effectively as a whole is strong and constant. The spectrum of criminal legislation is particularly extensive and it also acts preventively, without waiting for the commission of an act that actually harms people. However, neutralising the terrorist threat raises significant difficulties: firstly, from the standpoint of the main principles of criminal law, by querying the requirements of the principles of legality, necessity, or even the presumption of innocence. Furthermore, and this is certainly the most current issue, in terms of the very boundaries of criminal law and thus preserving the separation of powers by the intervention of the judicial authority in monitoring restrictions on individual freedoms. The protective framework of criminal procedure may indeed seem too restrictive and the extension of substantive criminal law on the prevention of terrorism is not necessarily accompanied by a decline in administrative law to the benefit of criminal proceedings. The Law of 13 November 2014 illustrates these two phenomena perfectly by extending the category of terrorist offences (section I) and the emergence of mechanisms competing with criminal procedure (section II).

I. The extension of the category of terrorist offences

Introduced into the Penal Code by Law No. 92-686 of 22 July 1992, a terrorist offence is not in principle a separate offence. With the exception of "environmental terrorism", the criminalisation technique chosen by the French legislature is based on the classification of an aggravating circumstance. Terrorist offences are thus ordinary crimes exhaustively listed by the law, "*intentionally in connection with an individual or collective undertaking aimed at seriously disturb public order by intimidation or terror*". Expanded several times, the list of offences that may be qualified as "terrorist offences" is now particularly long (11). However, while the Law of 13 November 2014 has added offences relating to explosives, the contribution of the new law is essentially for the extension of the repression of terrorism (A) and moral support for terrorism (B).

A. Enhanced repression of the risk of terrorism

The severity of the punishment of terrorist offences is accompanied by a strong desire to prevent these crimes and to limit the consequences thereof. This appears in specific provisions encouraging voluntary withdrawal from terrorist activity or active repentance (12). However, the desire to prevent the commission of terrorist acts is most evident through the creation of separate offences allowing wider-ranging repression than is possible under the rules relating to attempt or complicity. Thus criminal law criminalises scenarios that, on a criminological level, fall within the scope of preparatory acts or complicity attempts and cannot be dealt with under the rules of general criminal law (13). Incitement to terrorist acts or participation in an association of terrorist criminals is criminalized even if it has not been acted upon, and even if the methods usually characterising an act of provocation have not been employed (14). The Law of 13 November 2014 extended the existing suppressive measures by removing the publicity condition previously required for the latter type of provocation. However, the new law's contribution to early repression emerges especially in the creation of the offence of "individual terrorist enterprise".

Early repression is not a new phenomenon since the "criminal association in relation with a terrorist enterprise" (15) is a separate offence under Law No. 96-647 of 22 July 1996. While there remains the requirement that "one or several material acts" be committed, those acts are not specifically listed and may occur some considerable time before the commission of the planned offence. The legislature sitting on 13 November 2014 nevertheless decided that the provisions were insufficient in covering all scenarios involving the preparation of acts of terrorism. In order to

curb the so-called "lone wolf" phenomenon, it introduced a new offence of "individual terrorist enterprise".

Defined under Article 421-2-6 of the Penal Code (16) the new offence is complex and the authorities consulted during the review of the Bill were extremely critical with regard to the requirement of clarity and precision of criminal offences (17). From the point of view of the planned act of terrorism, it is more restrictive than the provision on criminal associations in that it is limited to the preparation of the most serious acts of terrorism (attacks on individuals, hijacking and destruction of goods that are hazardous to people). The material element of the offence also appears to be better defined as two facts must be characterised. The first is extremely broad: "*to hold, seek, obtain or make objects or substances such as to create a danger to others*", which seems very extensive since said objects or substances may be of any kind and do not have to be prohibited or specially regulated. Moreover, the simple fact of looking for such objects or substances will suffice, reducing the materiality of this condition to a bare minimum. However the constitution of the offence also requires another fact, consisting in different forms of behaviour:

• *Gathering information about places or people in order to take action in these places or to harm them or conducting surveillance of such premises or persons;*

• *Training or receiving training in the handling of weapons or any form of combat, in the manufacture or use of explosive, incendiary, nuclear, radiological, biological or chemical substances, or in the piloting of aircraft or vessels*;

• *Regularly consulting one or more public communication services online or holding documents directly causing the commission of acts of terrorism or which glorify or apologise for said acts*.

These different forms of behaviour seem variously to indicate a real terrorist plan. While the latter scenario appears fairly unequivocal, this is not the case for the former two. Although the "tracking" referred to is certainly a prerequisite for the commission of a terrorist attack, the corresponding forms of behaviour do not seem specific and everything then appears to be based on proof of the aim pursued by the person. The problem is similar to the latter behaviour: the consultation of such websites may well be justified by needs arising from journalistic or scientific work. There were demands that the legislature explicitly those assumptions from the scope of criminalisation, which option was not acted upon. In reality, such an exclusion was not necessary on a legal level since the required criminal intent is lacking here, and the offence is therefore not constituted. However, it is possible to fear serious evidential difficulties as to the motives of those who would materially commit the offence.

In addition to the anticipation of repression, the broad understanding of the risk of terrorism under French criminal law is also reflected in a strong criminalization of acts of support for terrorism. Financial support for terrorism is already the subject of several broadly defined offences (18); it is essentially *moral* support for terrorism that is tackled by the Law of 13 November 2014.

B. Enhanced repression of moral support for terrorism

Until recently, the offence of *apologie du terrorism* (apology for terrorism) was criminalised by the Law of 29 July 1881, special legislation governing freedom of expression and its abuses. The offence had, until now, been applied infrequently (19) and it was with a view to strengthening the effectiveness of that repression that the Law of 13 November 2014 intervened. The wording of the

criminalisation has not been amended but the offence has been added to the Penal Code itself (20).

This addition is important firstly on a symbolic level, to express the fact that apology for terrorism can be analysed in terms of a simple abuse of freedom of expression but must be excluded from the scope of that same freedom.

However, the inclusion of the offence of apology for terrorism in the Penal Code itself was mostly intended to prevent prosecutions being brought on the basis of the protective procedural framework provided by the 1881 Law. Under those provisions, repression is subject to a set of particularly restrictive formal rules, with public prosecutions in turn subject to a shorter statutory limitation period than is provided under ordinary law (21). By linking the offence of apology for terrorism to terrorist offences contained in the Criminal Code, the French legislature made significant amendments to the procedural rules applicable. Although derogatory rules governing custody and searches in terrorism cases remain excluded (22), it is now possible to use ordinary investigation methods and a number of special techniques for surveillance, infiltration, interception of correspondence or the capture of login data (23).

The specific context of early 2015 has allowed these changes to deploy their full range of effects. In accordance with the wishes of the Chancellery (24), many charges were brought and severe sentences pronounced (25). This situation and the extensive media coverage of certain cases, however, have highlighted the possibility of extending the current criminalisation and the difficulties in establishing its boundaries. Considered compatible with Article 10 of the European Convention (26), the criminalisation would appear, however, to raise questions as to its compliance with the principle of legality. The offence of apology for terrorism is not defined by the law and the legislature sitting on 13 November 2014 did not concern itself with it. The circular of 12 January 2015 nevertheless felt the need to state that it consists in "*presenting or commenting on acts of terrorism while basting a favourable moral judgement on the same*". This broad definition certainly does not solve the problem of the lack of predictability associated with repression, a circular having no legal value and not being binding on the judicial courts in their interpretation thereof. While it seems unlikely that a *question prioritaire de constitutionnalité* (QPC) would succeed and that the Constitutional Council would strike down the provisions concerned (27), as it did for the offence of sexual harassment (28), the large number of recent prosecutions will certainly push the Court of Cassation to rule on the exact scope of the criminalisation concerned here.

However, while the offence of apology for terrorism is indicative of the importance of procedural rules in the effectiveness of law enforcement, it is worth noting that the Law of 13 November 2013 contains a number of provisions relating to criminal procedure. The fundamental interest of the 2014 law on a procedural level does not lie in the extension of investigative methods in respect of online communication networks (29) or the concurrent jurisdiction of specialised courts (30). A greater concern is the emergence of mechanisms that compete with criminal procedure.

II. The emergence of mechanisms that compete with criminal procedure

Under French law, the judicial dualism between the administrative and judicial systems is a consequence of the separation of powers. Under Article 66 of the Constitution, the judicial authority is the *"guardian of the freedom of the individual"*, which takes exclusive jurisdiction over ordinary courts in criminal matters and, more specifically, the judicial police. As for the administrative police, it is subject to oversight by administrative courts. In principle, the dividing

line is clear: the purpose of the administrative police is to prevent breaches of public order, while the judicial police seek out evidence of offences that have already been committed. However, as we have seen above, criminal law intervenes in an increasingly preventive capacity, blurring the line between prevention and repression. The Law of 13 November 2014 has created new prohibitions that are qualified as administrative police measures (A) and the draft law on surveillance provides for a major expansion of administrative investigations (B) outside the scope of any review by the ordinary courts.

A. The proliferation of administrative prohibitions

Aside from the extension of administrative bans from French territory issued against foreigners, including nationals of a Member State of the European Union (31), the Law of 13 November 2014 introduced a specific device of prohibitions on French citizens from leaving French territory "*where there are serious reasons to believe that he plans*" to travel abroad in order to prepare acts of terrorism (32). Announced by the Minister of the Interior in a written and reasoned decision but not preceded by a debate, this new ban raises particular questions as to how it is monitored (33). The measure could be considered disproportionate, and the procedure as insufficiently compliant with the adversarial principle in relation to the requirements of Article 8 of the European Convention (34). In addition, although the evidence to establish the requisite suspicion is not specified (35), it is not excluded that they may constitute offences of criminal association or individual terrorist enterprise. In this case, despite the distinction made by the Constitutional Council between individual freedoms within the meaning of Article 66 of the Constitution and freedom to come and go (36), the distinction between administrative and judicial police and the exclusion of the ordinary courts becomes debatable.

The same can be said with respect to another measure introduced by the Law of 13 November 2014, which allows an independent administrative authority to order the withdrawal of online content "*when the exigencies of the struggle against incitement to acts of terrorism or apology for such acts*" justify the same (37). Despite the obvious similarity of such acts with the offences reviewed above, the legislature refused to entrust the ordinary courts with the task of combating that phenomenon. The interruption of an online communication service may well be ordered by the judicial court in summary proceedings (38). The Law also institutes the blocking (39) and administrative dereferencing (40) of websites, which is ordered by an "*administrative authority*", the *Direction générale de la police national* (DGPN – national police directorate). A "*qualified person*" appointed by the *Commission nationale de l'informatique et des libertés* (CNIL) has the task of ensuring compliance with the procedure. In the event of any irregularity, they may recommend that the DGPN bring the measure to an end and, should the latter not comply with the request, an application may be made to the administrative court. Strongly criticized by some of the bodies consulted, on both a technical and a legal level (41) the procedure is nevertheless effective and any censure on the part of the Constitutional Council now seems unlikely in light of its position on a similar mechanism established in the fight against child pornography (42).

However, the blurred distinction between administrative and judicial police seems even more worrying in light of the current surveillance Bill.

B. The expansion of administrative investigations

Currently being debated by the French Parliament is the surveillance Bill (43), which aims to create a comprehensive and coherent legal framework for administrative investigations. Although its scope is much broader than the prevention of terrorism, this aim allows all the measures

introduced or amended by the Bill to be used. Approved by the *Conseil d'Etat* (44) but fiercely criticised by all consultative authorities for the protection of fundamental rights and freedoms (45), the project significantly expands the legal field of administrative surveillance. To the administrative interception of telephone communications (46) are added geolocation measures, measures on the mass surveillance of connection data, the implementation of an algorithmic device meant to detect behaviour in preparation for a terrorist act or of close surveillance measures called IMSI-Catcher. These surveillance techniques shall be authorised by the Prime Minister at the written, reasoned request of the Ministers of the Interior, Defence, Justice, Economy, Budget or Customs. In theory, such authorisation can only be granted once a new independent administrative authority (the *Commission nationale de contrôle des techniques de renseignement*) has delivered its opinion, but that opinion is only advisory and not mandatory in the event of '*absolute urgency*' (47). The extension of investigation methods is, however, accompanied by the establishment of a monitoring procedure, currently almost non-existent (48). The fact that the future independent administrative authority will be partly composed of judges from both jurisdictional orders and, above all, that this will be accompanied by the judicial review of such measures by the *Conseil d'Etat*, ruling at first and last instance in a special court formation, is to be welcomed. However; in addition to the substantial restrictions on the adversarial principle and the giving of reasons for judicial decisions contained in this procedure, the relationship between administrative and criminal investigations raises particular questions.

In principle, in fact, the two investigations are not supposed to interfere: the administrative investigation is conducted for preventive purposes; the finding that an offence has indeed been committed means that the matter must be referred to the prosecuting authorities and the investigation becomes a judicial one. However; the combined extension of the administrative investigation and of offences committed over time at the preparatory stage could lead to serious practical difficulties. The Bill does not specify anything as to the switch from one procedural framework to another. It only provides an exemption to the rules on the destruction of evidence collected where the information gathered is transmitted to the Public Prosecutor as it reveals facts suggesting that an offence has been committed (49). There is a substantial risk that the administrative investigation will continue even where one of the preventive offences reviewed above has already been established.

But the main difficulty lies in the Bill's silence on the possibility of (and, if so, how) incorporating the evidence collected into criminal proceedings. Considering the requirements of Article 6 of the European Convention, it is inconceivable that such elements can be used as evidence in criminal proceedings if they cannot be debated in an adversarial way or are the result of irregular administrative police measures. The Bill says nothing and instead provides for the lack of access of people under surveillance to the contents of the evidence collected and even the lack of information on the reality of the implementation of the measure, even in the event of a successful appeal before the *Conseil d'Etat* (50). So while it seems possible to resort, in this context, to applications for preliminary rulings to be made to the *Conseil d'Etat*, the difficulties are considerable in light of the fact that the reasons for its decision will not be communicated to the parties concerned. Given these serious uncertainties, we must hope, along with the *Défenseur des droits* (Defender of Rights), that the Bill will be amended to ensure that established intelligence techniques do not become a way to *circumvent* criminal proceedings and their guarantees. It should however be noted that the amendments to the Bill when it was passed on its first reading by the National Assembly do not necessarily support this (51). In the absence of any legislative

about-face, the matter will be left to the Constitutional Council: an *a priori* referral has been announced by the President of the Republic (52).

Notes

(1) On the legalisation and its adoption procedures, see in particular R. Ollard & O. Desaulnay, « La réforme de la législation anti-terroriste ou le règne de l'exception pérenne », *Droit pénal* n° 1, Janvier 2015, étude 1.

(2) Art. 421-1 of the Penal Code (PC). See further in this paper on the difficulties posed by this definition.

(3) On this definition, see in particular A. Zabalza, *Terrorisme, Liberté et démocratie,* Bordeaux, 5 March 2015.

(4) This finding is not specific to France. See in particular C. Cerda-Guzman, « La lutte contre le terrorisme en droit constitutionnel étranger : vers un nouvel équilibre entre sécurité et libertés ? », *Revue des droits et libertés fondamentaux* 2015, n°14.

(5) Art. 61 of the Constitution.

(6) Art 61-1 of the Constitution.

(7) See the Laws reviewed by the impact study annexed to *Projet de loi renforçant les dispositions relatives à la lutte contre le terrorisme* (Bill strengthening provisions on the war on terror), n° 2110.

(8) *Projet de loi relatif au renseignement* (Bill on surveillance), n° 2669, tabled before the National Assembly on 19 March 2015.

(9) See in particular G. Jakobs, *Derecho penal del enemigo,* 2e ed., translated from German by M. Cancio Melía, Thomson, coll. *Civitas,* 2006; G. Jakobs, « Aux limites de l'orientation par le droit : le droit pénal de l'ennemi », *R.S.C.* 2009, p. 7.

(10) See in particular the special issue of the *Revue de sciences criminelles,* January-March 2009.

(11) Article 421-1 PC.

(12) Articles 422-1 and 422-2 PC.

(13) Articles 121-6 and 121-7 PC.

(14) Article 421-2-5 para. 1 PC on direct provocation by any means; Article 421-2-4 PC on provocation without effect by promises, gifts or threats.

(15) Article 421-2-1 PC.

(16) The penalty is 10 years' imprisonment and a €150,000 fine.

(17) See in particular *Commission nationale consultative des droits de l'Homme* (CNCDH), Opinion of 25 September 2014.

(18) Articles 421-2-2 PC and 421-2-3 PC.

(19) The impact study appended to the Bill strengthening provisions on the war on terror presented 14 convictions between 1994 and 2014.

(20) Article 421-2-5 PC.

(21) Article 42 *et seq* of the Law of 29 July 1881 on press freedoms.

(22) Article 706-24-1 of the Criminal Procedure Code (CPC).

(23) Article 706-80 *et seq*, CPC.

(24) *Circulaire du 12 janvier 2015 relative aux infractions commises à la suite des attentats terroristes commis les 7, 8 et 9 janvier 2015* (Circular of 12 January 2015 on offences committed following the terrorist attacks committed on 7, 8 and 9 January 2015).

(25) See in particular for the two months following the events of January 2015: « *Depuis les attentats, la justice a prononcé 132 condamnations pour apologie du terrorisme* », *lefigaro.fr,* 18 March 2015.

(26) ECHR, *Leroy v France*, Application n°36109/03, 2 October 2008.
(27) See however « Délit d'apologie du terrorisme : QPC cherche avocat », *Dalloz Actualité*, 15 February 2015.
(28) Decision n° 2012-240 QPC, 4 May 2012.
(29) Articles 13 to 22 of the Law of 13 November 2014.
(30) Articles 9 and 10 of the Law of 13 November 2014.
(31) Article L. 624-1 *et seq* of the *Code de l'entrée et du séjour des étrangers et du droit d'asile* (Code of Entry and Residence of Foreigners and of the Right to Asylum).
(32) Article L 244-1 of the *Code de la sécurité intérieure* (Internal Security Code).
(33) See in particular, qualifying the ban on "extreme security measures" A. Capello, « L'interdiction de sortie du territoire dans la loi renforçant les dispositions relatives à la lutte contre le terrorisme », *AJ Pénal* 2014 p. 560.
(34) See in particular CNCDH, abovementioned opinion.
(35) The CNCDH thus denounced "*purely subjective assessments*"
(36) See Decision n° 2011-631 DC 9 June 2011, on placing foreigners under house arrest, a measure "*which does not impinge upon freedom of the individual*" and which may therefore be reviewed by an administrative court.
(37) Article 12 of the Law of 13/11/2014, amending Law n°2004-575 of 21 June 2004 on confidence in the digital economy.
(38) Article 8 Of the Law of 13/11/2014, amending Article 706-23 CPP.
(39) Decree n° 2015-125 of 5 February 2015.
(40) Decree n° 2015-253 of 4 March 2015.
(41) See in particular CNCDH, Opinion cited above; *Conseil national du numérique*, Opinion n°2014-3 of 15 July 2014.
(42) Decision n° 2011-625 DC of 10 March 2011.
(43) *Projet de loi relatif au renseignement* (Bill on Surveillance), n° 2669, tabled on 19 March 2015.
(44) *Conseil d'Etat*, Opinion n°389.754, 12 March 2015.
(45) See CNCDH, Opinion of 16 April 2015; CNIL, Opinion of 19 March 2015; *Défenseur des droits* (Defender of Rights), Opinion n°15-04 of 2 April 2015.
(46) Article L. 241-1 *et seq* of the *Code de la sécurité intérieure* (CSI – Internal Security Code).
(47) Article 1 of the Bill.
(48) See V. Peltier, « Le droit au secret des correspondances », *in Traité des droits de la personnalité,* Lexis Nexis, 2013.
(49) New Article. L. 822-6 CSI.
(50) Article 4 of the Bill.
(51) At the time of writing, the Bill has been adopted at first reading and extends surveillance scenarios in particular; see *Projet de loi relatif au renseignement, adopté en 1ère lecture par l'Assemblée nationale le 5 mai 2015, TA n° 511*.
(52) "Le Supplément", Canal Plus, 19 April 2015, http://www.elysee.fr