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Backlash following the dramatic events of 2015

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Abbreviations

CCIF: Collective Against Islamophobia in France

CERD: International Convention on the Elimination of All Forms of Racial Discrimination

CNCDH: French National Human Rights Commission

COP 21: Conference of Parties 21

CRIN: Children Rights International Network

ECHR: European Convention of Human Rights

ECtHR: European Court of Human Rights

FRA: Fundamental Rights Agency

HRC: Human Rights Committee

HRL: Human Rights League

HRW: Human Rights Watch

ICCPR: International Covenant on Civil and Political Rights

NGO: Non-governmental organisation

UDHR: Universal Declaration of Human Rights

UMP: *Union pour un Mouvement Populaire* (Union for a popular movement)

UN: United Nations

‘Glorification of terrorism’ will stand for the French term: “*apologie du terrorisme*”.

The author has made all the translations, unless stated otherwise.

The full articles from the international instruments mentioned in this paper can be found in Appendix.

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Introduction

“If liberty means anything at all, it means the right to tell people what they do not want to hear” – George Orwell

Freedom of expression has been under attack since the beginning of 2015. On 7 January 2015, two terrorists, armed with assault rifles, forced their way into the offices of the French satirical newspaper *Charlie Hebdo* in Paris. They killed 11 people and injured 11 others in the building. They also killed a French police officer outside the building.¹ The gunmen identified themselves as belonging to the Islamist terrorist group Al-Qaeda’s branch in Yemen, who took responsibility for the attack. Several related attacks followed nearby and killed five more and wounded 11 more people. French authorities and citizens saw this attack as an obvious threat to freedom of expression as the past publications of *Charlie Hebdo* were pointed out as a justification for the attack.

As a result, France raised the Vigipirate terror alert – the French national security alert system - and soldiers were sent after the two terrorists. Two days later, on 9 January 2015, they were shot dead when they emerged from a building. The lack of a trial has fuelled the fear of people, who remain in the dark with no explanation from the terrorists, and may have lead to growing Islamophobia among the French society. However, on 11 January 2015, about two million people and more than 40 world leaders gathered in Paris for a rally of national unity. In the end, around 3.7 million people joined demonstrations across France behind the ‘*Je suis Charlie*’ (“I am Charlie”) motto. Unfortunately unity did not last long and an unhealthy atmosphere had started to engulf France.

¹ FRA, ‘Reactions to the Paris attacks in the EU: fundamental rights considerations’ (2015) FRA report January 2015, 3.

Four days after the attack, a poll revealed that 84% of French people were prepared to accept a certain limitation of their liberties to guarantee their security.² Moreover, a large majority agreed with the French President François Hollande and his Prime Minister, Manuel Valls when they declared: “France is at war.”³ The human rights organisations and the international community, which clearly saw what was coming, mostly feared abuses and disproportionate measures from French authorities. The Human Rights Watch (HRW) body expressed its concerns and stated:

“At this time of shock and mourning, France should set an example of tolerance and uphold the freedoms it promotes. Freedom of expression should not be weakened by this attack, nor should any other human rights.”⁴

The Chairman of the Committee of Ministers of the Council of Europe, Didier Reynders, warned France to ensure “the spirit of tolerance over the hatred and division, which terrorists seek to provoke.”⁵ However, France decided to issue new laws to restrict freedom of expression and to strengthen convictions for “*apologie du terrorisme*” (hereafter ‘glorification of terrorism’).

At the end of January 2015, people thought that it was a matter of time before the situation gets back to normal. Unfortunately, France was stroked for a second time at the end of the year. The attacks happened in Paris on the night of 13 November 2015. Gunmen and suicide bombers hit different places across Paris – such as a concert hall, a major stadium, restaurants and bars. As a result 130 people were killed and hundreds were wounded.⁶ Daech claimed responsibility for the attacks, saying that it was an act of retaliation for the French airstrikes in Syria and Iraq. Even if these attacks were not

² Buchanan Elsa, 'Paris attacks: What new state of emergency laws 'restricting liberties' are French MPs introducing?' (*Ibtimes*, 20 November 2015) <<http://ibtimes.co.uk>> accessed 12 June 2016.

³ Buchanan (n 2).

⁴ HRW, 'France: An Attack on Free Expression' [8 January 2015] HRW <<https://www.hrw.org/news/2015/01/08/france-attack-free-expression>> accessed 12 June 2016.

⁵ Council of Europe, 'Terrorist attack against 'Charlie Hebdo' magazine' (*Council of Europe*, 7 January 2015) <http://www.coe.int/en/web/portal/news-2015/-/asset_publisher/9k8wkRrYhB8C/content/-charlie-hebdo->> accessed 12 June 2016.

⁶ BBC, 'Paris attacks: What happened on the night' (*BBC*, 9 December 2015) <<http://www.bbc.com/news/world-europe-34818994>> accessed 12 June 2016.

targeting freedom of expression, it adds fuel to the growing paranoia brought against the Muslim population.

In the aftermath of these attacks, François Hollande decided to establish a state of emergency and therefore to derogate from article 15 of the European Convention on Human Rights. The measures implemented after the *Charlie Hebdo* attack were even more endorsed under the state of emergency. Another kind of fear has emerged: Will exceptional measures be normalised because of the expansion of the state of emergency? Freedom of expression is likely to be caught in the middle of the fight against terrorism.

Freedom of expression is known not to be *jus cogens*⁷ – meaning that it can be limited. However, different requirements must be fulfilled to ensure the proportionality and necessity of the restrictions. Regarding the past dramatic events, the fulfilment of these requirements can be questioned. Is freedom of expression in France at risk today? Are the measures – implemented in the wake of the attacks – truly necessary and proportionate?

France is known as the ‘human rights’ country and has shown in the past its devotion for the guarantee of freedoms and rights.⁸ If France starts to weaken its protection of fundamental freedoms, it is likely to end the strong human rights attachment France has ever shown. Unity and marches to defend freedom of expression against terrorism seems to have long been gone. International instruments duly ratified by French authorities are long forgotten too. Protection of freedom of expression does not constitute a priority anymore and surprisingly all means to achieve the goal of ending terrorism seem legit. Freedom of expression under terrorist threat is scandalous and severely punished through statements from French authorities whereas freedom of expression under governmental threat seems to be justified. Complaints are difficult to

⁷ Andrea Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (2008) EJIL, 19 [3].

⁸ French Government, ‘France and the institutions protecting and promoting human rights’ (*France Diplomatie*, March 2013) <<http://www.diplomatie.gouv.fr>> accessed 15 July 2016.

make in this difficult context as French authorities always hide themselves behind the fight against terrorism justification.

The chronological order will be privileged with freedom of expression as the red line through the thesis. In that sense, first will be studied the attachment of the French Republic to freedom of expression per se. Then, the French government's measures after the *Charlie Hebdo* attack will be separated from measures adopted under the state of emergency. However, a striking parallel between the two sets of measures will be revealed. Measures targeting freedom of expression under freedom of expression will find their roots in the measures issued after the *Charlie Hebdo* attack. Through the study of these measures, it will become clear that France is applying discriminatory and disproportionate criteria hid behind the 'fight against terrorism' motto. The French government seems nowadays to be willing to play on the edge between the requirements under its international obligations and what it thinks necessary for the French society. One may think that disproportionality and discrimination are not the appropriate answer to the terrorist actions, as it follows the way paved by terrorists. The fight against discrimination that France decided to undertake since the French revolution seems to have been replaced by the fight against terrorism – at all cost.

Chapter 1: International standards

“Give me the liberty to know, to utter and to argue freely according to conscience, above all liberties” – John Milton

First of all, in order to understand the issues at stake here, one needs to understand what is the freedom of expression tackled in this thesis. In that sense, the international instruments defining the freedom of expression give a solid ground of understanding. The international stage witnessed the compilation of treaties dealing with freedom of expression and the possible restrictions (I). Later on, the regional stage followed the lead and decided to tackle the same issue (II). For the purpose of the thesis, only the European Convention on Human Rights will be studied.

I. The recognition of freedom of expression at the international level

The international community - gathering around the United-Nations – issued a couple of resolutions and decisions in order to guarantee freedom of expression (A). Almost at the same time, it tackled the issue of restrictions of freedom of expression (B). Indeed, as freedom of expression is not a *jus cogens* right, it can be limited. The international stage particularly tackles the issue of hate speech (C). This issue is of particular importance in France considering its history during the Second World War.

A. Freedom of expression as a protected right in international instruments

The international community – gathering around the international treaties and bodies as well as courts – have agreed to define freedom of expression as a core stone of the international human rights regime.⁹ Indeed, the worse situations, which have plagued the world over the centuries, had often started with full control over the

⁹ Agnes Callamard, 'ICCPR: Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence' [2008] ARTICLE 19 [2].

freedom of expression, opinion and conscience.¹⁰ To name a few of these man-made creations: the slave trade and slavery in general, the inquisition, the Holocaust or the genocide in Rwanda, etc.¹¹ As Michael Scammell stated: Control over freedom of expression is “the extension of physical power into the realm of the mind and the spirit [...]”.¹²

For these reasons, international courts and bodies have on several occasions recognised the importance of freedom of expression. It started in 1946 when the UN General Assembly adopted on its first session the Resolution 59(I), stating:

“Freedom of information is a fundamental human right and [...] the touchstone of all the freedoms to which the United Nations is consecrated”.¹³

A couple of decades later, in the 1990s, the UN Human Rights Committee declared that “the right to freedom of expression is of paramount importance in any democratic society”.¹⁴

Freedom of expression is mentioned in most of the core international instruments – either expressly or in an implied way. In the Universal Declaration on Human Rights (UDHR), its article 19 is dedicated to freedom of expression, using more or less similar terms than article 19 of the International Covenant on Civil and Political Rights (‘ICCPR’), which states:

“Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart

¹⁰ Callamard (n9) [3].

¹¹ *ibid* [2].

¹² Michael Scammell, ‘Censorship and its History – A personal View’ [1988] ARTICLE 19 World Report [5].

¹³ Callamard (n9) [3].

¹⁴ *Tae-Hoon Park v. Republic of Korea* (App no 628/1995) ECtHR 20 October 1998 [10.3].

information and ideas through any media regardless of frontiers”.¹⁵

Indeed, taking a closer look at the impacts of freedom of expression, it is striking how it stands in the centre of everything. Through the freedom of expression, all rights are promoted and protected, allowing all citizens to stand for their rights, to challenge violations and to claim reparation.¹⁶ Therefore, unduly limitations and restrictions of freedom of expression impact the realisation of other rights.¹⁷

B. Restrictions of freedom of expression enshrined in the ICCPR

International law and domestic legislations may recognise the use of restrictions to frame freedom of expression, they have however lay down a set of rules for restrictions to be valid. Article 19(3) of the ICCPR states the conditions:

“The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*‘ordre public’*), or of public health or morals”.¹⁸

The first striking element is that the wording of this paragraph is vague. In that sense, even though the international community acknowledges the importance of freedom of expression, it has left a huge margin of appreciation and discretion at the hands of the States.¹⁹ Therefore it is up to the States to pick up one of the legitimate reasons to restrict freedom of expression and to apply this reason to their territory.

In order to balance this margin of appreciation, a new tool has emerged over the years

¹⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19.

¹⁶ Callamard (n 9) 6.

¹⁷ *ibid.*

¹⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19(3).

¹⁹ Callamard (n 9) 20.

and is known as the “three part test”.²⁰ According to this test, for a restriction to be justified and therefore valid, three different requirements must be fulfilled. First, limitations must be provided by law, which must be “accessible and formulated with sufficient precision to enable the citizen to regulate his conduct”.²¹

Second, the restriction must pursue a legitimate aim. The list of legitimate aims can be found in the international instruments. It is considered to be an exhaustive list as no other aim had been considered as legitimate to restrict freedom of expression.²²

Third, the restriction must be necessary to secure the aim. It means that there must be a “pressing social need” for the restriction.²³ The reason claimed by the State must be “relevant and sufficient” to justify the restriction. And the restriction must be “proportionate to the aim pursued”.²⁴ Therefore, the State should always seek the least restrictive actions available.

Later on, it will be studied that the European Convention on Human Rights sets a similar test. Through the different chapters, it will become obvious that France does not always respect and fulfil all the criteria. French laws will sometimes be unclear and not precise enough to be considered as fulfilling the first requirement of the “three part test”. Indeed, ill-defined or broad terms cannot fall under the ‘prescribed by law’ umbrella. This has been done to avoid States from hiding behind that provision when issuing unclear laws. Indeed, it can easily lead to abuses if no one can clearly understand the meaning and purpose of the law. Moreover, the necessity and proportionality will also be an issue for France. In practice, the law is not always applied without discrimination and according to necessity and proportionality principles. The only criterion – easily fulfilled – is the second one, as France will justify all measures by the legitimate aim of ‘fight against terrorism’ and therefore the protection of ‘national security’.

²⁰ Callamard (n 9) 23.

²¹ *The Sunday Times v. United Kingdom* (App no 6538/74) ECtHR 26 April 1979 [49].

²² Callamard (n 9) 26.

²³ Callamard (n 9) 27.

²⁴ *Lingens v. Austria* (App no 9815/82) ECtHR 8 July 1986 [39-40].

C. The ban of ‘propaganda for war’ and ‘hate speech’

The international community has decided to agree on one positive duty that should be imposed upon States.²⁵ France is therefore bound to it. This positive duty will then serve as an umbrella for France to ban ‘glorification of terrorism’.²⁶ This duty regarding restrictions of freedom of expression is stated in article 20 of the ICCPR:

“Any propaganda for war shall be prohibited by law” and “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.²⁷

This duty is the only one that States have to fulfil when restricting freedom of expression. At first sight, this might seem easy to follow but when looking at it from a closer look, it might not be that easy. Indeed, there is no agreed definition of the terms ‘propaganda’ and ‘hate speech’ in international law.²⁸ Instead, there are various national definitions and ways to interpret the meaning of these terms.

The meaning of ‘hate speech’, for instance, and thus restrictions of freedom of expression to avoid it, changes widely depending on the geography. Indeed the stricter restrictions on this point can be found in Europe, which suffered from the Holocaust and other genocides.²⁹ As it will be studied in the next chapter, France has decided to apply a high restriction on freedom of expression when concerning the denying of the Holocaust for instance.³⁰ In that sense, France decided to go beyond the international standards to strengthen measures targeting freedom of expression. It can already be seen as an abuse to the international standards but regarding the historical context, no one has dared to complain.

The Committee of Ministers of the Council of Europe issued the Recommendation (97) 20 on ‘Hate Speech’ in which they describe the term as:

²⁵ Callamard (n 9) 29.

²⁶ See Chapter 3.

²⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 20.

²⁸ Callamard (n 9) 29.

²⁹ *ibid* 30.

³⁰ See chapter 2.

“Covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”

The importance of freedom of expression and its restrictions are to ensure equality between people, who deserve to enjoy all of their rights without discrimination and with dignity. However, too many restrictions lead to a loss of the meaning of freedom of expression. States have to stay on the fragile edge to protect democracy and not to fall under dictatorship, where freedom of expression is only a myth.

As a reminder, France is one of the five permanent members of the UN Security Council since the creation of the United-Nations; also one of the members of the UN and it ratified the UN Charter. In that sense, one could expect France to respect the rules set up by the organisation. France did ratify the ICCPR in 1980. Moreover, the rights enshrined in the UDHR are considered as customary international law. In that sense, freedom of expression can fall under the international customary law umbrella. However, to be considered ICL, state practice must be widespread.³¹ As terrorist attacks in France have lead to the implementation of new measures targeting freedom of expression – such as the aggravation of the offence ‘glorification of terrorism’ or new surveillance measures – it may seem difficult for those measures to fall under the ICL umbrella. As terrorism is the new threat nowadays, measures to tackle it may only one day become ICL. Indeed, the ECHR does not tackle terrorism per se. The ECtHR is yet to issue decisions on freedom of expression and terrorism.³² France is therefore implementing measures under a legal vacuum.

Even if the new measures implemented by France cannot be considered as ICL, they are still restrictions to freedom of expression. However, despite the fact that freedom of expression is a protected and guaranteed right in almost every international instrument,

³¹ International Court of Justice Statutes, article 38.

³² Francesco Francioni, *Customary International Law and the European Convention on Human Rights* (1st edn, International Law 1999) 11-25.

it is yet not an absolute right.³³ In that sense, international and domestic law can allow restrictions of freedom of expression under different criteria. In the French case, the ratification of the ECHR – as for the ICCPR - is a proof that France accepted to be bound with the obligations enshrined in it. Therefore, France must always try to be in accordance with the ECHR (II). This is why in the following it will be considered more in details.

³³ Callamard (n 9) 7.

II. The recognition of freedom of expression at the regional stage

The European Convention on Human Rights is the one regional instrument relevant for France, which tackles freedom of expression. Indeed, article 10 of the ECHR provides the legal background for the respect of freedom of expression (A). Article 10 also recognises the legality of restrictions based on two criteria (B). Finally, article 14 of the ECHR prohibits the use of discriminatory measures in the enjoyment of this right.

A. Article 10 of the European Convention on Human Rights

The three regional human rights treaties – European, American and African – also guarantee freedom of expression. For the purpose of this thesis and as the ECHR is the only relevant instrument for France, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights are not going to be studied. France signed the ECHR in 1950 and ratified it in 1974. France did not make any reservation – meaning that France shall respect all the rights and freedoms enshrined in the ECHR. Therefore France agreed to be bound to the ECHR and to respect freedom of expression – as part of its international obligations. Therefore article 10 of the ECHR guarantees:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers [...].³⁴

In that sense, one can clearly notice that the ECHR took the exact same words than the article 19 of the ICCPR. It may be seen as a will from the authors of the ECHR to create a coherent legal framework for freedom of expression. There is no legal vacuum set in the international instruments, as the wording is precisely the same.

The European Court of Human Rights ('ECtHR') is the institution, which has the duty to supervise and monitor the compliance of each State with the ECHR.³⁵ It is also the

³⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10.

³⁵ Council of Europe, *European Court of Human Rights Questions and Answers* (CoE 2007).

authoritative interpreter of the ECHR. In that sense, in 1976, the ECtHR followed the lead and confirmed the key role of freedom of expression:

“Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man”.³⁶

In that sense, the ECtHR took the same path as the UN organs and recognise freedom of expression as a core right, which needs to be guaranteed and respected for a society to be considered democratic. Restrictions to it must be therefore narrowly studied.

As for the ICCPR, the ECHR tackles the issue of restrictions of freedom of expression (B).

B. Two criteria for restrictions of freedom of expression enshrined in the ECHR

Article 19(3) of the ICCPR provides different criteria for restrictions to freedom of expression to be valid. Article 10(2) of the ECHR states the same criteria but uses a different wording:

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

As for article 19(3) of the ICCPR, the two criteria are that restrictions must be “prescribed by law and necessary in a democratic society.” As mentioned before, the ECtHR recognised in the *Handyside case* that freedom of expression is a core element

³⁶ *Handyside v. United Kingdom* (App no 5493/72) ECtHR 7 December 1976 [49].

of a democratic society. In that sense, restrictions must strictly fulfil a legitimate aim. The list of legitimate aim is enshrined in the article 10(2). The list contains more legitimate aims than the list enshrined in article 19(3) of the ICCPR. The list is where lays the difference between the two articles. The ECHR therefore agreed to give a wider margin of appreciation to the States, whereas the UN gave less permissible grounds for restrictions.

The two criteria for a restriction to be valid are known as ‘the rule of law test’ and the ‘democratic necessity test’. The ‘rule of law test’ is to ensure that domestic legislation or judicial authority limits the scope of restrictions. In order to be fulfilled, the law must also be clear and precise enough in order to be understood by individuals. Moreover, the ‘democratic necessity test’ can be compared to the proportionality principle. In that sense, restrictions must be a response of a true need of a democratic society.

As mentioned earlier, the European organs consider freedom of expression as a fundamental key for democratic societies. In that sense, restrictions based on legitimate grounds must be strictly studied. The European Court of Human Rights therefore reminded:

“Freedom of expression [...] is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.”³⁷

In that sense, the ECtHR reinforces its will to supervise any restriction to freedom of expression. Through its supervision, the ECtHR will also apply the proportionality principle. The restrictions must have been implemented to respond to a social need but in a proportional way. In order for a case to reach the ECtHR, all local remedies need to be exhausted and an individual must bring the case. However, restrictions to freedom of expression happening in France nowadays will unlikely be tried before the ECtHR – if one day they are – until years from now.³⁸ It seems that the only thing to do in the

³⁷ *Thorgeirson v. Iceland* (App no 13778/88) ECtHR 25 June 1992 [63].

³⁸ Frédéric Edel, *The length of civil and criminal proceedings in the case-law of the European Court of Human Rights* (2nd edn, CoE 2007).

meantime is collect as many proofs as possible that restrictions imposed by the French government are not fulfilling all the criteria set in the ECHR and France is therefore in breach of its international obligations.

Over the years, France has been brought several times before the ECtHR for cases related to freedom of expression. France has never been found in violation of article 10 yet. Indeed, in France, restrictions are usually ‘prescribed by law’ and ‘necessary in a democratic society’ – often for the legitimate aim of national security due to terrorist threat. In *Seurot v. France*³⁹, the ECtHR acknowledged:

“There is no doubt that any remark directed against the Convention’s underlying values would be removed from the protection of Article 10 by Article 17.”

In that sense, article 17 of the ECHR, which allows the removal of protected rights and freedoms in case of abuse, applies to ‘glorification of terrorism’. In those instances, States are allowed to “sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance.”⁴⁰

In a similar way than the ICCPR, the ECtHR condemns the Holocaust denial. In *Garaudy v. France* case⁴¹, an individual’s complaint was found inadmissible as his statements and remarks had amounted to Holocaust denial. Therefore France did not breach freedom of expression.

Finally in *Leroy v. France* case, no violation of article 10 was found as a cartoonist’s drawings were recognised as “publicly condoning terrorism” after 9/11.⁴²

These cases prove that France knows how to use article 10 of the ECHR in order to restrict freedom of expression in a legal way. However, as it will be studied later on, the law and the legitimate aim are not the issue at stake. The disproportionality of the measures often lay in the practice and the coming into force of the legislation. Indeed,

³⁹ *Seurot v. France* (App no 57383/00) ECtHR 18 May 2004

⁴⁰ *Erbakan v. Turkey* (App no. 59405/00) ECtHR 6 July 2006 [56]

⁴¹ *Garaudy v. France* (App no. 65831/01) ECtHR 24 June 2003

⁴² *Leroy v. France* (App no. 36109/03) ECtHR 2 October 2008

the law states the restrictions and why the French government needs them. However, people targeted by these measures are often targeted due to their ethnic descent or just because the government needs to make an example of strictness out of them. As the ECHR adds:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”⁴³

In that sense, France should not target a specific category of its population when issuing new pieces of legislation. However, through chapters 3 and 4, it will be studied that this obligation seems to have been ignored or at least France has turned a blind eye to the practice and implementation of the new measures.

Finally the ECtHR warns that States should not restrict freedom of expression through the criminal law unless it is truly necessary.⁴⁴ However, as it will be studied later on, France decided to incorporate in its criminal code the offence of ‘glorification of terrorism’. In the aftermath of terrorist attacks, France has wanted to strengthen the judicial response to criminal offences related to terrorism. However, by doing that in a rush, it has not managed to secure the practice and to set up proper safeguards.

In the two next chapters, it will be obvious that in certain instances France refrains from fulfilling all the requirements of the “rule of law” and “democratic necessity” tests. The most difficult part to fulfil is the proportionality principle. Indeed, the measure must be the less lenient one and be “proportionate to the aim pursued”. As it will be studied further down, France always claims to use the most proportionate measures even though they are obviously not.

To conclude, the legal background has underlined the key role of freedom of expression acknowledged both internationally and regionally. It has also shown that France decided

⁴³ ECHR [article 14]

⁴⁴ *Sener v. Turkey* (App no. 26680/95) ECtHR 18 July 2000 [40, 42].

to ratify all the treaties regarding freedom of expression and is therefore bound by the international obligations enshrined in each treaty. The dedication of France to freedom of expression dates back to the French revolution. However, since 1881, France realised that freedom of expression needed to be limited – in respect of the international obligations at first. (Chapter 2)

Chapter 2: The importance of freedom of expression in France

"I disapprove of what you say, but I will defend to the death your right to say it." - Voltaire

France has developed a strong attachment to freedom of expression as early as during the time of the Enlightenment followed by the French revolution. Over the years, the different successor governments have decided to limit and control freedom of expression. The liberal idea that emerged in the 18th century had long been eroded over time and the present political will is to put a frame around freedom of expression, which seems to scare French authorities if enjoyed without a strong legal framework.

Section 1: Definition of freedom of expression in France

French revolutionaries have expanded the freedom and rights of the French citizens, who had been under a strict monarchy for centuries (I). Freedom of expression had therefore been recognised by a wide range of institutions.⁴⁵ Since the beginning, limitations were encompassed in freedom of expression. The European Court of human rights had confirmed the strength of such a term.⁴⁶ Finally, at the end of the 19th century, the first pieces of legislation dealing with freedom of expression emerged. The 1881 Press Law was issued and went towards the same direction than the French Declaration issued almost 100 years ago (II).

I. Historical establishment of freedom of expression in France

Freedom of expression has not always played an important role in French history. Between the Middle Age and the 18th century, censorship was the common norm. However, the French Revolution completely changed that. Freedom of expression was

⁴⁵ Patrick Wachsmann, *Liberté d'expression* (LexisNexis 2008) 9.

⁴⁶ Handyside (n 16).

protected as early as 1789 in Article 11 of the French Declaration of the Rights of the Man and of the Citizen (hereafter named the Declaration).⁴⁷ Honoré Mirabeau and Lafayette gave contribution to the draft of the Declaration in August 1789 with the help of Thomas Jefferson, who was at the time in France as a US diplomat. Jefferson was the main author of the American Declaration of Independence. In its article 11, the French Declaration states:

“The free communication of thoughts and of opinions is one of the most precious rights of man: any citizen thus may speak, write, print freely, except to respond to the abuse of this liberty, in the cases determined by the law.”⁴⁸

The same idea will be used in international instruments centuries later. This is interesting to realise that even as early as 1789, individuals had the same idea of what should be freedom of expression in a democratic society. And even at a turning point in history, as can be considered the French revolution, people already agreed to put restrictions to freedom of expression.

Therefore, revolutionaries agreed to include limitations, which are contained in article 10. Article 10 of the Declaration states that the manifestation of opinions must not trouble “the public order established by the law.”⁴⁹ This is a clear contrast with for instance the American Constitution, which states: “the Congress will never enforce legislation that will limit freedom of speech or freedom of media.”⁵⁰ Here lays the main difference between France and the United-States. The latter has a more individualistic view whereas France agreed to privilege the common good.

Legitimate aims are similar to the ones of the accepted limitations enshrined in ECHR and ICCPR centuries later. Indeed, article 10(2) of the ECHR provides that restrictions

⁴⁷ United Nations, *Freedom of expression and public order* (Training manual 2012) 16.

⁴⁸ French Declaration of Rights of the Man and Citizen (*‘Déclaration des droits de l’homme et du citoyen’*) [1789], article 11.

⁴⁹ *ibid* article 10.

⁵⁰ The United-States Constitution [1787].

of freedom of expression are possible in “the interests of national security, territorial integrity or public safety.”⁵¹ The notion of “prescribed by law” was already mentioned in the French Declaration as early as in the late 18th century.

Today, the French Constitution also guarantees freedom of opinions in its article 4. The constitutional review of 23 July 2008 confirmed the rights and freedoms guaranteed by the French Constitution. It has therefore confirmed the will of the French government to protect freedom of expression. In 1984, the Constitutional Council decided that:

Freedom of expression was “a fundamental right, which guarantees the enjoyment of other rights and freedoms and the national sovereignty.”⁵²

At the international level, the ECtHR also affirmed that freedom of expression was the keystone for the enjoyment of other rights.⁵³ This decision acknowledged the large umbrella of freedom of expression and included the protection not only to “information or ideas that are regarded as inoffensive but also to those that offend, shock or disturb the State or any sector of the population.”⁵⁴ In that sense, the Court confirmed that any “condition, restriction or penalty” imposed on freedom of expression must be proportionate to the legitimate aim pursued.⁵⁵

The idea of the necessity of freedom of expression in a democratic society was also expressed in the Human Rights Committee General Comment No. 34. The Committee reminded that freedom of opinion and expression are “indispensable conditions for full development of the person; they are essential for any society.”⁵⁶

⁵¹ ECHR [article 10(2)].

⁵² Decision (No 84-181) French constitutional council 11 October 1984.

⁵³ Handyside (n 16) 49.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ United Nations Human Rights Committee ‘General comment No. 34 – Article 19: Freedoms of opinion and expression’ (12 September 2011) UN Doc CCPR/C/GC/34 [2-3].

Almost a century after the French revolution, French authorities have decided to go even further in the restrictions of freedom of expression. The first set of laws dated back to 1881. These first restrictions laws were made before the creation of the UN and therefore before the creation of the international rules. However, the “rule of law” and “democratic necessity” tests seemed to be already respected (II).

II. First wave of limitations of freedom of expression in France

As early as the late 19th century, France decided to strengthen its legal system regarding freedom of expression. The main concern at that time was freedom of expression within freedom of the media. Indeed, newspapers were the main tool to spread ideas and opinions. In that sense, the Freedom of the Press Act from 29 July 1881 made it illegal to insult or defame someone. These offences targeted the press in general but also random individuals through public statements, pictures or drawings and radio podcasts addressed to unknown recipients.⁵⁷ The main goal was to protect the reputation of an individual. Article 29 of the Press law defines defamation as an action, which will ruin the reputation of an individual.⁵⁸ For the first time, a piece of legislation was listing offences that were not allowed to be written nor said in France. In 2016, this piece of legislation is still in force – though some amendments have been passed over the years.

Less than a century later, article 10 of the ECHR was drafted. The first cases brought before the ECtHR dealt with defamation. Violation of article 10 will be found in most of the cases with the perpetrators being mostly journalists. France was not the first country to rule in this way.

In 1893, following Auguste Vaillant's terrorist attempt, the first terrorist laws were voted. They are known as the *lois scélérates* and they severely restricted freedom of expression. The first restriction concerns the glorification of any felony or crime, which will be considered as a felony itself. This idea will be used decades later with the glorification of terrorism offence, which can be considered as terrorism. The provision also allowed French authorities to establish a widespread censorship of the press. The latter provision is not yet in place in France today. François Hollande decided not to use it for now.

The second restriction allowed French authorities to convict any person directly or

⁵⁷ Wachsmann (n 45).

⁵⁸ *ibid.*

indirectly involved in propaganda of the act. Different laws will carry out the same provisions in the 21st century. The 2014 counter-terrorism law, for instance, will strikingly state the almost exact same provisions.

The main turning point happened during and after the Second World War. Indeed, the French Declaration mentions in its article 1 that every individual is equal. This equal idealistic view had been under attack during the war. France tried before the war to prevent racism. It issued the Marchandeu decree-law on 21 April 1939, which forbade insults or defamation with a racist component, whose aim is to provoke hatred among citizens.⁵⁹ However, this decree-law was quashed at the beginning of the Vichy regime in 1940.⁶⁰ It was re-established after the war but its efficiency was limited as evidence had to be brought to prove the provocation of hatred – an almost impossible task to fulfil.⁶¹ Furthermore, prosecutors were the only persons able to bring a suit against perpetrators of such offences.⁶²

In 1960s the situation was rectified and solutions had to be sought to ease the prosecution of such acts. Indeed, the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) put pressure on the French government to review its position on insults and defamation.⁶³ In the ECHR, article 14 with article 10 depicts the same idea that discrimination should not refrain the enjoyment of freedom of expression.

Article 5 of the CERD states that States Parties must guarantee the enjoyment of the right to freedom of opinion and expression.⁶⁴ However, the same Convention expresses limitations, such as:

“States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial

⁵⁹ Wachsmann (n 45) 25.

⁶⁰ Anne-Marie Le Pourhiet, *‘Le droit français est-il Charlie?’* (2015) *Le Débat* n°185, 23.

⁶¹ Médiapart, ‘Loi du 1^{er} Juillet 1972 contre le racisme, dite loi Pleven’ (2014) Médiapart, 1.

⁶² *ibid.*

⁶³ Wachsmann (n 45) 25.

⁶⁴ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, art 5 (d) (viii).

discrimination in all its forms and promoting understanding among all races [...].”⁶⁵

The fight against racial discrimination has always been an issue. Nowadays, in France, and in the aftermath of the 2015 events, it has become even more crucial. The unclear scope of the CERD made it difficult to strike down discrimination. Indeed, it does not provide a set of rules to efficiently forbid and punish discriminatory comments. Article 1 of the Convention underlines that the policy of eliminating racial discrimination is not applicable to “distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and noncitizens.”⁶⁶ In that sense, the Convention seems to only target the racist component of ideas and not the discriminatory content of laws.⁶⁷ Consequently, France uses this legal vacuum in its new legislation. Indeed, nothing is the law can be considered as discriminatory per se. However, in practice, one can easily notice that measures are applied to a certain category of people – which therefore fulfils the definition of ‘discrimination’.⁶⁸

The weakness of the CERD made the French government to decide to issue more restrictive laws. However, these measures were in line with the international requirements.⁶⁹ Indeed, the law – in this case the 1881 Press Law, provided the restrictions. The restrictions pursued a legitimate aim – the fight against discrimination. And finally the restrictions were proportionate to the aim pursued. In that sense, requirements of the ECHR were respected and the restrictions were lawful. The fight against discrimination and racism took a step further when France issued two more restrictive laws on freedom of expression (Section 2). In that sense, France stood up for equality between citizens without any discrimination – a thing that will change decades later in 2015.

⁶⁵ CERD (n 50) article 2.

⁶⁶ CERD (n 50) article 1 (2).

⁶⁷ Le Pourhiet (n 60) 23.

⁶⁸ See chapter 3.

⁶⁹ Le Pourhiet (n 60) 23.

Section 2: More repressive legislation on freedom of expression

Based on the 1881 Press Law, the French legislator had decided to improve it through amendments or by removing some provisions from it in order to establish a stricter legal framework of freedom of expression. For the purpose of this paper, only limitations regarding racism and denial of the Holocaust will be dealt with in this section. The fight against discrimination will be the main goal of the French government between the 1970s and the 1990s. However, the decades after will be focusing on the fight against terrorism – leaving the fight against discrimination behind. Freedom of expression allows criticisms over an idea but not over a person or a group of persons. That is the thin line between lawfulness and unlawfulness of free speech in France. Set of laws has been implementing to frame this thin edge – first in 1972 with the Pleven law (I) and in 1990 with the Gayssot law (II).

I. The 1972 “Pleven” Law

Following the ratification of the CERD, several bills have been introduced to the Parliament. In 1972, the government decided to introduce an even stricter bill. The new law – known as the Pleven law – was passed on 1st July 1972 and goes way beyond the basic requirements of the CERD. Indeed, the Pleven law condemns every action, which would provoke:

“Discrimination, hatred or violence towards a person or a group of persons because of their origin or their belonging or non-belonging to an ethnic group, a nation, a race or a determined religion.”⁷⁰

It also punishes with harsher convictions offences – such as the one cited but also insult or defamation. In that sense, the Pleven law goes beyond article 14 of the ECHR regarding the “non-belonging to an ethnic group” – which is not mentioned in the ECHR. Once again, it shows the strong political will to strike down discrimination of any kind throughout France.

⁷⁰ Loi du 1er juillet 1972 contre le racisme dite loi Pleven (hereafter Pleven Law).

In its legislation, the French legislator did not follow precautions established in the CERD. Indeed, the CERD only targets “provocation to violent acts” whereas the Pleven law condemns “provocation to hatred”.⁷¹ The latter offence is very subjective and therefore more difficult to define and limit. Judges have a wide margin of appreciation when assessing such offences.⁷²

The subjectivity of the offence can be seen nowadays in the pile of lawsuits using the term ‘provocation to hatred’. Associations or NGOs will sue every statement – even humoristic ones –, which are seen as being against the message they try to defend.⁷³ For instance, a local NGO in Brittani in favour of the acknowledgement of Britanni’s rights had started a lawsuit against a Cabaret’s humoristic song depicting people in Brittani, as “boys are as mean as girls are dirty.”⁷⁴

The legislator went further by allowing complaints based on the origin of the person. Indeed, the term origin per se can include a large variety of meanings: regional origin, local origin, family origin, social origin or professional origin, etc.⁷⁵ Moreover the non-belonging to a nation includes all the nationality differences that the United Nations in its CERD decided to exclude.⁷⁶ A striking point in the Pleven law is the term “belonging to a religion.” This term is largely criticised both from legal and philosophical experts. Indeed, people adhere and believe in a religion but they certainly do not belong to a religion. The will of the legislator may have been to avoid the wording of blasphemy. Indeed, blasphemy is seen as an out dated outrage that should not be in force in a modern society.

In some instances, even if blasphemy is clearly the matter behind the claim, the French legislator has decided not to state it expressly. Indeed, in theory, French citizens are free

⁷¹ Le Pourhiet (n 60) 24.

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ Wachsmann (n 45) 26.

⁷⁵ Le Pourhiet (n 60) 24.

⁷⁶ CERD [article 1].

to challenge or blaspheme religious ideas, symbols, practices and even leaders.⁷⁷ However, in practice, one can be sued for such speeches. *Charlie Hebdo*, for instance, was sued couple of times for its depictions of Mohamed but also for caricatures of the pope.⁷⁸ Catholics groups have sued *Charlie Hebdo* for anti-religious speech more often than Muslim ones. *Charlie Hebdo* was only convicted once in a case initiated by the Catholics.⁷⁹ In the case regarding depictions of Muhammad, judges acquitted *Charlie Hebdo* based on the context around it – the newspapers had received threats after the publication – and the absence of a deliberate will to hurt all the Muslim population.⁸⁰ Because of the wide margin of appreciation of judges, and the absence of the precedent doctrine, it is difficult to draw a pattern from the judicial decisions. It really depends on the judges appointed to the case. This is sometimes seen as a lack of transparency and a feeling of unfairness.

In 1972, it was not possible yet to pass a law to the constitutional council for constitutional review. In that sense, the Pleven law did not get a chance to go through it. However, in 2008, the Parliament has allowed any French individual - during his or her trial in front of judges - to challenge a judicial provision, which is thought to be contrary to the French Constitution.⁸¹ This ‘*question prioritaire de constitutionnalité*’ (‘priority preliminary ruling on constitutionality’) had been used in the late 2000s regarding the Pleven law. However, one of the lowest courts in the constitutional council – in charge of a preliminary check and study of the question – decided on 16 April 2013 that: “the question of conformity of this law with freedom of expression does not present sufficient seriousness.”⁸² Therefore the court refused to transfer the question to the constitutional council.

In 2004, the French Parliament further amended the Press Law to make it a crime to

⁷⁷ Erik Bleich, ' French hate speech laws are less simplistic than you think' (*Washington Post*, 18 January 2015) <<https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/01/18/french-hate-speech-laws-are-less-simplistic-than-you-think/>> accessed 12 June 2016.

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ Wachsmann (n 45) 25.

⁸¹ Le Pourhiet (n 60) 24.

⁸² *ibid.*

discriminate against or defame persons on the basis of their sexual orientations.⁸³

In 1972, France decided to go beyond article 14 of the ECHR and the CERD in the fight against discrimination. Offences against an individual or a group of individuals based on the ethnicity became therefore unlawful in France. However, later on and after the attacks of 2015, the French government will turn a blind eye towards the measures obviously targeting a specific category of the French population in practice. As mentioned in Chapter 1, the only positive duty upon States, concerning restrictions of freedom of expression, is the ban of war propaganda and hate speech. In the ECHR, this ban falls under article 17, which provides that freedom of expression cannot be used if it constitutes an abuse. ‘War propaganda’ and ‘hate speech’ will clearly go against the values protected by the ECHR. France has at first followed the way paved by the international instruments and decided to strengthen the rules for crimes involving denial of the Holocaust (II).

⁸³ Bleich (n 77).

II. The 1990 “Gayssot” Law

French history has had a huge impact on freedom of expression. Denial of the Holocaust became a crime severely punished. The law from 13 July 1990 – known as the Gayssot law - introduced in the 1881 Press law an article 24 bis:

“Individuals, who have contested the existence of one or several crimes against humanity – as defined in article 6 of the Charter of the International Military Tribunal attached to the London Agreement” will be punished of one year imprisonment and a fine up to 45 000€.⁸⁴

Some academics have criticised this new legislation saying that it was restricting even more freedom of expression. The European Court of Human Rights – in its *Garaudy v. France* judgement from 24 June 2003 – decided that the Gayssot law was not breaching freedom of expression, as guaranteed in the European Convention.⁸⁵ It based its decision on the fact that “denying established historical facts – such as the Holocaust – cannot be considered as a historical search for the truth.”⁸⁶ Therefore the court considered that denial puts at risk the fight against racism and anti-Semitism and can severely disturb public order.

As for the Pleven law, the constitutionality of the Gayssot law had been challenged through a priority preliminary ruling on constitutionality. The case involved Jean-Marie Le Pen and the newspapers *Rivarol* for speeches falling under the Gayssot law. The France’s highest court – la *Cour de cassation* – in its 7 May 2010 decision – refused to transfer the question to the constitutional council, as it stated that article 24 bis of the 1881 Press Law did not “threaten the fundamental principles of freedom of expression and opinion guaranteed in the French Constitution” and that therefore the question was not serious enough.⁸⁷ This decision has been deeply criticised as the court decided to do the constitutional review by itself and had therefore bypassed the constitutional council.

⁸⁴ Le Pourhiet (n 60) 25.

⁸⁵ Wachsmann (n 45) 26.

⁸⁶ Jean-François Flauss, ‘*l’histoire dans la jurisprudence de la Cour européenne des droits de l’homme*’, *Revue trimestrielle des droits de l’homme* 2006 n°65, 5.

⁸⁷ Le Pourhiet (n 60) 25.

Even the then President of the constitutional council, Robert Badinter, said that it would have been interesting for the constitutional council to be able to review the law.⁸⁸

In 2004, the constitutional council had another chance to indirectly review both the Pleven law and the Gayssot law. The *Cour de cassation* allowed the review when it transferred the question of constitutionality of the Perben II law. This law extends the limitation period for offences under the Pleven and Gayssot laws. The limitation period will expire after a year, whereas for other offences in the 1881 law, it will still be three months.⁸⁹ On 12 April 2013, the constitutional council decided that the provisions will help to sue and convict perpetrators of such acts and is therefore not contrary to the constitutional requirements.⁹⁰ The decision indirectly validates the Pleven and Gayssot laws without proper and in depth review of the legislations. Academics regret that the council did not review the necessity of such laws in a liberal democracy such as France, nor the sufficiency of the definitions of the offences and nor the proportionality of the sentences.⁹¹

The Holocaust is not the only crime against humanity protected against denial. On 29 January 2001, the French Parliament issued a law “publicly acknowledging the 1915 Armenian genocide.”⁹² On 21 May 2001, the law known as the “Taubira” law recognised slavery as a crime against humanity.⁹³ Slavery was at the beginning included in the Gayssot law but was removed as slavery does not suffer as much from denial. However, the Armenian genocide does not benefit from the same protection. Indeed, even if the government recognised the genocide, it has failed to pass a law banning the denial of the Armenian genocide. Historians, academics and jurists have criticised every attempts of the government to do so, arguing that a compilation of laws based on historical events overwhelm the Criminal code and lead the judicial system to its burn out.

⁸⁸ Le Pourhiet (n 60) 25.

⁸⁹ Wachsmann (n 45) 26.

⁹⁰ *ibid.*

⁹¹ Le Pourhiet (n 60) 25.

⁹² *ibid* 26.

⁹³ *ibid.*

In 2008, a parliamentary mission on these questions issued a report, in which it states that the existing laws should not be challenged but the National Assembly should avoid to issue new laws in the future on this matter.⁹⁴ This report did not manage to stop the endless flow of parliamentary bills concerning other historical events – such as victims of nuclear tests, the genocide of gypsies or police abuses against Algerians in 1961.⁹⁵

According to official statistics, in 2011, there were 359 convictions involving ‘hate speech’.⁹⁶ In most of the cases, convictions were set as fines or suspended sentences. In only 11 cases, a jail term was established. Between 1972 and 2012, 58 per cent of France’s highest court’s decisions were restrictions of freedom of speech whereas 42 per cent upheld free speech.⁹⁷ Therefore the tendency seems to have been more towards restrictions than freedom. In theory, this can be seen as abuse from the French government. However, regarding the French history with ‘hate speech’, one can think that France needs to be strict about it to avoid what happened during the Second World War.

France has a paradoxical approach towards freedom of expression. Freedom of expression remains important and is still praised by the French population. At the same time, more and more restrictions come into force. However both the Pleven Law and the Gaysot Law respect the “rule of law” and “democratic necessity” tests and therefore the international obligations of France.

Events that occurred in 2015 may have changed the relationship between France and freedom of expression. Measures targeting freedom of expression in France seem to be unique as they are a response to the terrorist attacks of 2015. In that sense, the French government thinks that it is allowed not to respect all its international obligations. They are using the specificity of the situation to avoid certain requirements – especially the proportionality principle. (Chapter 3)

⁹⁴ Assemblée nationale XIII législature, *rapports d’information* [2008], 181.

⁹⁵ Le Pourhiet (n 60) 28 – see also chapter 4.

⁹⁶ *ibid.*

⁹⁷ Bleich (n 77).

Chapter 3: Tragic start of the year for freedom of expression in France

“If we don’t believe in freedom of expression for people we despise, we don’t believe in it at all” – Noam Chomsky

In 2015, freedom of expression had been under attack at least twice at the beginning and at the end of the year. Between both bloodbaths in Paris, politicians, academics, journalists and random citizens raised their voices to give their opinion and point of view on the freedom of expression in France. And the conclusions were often unexpected and sometimes a bit disproportionate. In this chapter, the focus will be targeted towards the measures threatening freedom of expression in the wake of the January attacks (Section 1). It will then end with the disproportionate responses given by the French authorities while targeting specific groups and children (Section 2).

Section 1: Charges for ‘glorification of terrorism’

Hours after the event of Charlie Hebdo, President François Hollande gave a sombre televised address to the nation and vowed to protect the freedom of expression that the journalists of Charlie Hebdo represented.⁹⁸ At the same time, however, the French government decided to start a fight against ‘glorification of terrorism’ (I). In that sense, restrictions on freedom of expression were created with a legitimate aim as the main goal. However, the implementation of the new legislation and measures in order to keep ‘glorification of terrorism’ under control is questionable (II). The proportionality of the implementation is at stake as a certain group of people is clearly targeted. The fight against terrorism seems to be privileged over the fight against discrimination. In that sense, France seems to have forgotten the fight against discrimination it did over the past decades – even centuries.

⁹⁸ Paul Kirby, ‘Paris attacks: France grapples with freedom of speech’ (2015) BBC 2015.

I. Definition of ‘glorification of terrorism’

Glorification of terrorism exists in international law. As mentioned in Chapter 1, it falls under article 20 of the ICCPR. In that sense, propaganda for war is prohibited as well as advocacy of “national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.⁹⁹ It can also fall under article 17 of the ECHR. The definition of ‘glorification of terrorism’ is not new in the French legal system (A). As mentioned in Chapter 2, France already decided to implement tough legislation against crimes of denial of the Holocaust. However, new measures have strengthened sentences for individuals found guilty of ‘glorification of terrorism’ (B). In that sense, others rights are at stake, such as the right to a fair trial or the respect of the non-discrimination principle.

A. The incorporation of ‘glorification of terrorism’ in criminal law

‘Glorification of terrorism’ is tackled both at the State level and at the international level. However, international law fails to give a clear definition of hate speech. The offence of ‘glorification of terrorism’ is of particular importance regarding the current context, when terrorist attacks strike on European soil and with the proliferation of hate and racist components contained in messages on the Internet. In French legislation, glorification of terrorism is precisely defined (1) and has been expanded under the 2014 counter-terrorism law (2).

1. The specificity of the ‘glorification of terrorism’ offence

As mentioned above, the notion of ‘hate speech’ is a large umbrella under which several offences can fall. In comparison, ‘glorification of terrorism’ has to fulfil different criteria in order to be claimed. Such offences should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression.¹⁰⁰ The French government has defined this offence in the criminal code, article 421-2-5, stating:

⁹⁹ ICCPR, article 20

¹⁰⁰ United Nations, *Freedom of expression and public order* (Training manual 2012) 43.

“Glorification of terrorism consists of favourably presenting or commenting terrorist acts already committed; for instance, if an individual approves a terrorist attack.”¹⁰¹

In that sense and as mentioned in Chapter 1, France did not follow the advice of the ECtHR, which states that States should avoid including freedom of expression restrictions in their criminal law.

This offence is different from the denial of terrorist acts. Denial is when an individual denies partially or in total terrorist attacks but does not expressly approve them. For instance, the individual can claim that the attacks are a conspiracy.¹⁰² However, there is no mention of how such an offence will be punished. It seems to be less important than glorification of terrorism. In that sense, French authorities seem not to compare denial of terrorist acts with denial of the Holocaust, which is severely punished by law.

Another important criterion to be fulfilled is that the glorification needs to be done in public.¹⁰³ Therefore before a court, testimonies will be the most valuable proof. In that sense, the more witnesses there are, the more chances you get to have the suspect be sentenced. The public component can also apply to social media, which are opened in public. However a major flaw can be revealed as a large number of social media accounts – such as Facebook, Instagram or else – is private. In these instances, an individual, being friends with the suspect, can report the post but it will take longer for the social media to react and there is almost no chance that the perpetrator will face judicial sentence.

However, incitement to terrorism can be punished even if the statement was made on social media private accounts or during private meetings.¹⁰⁴ Incitement to terrorism

¹⁰¹ Article 421-2-5 du Code pénal (French criminal code).

¹⁰² Service Public, 'Apologie du terrorisme - Provocation au terrorisme' (*Service public*, 15 January 2015) <<https://www.service-public.fr/particuliers/vosdroits/F32512>> accessed 12 June 2016.

¹⁰³ Service Public, 'Apologie du terrorisme - Provocation au terrorisme' (*Service public*, 15 January 2015) <<https://www.service-public.fr/particuliers/vosdroits/F32512>> accessed 12 June 2016.

¹⁰⁴ *ibid.*

must be direct and target a specific purpose – for instance a place or a person.¹⁰⁵ The main goal is to incite someone else to commit such acts.

An individual on his or her own cannot bring a complaint. He can however join an association or take the status of '*Partie Civile*', which will allow him or her to claim damages.¹⁰⁶ This provision largely limits the claims and therefore sentences towards perpetrators. Another striking element is the lack of responsibility of social media. Indeed, prosecution will be launched against the perpetrators of the glorification but not against social media per se. In that sense, social media seems not to be dedicated to the eradication of such messages, as they do not fear prosecution.

Even if social media are not held responsible, individuals who glorify terrorism on the Internet will face greater sentences up to seven years in jail and 100 000€ fine – compared to five year jail sentence and 75 000€ fine in other sentences.¹⁰⁷

The piece of legislation, which made the inclusion of 'glorification of terrorism' offences into the criminal code possible, is the 2014 counter-terrorism Act. This Act strengthens the fight against terrorism and therefore the fight against 'glorification of terrorism' (2). In that sense, France seems to be in compliance with its international obligations as the "rule of law" and "democratic necessity" tests are respected. Indeed, a new piece of legislation was issued and the fight against terrorism can fall under the legitimate aim 'national security'. In that sense, France seems to fully respect the ECHR. However, it also depends on how the Act is applied. The application can still be disproportionate.

¹⁰⁵ Kenan Malik, 'Don't limit speech in France' (New York Times, 16 January 2015) <<http://nytimes.com/2015/01/17/opinion/don't-limit-speech-in-france.html>> accessed 12 June 2016.

¹⁰⁶ Doreen Carvajal & Alan Cowelljan, 'French rein in speech backing acts of terror' (New York Times 15 January 2015) <<http://nytimes.com/2015/01/16/world/europe/french-rein-in-speech-backing-acts-of-terrori.html>> accessed 12 June 2016.

¹⁰⁷ Service Public, 'Apologie du terrorisme - Provocation au terrorisme' (*Service public*, 15 January 2015) <<https://www.service-public.fr/particuliers/vosdroits/F32512>> accessed 12 June 2016.

2. Further restrictions of freedom of expression through the 2014 counter-terrorism Act

‘Glorification of terrorism’ is not a new offence as it was already mentioned in the 1881 law on the Freedom of the Press.¹⁰⁸ As mentioned in Chapter 2, this often called Press Law defines freedoms and responsibilities of media in general in France. The 1881 Press Law set up a legal framework for publication and though it has been amended several times since its release, it remains in force today.

However, in November 2014, the French government decided to adopt a new law to strengthen its fight against terrorism through limitations of freedom of expression.¹⁰⁹ French authorities incorporated in the provisions of the 2014 counter-terrorism law the ‘glorification of terrorism’ offence.¹¹⁰ In doing so, article 5 of the law removed this offence from the 1881 Press Law in order to include it in the criminal code, article 421-2-5.¹¹¹ It has therefore eased the trial of these offences as they can now be based on the criminal code rather than a piece of legislation. In that sense, ‘glorification of terrorism’ offences have started to be tried in immediate summary trial system.¹¹² The President of the Magistrates’ Trade Union, Virginie Duval, stated that at that time, it was necessary to remove ‘glorification of terrorism’ from the 1881 Press Law as the former legal framework made it impossible to prevent terrorist propaganda websites.¹¹³ Nevertheless, the HRW body notes that the terms ‘inciting’ or ‘glorifying’ terrorism are broad and speech with no direct causal link to terrorism can fall under their umbrellas – breaching the right to freedom of expression.¹¹⁴

¹⁰⁸ Loi sur la liberté de la presse du 29 juillet 1881 (*hereafter 1881 Press Law*).

¹⁰⁹ Loi n°2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme (*hereafter the 2014 counter-terrorism law*).

¹¹⁰ HRW, ‘France: An Attack on Free Expression’ [8 January 2015] HRW <<https://www.hrw.org/news/2015/01/08/france-attack-free-expression>> accessed 12 June 2016.

¹¹¹ HRW, ‘Human Rights Watch concerns and recommendations on France’ (2015) HRC June 2015, 3.

¹¹² Article 395 du Code de procédure pénale (French code of criminal procedure).

¹¹³ Lucie Soullier, ‘Apologie du terrorisme : la justice face à l'urgence’ (*Le Monde*, 22 January 2015) <http://www.lemonde.fr/societe/article/2015/01/22/apologie-du-terrorisme-la-justice-face-a-l-urgence_4560603_3224.html#partie4> accessed 12 June 2016.

¹¹⁴ HRW, ‘Human Rights Watch concerns and recommendations on France’ (2015) HRC June 2015, 3.

Indeed, in 1881, the main concern was to protect freedom of expression of media – meaning, especially at that time, newspapers. However, over 130 years later, French authorities have realised that few websites have diverted the legal vacuum to establish dangerous messages or propaganda.¹¹⁵ Criminalisation of the offence ‘glorification of terrorism’ has been adopted to respond to the increasing number of people leaving France to join Daech forces in Syria in the last couple of years.¹¹⁶ Indeed, French authorities thought that individuals, who were likely to leave France, were also the ones glorifying terrorism on the Internet.¹¹⁷ Therefore, the opportunity to charge them with ‘glorification of terrorism’ offence would prevent them from leaving France as they would need to be present for their trial. In that sense, the 2014 counter-terrorist law seems to have had serious ground to establish the offence ‘glorification of terrorism’ and therefore be in compliance with article 10 of the ECHR.

An interesting point regarding this new provision of the 2014 counter-terrorist law is that it had not been implemented until the *Charlie Hebdo* attacks. Indeed, no lawsuit has been attempted against the propaganda websites in over two months. However, two days after the attacks, six convictions had already been delivered by immediate summary trials.¹¹⁸ These convictions – from three months up to four years imprisonment – were therefore for the first time based on the 2014 counter-terrorist law. Amnesty International is concerned about the vagueness of this piece of legislation and condemned that in most cases, French authorities have conducted investigations on individuals for statements that could not fall under ‘glorification of terrorism’ nor ‘incitement to hatred’ umbrellas. In those cases, France breached the lawful exercise of freedom of expression.¹¹⁹ The rapidity of the justice leaves doubts on the seriousness of the trial and the respect of the fair trial principle. The vagueness of the legislation can

¹¹⁵ Soullier (n 113).

¹¹⁶ *ibid.*

¹¹⁷ HRW, 'France: An Attack on Free Expression' [8 January 2015] HRW <<https://www.hrw.org/news/2015/01/08/france-attack-free-expression>> accessed 12 June 2016.

¹¹⁸ Louis Imbert, 'Apologie d'actes terroristes : des condamnations pour l'exemple' (*Le Monde*, 23 March 2016) <http://www.lemonde.fr/societe/article/2015/01/13/apologie-d-actes-terroristes-des-condamnations-pour-l-exemple_4555102_3224.html> accessed 12 June 2016.

¹¹⁹ Amnesty International, 'Des vies bouleversées l'impact disproportionné de l'état d'urgence en France' (2016) Amnesty International Publications, 33.

amount to a breach of France's international obligations. Indeed, in the "rule of law" test the first criterion - for a restriction of freedom of expression to be valid - is that the law must provide restrictions. Moreover, the law should not only provide the restrictions, it should also be clear enough to be understood by everyone. The respect of this international criterion is therefore questionable.

Public prosecutors insisted that the use of the 2014 counter-terrorist law was a way to show the "severity" of the French Republic after the attacks. Moreover, the convictions are seen to be justified as all the convicts had either a criminal record; a suspended sentence or it was a repeated offence.¹²⁰

At first glance, it seems that the new measure – legally incorporated in the 2014 law – has been implemented with proportionality. Fair trial provisions were respected and sentences were not challenged.¹²¹ However, disproportionate measures will arise later on and stem from legal measures such as the 2014 counter-terrorist provisions. The HRW body raised concerns over the lack of proper safeguards for this piece of legislation.¹²²

Moreover, the vagueness of the 2014 counter-terrorism Act will lead to conviction of random individuals and not terrorists – as the French government said it would target (B). In that sense, the "rule of law" test seems to have been neglected, as a piece of legislation is not enough for restrictions to be valid. Indeed, legislation must be precise and clear, which, according to human rights organisations, is obviously not the case. Furthermore, proportionality over the entry into force of the legislation can be challenged as many convictions were decided over a couple of days. One can wonder if a lawsuit does not need more time to be prepared.

¹²⁰ Imbert (n 118).

¹²¹ *ibid.*

¹²² HRW, 'France: An Attack on Free Expression' [8 January 2015] HRW <<https://www.hrw.org/news/2015/01/08/france-attack-free-expression>> accessed 12 June 2016.

B. Concerns over convictions for ‘glorification of terrorism’ offence

Freedom of expression can be limited and, in its core essence, ‘glorification of terrorism’ seems to be a reasonable ground to convict individuals who glorify terrorism. France uses ‘glorification of terrorism’ to harshen legal provisions, which therefore restrict freedom of expression. However, justified reasons do not give the right to French authorities to breach the right to a fair trial (1). Moreover, the term ‘glorification of terrorism’ should be used wisely and not serve as an example for the society in general when the culprits have clearly not meant to glorify terrorism (2). In that sense, proportionality of the legislation in practice is debatable. However, the ECtHR will only be able to give its point of view if – one day – a case is brought before them. That will be the final and decisive step to know for sure if France can be considered as in violation of the ECHR. In the meantime, as mentioned before, evidence can be collected and some are obviously going towards the recognition of a violation of article 10 of the ECHR.

1. Concerns towards the right to a fair trial

Concerns have risen among the population, politicians and even the international community. In January 2016, the Ministry of Justice has recorded 117 cases based on an alleged offence of ‘glorification of terrorism’ and ‘incitement to racial discrimination’ out of 251 cases filed since the *Charlie Hebdo* attacks.¹²³ This over number of cases raises concern and worries. Indeed, 117 cases filed in less than three weeks seem questionable. Rapidity does not necessary mean lack of study of the case but a deep and serious study is less likely to have occurred in that short amount of time. The then Minister of Justice, Christiane Taubira transmitted a new circular five days after the attacks aiming at enlarging the definition of ‘glorification of terrorism’.¹²⁴ In that sense,

¹²³ Soullier (n 113).

¹²⁴ *ibid.*

‘glorification of terrorism’ is the fact of “presenting and giving a favourable comment of terrorism”.¹²⁵

This wide definition is debatable, as it does not mention requirements anymore. Indeed, it seems that anyone can report alleged statements from another person and claims that it falls under the ‘glorification of terrorism’ umbrella. Even though French authorities have claimed that this definition has not for purpose to “restrict freedom of expression but to convict actions that are directly linked to the terrorist attacks”.¹²⁶ One can seriously wonder if abuses are not likely to happen. The main target of the authorities is expressly named as the Internet. The latter is considered as the most dangerous threat used as a tool to indoctrinate individuals in order to incite them to commit terrorist attacks.¹²⁷

The Internet is wide and always on the move, therefore legislation cannot keep up with the last update. Indeed, people using the Internet to incite hatred or to glorify terrorism know how to use the flaws and legal vacuums. In that sense, French authorities have to always be on the edge of the legality if they want to keep up with new technologies. After the attacks and new feelings driven the French society, it seems that the authorities have wanted to show that they were doing something about it and that these attacks would not remain unpunished.

Among the 117 cases filed in less than a month, only 77 were based on glorification of terrorism.¹²⁸ The others were coupled with other offences, such as insults. The accumulation of offences can be seen as a desperate attempt to find grounds in order to prosecute individuals to prove to public opinion that something was being done. Moreover, among the 77 cases regarding the sole offence of ‘glorification of terrorism’,

¹²⁵ French circular (*‘circulaire’*) n° 2015/0213/A13 from 12 January 2015.

¹²⁶ Soullier (n 113).

¹²⁷ *ibid.*

¹²⁸ *ibid.*

44 were tried, and 22 of these 44 cases were tried in immediate summary trials.¹²⁹ At the end, 12 cases resulted in a jail sentence.

Finally, jail sentences remain rare even although public prosecutors have received strict rules from Christiane Taubira – the former Minister of Justice – to be firm and to pledge for the highest sentence possible.¹³⁰ In law journals, these rules have been criticised with the main concern being targeted toward the immediate summary trials.¹³¹ Indeed, the Magistrates' Trade Union criticises the systematic way of trying the offence 'glorification of terrorism' in a hurry.¹³² The Magistrates consider that these kinds of offences deserve a longer trial in order to be totally fair. They worry that trying the individual in a hurry will lead to emotional convictions rather than sound legal ones.

However, magistrates have also to deal with the pressure from the citizens. Indeed, in the wake of *Charlie Hebdo* attacks, people have shown concern about freedom of expression but a growly expectation for prosecution. As it was impossible to try the perpetrators of the attacks – having been killed by the French authorities – the French population with the support of media has started to point fingers towards anyone who would dare to glorify what had happened. In that sense, an unhealthy atmosphere has surrounded every trial relating to 'glorification of terrorism'. Therefore, magistrates – despite their independence from the executive power – must have felt the pressure to convict any culprits.

The Magistrates' Trade Union has noticed that even if the Taubira's circular states that each case should be tried individually, it is likely impossible in practice.¹³³ Indeed, immediate summary trials leave only a few hours to the defence to prepare itself and the trial per se only last a few minutes.¹³⁴ Several lawyers have called upon a resistance against summary trials for 'glorification of terrorism'. Systematic delays should be

¹²⁹ Imbert (n 118).

¹³⁰ Carvajal & Cowelljan (n 106).

¹³¹ *ibid.*

¹³² Malik (n 105).

¹³³ Soullier (n 113).

¹³⁴ Malik (n 105).

demanding and immediate summary trials should be refused.¹³⁵ If lawyers failed to do so, they will be considered as accomplices of the government bashing. The main backlash of this action is the risk for the alleged guilty to be placed in pre-trial detention during the delay.¹³⁶

At the end, convicts will often be sentenced to serve a jail term, which is not the solution as worse consequences might come from a jail term. Proportionality is therefore at stake in these situations, as decisions cannot be considered as the most lenient ones. Article 6 of the ECHR can be considered at stake here as impartiality of magistrates can be challenged.

Moreover, for magistrates to acknowledge the lack of time they have to study each case, it reinforces the question of proportionality. Indeed, do these trials really have to be tried to quickly? In the aftermath of *Charlie Hebdo* attack, the government put pressure on the judiciary to have more convictions. However, convictions do not necessarily mean that justice has been served. If the only goal of the government is to have an increasing number of convictions, France is definitely in breach of its obligations under the ECHR. Regarding some of the profiles of convicts, the legitimate aim of France can be seen as blurred (2).

2. A gap between the theory and the practice in convictions for 'glorification of terrorism'

In theory, even with the wide definition of the 'glorification of terrorism' offence, the main aim of the government should have been to punish individuals using propaganda of terrorist acts to convince those watching or reading to commit terrorist attacks.¹³⁷ However, the Vice-President of the Magistrates' Trade Union, Laurence

¹³⁵ Imbert (n 118).

¹³⁶ Soullier (n 113).

¹³⁷ HRW, 'Human Rights Watch concerns and recommendations on France' (2015) HRC June 2015, 3.

Blisson, denounces that individuals prosecuted do not fit the profile given in the legislation.¹³⁸ She criticizes that:

“According to the legislator, the aim was not to target drunk people or mentally-ill people. However offences look more and more like outrages and threats toward police officers than organised support to terrorist networks”.¹³⁹

In that sense, the ‘democratic necessity’ test of the ECHR - based on the legitimate aim of ‘national security, territorial integrity and public safety’ - does not fit the situation anymore. Indeed, how drunk people or mentally-ill people can threaten national security of France? In these cases, restrictions of freedom of expression can be considered as invalid.

Despite the gap between what the legislation defines and the practice, the judiciary has decided to strengthen its decisions. For instance, in Paris, a drunk individual has been convicted to 14 months in jail for having said to police officers: “The only thing I want to do in life is the Jihad and to kill police officers”.¹⁴⁰ The fact that he was drunk during the altercation with the police officers had not been taken into account by the judges. His apologies during his immediate summary trial did not manage to convince the judges nor the concerns and worries of his lawyers to have his client radicalised in jail.¹⁴¹ The trial took place three days after the attacks on *Charlie Hebdo*’s newspapers. His lawyer made it clear that this individual was drunk and has no link with any terrorist group. The defence was organised around the argument that the alcohol was “talking” during the incident.¹⁴²

Another case, which happened a few weeks later, also concerns an individual being deeply drunk. He had a car accident and when police officers arrived at the scene, he

¹³⁸ Malik (n 105).

¹³⁹ Soullier (n 113).

¹⁴⁰ *ibid.*

¹⁴¹ HRW, ‘Human Rights Watch concerns and recommendations on France’ (2015) HRC June 2015, 4.

¹⁴² Soullier (n 113).

started to insult them and said: “There should be more Kouachi [*name of the terrorists responsible of the attacks from January 2015*] and I hope you’ll be next”.¹⁴³ He therefore had to face different charges such as alcohol impaired driving, insult at police officers and ‘glorification of terrorism’. Eventually he was sentenced to four years in jail. Public prosecutor, François Pérain, explained that the severity of the sentence came from the glorification of terrorism component.¹⁴⁴ Once again, the fact that he was drunk during the incident was not taken into consideration and did not serve to lessen the sentence.

The main concern is what will happen to these individuals in jail. Indeed, it is common knowledge that radicalisation is happening nowadays in jails. Therefore putting individuals in jail that were not radicalised in the first place can be seen as a more dangerous threat than the actual risk.

Another issue of concern was the will at that time of the Minister of Justice, Christiane Taubira, to define the offence ‘glorification of terrorism’ as an aggravating circumstance to offences relating to racism and anti-Semitism.¹⁴⁵ In evoking this idea a few days after the attacks, concerns were suddenly raised, as the 1881 Press Law would have become pointless. Indeed such offences are included in the 1881 Press Law and the idea would have been to remove racism and anti-Semitism from the 1881 Press Law in order to include them in the criminal code. Once again, it would have put more and more offences in the French criminal law. Moreover, it would have eventually made the 1881 Press Law inefficient and sent the wrong message of a defined hierarchy of offences to the population. Indeed, the 1881 Press Law would have only been left with offences relating to defamation. Defamation would therefore have been seen as less important and grave than racism, anti-Semitism and ‘glorification of terrorism’. The president of the Magistrates’ Trade Union reacted to this statement by saying that “a piece of legislation should not be made on the spur of emotion.”¹⁴⁶

¹⁴³ Imbert (n 118).

¹⁴⁴ Kirby (n 98).

¹⁴⁵ Imbert (n 118).

¹⁴⁶ *ibid.*

To conclude, ‘glorification of terrorism’ is therefore provided by the law and seems to constitute a legitimate aim to allow restrictions on freedom of expression. In that sense, the ‘rule of law’ and ‘democratic necessity’ tests from the ECHR seem to be fulfilled. However, proportionality in the implementation of the sanctions is not respected. First, French authorities fail to show the relevance of the convictions of the individuals found guilty. Indeed, what can be the point of putting drunk people – not yet radicalised – in jail? Jail sentences do not seem to be the most lenient way to deal with these individuals. Drunk people cannot be seen as major threats to public order and therefore lenient sanctions should be sought to deal with such individuals.

Moreover, even if the particular idea to remove racism and anti-Semitism from the 1881 Press Law did not break through, the French government has established new measures to deal with ‘glorification of terrorism’ and therefore freedom of expression (II). A decree was issued to amend the 2014 counter-terrorism Act to strengthen the measures against freedom of expression – by blocking websites. Moreover, the 2015 surveillance law was passed, which allows tapping of phones and emails without prior judicial decision.

II. Creation of pieces of legislation aiming at keeping ‘glorification of terrorism’ under control

Since *Charlie Hebdo*, the French government has expressed the will to control freedom of expression, especially on the Internet (A). Indeed, nowadays, individuals can freely and often anonymously express themselves on the Internet. Following the attacks, some people have decided to glorify terrorism either on social media or through the Internet in general. The need therefore has been to punish the perpetrators of glorification of terrorism rather than to control what can be said on the Internet - a thing, which is impossible to do. Moreover, in the wake of the January attacks, the French government passed the 2015 surveillance law allowing the authorities to conduct house search, phone and emails tapping (B). The main concern about freedom of expression is the fact that during those house searches, police officers can collect personal data from electronic devices – falling under the protection of freedom of expression - without prior judicial decisions.

A. The will to control what is said on the Internet with no serious ground

In the aftermath of the January attacks and the impact they had on freedom of expression, a decree to amend the 2014 counter-terrorism Act came into force.¹⁴⁷ In that sense, since February 2015, the counter-terrorism Act states:

“The Ministry of the Interior can block sites inciting or advocating terrorism, even when the state of emergency is not declared.”¹⁴⁸

At first sight, this purpose seems legitimate, as French authorities have already assessed the dangerousness of the Internet. Indeed, the Internet is seen as a tool for incitement leading to radicalisation of individuals and later on to the commitment of terrorism acts.¹⁴⁹ Moreover, as in the wake of the January attacks, the question of implementing a

¹⁴⁷ Decree of 5 February 2015 putting in place the 2014 counter-terrorism Act.

¹⁴⁸ Buchanan (n 2).

¹⁴⁹ Soullier (n 113).

state of emergency was not on the table. It seems logical that this piece of legislation should insist on the legitimacy of the measures even when there is no state of emergency.

However, an amendment to the 2014 counter-terrorism Act states that the Ministry of the Interior may “take all measures to ensure the interruption of websites encouraging acts of terrorism or which glorify terrorism”.¹⁵⁰ This amendment seems a bit redundant when taking into account the current wording of the legislation. The only slight difference is the wording chosen for the mean to achieve the purpose. In the Terrorism Act per se, the Interior Ministry can “block sites” whereas in the amendment, the same Ministry can “take all measure to ensure the interruption of websites”.

In the amendment, the wording seems to give a greater margin of appreciation to the French authorities to shut down websites glorifying terrorism. As the appropriate measures to be taken are not defined, one can wonder if impunity towards the established measures is not in place or is likely to be.

Moreover, article 12 of the counter-terrorism act gives legal grounds to the French government to block websites inciting or glorifying terrorism without “prior, independent judicial authorisation.”¹⁵¹ In doing so, France is in breach of article 19 of the ICCPR, which requires necessity and proportionality of the measures.¹⁵² It is also in breach of the ECHR, which requires the same criteria: ‘a democratic necessity’ and proportionality of the measures. Therefore this article can enable the government to block access to websites that do not constitute a proper threat to national security. Indeed, one can imagine that the French government would only have to state that the particular website may or may have constituted a threat to national security. As no prior judicial authorisation is needed, France will not face any challenge. The lack of proper safeguards is the starting point of abuses.

¹⁵⁰ Buchanan (n 2).

¹⁵¹ HRW, ‘Human Rights Watch concerns and recommendations on France’ (2015) HRC June 2015, 3.

¹⁵² *ibid.*

Article 5 of the counter-terrorism act threatens freedom of expression but also freedom of media. Indeed, article 5 creates an offence of “regularly visiting terrorist websites”.¹⁵³ In 2012, the government of Sarkozy had tried to create the same kind of offence after the terrorist attacks conducted by Merah.¹⁵⁴ However, they did not manage to pass it before the presidential elections. Once elected, Hollande’s government had dropped the idea.¹⁵⁵ At that time, Manuel Valls, the then Minister of the Interior, said that a “regularly visiting terrorist websites” offences would raise constitutionality issues and will overwhelm the surveillance services.¹⁵⁶ It appears that he changed his mind rather quickly.

The legislation considers that ‘glorification of terrorism’ can be seen as terrorism. This reasoning is hazardous as there is a thin and blurred line between opinion and glorification and information and propaganda.¹⁵⁷ Media is known to navigate in the blurring area of these terms. Therefore journalists or random citizens could be prosecuted for commenting on a video uploaded by terrorist organisations. This idea directly targets, for instance, Reporters without Borders, which reports interviews of members of terrorist groups.¹⁵⁸ Other countries have also crossed the line. In United-Kingdom, Scotland Yard has warned that individuals, who watch the online video of the execution of James Foley could be arrested under counter-terrorist laws.¹⁵⁹

The right to information seems also threatened if you follow the provisions of the law; you should not study, write an essay, research or simply want to know more about either terrorist groups or their activities. However, to refuse to tackle this issue will make those groups even more special for people glorifying terrorism and will lead them

¹⁵³ Amnesty International, ‘Des vies bouleversées l’impact disproportionné de l’état d’urgence en France’ (2016) Amnesty International Publications, 33.

¹⁵⁴ Imbert (n 118).

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ ‘<https://presumes-terroristes.fr>’.

¹⁵⁸ Amnesty International, ‘Des vies bouleversées l’impact disproportionné de l’état d’urgence en France’ (2016) Amnesty International Publications, 33.

¹⁵⁹ *ibid.*

to go deeper in the dark web. Therefore, it would be even more difficult for authorities to keep an eye on them.

The 2014 counter-terrorism Act raised criticism on both content and form but many parliamentarians were ready to give up fundamental freedoms for the fight against terrorism. That is not good news as terrorism is the new permanent threat, which is unlikely to be tackled in a couple of months. As the fight against ‘glorification of terrorism’ on the Internet was not enough, France decided to also intrude in private life of individuals. In that sense, the 2015 surveillance law was passed – allowing French authorities to tap phones and emails without prior judicial authorisation (B).

B. The 2015 Surveillance law against freedom of expression

The 2015 surveillance law issued in the wake of the *Charlie Hebdo* attacks has led to criticism and concerns from the population and human rights organisations (1). Tapping of phones and emails without prior judicial authorisation may become the norm under this piece of legislation. The human rights organisations have even tried to challenge the law before the constitutional council (2). The main concern is that collection of personal data can be done without prior judicial decision. This can easily lead to abuse, as the judiciary is not involved in the process.

1. Concerns from citizens and human rights organisations

In the aftermath of the January attacks, French Prime Minister, Manuel Valls, announced the adoption of a series of counter-terrorism measures.¹⁶⁰ On 21 January 2015, 14 days after the attacks, the European Union Agency for Fundamental Rights (FRA) noted an annual increase of 130% in the number of people under surveillance as potential terrorist threats in France.¹⁶¹

Relating to the Prime Minister's statement, a new surveillance law was issued in June 2015. The French parliament overwhelmingly approved the bill strengthening surveillance powers and measures – gathering votes both from socialist, right wing and the then UMP parties.¹⁶² The measures will include tapping phones and emails without prior judicial approval. Civil societies have protested against these measures declaring that they would legalise highly intrusive surveillance methods without guarantees for freedom of expression and right to privacy.¹⁶³ Protesters launched a campaign against the legislation with the motto “24 hours before 1984” in reference to George Orwell's

¹⁶⁰ FRA, 'Reactions to the Paris attacks in the EU: fundamental rights considerations' (2015) FRA report January 2015, 4.

¹⁶¹ *ibid.*

¹⁶² Angelique Chrisafis, 'France passes new surveillance law in wake of Charlie Hebdo attack' (*The Guardian*, 5 May 2015) <<https://www.theguardian.com/world/2015/may/05/france-passes-new-surveillance-law-in-wake-of-charlie-hebdo-attack>> accessed 12 June 2016.

¹⁶³ *ibid.*

novel ‘1984’ about life under a dictatorship.¹⁶⁴ Amnesty International joined the protest and expressed concerns over these “extremely large and intrusive powers without judicial controls.”¹⁶⁵ During the review of France’s compliance with ICCPR in July 2015, the UN Human Rights Committee also shared its concern by stating that:

The law “grants excessively large powers of very intrusive surveillance on the basis of broad and ill-defined aims, without prior judicial authorisation and without an adequate and independent oversight mechanism.”¹⁶⁶

In that sense, France is obviously in breach of the ‘rule of law’ test established by the ECHR. Indeed, “broad and ill-defined aims” cannot be enough to fulfil the criterion of precise and clear legislation. Therefore, restrictions on freedom of expression are abusive.

French authorities are authorised to spy on the digital communications of anyone suspected to be linked to a “terrorist inquiry”.¹⁶⁷ They also have the right to place cameras and recording devices in private homes. As no prior authorisation from a judge is required, it leaves the margin of appreciation to the authorities. Therefore the use of a direct causal link to terrorist inquiries is questionable. These measures seem to allow mass surveillance, which is not permissible by the ECtHR.¹⁶⁸

Moreover, adding to the 2014 counter-terrorism Act, individuals who regularly visit terrorist websites might have their electronic devices tapped. Hypothetically it might target students who research data for a paper or journalists. And as no judge is involved, the lack of safeguards seems obvious. Data collected through tapping, cameras or

¹⁶⁴ Amnesty International, ‘Préoccupations sur la proposition de loi relative aux mesures de surveillance des communications électroniques internationales’ (2015) Amnesty International Publications, 5.

¹⁶⁵ Amnesty International, ‘Préoccupations sur la proposition de loi relative aux mesures de surveillance des communications électroniques internationales’ (2015) Amnesty International Publications, 5.

¹⁶⁶ HRW, ‘France - State snooping is now legal’ (28 July 2015) HRW Publications.

¹⁶⁷ Chrisafis (n 162).

¹⁶⁸ *Szabo and Vissy v. Hungary* (App No. 37138/14) ECtHR 6 June 2016

recording devices can be kept from a period between a month to five years.¹⁶⁹ The management of the data is not defined in the law - leaving a real legal vacuum on how French authorities plan on using them in case of innocence of the individuals.

Manuel Valls stated that the law was “necessary and proportionate” and could not be compared to the mass surveillance Patriot Act introduced in the United States in 2001.¹⁷⁰ However, the chairman of the Paris bar lawyers’ association, Pierre-Olivier Sur, warned that the law was “a serious threat to public liberties and would put French people under general surveillance.”¹⁷¹ The Minister of the Interior, Bernard Cazeneuve, declared:

“The measures proposed are not aimed at installing generalised surveillance. On the contrary, it aims to target people who we need to monitor to protect the French people.”¹⁷²

However, it is not clear from the French government how they plan on not establishing mass surveillance. Indeed, as it seems that every citizen can be a potential target of the 2015 surveillance law, the government seems to have rather established a mass surveillance law – in contradiction with its international obligations.

International communities worry that if mass surveillance is allowed in a country - such as France, it could happen elsewhere.¹⁷³ The office of the High Commissioner of human rights had called upon the French government “to clarify the scope of the law, counterbalance the powers of the executive and ensure an effective remedy to those

¹⁶⁹ Amnesty International, ‘Préoccupations sur la proposition de loi relative aux mesures de surveillance des communications électroniques internationales’ (2015) Amnesty International Publications, 8.

¹⁷⁰ Chrisafis (n 162).

¹⁷¹ Amnesty International, ‘Annual Report on France’ (2016) Amnesty International Publications < <https://www.amnesty.org/en/countries/europe-and-central-asia/france/report-france/> > Accessed 12 June 2016.

¹⁷² Chrisafis (n 162).

¹⁷³ HRW, ‘France - State snooping is now legal’ (28 July 2015) HRW Publications.

targeted by surveillance measures.”¹⁷⁴ The French government has not yet followed the advice. The 2015 surveillance law look therefore much like a mass surveillance law despite the Prime Minister and Ministers’ statements. In that sense, this piece of legislation cannot be considered as proportionate and is therefore in breach of the international standards. Challenges were brought before the Constitutional Council in order to quash the 2015 surveillance law (2).

2. Challenge of the law before the Constitutional Council

French President of the Republic, François Hollande, wanted to ease the release of the law and avoid campaigns against it. In that sense, he brought the matter to the constitutional council – the highest French authority on constitution issues. The same day, several human rights organisation, such as Amnesty International or the Human Rights League, brought a complaint before the constitutional council.¹⁷⁵ They raised concerns on the means used to reach the alleged goal of such measures: the fight against terrorism. The main criticism is that the law was passed under fast-track legislative procedure, without proper time to debate over the provisions.¹⁷⁶ The examination of the provisions lasted ten days at last.¹⁷⁷ This procedure is said to be contrary to the statement of the United-Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, which underlines the necessity to have thorough examinations over surveillance measures.¹⁷⁸

¹⁷⁴ Zeid Ra’ad al hussein, ‘The Commissioner addresses the French Senate on surveillance bill’ (Coe, 2015) <<http://www.coe.int/en/web/commissioner/-/the-commissioner-addresses-the-french-senate-on-surveillance-bill?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fcountry-report%2Ffrance>> accessed 12 June 2016.

¹⁷⁵ Amnesty International, ‘Préoccupations sur la proposition de loi relative aux mesures de surveillance des communications électroniques internationales’ (2015) Amnesty International Publications, 3.

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.* 6.

¹⁷⁸ United Nations Human Rights Council ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism’ (28 December 2009) UN Doc A/HRC/13/37.

The human rights organisations also draw the constitutional council's attention on breaches of right to privacy and freedom of expression.¹⁷⁹ In order to be considered as legitimate and proportionate, the measures must be justified by a reasonable goal. However, mass surveillance cannot be considered as proportionate – whereas targeted surveillance might be justified.¹⁸⁰

In July 2015, the constitutional council decided that most of the provisions were in conformity with the French Constitution.¹⁸¹ The few provisions found that did not conform to the Constitution were re-written. Indeed, most issues arose from the wording chosen by the legislator. The council also reform some aspects of the law, which went even further. For instance, the law allowed intelligence agencies to conduct surveillance in emergency situations without the Prime minister's authorisation.

Therefore, this disputable law came into force and is now applicable in France. French authorities have rejected the idea to bring its legislation in line with both the right to privacy and freedom of expression. By doing so, it has ignored the treaties it has ratified and has now allowed its own citizens to be spied on by the state without proper and valid grounds.¹⁸² It seems that mass surveillance has become the norm in French society even if it is forbidden in international law. On 12 January 2016, the European Court of Human Rights made mass surveillance illegal.¹⁸³

As FRA resumed it, “the main focus of attention shifted from issues of freedom of expression to [...] countering terrorism.”¹⁸⁴ Its scope is also debatable, as it does not seem to follow the anti-discriminatory and proportionality requirements.

¹⁷⁹ Amnesty International, ‘Préoccupations sur la proposition de loi relative aux mesures de surveillance des communications électroniques internationales’ (2015) Amnesty International Publications, 13.

¹⁸⁰ *ibid* 14.

¹⁸¹ Decision (n 2015-713 DC) French constitutional council 28 July 2015 < <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-713-dc/decision-n-2015-713-dc-du-23-juillet-2015.144138.html>>.

¹⁸² HRW, ‘France - State snooping is now legal’ (28 July 2015) HRW Publications.

¹⁸³ *Szabó and Vissy v. Hungary* (App no 37138/14) ECtHR 12 January 2016.

¹⁸⁴ FRA, ‘Reactions to the Paris attacks in the EU: fundamental rights considerations’ (2015) FRA report January 2015, 1.

To conclude, in the aftermath of *Charlie Hebdo*, French authorities tried to control the areas around terrorism. As it is nearly impossible to predict a new attack and perpetrators often died during the attacks, French authorities wanted to punish people, who glorify terrorism. In that sense, the offence of ‘glorification of terrorism’ has been strengthened and is now part of the criminal law. However, despite the legitimate aim and pieces of legislation providing it, proportionality is not implemented in practice. In that sense, all the requirements from the ECHR are not fulfilled and restrictions on freedom of expression cannot always be considered valid. Moreover, surveillance laws have proliferated with uncertain consequences. The 2015 surveillance law can lead to abuses concerning the collection and use of personal data – protected under freedom of expression. Moreover, as mass surveillance laws are prohibited under international law, one can wonder if France is not obviously in breach of its international obligations with the issuing of the 2015 surveillance law. Disproportionate component can also be seen during the application of the measures enshrined in legislation. (Section 2)

Section 2: The disproportionate application of the measures enshrined in French legislation in the aftermath of January attacks

After the release of new pieces of legislation – the 2014 counter-terrorism Act and the 2015 surveillance law - and the first convictions, a specific pattern reveals itself. Unfortunately, despite the absence of clear definitions in legislation regarding the targeted individuals, one can clearly see that measures are applied to a certain category of the population (I). It therefore breaches the international obligations of France, which agreed to be bound with. Indeed, Article 2(1) of the ICCPR obligates each State to “respect and ensure to all persons within its territory [...] the rights recognised in the Covenant without distinction of any kind [...]” Moreover, article 14 of the ECHR provides that: “The enjoyment of the rights and freedoms set forth in this ECHR shall be secured without discrimination [...]” Therefore, freedom of expression should be enjoyed without discrimination.

The measures described in Section 1 are also been conducted in a disproportionate way. Indeed, these measures have been targeted comedians and children (II). Targeting comedians may lead to the opposite aim, as the government is seen to apply censorship and a double standard when dealing with freedom of expression. Moreover, minors should be dealt in a sensitive way and should not be considered as adults.

I. Discrimination against the Muslim community

In that part and for the relevance of the paper, the focus will be drawn to discrimination against Muslims. French population have generalised and wrongfully arrived at the idea that Muslims and terrorists are likely to go hand in hand. This has led to a sensitive atmosphere across the country (A). Moreover abuses from the French authorities have also been noticed. They often go beyond the legal framework given by the already mentioned laws (B). Unity and marches organised across France in the aftermath of *Charlie Hebdo* seem to have been long forgotten. Freedom of expression has therefore been wrongfully used in order to attack the Muslim community.

A. Wave of violence against Muslims from public opinion

In the aftermath of the attacks on *Charlie Hebdo*'s office, various human rights organisations issued declarations and called upon the French authorities to bring those responsible to justice and to avoid backlash against French Muslims.¹⁸⁵ Western Europe researcher at the HRW body, Izza Leghtas, called upon the French authorities to protect Muslims from reprisal.¹⁸⁶

Islamophobia has been a recurrent issue in France for couple of years now. Before the attack in January, the Council of Europe Commissioner for Human Rights, Nils Muižnieks had already warned that:

“Discrimination and hate speech not only persist in France but are on the rise. There is an urgent need to combat this in sustained and systematic manner.”¹⁸⁷

In that sense and regarding the long fight against discrimination, France should stand up to its past laws and strengthen them if needed in order to prevent discrimination. However, this struggle is not a priority in France anymore compared to the fight against terrorism. The fight against terrorism may have led the French government to turn a blind eye to the meaning of article 14 ECHR.

Despite the strong condemnation of the attacks on *Charlie Hebdo* and the distance religious communities put between them and the concept that the terrorists carried out in the name of religion, a dramatic increase in Islamophobic incidents was reported.¹⁸⁸ In 2015, anti-Muslim acts tripled with peaks in activity occurring after the two dramatic

¹⁸⁵ HRW, 'France: An Attack on Free Expression' [8 January 2015] HRW < <https://www.hrw.org/news/2015/01/08/france-attack-free-expression>> accessed 12 June 2016.

¹⁸⁶ *ibid.*

¹⁸⁷ Commissioner for Human Rights, 'France: persistent discrimination endangers human rights' (17 February 2015) Visit Report < <http://www.coe.int/en/web/commissioner/-/france-persistent-discrimination-endangers-human-rights?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fcountry-report%2Ffrance%2F>>.

¹⁸⁸ FRA, 'Reactions to the Paris attacks in the EU: fundamental rights considerations' (2015) FRA report January 2015, 2.

attacks at the beginning and the end of the year. The French National Human Rights Commission (CNCDH) reported a total of 429 anti-Muslim threats or hate crimes in 2015 – compared to 133 in 2014. The president of the commission stressed that this number only took into account the reported crimes to the police and she acknowledged that most of the insults and hate crimes are not reported. Therefore the number is expected to be much higher in reality.

Representatives of Buddhist, Christian, Jewish and Muslim organisations in France decided to release a common statement:

“We, the leaders of worship in France here today [...] are unanimous in defending the values of the Republic, freedom, equality, fraternity, and especially freedom of expression. We are committed to continuing this process of sharing, dialogue and fraternity.”¹⁸⁹

The same community leaders expressed their concerns over the safety of Jews and Muslims. This same fear rose among communities in the majority of EU Member States.¹⁹⁰ These communities called upon the French government to increase security measures and to enhance their protection in sensitive areas – such as schools, or worship spaces.¹⁹¹

Mosques across EU were under threat and received police protection. The French Council of the Muslim Faith asked Muslims to be cautious due to the increase of hate crime incidents.¹⁹² The HRW body reported that several mosques have been attacked since January 2015.¹⁹³ For instance, in Le Mans, three grenades were thrown into a

¹⁸⁹ FRA, ‘Reactions to the Paris attacks in the EU: fundamental rights considerations’ (2015) FRA report January 2015, 2.

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.*

¹⁹² *ibid.* 3.

¹⁹³ HRW, ‘France: An Attack on Free Expression’ [8 January 2015] HRW <<https://www.hrw.org/news/2015/01/08/france-attack-free-expression>> accessed 12 June 2016.

mosque, luckily without causing any physical injuries.¹⁹⁴ However, media have failed to emphasise moral damages caused by such acts. Muslims are sharing their fear of not being safe in their own country.

Violence struck after the January attacks. However, prosecution of the perpetrators of such violent acts is likely to fail as witnesses are hard to find and crimes will often be left unpunished. The priority of the French authorities is clearly leaning towards the fight against terrorism – leading to obvious abuse (B).

¹⁹⁴ Soullier (n 113).

B. Abuses from French authorities targeting a specific ethnic community

Ethnic profiling – through identity checks – is illegal in France. President François Hollande made it one of his commitments during the 2012 election campaign. French authorities must have a serious ground to check the identity of an individual. In the wake of *Charlie Hebdo* attacks, ‘glorification of terrorism’ has become a justified ground for conducting an identity check. However, French and international human rights organisations have stressed that a lot of ID checks were conducted without proper and reasonable cause. They went to Court and on 24 June 2015, the Paris Court of Appeals ordered the French government to pay damages to people subjected to unwarranted identity checks.¹⁹⁵ The Court considered that ID checks are illegal, even though “no humiliating or insulting statements were made during these checks.”¹⁹⁶ The Court of Appeals found violations in five of the 13 cases it reviewed. All 13 cases were dismissed in lower court.¹⁹⁷ The two lawyers in charge of the 13 cases welcome the decision and emphasised that the judges reminded the government that “the principles of equality and non-discrimination also apply to police.”¹⁹⁸

The Court strengthened that it is a state’s obligation to prevent discrimination and in that case, the government has failed in its duty. The worrying part the Court emphasised is the absence of any record for identity checks stating why individuals were stopped – meaning that victims are deprived of legal recourse in cases of discrimination or abuse.¹⁹⁹

Despite the success in the first five cases, the eight remaining cases, which were dismissed by the Court, raised troubling concerns. Indeed, the Court acknowledged the creation of “sensitive areas”, where identity checks and more coercive measures might happen more easily due to the dangerousness of certain areas. Moreover, the ruling

¹⁹⁵ HRW, ‘France: Ruling against ethnic profiling’ (24 June 2015) HRW Publications.

¹⁹⁶ *ibid.*

¹⁹⁷ Amnesty International, ‘Préoccupations sur la proposition de loi relative aux mesures de surveillance des communications électroniques internationales’ (2015) Amnesty International Publications, 6.

¹⁹⁸ *ibid.*

¹⁹⁹ HRW, ‘France: Ruling against ethnic profiling’ (24 June 2015) HRW Publications.

placed a heavy burden on the alleged victims, who must produce evidence of discriminatory intent.²⁰⁰ Without a proper record stating on which grounds they were stopped, it is simply impossible to prove any discriminatory intent. In that sense, individuals are clearly being prevented from their freedom of movement and freedom of expression within the French territory based on discriminatory criteria. France is therefore in violation of article 10 and 14 of the ECHR.

Amnesty International raised concerns that in the wake of January attacks, the establishment of new legislation and the growing of islamophobic incidents, it has still not witnessed people being charged or jailed for anti-Muslim or other kind of racist comments under the 'defending terrorism' offence.²⁰¹

This unfortunate situation is helpful for the far-right party – the Front National (National Front) whose leader is Marine Le Pen. She has used the growing feeling against Muslims to make a significant step to broaden her electorate. She compared Muslims praying in the streets to the Nazi occupation.²⁰² Four anti-racism and human rights groups have brought a case against her on charges of “incitement to discrimination, violence or hatred towards a group of people on the basis of their religion.”²⁰³ During a political meeting she added:

“It’s an occupation of swaths of territory, of areas in which religious laws apply [...] for sure, there are no tanks, no soldiers, but it’s an occupation all the same and it weighs on people.”²⁰⁴

She gained many supporters even after being fined by the Court for her statements. This unhealthy atmosphere has an impact on the daily life of Muslims. They have to face

²⁰⁰ HRW, 'France: Ruling against ethnic profiling' (24 June 2015) HRW Publications.

²⁰¹ Ali Abunimah, 'France begins jailing people for ironic comments' [19 January 2015] Electronicintifada.

²⁰² Angelique Chrisafis, 'Marine Le Pen goes on trial charged with anti-Muslim hate speech' (*The Guardian*, 20 October 2015) <<https://www.theguardian.com/world/2015/oct/20/marine-le-pen-trial-charged-anti-muslims-hate-speech>> accessed 12 June 2016.

²⁰³ *ibid.*

²⁰⁴ *ibid.*

daily ironic comments on how they are certain terrorists because of their religious belief. Presidential elections are only a year ahead and the dark cloud is likely to stay above France. Le Pen is clearly mistaken when she is talking of occupation and the only goal seems to further divide French society. The Ministry of the Interior estimates that eight to ten per cent of the French population is Muslim. In the same study by the National Institute for Demographic Studies conducted in 2008 and published in 2010, 45 per cent of respondents aged between 18 and 50 years old claimed no religious affiliation, 43 per cent identified themselves as Catholic, two per cent as Protestant and the remaining two per cent as Orthodox Christian, Buddhists, Jewish and others.

While French authorities should continue their search for those responsible for the attacks and hold them accountable for their actions, they should not use the attacks to target a specific group within the French population and to strengthen the fear and division among the citizens.²⁰⁵ This growing tension will lead to even greater danger of terrorist threat. Where a population is not united anymore, individualistic views will develop and will lead to dramatic measures. It is also a clear breach of non-discrimination principle guaranteed by the international instruments that France decided to be bound with.

French authorities have also started a clamp down on ironic and satirical comments, which, according to them, fall under ‘glorification of terrorism’. They have also rejected the minority excuse for young people, who may have shared stupid comments without realising the gravity of the situation (II).

²⁰⁵ HRW, 'France: An Attack on Free Expression' [8 January 2015] HRW <<https://www.hrw.org/news/2015/01/08/france-attack-free-expression>> accessed 12 June 2016.

II. Delicate cases on double-standard with freedom of expression

Hours after the attack on *Charlie Hebdo*, President François Hollande gave a televised address in which he said that “*Charlie Hebdo*’s heroes had defended freedom of speech”.²⁰⁶ However, a week later, 54 people had already been detained and several jailed for a variety of remarks – either shouted out in the street or posted on social media. French judiciary seems to be entangled in double standards. One such unfortunate famous case concerns the so-called comic Dieudonné, who has managed to pave the way for his young fans (A). French authorities have also had to face ‘glorification of terrorism’ cases involving minors – leading to a delicate situation (B).

A. The sensitive issue of the comedian Dieudonné

On 11 January 2015, a peaceful march was organised in Paris where politicians from across the 28 EU Member States, in which victims and citizens participated. In total, 3.7 million French citizens took part in this march. The main motto was: “*Je suis Charlie*” (“I am Charlie”) and the gathering was also to support freedom of expression and to show unity after what happened. However, unity of the French population seemed to have only lasted a couple of days and dissention soon re-emerged.

Criticism also emerged from people disagreeing with the “*Je suis Charlie*” motto and strengthening the idea that media should not be allowed to say just anything they want. Unfortunately, the face of the movement has been the so-called comic and comedian Dieudonné M’bala M’bala. He is known for scandalous and inflammatory remarks both on social media and during his shows. The day after the march, he posted on social media: “I feel like Charlie Coulibaly”. Amedy Coulibaly murdered four Jewish men in a kosher supermarket during the January attacks. Dieudonné faced trial for glorification

²⁰⁶ Kirby (n 98).

of terrorism and hate speech and was convicted on hate crime charges and fined 10,000 euros.²⁰⁷

His different statements have started a severe opposition between those in favour of freedom of expression at any cost and those who cannot tolerate what he stands for. Moreover Dieudonné's case has highlighted growing tensions in France between the French commitments to free speech and the desire to prevent hate crimes.²⁰⁸ Prime minister, Manuel Valls, repeated the government's position on the question: "Freedom of speech should not be confused with anti-Semitism, racism and Holocaust denial".²⁰⁹ These latter are severely punished in the French legislation but also in international law – both at the UN and European levels.

The main issue concerns young fans, who admire Dieudonné and see in his arrest the double standard of the government. Indeed the government is seen as supportive towards *Charlie Hebdo* even after their controversial covers but does not defend the tasteless posts of Dieudonné in the name of freedom of expression. Most of his fans followed his path and the Ministry of Justice revealed that a number of summary trials had happened across France for expressions of support for the gunmen.²¹⁰

Dieudonné's main argument is that "his dark humour is not anti-Semitic but is aimed at the French establishment."²¹¹ He also added that it was not fair that a satirical magazine was allowed to mock Islam and yet, Muslims were forbidden to express views that others may consider offensive.²¹² He wrote an open letter to the Minister of the Interior: "You are looking for a pretext to forbid me. You consider me like Amedy Coulibaly

²⁰⁷ Dan Bilefsky, 'Court rules against French comedian Dieudonné in free-speech case' (*New York Times*, 10 November 2015) <<http://www.nytimes.com/2015/11/11/world/europe/dieudonne-mbala-mbala-france-european-rights-court.html>> accessed 12 June 2016.

²⁰⁸ *ibid.*

²⁰⁹ Kirby (n 98).

²¹⁰ *ibid.*

²¹¹ Bilefsky (n 207).

²¹² Malik (n 105).

when I am not any different from Charlie.”²¹³ He then decided to take his case to Strasbourg. The European Court of Human Rights confirmed the previous judgement stating that his shows could not be described as entertainment but rather as a political gathering promoting Holocaust denial. By doing so, the Court overruled a previous ruling from 1999, in which it stated on a conviction for the publication of a poem:

“Even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.”²¹⁴

The Court has therefore decided that what Dieudonné was doing could not fall under an artistic definition and that he also had a huge impact in the suburbs. ‘Glorification of terrorism’ and ‘Holocaust denial’ were recognised in Dieudonné’s statements.

The highest French administrative Court decided to follow the direction of the Prime minister, who issued a decree to ban all of Dieudonné’s shows. The court expressed that when laws cannot be used in certain instances, an administrative ban of shows can be the more lenient way to prevent public disorder.²¹⁵ It has fuelled criticism towards the government and put Dieudonné on a pedestal – strengthening his dangerousness.

In a certain degree, it is common knowledge that satirical magazines are less willing to cross the line when it comes to the Jewish community – regarding French history from the Dreyfus affair to the Vichy regime. However, it should not be considered as a reason to excuse hate crime and denial of the Holocaust. Religious communities called upon

²¹³ Al Jazeera, 'France arrests 54 for 'defending terrorism' after Charlie Hebdo attack' (*Al Jazeera*, 14 January 2015) <<http://america.aljazeera.com/articles/2015/1/14/france-charliehebdoarrests.html>> accessed 12 June 2016.

²¹⁴ *Karatas v. Turkey* (App no 23168/94) ECtHR 8 July 1999.

²¹⁵ *Le Pourhiet* (n 60) 28.

the government to expand the protection for insults based on religion. All hate crimes targeting any religious communities should be prosecuted.

However, international newspapers have started a campaign against the reaction of the French government with titles as “The biggest threat to French free speech is not terrorism, it’s the government.”²¹⁶ Few human rights advocates have blame French authorities for going too far. The executive director of ‘Article 19’, a London-based free speech advocacy group, stated that it was quite “cynical that the reaction of the French authorities is to undermine the very free speech values that *Charlie Hebdo* stands up for, that is satirical, irreverent and sometimes deeply offensive humour.”²¹⁷ Academics have agreed to say that:

“It is easy to silence speakers who spew hate or obnoxious words, but censorship rarely ends with those on the margins of our society.”²¹⁸

The more attempts that were made to silence Dieudonné, the more supporters he got. Journalists and French citizens, who do not support him, would prefer to see freedom of expression wins. Banning something makes it exciting and attracting, especially for the youth with lack of understanding. Being able to debate on a topic might help to change some state of minds. Therefore, both freedom of expression and prevention of hate crime will be respected. President François Hollande stated that “French Muslim have the same rights, the same duties as all citizens.”²¹⁹

International and domestic academics, lawyers and human rights advocates agree that incitement to terrorism should be criminalised but that:

²¹⁶ Al Jazeera, 'France arrests 54 for 'defending terrorism' after Charlie Hebdo attack' (*Al Jazeera*, 14 January 2015) <<http://america.aljazeera.com/articles/2015/1/14/france-charliehebdoarrests.html>> accessed 12 June 2016.

²¹⁷ Alexander Throwbridge, 'French arrests draw charges of free speech hypocrisy' (*Cbsnews*, 15 January 2015) <<http://www.cbsnews.com/news/french-arrests-draw-charges-of-free-speech-hypocrisy/>> accessed 12 June 2016.

²¹⁸ Al Jazeera, 'France arrests 54 for 'defending terrorism' after Charlie Hebdo attack' (*Al Jazeera*, 14 January 2015) <<http://america.aljazeera.com/articles/2015/1/14/france-charliehebdoarrests.html>> accessed 12 June 2016.

²¹⁹ Carvajal & Cowelljan (n 106).

“French law goes beyond that and effectively criminalises opinions justifying terrorist acts without any likelihood or intent of such acts actually occurring. That violates international law.”²²⁰

Among the individuals detained, none of them are suspected of planning violence or having links to attacks. This raises questions about whether the French authorities are impinging on freedom of speech. Arrests have also concerned young people, which can also discredit the reasonable grounds on which the government said it had based its measures. This also raises the question of how the convicted individuals will see the government after that? For their relatives - or even in the public opinion mind – they will be assimilated to terrorists. It must not be easy to get back to your life when you have the label ‘terrorist’ on your front head.

Moreover, in the case of Dieudonné, another aspect of freedom of expression was revealed. Indeed, even if he clearly glorifies terrorism and denies the Holocaust, as he is a public figure, the simple idea of censorship can fuel his ideas rather than stop them. Even based on solid legal grounds – such as article 17 of the ECHR – banning his shows and suing him constantly seem to only serve what he stands for. The cleverest idea will be to demonstrate how he is wrong by allowing debates with historians for instance. Rather than trying to make him disappear, it would be more intelligent to put him at the centre of a TV show for instance and to destroy one by one all of his arguments.

Another questionable measure is the treatment of minors as if they were adults. In that sense, children and teenagers cannot be held accountable of their statements the same way than adults (B).

²²⁰Throwbridge (n 217).

B. Targeting minors for 'glorification of terrorism'

After the attacks on *Charlie Hebdo*, French authorities have started a strong policy towards actions considered as falling under 'glorification of terrorism'. Some of the measures were targeted towards minors. Freedom of expression can be restricted. However, the rest of the French international obligations should not vanish. In that sense, the best interest of the child – enshrined in the Convention on the Rights of the Child – should prevail in cases involving children.

In late January, French authorities detained and questioned an eight-year-old boy who has reportedly praised the attack on *Charlie Hebdo* and refused to take part in a national minute of silence, which was held on 9 January 2015. He also said that "he was not Charlie" in class.²²¹ The head teacher decided to file a complaint based on the 'glorification of terrorism' offence against the father of the boy. The boy was interrogated for two hours in the police station. His lawyer mentioned that to the question "What does the word terrorism mean to you?", the child replied "I do not know."²²²

In that case, what is striking is for a child to have to go through this. According to a lawyer for the International Federation for Human Rights, Clemence Bectarte, this situation is alarming. She stated: "How can we consider it right that an eight-year-old boy should be kept in custody."²²³ Even if he said what he is suspected to have said, the proper and proportionate reply is definitely not detention and interrogation. An eight-year-old boy cannot be held responsible for opinions on terrorism. He is more likely to be wrong on what the word really means. In that sense, teachers and adults in general should debate with him and make him understand what it means and why it is important

²²¹ 'French Police Interrogate Child for 'Apology for Terrorism' (*Telesur*, 29 January 2015) <<http://www.telesur.tv/english/news/French-Police-Interrogate-Child-for-Apology-for-Terrorism---20150129-0005.html>> accessed 12 June 2016.

²²² *ibid.*

²²³ Felicity Capon, 'Freedom of speech facing 'major threat' in France' (*Europe newswatch*, 10 February 2015) <<http://europe.newswatch.com/freedom-speech-facing-major-threat-france-305853>> accessed 12 June 2016.

to be careful with what you say. Lawyers agreed that in this kind of case, “pedagogy is what we need.”²²⁴

The boy’s lawyer condemned the “current state of collective hysteria that surrounds this notion of ‘glorification of terrorism’.”²²⁵ The boy was punished twice – first at school by being deprived of playtime and by having to stand in the corner – and the second time when he had to go to the police station.

Another case deals with a 16-year-old student who had been taken into custody for “defending terrorism.”²²⁶ His alleged crime was to post on Facebook a cartoon “representing a person holding the Charlie Hebdo magazine, being hit by bullets, and accompanied by an ‘ironic’ comment.”²²⁷ Even if this post was more than tasteless, it does not seem to meet the proportionate threshold to detain a person, especially a minor. French authorities cannot even claim that he was a threat for national security, as the student has no prior criminal record and according to the prosecutor, he does not have a “profile suggesting an evolution towards jihadism.”²²⁸

He seems to be an average teenager, who just posted the cartoon because he thought it was “funny.” As most of the teenagers of this age, maturity was not his biggest asset and it seems difficult to think that he should be blame for that. Once again, pedagogy should be preferred rather than coercive measures. Moreover, after a traumatic event – such as the *Charlie Hebdo* attack – it seems logical for teenagers and also younger children to express their feeling. It might be done in an awkward way but it is better for them to express feelings than to shut them down, which will lead to more dramatic consequences. The Children Rights International Network (CRIN) has issued a helpful

²²⁴ 'French Police Interrogate Child for 'Apology for Terrorism' (*Telesur*, 29 January 2015) <<http://www.telesur.tv/english/news/French-Police-Interrogate-Child-for-Apology-for-Terrorism----20150129-0005.html>> accessed 12 June 2016.

²²⁵ 'French Police Interrogate Child for 'Apology for Terrorism' (*Telesur*, 29 January 2015) <<http://www.telesur.tv/english/news/French-Police-Interrogate-Child-for-Apology-for-Terrorism----20150129-0005.html>> accessed 12 June 2016.

²²⁶ Abunimah (n 201).

²²⁷ *ibid.*

²²⁸ *ibid.*

leaflet on how to tackle such issues with children.²²⁹ The first principle is to be opened about what happened and to let them say anything they want to say.²³⁰ It might seem difficult for children to trust adults and talk about their feelings if once they do so; they are punished or dragged off to a police station.

Arrests were also conducted towards a 14-year-old girl charged also with “defending terrorism.”²³¹ She allegedly shouted at a tram conductor: “We are the Kouachi sisters, we’re going to grab our Kalashnikovs.”²³² The reference is to the two Kouachi brothers that carried out the *Charlie Hebdo* attack. Another case for instance concerns a “very drunk 18-year-old passenger in the car, who allegedly made comments in favour of the *Charlie Hebdo* attack. She was charged with “defending terrorism” and sentenced to 210 hours of community service. Prosecutors had asked for a four-month jail term.”²³³

The severity of the prosecutors raises troubling concerns. This severity seems to be misplaced and not targeted towards the “real” perpetrators and dangerous people. Teenagers are either drunk or obviously trying to get into troubles. As mentioned earlier, jail is not the right place to avoid radicalisation and the will from prosecutors to send those teenagers in jail is not understandable. Another questionable piece of evidence is that journalists have noticed that in almost every case where a name is provided, those arrested would appear to be of North African ancestry.²³⁴ This suggests that the French repression seems to be quite targeted. As mentioned above, targeting a certain category of persons is discriminatory and therefore unlawful.

²²⁹ CRIN, ‘CRINmail 156’ (10 December 2015) <<https://www.crin.org/fr/accueil/notre-action/cm/crinmail-156>> accessed 12 June 2016.

²³⁰ CRIN, ‘How to talk to children about traumatic events’ (27 March 2016) <<http://www.crin.org/en/library/publications/communication-how-talk-children-about-traumatic-events>> accessed 12 June 2016.

²³¹ CRIN, ‘How to talk to children about traumatic events’ (27 March 2016) <<http://www.crin.org/en/library/publications/communication-how-talk-children-about-traumatic-events>> accessed 12 June 2016.

²³² *ibid.*

²³³ *ibid.*

²³⁴ *ibid.*

Many of the arrests are simply absurd and disproportionate and it is impossible to imagine what purpose they could serve other than to show the French government as tough and to satisfy a desire of some parts of the population.²³⁵ Discriminatory measures have come into force and seem to be considered as the norm. Few lawyers and human rights organisations have tried to challenge this status quo but in the context of terrorist threats and the mourn of the population after the attacks on *Charlie Hebdo*, the hope for a change has gone.

To conclude, France seems to obviously be in breach of their international obligations regarding non-discrimination. Moreover, it does not seem to follow the best interest of the child when conducting interviews at police station. Freedom of expression may be restricted when respecting the international requirements – ‘rule of law’ and ‘democratic necessity’ tests. However, these measure are clearly targeting the Muslim community and fall into a legal vacuum as none of the law specifically targets Muslim. Therefore the burden of proof is severely heavy on the victims, which cannot bring parts of legislation as proof before a court. Practice is more difficult to prove. Proportionality can also be questioned when comedians and minors are facing charges. People often praise comedians – if not, they would not be famous. In that sense, charging comedians is a risk of having all his supporters falling deeper for their ideas. In Dieudonné’s case, censorship does not seem to be the solution – even based on sound legal grounds. Moreover, teenagers and children cannot be treated as if they were grown-ups. That is a clear breach of the best interest of the child. Proportionality is once again at stake in those cases. France seems to have a thing for tackling the issues in a hurry and dealing with consequences later.

Unfortunately, one could have expected this situation and these measures to calm down and disappear with time but that hope had been long gone with the advent of the Paris attacks in November 2015. (Chapter 4)

²³⁵ Abunimah (n 201).

Chapter 4: The dramatic end of the year for freedom of expression in France

“If the freedom of speech is taken away then dumb and silent we may be led, like sheep to the slaughter” – George Washington

Ten months after the *Charlie Hebdo* attacks, terrorist attacks struck France for the second time in less than one year. 2015 has therefore witnessed another set of traumatic events in November, which had led to the establishment of a state of emergency on 14 November 2015. Measures on freedom of expression that were set in force after the *Charlie Hebdo* attack have become the norm and have been worsened under the state of emergency. The use of the state of emergency is rare and triggers the implementation of exceptional measures. For the second time in history, France has declared the state of emergency on its mainland and pledged to fulfil the minimum requirements as enshrined in the international treaties. Exceptional measures have also been implemented with a clear pattern of discrimination. The fight against discrimination has been even more forgotten under the state of emergency.

Section 1: The legitimacy of the state of emergency in France

As the implementation of the state of emergency allows the creation of exceptional measures as well as the derogation from some international obligations, state of emergency should be limited and strictly protected by safeguards. In that sense, the state of emergency has been rarely used (I). However, the rare use of the state of emergency in the French history has been accompanied with alleged or proven abuses from the government. Last year in France, a state of emergency had been established. However some doubts may arise on the fulfilment of both the international and domestic requirements (II).

I. The rare use of the state of emergency

The term of ‘state of emergency’ emerged 60 years ago during the conflict between France and Algeria over the latter’s independence. Despite the context, several safeguards were mentioned in the law in order to control the status of ‘emergency’ (A). However, taking the past statements of state of emergency in France, freedom of expression is easily at risk during those times (B).

A. The troubled past of the state of emergency

State of emergency emerged in the 1950s but not without serious consequences. It was considered necessary during the Algerian war even if criticism arose even at that time (1). However it has also showed its weaknesses and dangerousness over the years (2).

1. The birth of the state of emergency in France

The state of emergency has emerged in France during the conflict in Algeria.²³⁶ In order to avoid the state of siege, which would have given the powers to the military, the French government decided to create ‘the state of emergency’ instead. In that sense, power still lies in the government’s hands and it is even increased. The law creating the state of emergency dates back to 3 April 1955 and states:

“The state of emergency can be declared on all or part of the territory, including the overseas departments, in case of an imminent peril resulting from grave disturbances to public order, or in case of events presenting, by their nature or gravity, the character of a public calamity”.²³⁷

In that sense, the state of emergency was made to be temporary and in order to control it; one could only declare a state of emergency for twelve days. In order to expand it,

²³⁶ HRW, ‘France: abuses under state of emergency’ (4 March 2016) HRW Publications, 5.

²³⁷ Le Monde, ‘Attentats du 13 novembre: ce que veut dire la déclaration d’état d’urgence en France’ (*Le Monde*, 14 November 2015) <http://www.lemonde.fr/societe/article/2015/11/14/attaques-a-paris-ce-que-veut-dire-la-declaration-d-etat-d-urgence-en-france_4809523_3224.html> accessed 12 June 2016.

the head of state would need a law and therefore the approval of the elected assembly. The idea behind was to prevent a single person from holding power for an unlimited amount of time.²³⁸

Under the state of emergency, the '*Préfets des départements*' ('Prefects of the department') can restrict the freedom of movement of citizens and to prevent people from residing on the territory if they want to challenge the powers of the authorities.²³⁹ The Minister of the Interior, in charge of the whole territory, and the prefects, in charge of each department, can order the temporary closure of theatres and ban specific assemblies. The law expanding the state of emergency can give authorities the power to search houses at day or night and also to control the press.²⁴⁰

State of emergency has been declared a few times in French history. The first establishment of the state of emergency happened after the promulgation of the law in May 1955 and concerned the Algerian war.²⁴¹ In August 1955, the state of emergency was expanded for six more months. Even at that time, concerns were raised mostly among political parties.²⁴² The opponents of the government saw this repression as being too harsh and as dangerous for the French democracy. The well-known newspapers, *L'Humanité*, made harsh criticism over the draft of the law, which was yet to be voted by members of the Parliament, and warned "emergency provisions were not likely to remain confined to Algeria, but would soon be employed in mainland France as well".²⁴³ Despite the criticism – even among the members of Parliament, the French government decided to pass the law.

²³⁸ France Culture, 'Comment l'état d'urgence est né en 1955' (*France culture*, 14 November 2015) <<http://www.franceculture.fr/droit-justice/comment-letat-durgence-est-ne-en-1955#>> accessed 12 June 2016.

²³⁹ Le Monde, 'Attentats du 13 novembre : ce que veut dire la déclaration d'état d'urgence en France' (*Le Monde*, 14 November 2015) <http://www.lemonde.fr/societe/article/2015/11/14/attaques-a-paris-ce-que-veut-dire-la-declaration-d-etat-d-urgence-en-france_4809523_3224.html> accessed 12 June 2016.

²⁴⁰ *ibid.*

²⁴¹ *ibid.*

²⁴² Grey Andersen, 'The French Emergency' (*Jacobin*, 24 November 2015) <<https://www.jacobinmag.com/2015/11/paris-attacks-hollande-state-of-emergency-de-gaulle-algeria-isis-terrorism/>> accessed 12 June 2016.

²⁴³ *ibid.*

The main goal of the state of emergency then was to protect French people living in Algeria and to keep this territory French. However, the situation ended with Algeria gaining its independence. Therefore one can wonder if the state of emergency had been useful or if it rendered the situation even more complicated and incontrollable. Politicians from the majority agreed to say that it was a means to an the end but being aware of the result, it is difficult to understand why limiting fundamental freedoms and rights may have been a thoughtful move to take.

2. The first obvious deviance under state of emergency

Since that time, the state of emergency had been only used three times within mainland France. The first time was after the return of the General Charles de Gaulle to power, following the events of 13 May 1958.²⁴⁴ The second time was in 1961 after the putsch of four generals.²⁴⁵ For the first time, abuses arising from the state of emergency emerged. Indeed, four senior generals executed a putsch in Algiers and in response the government declared a state of emergency in mainland France.²⁴⁶ The then President of the French Republic, Charles de Gaulle, used the emergency powers stated in article 16 of the 1958 Constitution. He was then able to issue executive decisions, including one that prolonged the state of emergency indefinitely.²⁴⁷ As a consequence, France lived under a continuous state of emergency for just over two years. The state of emergency expired in May 1963 – after being extended three times – and after the signing of the Avian Accords, which put an end to the war in Algeria.²⁴⁸

This two-year state of emergency left a bitter taste within French society. Democracy seemed to have been suspended for the length of the state of emergency. In 1961,

²⁴⁴ Le Monde, 'Attentats du 13 novembre : ce que veut dire la déclaration d'état d'urgence en France' (*Le Monde*, 14 November 2015) <http://www.lemonde.fr/societe/article/2015/11/14/attaques-a-paris-ce-que-veut-dire-la-declaration-d-etat-d-urgence-en-france_4809523_3224.html> accessed 12 June 2016.

²⁴⁵ *ibid.*

²⁴⁶ France Culture, 'Comment l'état d'urgence est né en 1955' (*France culture*, 14 November 2015) <<http://www.franceculture.fr/droit-justice/comment-letat-durgence-est-ne-en-1955#>> accessed 12 June 2016.

²⁴⁷ *ibid.*

²⁴⁸ Le Monde, 'Attentats du 13 novembre : ce que veut dire la déclaration d'état d'urgence en France' (*Le Monde*, 14 November 2015) <http://www.lemonde.fr/societe/article/2015/11/14/attaques-a-paris-ce-que-veut-dire-la-declaration-d-etat-d-urgence-en-france_4809523_3224.html> accessed 12 June 2016.

negotiation began between France and Algeria to pave the way towards independence. General de Gaulle was then convinced that independence was the only way out from the war. Algerian and French peoples backed up his decision. In January 1961, a referendum showed that 75% of people in mainland France and in Algeria were in favour of the independence.²⁴⁹ However, some high-ranked politicians, even close to de Gaulle, did not share the President's view on independence. This was the case for the then Minister of the Interior, Roger Frey, the Prime Minister, and Michel Debré and the Commissioner of Paris Police ("*Préfet de Police de la Seine*"), Maurice Papon.²⁵⁰

These three were therefore against the independence and thus against people supporting it. They chose to use the powers given by the state of emergency to create discriminatory measures. In that sense and under the state of emergency, a racist curfew was established on 5 October 1961 – targeting only Algerians living in France. To protest against the curfew and the harsh measures created by the Commissioner of Paris Police, thousands of Algerians organised a peaceful march in Paris on 17 October 1961.²⁵¹ The march was forbidden under emergency powers. As a consequence, the Police gave a brutal response to it and over 150 Algerians were killed and their bodies ended up in the Seine.²⁵² For the first time under state of emergency, freedom of expression and freedom of assembly were neglected and trampled.

What is even more striking is the absence of this event from French history. The hierarchy silenced the perpetrators. And even the President - who was said to be upset with what happened – decided to turn a blind eye to it and to move on.²⁵³ His will was to avoid pouring oil on the fire and intensifying animosity between French and Algerians in France. In that sense, everything was done to prevent citizens to know

²⁴⁹ Soren Seelow, '17 octobre 1961 : "Ce massacre a été occulté de la mémoire collective"' (*Le Monde*, 6 April 2013) <http://www.lemonde.fr/societe/article/2011/10/17/17-octobre-1961-ce-massacre-a-ete-occulte-de-la-memoire-collective_1586418_3224.html> accessed 12 June 2016.

²⁵⁰ *ibid.*

²⁵¹ *ibid.*

²⁵² *Le Monde*, 'Attentats du 13 novembre : ce que veut dire la déclaration d'état d'urgence en France' (*Le Monde*, 14 November 2015) <http://www.lemonde.fr/societe/article/2015/11/14/attaques-a-paris-ce-que-veut-dire-la-declaration-d-etat-d-urgence-en-france_4809523_3224.html> accessed 12 June 2016.

²⁵³ *ibid.*

about the even. Censorship of media occurred and journalists were banned from the scene where the massacre happened.²⁵⁴ Adding to the censorship, judicial claims were soon dropped and amnesty laws were created to protect measures and actions taken in order “to maintain law and order” in France.²⁵⁵

This event was raised for the first time in 1997-1998 during the Papon trial. Indeed, Maurice Papon was prosecuted for complicity for crimes against humanity when he worked for the Prefecture of Gironde during the Second World War.²⁵⁶ Witnesses testified of his role at the time of the Algerian conflict. Jean-Luc Einaudi - who covered the trial for *Le Monde* – started to refer to the event by using the term ‘massacre’. Papon decided to sue him for defamation – proceedings that he lost when the Court found the term ‘massacre’ legitimate to refer to the 17 October 1961 events. Therefore, since 1998, the 1961 state of emergency is finally recognised as not being flawless in term of protection of fundamental rights. Since then, the 1955 law establishing the state of emergency is considered as not flawless (B).

²⁵⁴ Seelow (n 249).

²⁵⁵ *ibid.*

²⁵⁶ *ibid.*

B. The state of emergency as a threat to freedom of expression

The 2005 establishment of the state of emergency has reinforced the idea of the hazardous consequences of such measures (1). The law was said to be out-dated and should not be used again without proper and deep changes (2). In 2015, however, the French government has established a state of emergency – using the 1955 law with only few modifications.

1. New abuses under the 2005 state of emergency

The state of emergency had been implemented one more time before its establishment in 2015. Indeed, a decade ago, the government decided to establish a state of emergency to narrow down the impact caused by the riots.²⁵⁷

In November 2005, two teenagers of immigrant descent died while the police was chasing them. They tried to hide from the police in an electricity substation.²⁵⁸ This event sparked countrywide riots.²⁵⁹ After a couple of days, 300 towns had reported violence and over 1,400 cars were torched. Five days after the death of the teenagers, France decided to take extraordinary measures and to base their approach on the 1955 law. Although this piece of legislation was considered as a “leftover” of the Algerian war, it was implemented over 40 years after the end of the last state of emergency.²⁶⁰ This state of emergency lasted until 4 January 2006.²⁶¹

²⁵⁷ Le Monde, 'Attentats du 13 novembre : ce que veut dire la déclaration d'état d'urgence en France' (*Le Monde*, 14 November 2015) <http://www.lemonde.fr/societe/article/2015/11/14/attaques-a-paris-ce-que-veut-dire-la-declaration-d-etat-d-urgence-en-france_4809523_3224.html> accessed 12 June 2016.

²⁵⁸ Spiegel, 'A state of emergency in the Grande Nation' (*Spiegel*, 8 November 2005) <<http://www.spiegel.de/international/rioting-in-france-a-state-of-emergency-in-the-grande-nation-a-383917.html>> accessed 12 June 2016.

²⁵⁹ Laurent Olivier, 'Here's the Last Time France Declared a State of Emergency' (*Time*, 14 November 2015) <<http://time.com/4112625/france-state-of-emergency/>> accessed 12 June 2016.

²⁶⁰ *ibid.*

²⁶¹ *Ibid.*

According to the 1955 law, the French authorities set up curfews at their discretion in areas beset by violence.²⁶² Academics and politicians have questioned the wisdom of referring to a piece of legislation dating back to the Algerian war and which had led to the blood bath in October 1961.²⁶³ A Socialist deputy, Elisabeth Guigou, from the opposition party, declared, “Imposing a law passed during the Algerian war was not the best reference for the current unrest”.²⁶⁴ This statement is paradoxical as a decade later a Socialist President will be the one to establish a state of emergency based on the 1955 law.

Riots were often organised by the youth, who felt misunderstood by the French government. The will of the government at that time was not to understand them but rather to nip in the bud the violence. The then French President, Jacques Chirac, told his cabinet: “[The state of emergency] is necessary to speed up the return to calm”.²⁶⁵ His Minister of Interior, Nicolas Sarkozy added: “The government’s policy is firmness, composure and moderation”.²⁶⁶

The establishment of the state of emergency raised concerns among experts in human rights. The president of the League of Human Rights, Jean-Pierre Dubois, stated: “I am afraid that public authorities are currently playing with fire; It is a well-known fact that prison is a place where you learn how to commit more serious crimes.”²⁶⁷ State of emergency was therefore considered as not the most efficient tool to deal with exceptional situations (2).

²⁶² Spiegel, 'A state of emergency in the Grande Nation' (*Spiegel*, 8 November 2005) <<http://www.spiegel.de/international/rioting-in-france-a-state-of-emergency-in-the-grande-nation-a-383917.html>> accessed 12 June 2016.

²⁶³ Spiegel, 'A state of emergency in the Grande Nation' (*Spiegel*, 8 November 2005) <<http://www.spiegel.de/international/rioting-in-france-a-state-of-emergency-in-the-grande-nation-a-383917.html>> accessed 12 June 2016.

²⁶⁴ *ibid.*

²⁶⁵ Olivier (n 259).

²⁶⁶ Spiegel, 'A state of emergency in the Grande Nation' (*Spiegel*, 8 November 2005) <<http://www.spiegel.de/international/rioting-in-france-a-state-of-emergency-in-the-grande-nation-a-383917.html>> accessed 12 June 2016.

²⁶⁷ *ibid.*

2. *The out-dated 1955 legislation*

Under the 1955 law, specific measures are allowed without proper and explicit safeguards. These measures are not consequence-free on freedoms and rights. Under article 5, regional prefects can “forbid the movement of people and vehicles in places and times fixed by decree”. The same article allows prefects to keep out of the zones “any person seeking to obstruct, in any manner whatsoever, the action of the public powers”. What is striking in the wording is the absence of criteria to avoid measures based only on French authorities’ discretion. This lack of safeguards leads most of the measures to be taken based on ethnic criteria and therefore considered as being discriminatory.

Article 6 authorises the Minister of Interior to issue house-arrest warrants for people “whose activity is dangerous for public safety and order”. Once again, the absence of a clear definition of the term “public safety and order” may lead to abuse. During the 1961 police violence, the same notion was used to explain the bloodbaths that happened.

Articles 8 and 11 target and therefore threaten freedom of expression. Article 8 allows the authorities to “order the temporary closure of theatres and cinemas, bars and meeting places of all kind; Meetings likely to provoke or fuel disorder can also be banned”.²⁶⁸ Once again, there is no definition of what kind of disorder the article is tackling. Therefore discretion is left to the French authorities to decide when meetings can provoke disorder. The major issue in these cases is that authorities can use the fear of disorder reason to ban political meetings or meetings that would not fall in line with the governmental message. In 1955, it may not have been an issue but nowadays the main tool for opposition is demonstrations and meetings. The neutrality of the French authority to decide when to ban or not meeting under state of emergency has been tackled once again in 2015 when the government decided to ban ecological meetings

²⁶⁸ Loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence version consolidée au 12 juin 2016, article 8 (hereafter the 1955 Law) – available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350>.

during the COP21 in November 2015.²⁶⁹ Many demonstrators saw this decision as censorship by the government and as a threat for freedom of expression.

Article 11 permits the authorities to “order house searches at any time of day or night” and give the authorities the right “to control the press and publications of all kinds as well as radio emissions, cinema projections and theatrical shows.”²⁷⁰ This article directly targets freedom of expression. Safeguards cannot be easily drawn from the wording. Indeed, there is no mention of which criteria should be taken into account to ban certain movies or shows and to delete certain articles in newspapers. As for article 8, French authorities can therefore commit abuses in order to choose which messages can be followed through the population. Censorship is the most common threat to freedom of expression. Governments have used it for ages in order to give restricted information to their population, as enlightened citizens were considered to be dangerous for the power in place. If press only praises government, people tend to believe in it and therefore to keep electing the same persons.

This legislation also gives the frame and the sanctions if someone breaches the law. Adults breaking the law face two months in jail and/or a fine of up to 3,750 euros. The dangerous part is what comes next - meaning that minors breaking the law can be sent to jail for a maximum of one month.²⁷¹ Jail time is not banned for children but it should be the last option. Educative measures should always be the priority and the best option for a child.

Moreover, the last time the 1955 legislation was used in 2005, another concern was highlighted. Indeed, according to newspapers at that time:

²⁶⁹ See Chapter 4 section 2.

²⁷⁰ Loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence version consolidée au 12 juin 2016, article 11

²⁷¹ Spiegel, 'A state of emergency in the Grande Nation' (*Spiegel*, 8 November 2005) <<http://www.spiegel.de/international/rioting-in-france-a-state-of-emergency-in-the-grande-nation-a-383917.html>> accessed 12 June 2016.

“Exhuming a 1955 law send to the youth of the suburbs a message of astonishing brutality: that after 50 years France intends to treat them exactly as it did their grandparents”.²⁷²

The meaning behind these statements was that the 1955 law can be seen as discriminatory and targeting a certain category of citizens. Discrimination measures based on the law have already proven their dangerousness and uselessness during the 1963 state of emergency. Therefore, establishing a state of emergency under the 1955 law could be considered as in contradiction with the non-discrimination principle – enshrined both in the ICCPR and the ECHR.

To conclude, the state of emergency was born during a difficult period of time, when France was at war. Under the different establishments of state of emergency, abuses were made. Freedom of expression was at stake when demonstrations were banned and racism grew. Criticism emerged and the state of emergency law was considered out-dated. However, in 2015, the French government decided to implement it again – making only a few changes (II).

²⁷² Seelow (n 249).

II. Criteria to establish the state of emergency in 2015

State of emergency always goes hand in hand with derogations from international instruments. Indeed, the state of emergency responds to an exceptional situation that the State considers being so exceptional that it needs exceptional powers to deal with it. In that sense, the State considers to have serious legitimate aims to derogate from its international obligations. However, the international community settled different criteria to fulfil before the state of emergency can be considered valid (A). As previously said, freedom of expression is not a *jus cogens* right and can be restricted. However, derogation must be kept under control to avoid abuse. After the establishment of the state of emergency in France, concerns and worries start to rise from the international community (B). The international community was – and still is – concerned about abuses that can happen under the state of emergency.

A. The obligation to fulfil different requirements

The international community has defined different criteria that need to be fulfilled in order for derogation - from the rights and freedom guaranteed in international instruments - to be valid (1). Additional safeguards have been set up by French authorities through domestic legislation in order to prevent abuses (2).

1. *The international requirements*

Under article 15 of the European Convention on Human Rights (ECHR) and article 4 of the International Covenant on Civil and Political Rights (ICCPR), the government can impose restrictions on certain rights, including freedom of movement, expression, and association, during states of emergency but only “to the extend strictly required by the exigencies of the situation”.

Article 4 of the ICCPR also states different conditions, which must be fulfilled by the State when setting the emergency derogations.²⁷³ Among the conditions, it is expressly

²⁷³ United Nations, *Freedom of expression and public order* (Training manual 2012) 24.

mentioned that these derogative measures must be officially proclaimed.²⁷⁴ Moreover, the State must inform the other State Parties of the rights limited and the reasons for the limitations.²⁷⁵ On 23 November 2015, France informed the United-Nations General Secretary of its decision to apply the 1955 law on state of emergency.²⁷⁶ The French delegation warned that certain measures could imply derogation from its obligations under articles 9, 12 and 17 of the ICCPR.²⁷⁷ These articles tackle several issues: detention, liberty of movement and the right of privacy including the privacy of correspondence, which can be linked to freedom of expression.

Following the statement to the UN Secretary General, France filed a formal derogation statement from ECHR with the Secretary-General of the Council of Europe – according to the requirement enshrined in article 15 of the ECHR.²⁷⁸ In that regard, the French delegation's statement is really vague as it only notices that some of the emergency measures “may involve a derogation from the obligations” under the ECHR.²⁷⁹ It lacks any specification on what kinds of measures are tackled and what they will exactly do. It does not stipulate which rights will be concerned with the derogation nor in what extend they will be derogated from.²⁸⁰ That could lead to abuses from the French government.

Moreover, the meaning and the definition of the ‘state of emergency threatening the life of the nation’ is important because neither article 15 of the ECHR nor article 4 ICCPR expressly describe if this notion can refer to terrorism. According to the group of experts gathered in 1984:

²⁷⁴ United Nations, *Freedom of expression and public order* (Training manual 2012) 24.

²⁷⁵ *ibid* 25.

²⁷⁶ French delegation, ‘Notification of France to the Secretary General of the United Nations’ (C.N.703.2015) 25 November 2015.

²⁷⁷ French delegation, ‘Notification of France to the Secretary General of the United Nations’ (C.N.703.2015) 25 November 2015, 11-16.

²⁷⁸ COE, ‘Reservations and Declarations for Treaty No005 - Convention for the Protection of Human Rights and Fundamental Freedoms’ (*Coe*, 12 June 2016) <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=N5hF4XrW> accessed 12 June 2016.

²⁷⁹ *ibid*.

²⁸⁰ *ibid*.

“A state party may take measures derogating from its obligations under the ICCPR pursuant to Article 4 only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: affects the whole of the population and either the whole or part of the territory of the State, and threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.”²⁸¹

The only difference is the reservation made by France in 1974 regarding article 15 of the ECHR. In that sense, the ECHR cannot “limit the powers of the President of the Republic when he takes concrete and necessary measures in a particular context.”²⁸² One can wonder if the derogation had not been accepted, France could still have implemented the following measures – to be studied further down in this chapter.

At first sight, terrorism seems to fulfil the definition of a ‘public emergency threatening the life of the nation’ because it does affect the population and threaten the physical integrity of the State. However, the major issue concerns the “grave and imminent” elements. Indeed, it seems that States tend to use derogation in a more permanent way.²⁸³

Article 4 ICCPR and 15 ECHR share few common points. One of them is that measures taken when derogating from these instruments should not be discriminatory. Measures taken under the law must be strictly proportionate to the aim pursued and that these

²⁸¹ T Karimova, 'Derogation from Human Rights treaties in situations of emergency' (RULAC 2010) <http://www.geneva-academy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php> accessed 12 June 2016.

²⁸² Jean-Jacques Régibier, 'Des syndicats de journalistes mettent en garde contre les atteintes à la liberté d'expression' (*L'Humanité*, 18 November 2015) <<http://www.humanite.fr/etat-durgence-des-syndicats-de-journalistes-alertent-sur-la-liberte-dexpression-590161>> accessed 12 June 2016.

²⁸³ S Oussène and S Dankoro, *‘La scène internationale à l'heure des menaces terroristes’* (1st, L'Harmattan, France 2012) Chapter 1.

powers are not applied in a discriminatory manner and do not stigmatise people of a particular ethnicity, religion, or social group.²⁸⁴ Taking a step back and looking at the previous state of emergency establishments, one can wonder if France will manage to avoid targeting a certain category of people. The new surveillance measures put in place after the establishment of the state of emergency can be seen as evidence of failure by the French authorities.²⁸⁵ Therefore France is in violation of the ECHR.

Another key condition is the recognition of ‘an immediate danger threatening the life of the nation’. Indeed, the Human Rights Committee shows its reluctance to legitimate states of emergency, which are declared at peacetime.²⁸⁶ In its General Comment on Article 4, the Committee notes:

“If States Parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.”²⁸⁷

Despite the declaration of the Prime Minister, Manuel Valls, declaring that France was “at war”, the fulfilment of all the requirements - for the state of emergency to be valid - is debatable. Indeed, war on terror seems to be a permanent feature today, and cannot really be considered as an armed conflict.

Moreover, the Human Rights Committee also specifies that derogatory measures must be limited in time.²⁸⁸ It stresses that:

“Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature”.²⁸⁹

²⁸⁴ HRW, ‘France : abuses under state of emergency’ (4 March 2016) HRW Publications, 4.

²⁸⁵ See Chapter 4, section 2.

²⁸⁶ United Nations, *Freedom of expression and public order* (Training manual 2012) 25.

²⁸⁷ United Nations Human Rights Committee: ‘General Comment No 29 States of Emergency (Article 4)’ (24 July 2001) U.N. Doc. CCPR/C/21.

²⁸⁸ United Nations, *Freedom of expression and public order* (Training manual 2012) 25.

The most problematic issue is the fact that war against terrorism seems to be going on nowadays and seems to be in contradiction with the temporary nature required. Indeed, regarding the dramatic events, which struck European capitals, it seems unlikely that this “war” will come to an end soon. International requirements seem to be lacking to assess expressly the lawfulness of the state of emergency in France.

In that sense, French derogation to the international standards is far from being flawless. The derogation’s statements are vague and do not precise in which way France plans to derogate from the rights and freedoms guaranteed in the international instruments. Moreover, terrorism seems to be a tricky reason to justify derogation. According to what was said before, the international community should have refused the derogation or at least gives conditions to be able to review it properly. The last safeguard was the domestic requirements. But once again, France managed to go around them and established the 1955 law, even though it was considered out-dated and discriminatory.

2. The domestic requirements

In addition to the international requirements, France has to implement the state of emergency in its own legal system. On 14 November 2015 – the day after the Paris attacks – the French government issued a decree (n°2015-1475) to implement the 1955 law (n°55-385) establishing the state of emergency.²⁹⁰ On the same day, the decree was published in the Official Journal of the French Republic, which made it directly applicable.²⁹¹ Several decrees after this one extended the area concerned by it. Indeed, the first decrees only concerned Paris and the Ile-de-France region whereas the other decrees expanded the state of emergency’s measures to the mainland France entirely –

²⁸⁹ United Nations Human Rights Committee: ‘General Comment No 29 States of Emergency (Article 4)’ (24 July 2001) U.N. Doc. CCPR/C/21.

²⁹⁰ Décret n° 2015-1475 du 14 novembre 2015 portant application de la loi n° 55-385 du 3 avril 1955.

²⁹¹ *ibid.*

including Corsica.²⁹² In the last decrees dating back to 18 November 2015 extended the state of emergency to the French overseas territories.²⁹³

The French delegation to the Council of Europe was aware that some measures comprised in the 1955 law might breach the ECHR. That is the reason why the French delegation warns the Secretary General that France might derogate from the ECHR, falling under article 15 of the Convention.²⁹⁴ Concerning freedom of expression and as expressly mentioned in all the decrees, France can apply article 8 of the 1955 law. This article states that the Minister of Interior – in charge of the entire territory – and the prefect – in charge of a department – can order the closure of theatres and other meeting places or even ban any meeting considered as a threat to public order.²⁹⁵ As mentioned above, this unclear meaning leaves a wide margin of appreciation to the authorities and can lead to abuse threatening freedom of expression.

After the release of these different decrees, Prime Minister, Manuel Valls, told the French Assembly that these measures were “a short-term answer” and that these new measures should be included in the French Constitution to “give it a sound legal basis”.²⁹⁶ He warned the members of Parliament that other liberties could be temporarily limited. What is striking is the contradictory statement that he made in his allocution to the Parliament. Indeed he emphasized the temporariness of the measures but wished to encompass them in the French Constitution – making them permanent.

The Prime Minister’s speech was a first step to legalize some measures through the parliamentary system. Politicians often use this trick, as measures stamped with the approval of the Parliament are more likely to be accepted by the population. As MPs are elected, the government can justify the establishment of newly contested measures by

²⁹² Décret n° 2015-1478 du 14 novembre 2015 modifiant le décret n° 2015-1476 du 14 novembre 2015 portant application de la loi n° 55-385 du 3 avril 1955.

²⁹³ Décrets 2015-1493 and 2015-1494 relatifs à la mise en place de l’état d’urgence.

²⁹⁴ Marko Milanovic, 'France Derogates from ECHR in the Wake of the Paris Attacks' (*EJIL*, 13 December 2015) <<http://www.ejiltalk.org/france-derogates-from-echr-in-the-wake-of-the-paris-attacks/>> accessed 13 June 2016.

²⁹⁵ Loi n°55-385 du 3 avril 1955 relative à l’état d’urgence (n 249).

²⁹⁶ Buchanan (n 2).

saying that the citizens indirectly agreed on them. Therefore in February 2016, new laws passed aimed to enhance the intelligence services' capabilities, particularly for intercepting communications.²⁹⁷ Days later, the National Assembly agreed to extend the state of emergency for an additional three months with an overwhelming approval, 577 to 6, and with one abstention.²⁹⁸ The upper house followed this approval the following day with 336 voting for and 12 abstaining.²⁹⁹

The temporariness of the situation and the measures is at stake, as it seems that the government is using the state of emergency to pass new pieces of legislation and is wishing to make them permanent. The fear is if the government manages to encompass some of the changes in the Constitution – making them almost impossible to quash.

At the end, it seems that the derogation to article 15 of the ECHR has been done in the edge of legality. Indeed, the statement given to the Secretary-General of the Council of Europe cannot be considered as fully detailed, as it should be. There is no clear mention of the rights and freedoms from which France wishes to derogate from. Moreover, the domestic requirements – supposedly made to safeguard the use of state of emergency – were fulfilled in favour of the government. Indeed, few changes were made to the 1955 out-dated law and it can still be considered as vague and imprecise piece of legislation. All of this has led the international community to express their worries and concerns over the situation in France (B).

²⁹⁷ Buchanan (n 2).

²⁹⁸ Andersen (n 223).

²⁹⁹ *ibid.*

B. Worries and concerns of the international community

According to the 1955 law, article 3, the state of emergency is supposed to last twelve days.³⁰⁰ However, on 20 November 2015, the French parliament decided to extend the state of emergency for three more months until 26 February 2016. And eventually on 20 February 2016, the state of emergency was expanded one more time to last until 26 May 2016.³⁰¹ In doing so, members of the Parliament agreed on expanding the powers under the 1955 law.³⁰²

On May 2016, the French Assembly decided to extend the state of emergency until the end of July. This time, no demonstration occurred as the expansion was made just couple of days before the end of the prior extension of the state of emergency.³⁰³ The French government did not allow any debate and did not consult the French population. By prolonging once again the state of emergency, it has turned a blind eye towards the concerns and worries of the international community.

The expansion of the state of emergency has given rise to criticism among the French population. Criticism has also emerged from members of the international community. On 19 January 2016, five United-Nations special rapporteurs, including those on freedom of opinion and expression, and on the protection and promotion of human rights while countering terrorism, demanded to the French government not to extend the state of emergency beyond 26 February 2016. They stated:

“While exceptional measures may be required under exceptional circumstances, this does not relieve the authorities from demonstrating that these are applied

³⁰⁰ Loi n°55-385 du 3 avril 1955 relative à l'état d'urgence (n 249).

³⁰¹ French Government, 'L'état d'urgence est prolongé jusqu'au 26 mai 2016' (*Service public*, 22 February 2016) <<https://www.service-public.fr/particuliers/actualites/A10391>> accessed 13 June 2016.

³⁰² HRW, 'France: abuses under state of emergency' (4 March 2016) HRW Publications, 5.

³⁰³ Sean Adl-tatabai, 'Thousands Protest In Paris Against On going State Of Emergency In France' (*Yournewswire*, 14 March 2016) <<http://yournewswire.com/thousands-protest-in-paris-against-ongoing-state-of-emergency-in-france/ce-public.fr/particuliers/actualites/A10391>> accessed 13 June 2016.

solely for the purposes for which they were prescribed, and are directly related to the specific objective that inspired them.”³⁰⁴

These five UN experts have also stressed “the lack of clarity and precision of several provisions of the state of emergency and surveillance laws.” Their main concern remains restrictions of freedom of expression, freedom of peaceful assembly and the right to privacy.³⁰⁵ In that sense, restrictions to freedom of expression seem to be not valid, as the legislation is not clear and precise and therefore does not fulfil the ‘rule of law’ test from the ECHR.

When President François Hollande declared the state of emergency in the wake of the traumatic events happened in November 2015, the aim was to prevent future terrorist attacks.³⁰⁶ He and his government have failed to demonstrate that over the months these measures were still consistent with the aim. French authorities seem therefore in breach with article 4 ICCPR and 15 ECHR that clearly state that measures should be of a temporary nature and only applied for the aim prescribed. The French state of emergency has not been extended with a serious and detailed control of the pertinence of such measures.

The Human Rights Watch (HRW) body raised concerns about the new powers granted to the French authorities.³⁰⁷ It calls upon the French government to apply these new measures in a narrow and limited manner in order to avoid “trampling on human rights”.³⁰⁸ The HRW body decided to intervene after the release of the new law that expands the government’s emergency powers under the 1955 law. The HRW body is concerned about the new emergency powers, which allow the government to infringe with freedom of expression by blocking “websites deemed to glorify terrorism without

³⁰⁴ HRW, ‘France: abuses under state of emergency’ (4 March 2016) HRW Publications, 4.

³⁰⁵ RFI, ‘French anti-terrorist measures restrict freedoms ’ (*RFI*, 19 January 2016) <<http://en.rfi.fr/France/20160119-french-anti-terrorist-measures-restrict-freedoms-un>> accessed 13 June 2016.

³⁰⁶ Amnesty International, ‘Des vies bouleversées l’impact disproportionné de l’état d’urgence en France’ (2016) Amnesty International Publications, 6.

³⁰⁷ HRW, ‘France: New emergency powers threaten rights’ (25 November 2015) HRW Publications, 2.

³⁰⁸ *ibid.*

prior judicial authorization”.³⁰⁹ These measures were created after the Charlie Hebdo attack and prior to the establishment of the state of emergency. However, the French government endorsed these measures when establishing the state of emergency. Some human rights organisations – or even random individuals – have started to realise the consequences of such measures on their rights and freedoms. Strangely, the consequences were more easily seen because coupled with the state of emergency. The HRW body recognizes that this measure interferes with freedoms of association and expression. Western Europe researcher at Human Rights Watch, Izza Leghtas, reminds the French government that:

It “should keep people safe and bring those responsible for the horrific attacks to justice, but it also has a duty to protect people’s freedom and rights, and not to discriminate against any segment of the population”.³¹⁰

In that sense, and per usual, the main concern was and still is the fight against discrimination that France seems to have given up.

The HRW body recognised the lack of information to be able to assess the necessity or proportionality of the new measures implemented. However, the HRW body acknowledged the difficult context in which these measures have been implemented and therefore is aware of the risk of abuses, which may result from them.³¹¹ That is why the HRW body emphasizes the strong need for Parliament to control the use of these measures and that they are used in the “narrowest possible way and for the shortest possible time”.³¹² State of emergency has been established for nearly eight months now and cannot be really considered as temporary anymore.

³⁰⁹ HRW, 'France: New emergency powers threaten rights' (25 November 2015) HRW Publications, 2.

³¹⁰ HRW, 'France: New emergency powers threaten rights' (25 November 2015) HRW Publications, 3.

³¹¹ *ibid.*

³¹² *ibid* 4.

The Council of Europe has also expressed concern over the extension of the state of emergency in France.³¹³ Its president Thorbjørn Jagland wrote a letter to François Hollande in January 2016 in which he expressed his concern about the planned extension and remind that “risks could result from the prerogatives conferred on the executive [...] if they are not accompanied by appropriate safeguards.”³¹⁴

Later on, criticisms have risen also from French people. In January 2016, the French National Consultative Commission of Human Rights (CNCDH) warned that the state of emergency would “intrinsically harms public liberties”.³¹⁵ The organisation went further when it released its statement mentioning that:

“The state of emergency, which must remain temporary, should not become the rule: its sole and only aim is a rapid return to normality”.³¹⁶

Return to normality seems to become a dream nowadays. Exceptional measures have started to become the norm without any concern for proportionality or discriminatory content. France is deliberately forgotten the ECHR and its obligations.

Regarding the expansion of the state of emergency – twice since its establishment – it seems obvious that these concerns were not taken into account by the French government. However, the CNCDH emphasises that threatening the human rights would be the “biggest victory for the enemies of human rights”.³¹⁷ Adding to its concerns, the UN rights experts group estimated that the measures implemented in France “do not seem to adjust to the fundamental principles of necessity and proportionality.”³¹⁸ Another NGO, the Human Rights League (HRL) has also tried to challenge the establishment of the state of emergency by stating that the November

³¹³ Eric Maurice, 'French state of emergency under growing criticism' (*Euobserver*, 26 January 2016) <<https://euobserver.com/justice/131994>> accessed 13 June 2016.

³¹⁴ *ibid.*

³¹⁵ *ibid.*

³¹⁶ Maurice (n 313).

³¹⁷ *ibid.*

³¹⁸ HRW, 'France: New emergency powers threaten rights' (25 November 2015) HRW Publications, 5.

attacks cannot constitute anymore an “immediate threat” that could justify the maintenance of the state of emergency.³¹⁹

The establishment of the state of emergency is therefore questionable. From that doubtful point, the new measures put in place seem even more suspicious and threatening for human rights.

Article 15 ECHR and 4 ICCPR allow the government to impose restrictions on certain rights, including freedom of expression and association during states of emergency, but only “to the extent strictly required by the exigencies of the situation”.³²⁰ However the government must ensure that any measure implemented is strictly proportionate to the aim pursued and non-discriminatory.³²¹

The state of emergency seems to be endless and even the Prime minister, Manuel Valls, implied that the state of emergency would stay “until we can get rid of Daesh”.³²² Even though he also recognised that France “cannot live forever” under a state of emergency, some exceptional measures could become a kind of normality until the threat of new attacks is definitely gone. In that sense, the new measures concerning surveillance would likely stay as the norm to follow. It seems interesting to measure the impact of their existence on the people.

According to the HRW body’s researcher, Leghtas:

“Now more than ever, France should be irreproachable in its respect for human rights. Excessive restrictions would be a gift to those who seek to instil fear, undermine democratic values, and hollow out the rule of law in France and in Europe.”³²³

³¹⁹ HRW, 'France: New emergency powers threaten rights' (25 November 2015) HRW Publications, 5.

³²⁰ Maurice (n 313).

³²¹ *ibid.*

³²² *ibid.*

³²³ HRW, 'France: New emergency powers threaten rights' (25 November 2015) HRW Publications, 3.

At first sight, France does not seem to have followed this piece of advice and has on the contrary decided to firmly act even if it means to target certain category of the population and therefore be in breach of its international obligations.

To conclude, France fulfilled the international requirements by issuing a statement of derogation. However, the statement cannot be considered as complete, as it was far from being precise and clear on which rights and freedoms would be derogated from. Even if the state of emergency and therefore freedom of expression seems to be valid, the notion of terrorism is still blurred. Indeed, terrorism cannot be considered as an immediate threat. Therefore, it seems that by allowing the state of emergency to happen on this ground, the UN gives its approval to a constant state of emergency. Indeed, terrorism seems to be a permanent threat. Some departments within the international organisations have raised concerns on that point. They feared that France might expand the state of emergency indefinitely – a thing that is already happening as France decided to expand the state of emergency until beginning of 2017. In the meantime, new measures are being implemented and are directly threatening freedom of expression. (Section 2)

Section 2: Problematic proportionality and non-respect of the non-discrimination principle of the new measures targeting freedom of expression

In November 2015, the French government decided to establish the state of emergency based on the 1955 law. However, in order to put this piece of legislation up to date, the government made a few amendments. New extensive powers were created in order to match the evolution of the society. The exponential increase of electronic devices has pressured the government to focus their new measures on surveillance (I). Freedom of expression protects also private communication and data on electronic devices. The new surveillance law allows the collection of data from personal electronic devices for an uncertain period of time, which can easily lead to abuse. However, few legal vacuums and the lack of meaningful safeguards seem to lead to abuses and discriminatory practices (II). Indeed, once again, measures target more specifically the Muslim community. Moreover, France has started using the measures given by the state of emergency to restrict freedom of expression during certain events with no causal link to terrorism.

I. Expansion of the surveillance measures

Freedom of expression is at stake today with the creation of new powers, which allow French authorities to conduct house searches, during which, they can copy personal data contained in personal electronic devices (A). Personal data is protected under freedom of expression. In that sense, collection of personal data puts at risk this freedom. Moreover French authorities can also interrupt online public communication service without strong legal base (B). These measures reinforce the legislation implemented after the *Charlie Hebdo* attack. Indeed, some of the measures from the 2014 counter-terrorism Act and the 2015 surveillance law have been enshrined in the 1955 law on the establishment of the state of emergency. French government has also gone further on some issues – such as the house search. The main flaw is the ill-defined or broad terms

used by the French government. It is therefore more difficult to challenge an action from the French authorities, as it may fall under a vague definition.

A. Allowing surveillance and the collection of personal data

By allowing the state of emergency and its expansion over the months, the French government has added new measures to the ones already in place in the 1955 law. Indeed, François Hollande declared that in preparing the law to extend the state of emergency, he had asked the parliament to adapt it to “suit new technologies and new threats.”³²⁴

House searches are already a tool for the police as they are mentioned in the criminal code.³²⁵ However, under the state of emergency, prefects can authorise house search based on vague reasons, less grave than those required by the criminal code.³²⁶ In that sense, French authorities can search any building or accommodation if there are “serious suspicions that the place welcomes people whose behaviour is a threat for security and public order.”³²⁷ House search is conducted by day or night and without any judicial warrant. The lack of safeguards here is clear and obvious. Abuses can therefore easily happen without public knowledge.

For the purpose of this paper, the main issue is not the house search per se, as it falls under the right of liberty. However, freedom of expression can be at stake during these house searches as authorities have the right to download and copy personal data saved on computers and other electronic devices.³²⁸ The alarming issue is the lack of meaningful safeguards and strict rules in order to control the use, retention and

³²⁴ Robert Hackwill, 'France's state of emergency - What will it mean for the French?' (*Euronews*, 19 November 2015) <<http://www.euronews.com/2015/11/19/france-s-state-of-emergency-what-will-it-mean-for-the-french/>> accessed 13 June 2016.

³²⁵ Articles 56, 76 et 92 du Code de procédure pénale (French code of criminal procedure).

³²⁶ Loi 55-385 du 3 avril 1955 relative à l'état d'urgence (n 249) article 11.

³²⁷ *ibid.*

³²⁸ HRW, 'France: New emergency powers threaten rights' (25 November 2015) HRW Publications, 3.

dissemination of data by the police.³²⁹ The law does not specify the path to follow with data collected under searches, which did not reveal any connection to wrongdoing.³³⁰

Article 11 of the 1955 law (modified in November 2015) does not define or even take into account the possibility for French authorities to copy personal data. The gap between lawfulness and abuse is therefore very tight as French authorities are acting under a legal vacuum. The law is also silent on the admissibility of materials found before a Court.³³¹ Proportionality of the measure is therefore questionable. According to the ECHR, the measure does not fulfil the ‘rule of law’ test and restrictions on freedom of expression under it cannot be considered as valid. There is no precise and clear legislation to frame the measure.

The international community, the Human Rights Committee and different NGOs have criticised and raised concerns over these measures. Amnesty International conducted several interviews with people who had been subjected to house searches. For each case, people expressed their surprise and their lack of understanding about the searches. Orlando, whose house had been searched on 1st December 2015 at 4am, described how the police copied all the data saved on hard drives and cell-phones even from his two children – aged 10 and 16 – who were at home during the search.³³² Amnesty International questions in its report the proportionality of such measures and the lawfulness of targeting children.

The Human Rights Committee stated:

“When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat and the necessity and proportionality of the specific action

³²⁹ Amnesty International, ‘Des vies bouleversées l’impact disproportionné de l’état d’urgence en France’ (2016) Amnesty International Publications, 11.

³³⁰ HRW, ‘France: New emergency powers threaten rights’ (25 November 2015) HRW Publications, 4.

³³¹ *ibid.*

³³² Amnesty International, ‘Des vies bouleversées l’impact disproportionné de l’état d’urgence en France’ (2016) Amnesty International Publications, 13.

taken, in particular by establishing a direct and immediate connection between the expression and the threat.”³³³

A legal vacuum regarding the copy of personal data exists today in France and the relevance of such practice in relation with the terrorist threat is not obvious. It cannot therefore explain the relevance of copying personal data from childrens’ electronic devices. Some house searches have led to nothing and therefore there is no direct and immediate connection to these individuals with terrorism.

The UN sent the French authorities a list of its concerns, including “the lack of clarity and precision of several provisions, surveillance laws and scope of restrictions to the freedom of expression and the right to privacy.”³³⁴ This has lead to the police practice of collecting and copying personal data without any clear underpinning legislation behind it.

The French government has gone further than the 2014 counter-terrorism Act. Indeed, under the latter, tapping of phones and emails were considered – which was already a violation of freedom of expression. It was already problematic, as tapping phones and emails was seen as the norm even if it violates article 10 of the ECHR. However, house search per se was not on the table yet. With these new measures, French authorities can sear houses and collect any personal data – taking a step further to the violation of article 10 of the ECHR. Legitimate aim seems hard to find, as house search are conducted on a mass spectrum. Anyone can have his or her house searched. Discriminatory component is not a legitimate reason to search a house – even though most of the victims of house search are from the Muslim community.

The government has also reinforced the shut down of online public communication based on ‘glorification of terrorism’ (B).

³³³ United Nations Human Rights Committee, ‘Concluding observations on the fifth report of France’ (21 July 2015) UN Doc CCPR/C/FRA/5 [10].

³³⁴ Lizzie Dearden, 'Paris attacks: France's state of emergency is imposing 'excessive' restrictions on human rights, UN says' (*The Independant*, 20 January 2016) <<http://www.independant.co.uk/news/world/europe/paris-attacks-frances-state-of-emergency-is-imposing-excessive-restrictions-on-human-rights-un-says-a6822286.html>> accessed 13 June 2016.

B. Interruption of online public communication service

Under the modified 1955 law, the Interior minister can take “measures to ensure the interruption of any only public communication service that incites the commission of terrorist acts or glorifies them”.³³⁵ Once again, the same lack of meaningful safeguards is obvious. As previously seen in chapter 3, glorifying terrorist acts is a term, which is broadly defined under French law. In that sense, measures targeting and allowing the shut down of communication services based on the “glorification of terrorist acts” could also hide another purpose, such as political one.

These measures are strongly related to surveillance. Indeed, in order to interrupt public communication services, French authorities have to be aware of their existence. However, Amnesty International has reminded France of the rule that surveillance of communications is already a breach of the right to privacy and freedom of expression from their interception on.³³⁶

Moreover, surveillance – through house searches or communication intercepts – was based on vague provisions, which leave a wide margin of appreciation to the authorities. Amnesty International strengthens the wrongfulness of the practice by publicly stating that proportionality was long exceeded.³³⁷ According to official statistics, French authorities searched 3 242 houses between 14 November 2015 and 29 January 2016.³³⁸ Following these searches, the Paris Public Prosecutor stated that 25 criminal investigations had been opened for alleged crimes in relation with terrorism.³³⁹ It means that in more than 3 200 cases, house searches – allowed under state of emergency - did not reveal any link with terrorist acts. Freedom of expression and the right to privacy in these cases were therefore breached for nothing and constituted flagrant abuses. Even

³³⁵ HRW, 'France: New emergency powers threaten rights' (25 November 2015) HRW Publications, 4.

³³⁶ Amnesty International, 'Préoccupations sur la proposition de loi relative aux mesures de surveillance des communications électroniques internationales' (2015) Amnesty International Publications, 5.

³³⁷ Amnesty International, 'Des vies bouleversées l'impact disproportionné de l'état d'urgence en France' (2016) Amnesty International Publications, 33.

³³⁸ *ibid.*

³³⁹ *ibid.*

though it was brought to light that these searches did not find any evidence of acts of terrorism, data collected by the French authorities are not known to have been deleted and must be stored somewhere.³⁴⁰

On the international stage, these measures have been also criticised. In reviewing France's compliance with the ICCPR, the UN Human Rights Committee stated:

“In enacting the new mass surveillance law, the French government has ignored warnings from the UN and human rights groups. The law grants excessively large powers of intrusive surveillance on the basis of broad and ill-defined aims, without prior judicial authorization and without an adequate and independent oversight mechanism”.

In that sense, the UN has reminded France of its international obligations. Once again, “broad and ill-defined terms” cannot amount to the fulfilment of the ‘rule of law test’ from the ECHR. Therefore, restrictions on freedom of expression based on those pieces of legislation are not valid.

The only exception to the surveillance measures is of human nature. Indeed, the modified 1955 law exempts Members of Parliament, lawyers, magistrates and journalists from house searches and collection of personal data.³⁴¹ This double standard seems at first glance unfair even if it can be explained as this category of citizens' deal with sensitive information in their field of expertise. However, this situation reinforces the feeling among the population that different categories exist. Nowadays, it may seem hazardous to reinforce such a feeling in a society where it has become the norm to “finger point” your neighbour.

³⁴⁰ Amnesty International, ‘Des vies bouleversées l’impact disproportionné de l’état d’urgence en France’ (2016) Amnesty International Publications, 36.

³⁴¹ Buchanan (n 2)

To conclude, abuse can clearly be seen in the new surveillance measures and the shut down of websites. What is striking is the lack of independent safeguards in order to control the measures. Being able to collect and store personal data is hazardous and the purpose behind it is too blurred. Even if the French government states that it did not plan to do anything with the collected data, it does not mean that it will always be the case. One day, they may use it for a different purpose than the fight against terrorism. This is a clear breach of freedom of expression and the right to privacy. The legislation being vague and too broad cannot also fulfil the criteria of the ECHR for restrictions to be valid. In that sense, all the restrictions on freedom of expression based solely on this legislation should be quashed. Moreover, these measures have mainly targeted Muslim people and have been used for political purposes (II). In that sense, they are in breach of article 14 of the ECHR.

II. Discriminatory component of the exceptional measures

The new measures, mentioned in this chapter, have been implemented in a way, which directly targets the Muslim community (A). Once again, and in a similar pattern that the measures implemented after the *Charlie Hebdo* attack, none of the measures explicitly mention and target a specific group. However, in practice, it is obviously the case. The exceptional powers coming from the establishment of the state of emergency have also been used to restrict freedom of expression in some events. The main purpose of these restrictions was not the fight against terrorism but rather a political will – such as prevent political demonstrations during the Conference of Parties (COP) 21 on UN Framework on Climate Change (B).

A. Measures targeting a particular group

Two specific groups suffered from the exceptional measures taken under the state of emergency. Muslim people suffered and are still suffering from discrimination (1). The non-discrimination principle is one of the international obligations of France. The Muslim community should not see its freedom of expression or any other right breached because of discriminatory measures. Moreover, political opponents have also suffered from the ban of certain demonstrations (2). In that sense, freedom of expression was restricted based on the state of emergency even though ecological demonstrations have no causal link with terrorism. One can say that during state of emergency, demonstrations can be banned because of the risk to the public order and the threat of a terrorist attack. However, it has been showed that not all demonstrations were banned. In that sense, the objectivity and fairness of the government can be questioned.

1. The 'Anti-Muslim' measures

International instruments reinforce the fact that the fight against discrimination cannot be forgotten in case of exceptional circumstances. Article 4(1) of the ICCPR states that derogating measures from the rights guaranteed by the Covenant should not

lead to discrimination based only on race, colour, sex, language, religion or social origin. This interdiction is *jus cogens*.³⁴² Moreover, measures established under the state of emergency should not allow direct or indirect discrimination on other illegal reasons.³⁴³ Article 15 of the ECHR also states that derogation should not be used to undermine the value of the rights and freedoms enshrined in the convention. Therefore article 14 of the ECHR should not be forgotten during the state of emergency.

On the national stage, one of the requirements to implement exceptional measures is that French government should respect the anti-discriminatory rule. Even though in theory and on the paper, these measures do not target any specific group, in practice, it is striking that they are targeting people from the Muslim religion.³⁴⁴ The French human rights ombudsperson (*“défenseur des droits”*), Jaques Toubon has received over 40 complaints about abuse committed under the emergency measures. He stated:

“In reality these measures are aimed at a specific movement and at very observant Muslims. That can give rise to a feeling of injustice and of defiance towards public authorities.”³⁴⁵

The Collective Against Islamophobia in France (CCIF), which has assisted the HRW body in its report, had documented 180 cases of abusive house arrests and raids.³⁴⁶ Muslim individuals were targeted on the basis of vague criteria, including their religious practices described by the authorities as “radical”.³⁴⁷ In that sense, French authorities were able to label these people “a threat to public order or to national security”.³⁴⁸ The situation constitutes a breach of freedom of expression but also freedom of religion or

³⁴² Ulf Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' [2008] 18(5) EJIL.

³⁴³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, article 4(1).

³⁴⁴ Amnesty International, 'Des vies bouleversées l'impact disproportionné de l'état d'urgence en France' (2016) Amnesty International Publications, 18.

³⁴⁵ HRW, 'France: abuses under state of emergency' (4 March 2016) HRW Publications, 4.

³⁴⁶ *ibid.*

³⁴⁷ Amnesty International, 'Annual Report on France' (2016) Amnesty International Publications < <https://www.amnesty.org/en/countries/europe-and-central-asia/france/report-france/>

> – Accessed 12 June 2016.

³⁴⁸ *ibid.*

belief. The lack of valid criteria to target Muslim people takes us back to the darkest hours of democratic society and its history. Indeed, it seems that France has adopted the global and threatening idea that all Muslims are terrorists. Therefore starting from this statement, every measure would be justified according to French government.

This wrongful statement has led to house searches of exclusively Muslim people and also mosques and other Muslim prayer places.³⁴⁹ In some cases, French authorities have shut mosques down without any specific proof of motives, except the large umbrella “threat to public order or to national security. Unfortunately these measures have fuelled the growing Islamophobia in France, as now people have seen that even the government was targeted the Muslim community (2).

2. The growing of Islamophobia

Islamophobia has grown in France since the beginning of 2015. The *Charlie Hebdo* attacks saw the emergence of stronger actions against Muslims. Western Europe researcher at Human Rights Watch, Izza Leghtas has showed his concern:

“In a context of growing Islamophobia, the French government should urgently reach out to Muslims and give them assurances that they are not under suspicion because of their religion or ethnicity”.³⁵⁰

Indeed, France has been infected by islamophobic ideas over the last couple of years. The FRA report recorded a 110% increase of Islamophobic incidents between January 2014 and January 2015.³⁵¹ Therefore the terrorist attacks from November 2015 have fuelled the extreme far right party and its proponents. As not so long ago in French history, French citizens have started to stigmatise Muslim people, hiding themselves behind the ‘moral duty that every French citizen should have’. What is even more

³⁴⁹ HRW, ‘France: abuses under state of emergency’ (4 March 2016) HRW Publications, 4.

³⁵⁰ HRW, ‘France: abuses under state of emergency’ (4 March 2016) HRW Publications, 5.

³⁵¹ FRA, ‘Reactions to the Paris attacks in the EU: fundamental rights considerations’ (2015) FRA report January 2015, 4.

frightening is the lack of response from the government to prevent these actions. French authorities have rather acted in the opposite direction by allowing citizens to call a toll-free hotline called “Stop Jihadism”.³⁵² Anyone can call this number and anonymously report alleged jihadist cases.³⁵³ By allowing people to hide their identity, French authorities are likely to commit abuses lead by wrongful information. Anyone who has a grudge against someone can report him or her to the authorities. In a state of emergency context, it might seem quite inappropriate to base exceptional measures, actions and powers on inaccurate information.

Furthermore, it is a striking breach of the anti-discriminatory principle that frames the use of exceptional measures. The HRW body has strengthened the need of France to remember its basic standards:

“Freedom, equality and fraternity have been badly damaged in the weeks since the November attacks. France should live by those words and restore their meaning.”³⁵⁴

To conclude, France does not respect the non-discrimination principle. In that sense, it clearly breaches article 14 of the ECHR. Moreover, France has used the establishment of the state of emergency to target random demonstrators with no causal link to terrorism (B). The legitimate aim of ‘national security’ does not seem legit and applicable in these instances.

³⁵² Amnesty International, ‘Des vies bouleversées l’impact disproportionné de l’état d’urgence en France’ (2016) Amnesty International Publications, 18.

³⁵³ *ibid.*

³⁵⁴ HRW, ‘France: abuses under state of emergency’ (4 March 2016) HRW Publications, 5.

B. Exceptional measures targeting actions with no link with terrorism

Multiple expansion of the state of emergency has led to a kind of ‘normalisation’ of the exceptional measures, which are now targeting individuals with no link with terrorism. Government has used the term “possible threat” to explain why some demonstrations needed to be banned. Demonstrations are also a form of freedom of expression. Therefore banning demonstrations with no proper grounds constitute a violation of article 10 of the ECHR. Indeed, it seemed that the ban only targets demonstrations of opponents to the French government (1). The exceptional measures can also threaten future public demonstration, as sport tournaments (2). These tournaments are a way for French citizens to freely express their opinions. Once again, restrictions can happen if strictly justified. But it seems that the justification given by the French authorities do not explain why the tournaments or demonstrations are an issue. Freedom of expression is clearly at stake today, as demonstrations are one of the democratic ways for citizens to express their opinion.

1. The ban of demonstrations during COP 21

Freedom of expression has been also diminished for a complete other reason than terrorism. Indeed, France hosted the annual Conference of Parties (COP) 21 on UN Framework on Climate Change from 30 November 2015 to 12 December 2015. This event, also known as the 2015 Paris Climate Conference, attracted close to 50,000 participants including 25,000 official delegates from government, intergovernmental organisations, UN agencies, NGOs and civil society.³⁵⁵

The conference started only 17 days after the attacks that struck France – Paris in particular. French authorities have therefore warned the different organisations that march for the environment, which had been planned to coincide with the COP21, will

³⁵⁵ COP 21, 'COP - What's it all about?' (*COP21Paris*, December 2015) <<http://www.cop21paris.org/about/cop21>> accessed 13 June 2016.

not be authorised for security reasons.³⁵⁶ They based their actions on emergency measures in order to control a potential threat to public order with no link with the state of emergency.³⁵⁷ The government issued a statement, declaring:

“In order to avoid additional risks, the government has decided not to authorise climate marches planned in public places in Paris and other French cities.”³⁵⁸

Even if demonstrations can be banned under state of emergency for grounded reasons, France has shown that in some instances, it was willing to ban and in others not. Indeed, France allowed strikes to happen even if the same threat was present. However, strikes are mostly full of possible electors and, as presidential elections are planned to be next year, some people have seen that as a gesture from the government to ease the tension with its electors. Transparency is therefore not present and abuse can be suspected.

Amnesty International raises concerns that French authorities will target other individuals with no link with terrorism but only seek to legally enjoy their freedom of assembly and expression.³⁵⁹ Environmental activists wanted to put pressure through the marches on governments to cut greenhouse gas emissions.³⁶⁰ According to Amnesty International, these measures are dangerous, especially when they are “progressively normalised by the multiple expansion of the state of emergency.”³⁶¹ The UN added that such measures do not seem to fulfil “the fundamental principles of necessity and proportionality.”³⁶²

³⁵⁶ Ben Quinn, 'COP21 climate marches in Paris not authorised following attacks' (*The Guardian*, 19 November 2015) <<https://www.theguardian.com/world/2015/nov/18/cop21-climate-marches-paris-attacks>> accessed 13 June 2016.

³⁵⁷ Amnesty International, 'Des vies bouleversées l'impact disproportionné de l'état d'urgence en France' (2016) Amnesty International Publications, 19.

³⁵⁸ Quinn (n 356).

³⁵⁹ Amnesty International, 'Des vies bouleversées l'impact disproportionné de l'état d'urgence en France' (2016) Amnesty International Publications, 19.

³⁶⁰ Quinn (n 356).

³⁶¹ Amnesty International, 'Annual Report on France' (2016) Amnesty International Publications <<https://www.amnesty.org/en/countries/europe-and-central-asia/france/report-france/>> – Accessed 12 June 2016.

³⁶² Dearden (n 334).

French authorities did not only ban protest marches, they also imposed forced residency on 26 environmental activists on the basis of their possible engagement in violent demonstrations.³⁶³ However, these individuals had never received solid grounds on which was based the decision of forced residency. These decisions seem therefore only discretionary and constitute a clear breach of freedom of movement, expression and assembly.

Greenpeace France executive director, Jean-François Juilliard, expressed that people, who were expected to demonstrate in Paris, will not be “silenced” and that:

“We will find new, imaginative ways to ensure our voices are heard in the UN conference centre and beyond.”³⁶⁴

The ban of demonstrations and marches as well as the forced residency decisions raised huge criticism among NGOs and abroad. In that sense, Greenpeace reported several marches for the climate, for Paris and for humanity in hundreds of towns and cities across the world.³⁶⁵

The Coalition Climate 21 organisation denounced a way for the French government to keep the COP21 on the political stage and to avoid disturbances coming from grassroots people.³⁶⁶ The organisation strengthened its will to find “an alternative form of citizen mobilisation to demonstrate that COP21 would not just be left to the negotiators.”³⁶⁷

For those who decided to breach the ban of demonstrations, arrests were the answer. Indeed, over ten days, police arrested 208 people during protests, and 174 among them

³⁶³ Amnesty International, ‘Annual Report on France’ (2016) Amnesty International Publications < <https://www.amnesty.org/en/countries/europe-and-central-asia/france/report-france/>.

> – Accessed 12 June 2016.

³⁶⁴ Quinn (n 356).

³⁶⁵ Dearden (n 334).

³⁶⁶ Quinn (n 356).

³⁶⁷ *ibid.*

were kept in custody for the remaining days before the end of the COP21.³⁶⁸ They were released after 12 December 2015 and are not facing any charges.

Unfortunately for freedom of expression, what seems an exceptional measure and partly justified by the recent attacks is becoming more and more common. As the state of emergency is still expanding over the months, French authorities seem to be willing to control other major events and the demonstrations that come with them (2).

2. Euro and Tour de France

On 23 May 2016, the French Assembly agreed to extend the state of emergency until the end of July. The main purpose behind this decision is to keep the high attention during the two major events, which will occur during summer in France: the Euro 2016 football championship in June and the Tour de France in July. The state of emergency will have been in force for more than eight months. Even if national security is still in danger today, it seems disproportionate to remain under a state of emergency. The Tour de France takes place every year and numerous football tournaments have been played before; all of which were carried out without a state of emergency measures. France can always use its Vigipirate plan, which is France's national security alert system. What seems and should be temporary at the beginning seem to become more and more permanent.

France is hosting the Euro 2016 football championship from June 10. Prime Minister, Manuel Valls, declared that this event is considered as a "security priority".³⁶⁹ He stated:

³⁶⁸ Bianca Jagger, 'A state of emergency in France: Draconian measures threaten civil liberties' (*Huffington Post*, 30 November 2015) <https://www.huffingtonpost.com/bianca-jagger/post_10535_b_8682788.html> accessed 13 June 2016.

³⁶⁹ Angelique Chrisafis, 'France seeks to extend state of emergency until end of July' (*The Guardian*, 20 April 2016) <<https://www.theguardian.com/world/2016/apr/20/france-seeks-to-extend-state-of-emergency-until-end-of-july>> accessed 13 June 2016.

“Faced with an event this big [...] which must take place in conditions of security and which at the same time should be a celebration [...] we have to ensure security. The state of emergency cannot be permanent but for these big events [...] we have to prolong it.”³⁷⁰

French authorities have warned that after the Belgian attacks; one could not exclude planned attacks on the football tournament. However, a French police officer replied that it was “hardly a scoop” as huge events are always under scrutiny to avoid such attacks – even before the state of emergency.³⁷¹ The tournament is taking place in ten host cities across France, with the opening and final games held at the Stade de France. As this same stadium was a target of the November attacks, the security forces will be deployed there. However, it has not been clearly stated which measures will be taken and if the same measures will be applied both in Paris and in province. Comparing prior games happening in province and in Paris, security measures are likely to be strengthened only in Paris.

Football tournaments will not be the last events happening in France. The danger now is to keep expanding the state of emergency using these kind of events as an excuse. One can expect French authorities to ban demonstrations during those events as they did during the COP 21. To be consistent, they should also avoid gathering of individuals to diminish the risks. However, since early May, trade unions have called upon citizens to demonstrate against the Labour Bill. For nearly four weeks, hundreds of thousands of protestors have had meetings on the streets. Strangely, one year from the presidential elections, the French government had not used the state of emergency to ban these kinds of gatherings. Double standard seems to exist when dealing with the banning of demonstrations. However, the same government will prolong the state of emergency in order to protect citizens during two events. The government did not mention the tennis Roland Garros tournament, which apparently did not need specific protection.

³⁷⁰ Chrisafis (n 369).

³⁷¹ *ibid.*

United-Kingdom has not declared a state of emergency in order to host the tennis Wimbledon tournament. Moreover, the Tour de France will, this year, travel to both Spain and Switzerland and once again these countries have not showed the will to establish a state of emergency in order to protect the race.

To conclude, France is now using the state of emergency at its advantage. Whenever and wherever it fits its plan, restrictions on freedom of expression can be created.

Conclusion

*“There can be no such thing as public liberty without freedom of speech” –
Benjamin Franklin*

To conclude, freedom of expression is at stake nowadays in France. Its main threat comes from the endless state of emergency, which was at the beginning supposed to be temporary. As I write these words, France has been under a state of emergency for more than eight months. Concerns are everywhere and from everyone, as the end of the state of emergency is far from being known. The Lawyers’ Trade Union has warned: “threatening fundamental rights to fight terrorism precisely what terrorists expect us to do.”³⁷² In that same trend, the Journalists’ Trade Union worries that “security is used today to justify pointless and dangerous measures for citizens, democracy and especially for freedom of expression and information.”³⁷³

Moreover, the constitutional council seems to have given up its safeguard role. Validating the surveillance law in 2015 without pointing out the obvious lack of precision in the terms or measures going beyond the necessity and proportionality proves that the council only goes towards one direction: the governmental one. Mid-2015, the council added that it refuses to guarantee the conformity of legislation or of the French Constitution with the international obligations of France regarding human rights.³⁷⁴ The relevance of such a council is at the end, questionable. Of course, recourses can be brought to the European Court of Human Rights. As France ratified the ICCPR, the Human Rights Committee can also be included in the debate. However, its role is purely political and international pressure has already been witnessed as pointless in France. Moreover claims would take years before reaching a decision. Individuals will have to wait between eight to 10 years before having a ECtHR judgement – and only in the case where individuals would file a complaint now in the French lowest courts.

³⁷² Régibier (n 282).

³⁷³ *ibid.*

³⁷⁴ *ibid.*

France has managed to turn a blind eye to criticisms. Even the United Nations has failed to put some sense into the French government's mind. The UN has clearly stated that the state of emergency in France was imposing "excessive and disproportionate restrictions on fundamental human rights."³⁷⁵ The five Special Rapporteurs even tried to remind France of its international obligations, when stating:

"Ensuring adequate protection against abuse in the use of exceptional measures and surveillance measures in the context of the fight against terrorism is an international obligation of the French State."³⁷⁶

The common point amongst the multitude of criticisms is the failure of France to respect the fundamental principles of necessity and proportionality. In that sense, the international community recognises the difficult context and the need for France to act. The disputable point is how France decided to react.

On a domestic level, the CNCDH points out that the state of emergency "inherently harms public liberties" and that it must remain temporary to prevent the normalisation of the exceptional measures.³⁷⁷ The CNCDH is preaching for a rapid return to normality. In the mean time, French people cannot do much except wait and hope for a short outcome. Let's hope that the French authorities will remember their international obligations and duties before they cross the line and commit too many abuses.

On 14 July 2016, a terrorist attack happened in Nice. This attack occurred at the end of the fireworks on the '*promenade des anglais*'. The state of emergency or the presence of numerous police officers did not manage to avoid it. Nevertheless, the French government decided to expand the state of emergency until beginning of 2017. The end of the state of emergency and the return to normality seem to have pulled away.

³⁷⁵ Dearden (n 334).

³⁷⁶ *ibid.*

³⁷⁷ Hackwill (n 324).

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Appendix

- **International Covenant on Civil and Political Rights (ICCPR)**

Article 4

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary- General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

- **European Convention on Human Rights (ECHR)**

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15 – Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 17 – Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Abstract

Freedom of expression has been targeted twice in 2015 in France. The first time, early 2015, occurred when terrorists attacked the Charlie Hebdo newspapers after different publications of the Prophet Mohamed. In the wake of that event, French authorities made a paradox decision when they choose to limit freedom of expression over the protection of that same freedom. They have therefore established and put into force different measures with the aim to control freedom of expression. After acknowledging the right of Charlie Hebdo to publish cartoons of Prophet Mohamed under freedom of expression, it has suddenly appeared that not everyone can enjoy this freedom on an equal basis. Measures have been targeted ethnic religious groups, children and even comedians. The motto “I am Charlie” seems to have long been forgotten as every citizen has started to point finger at his neighbour.

The second traumatic event occurred at the end of 2015 when terrorists attacked random places across Paris. It has lead to the establishment of a state of emergency in mid-November and which continues at least until the end of October. This long run state of emergency has had huge impacts on freedom of expression. New surveillance law has emerged with the possibility to collect personal data and correspondence. Once again, these measures have mostly targeted ethnic religious groups but also political opponents to the French government.

After studying these measures, one question remains: Are they really proportionate and relevant to prevent another attack? The answer has two folds. The first one is that the measures are often based on solid legal rules. However, and here is the second one, it leaves a wide margin of appreciation to the authorities, leading to abuses.

Key words:

Freedom of expression
France
State of emergency
Terrorist threats

Zusammenfassung

2015 wurde die Meinungsfreiheit in Frankreich zwei Mal angegriffen. Zum ersten Mal geschah es Anfang des Jahres, als Terroristen die Zeitungsredaktion von Charlie Hebdo attackierten nachdem sie mehrere Mohamed Karikaturen veröffentlicht hatte. Die Folge davon war, dass die Französischen Autoritäten eine paradoxe Entscheidung trafen, als sie beschlossen die Meinungsfreiheit einzuschränken anstatt sie zu schützen. Deshalb ergriffen sie verschiedene Maßnahmen mit dem Ziel die Meinungsfreiheit zu kontrollieren. Nachdem sie zuerst das Recht von Charlie Hebdo auf die Veröffentlichung der Karikaturen anerkannt hatten, wurde plötzlich deutlich, dass nicht jeder dieses Recht gleichwertig in Anspruch nehmen kann. Die Maßnahmen richteten sich gegen ethnische und religiöse Gruppierungen, gegen Kinder und sogar gegen Humoristen. Das Motto „Ich bin Charlie“ scheint schon lange vergessen zu sein da alle Bürger damit anfangen mit dem Finger auf andere zu zeigen.

Das zweite traumatische Ereignis geschah Ende 2015 als Terroristen zufällige Ziele quer durch Paris angriffen. Das führte Mitte November zur Einführung eines Ausnahme Zustands der mindestens bis Ende Oktober andauern wird. Diese lange Dauer des Ausnahme Zustands hatte gravieren Folgen auf die Meinungsfreiheit. Eine neue Gesetzgebung würde eingeführt und ermöglicht es persönliche Daten und Korrespondenz zu sammeln. Diese Maßnahmen richteten sich aufs Neue gegen ethnische und religiöse Gruppierungen aber auch gegen politische Gegner der Französischen Regierung.

Nach einer Auseinandersetzung mit diesen Maßnahmen bleibt eine Frage offen: sind diese Maßnahmen tatsächlich verhältnismäßig und relevant um einen neuen Angriff vorzubeugen? Denn auch wenn diese Maßnahmen sich auf eine solide Rechtsgrundlage stützen, geben sie den französischen Autoritäten doch einen weiten Ermessensspielraum, der zu Missbrauch führt.

Was ist Meinungsfreiheit? Ohne die Freiheit zu beleidigen, hört sie auf zu existieren.
Salman Rushdie

Stichworten:

Freiheit der Meinungsäußerung
Frankreich
Notfallsituation
Terroristische Bedrohungen