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Judicialization of Anti-terrorism System in France

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Abstract

The centralization, depoliticization and empowerment of judges in the French counter-terrorism system is an effective measure against terrorism, despite the fact, that it is controversial. The article will discuss the powers of the leading judicial bodies in the fight against terrorism, their advantages and disadvantages. The article emphasizes the thesis of the effectiveness of the anti-terrorism system in France, even though it is based on complex principles.

Streszczenie

Judykalizacja systemu antyterrorystycznego we Francji

Centralizacja, odpolitycznienie i wzmocnienie uprawnień sędziów we francuskim systemie antyterrorystycznym jest skutecznym środkiem walki z terroryzmem, mimo, że budzi wiele kontrowersji. W artykule zostaną omówione uprawnienia głównych or-

ganów sądowych w zakresie walki z terroryzmem, ich zalety i wady. Artykuł akcentuje tezę o skuteczności systemu antyterrorystycznego we Francji, mimo, iż opiera on się na twardych zasadach.

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I. Introduction

The fight against terrorism in France is based on a centralized judicial apparatus that seems to function well. However, it is sometimes criticized for having overly broad powers for judges. The extensive legislative achievements and constant updating of regulations result from experience and the evolution of terrorist threats.

In the 1990s, the French struggled with both left- and right-wing terrorism stemming from the Algerian War of Independence. In turn, they experienced attacks from Palestinian terrorists in the 1970s. In the 1980s, the state had to contend with the activity of leftist and separatist groups. During this period, Islamic terrorism also entered the scene. And while the French authorities were already quite familiar with the problem of leftist and separatist terrorism, they had little experience with international terrorism¹. Indeed, this period was central to creating a counter-terrorist judicial apparatus. Following the law of 9 September 1986,² a centralized counter-terrorism system was created, with specialized prosecutors and investigative judges working closely with the intelligence services³. Depoliticizing this system was designed to make it more effective. Since then, the approach to counterterrorism has become more radical due to the high number of attacks and fatalities. According to the *Global Terrorism Index*, as many as 138 attacks occurred in France

¹ J. Shapiro. B. Suzan, *The French Experience of Counter-terrorism*, "Survival. The International Institute for Strategic Studies" 2003, vol. 45, no. 1, pp. 68–69.

² Loi no. 86–1020 du 9 September 1986 relative à la lutte contre le terrorisme et aux atteintes à la sûreté de l'Etat.

³ *How the November 2015 attacks marked a turning point in French terror laws*, <https://tiny.pl/wm8dj> (12.08.2022).

between 2015 and 2021⁴. It is worth noting that current terrorist threats in France have undergone a certain reconfiguration. On the one hand, Islamic terrorism and individuals who identify with the ideology of jihadist groups are a threat. The problem in this respect is radicalized citizens inside the state (radicalization occurs most often on the Internet, in prisons and in places of religious worship, i.e. places that are conducive to indoctrination), as well as the problem of returning Foreign Fighters Terrorists (FFT) from Syria and Iraq, i.e. French citizens who have traveled to areas subject to the activities of the so-called Islamic State organization to support their fight⁵. Additionally, separatist terrorism remains a threat, while incidents from right-wing and left-wing groups are less common.

The article's main objective will be to analyze the anti-terrorism system in the context of the role and powers of French judges in the fight against terrorism. The author will try to answer the question: does such a system lead to the abuse of power? The method of analysis will also permit validation of the thesis regarding the effectiveness of the anti-terrorist system in France.

II. Centralization and Judicialization of Anti-Terrorism Policy

In the early 1980s, the fight against terrorism in France was not centralized or institutionalized within government structures; hence it was poorly coordinated. At least seven police forces in four cabinet ministries had different and overlapping responsibilities in terrorism-related matters. To make matters worse, these agencies rarely met, distrusted and even misled each other. In the judicial sphere, terrorism cases were handled by local prosecutors and investigators in the places the attacks took place. Unfortunately, terrorist attacks were rarely isolated incidents, and the specific location of the attack had little relevance to its investigation or prosecution. With limited contact between prosecutors from different jurisdictions working on related cases, the ability to communicate information and discover evidence was impaired. The Act of 1986, mentioned above, created several new bodies within the French government that specialized in terrorism-related issues and coordinated and

⁴ *Global Terrorism Index*, <https://tiny.pl/wm8dl> (20.08.2022).

⁵ A total of 1,300 such people left.

centralized the terrorism system within the French government⁶. It was not an isolated action, given that in 1963, during the escalation of terrorism associated with the Algerian War of Independence, the government established a similarly centralized system, setting up an entirely new and special court called the State Security Court. Its drawback was that it was entirely outside the regular French justice system and thus was often seen as an instrument of political oppression, particularly by the left-wing political opposition⁷. Instead of creating an entirely new court, the 1986 law centralized terrorism proceedings in the existing Paris District Court and allowed ordinary judges to decide the outcome of cases. Under this system, the local prosecutor decides whether a crime committed in the geographic area for which it is responsible is related to terrorism, based on the definition of terrorism. If an incident corresponds to this definition, they refer the case to specialized judges within the Paris District Court. The system provides a way around the problem of the small size of local prosecutors' offices and minimizes the danger of reprisals against local officials (an issue that has particularly affected separatist terrorist groups in Corsica)⁸.

The centralization of the anti-terrorism system in France has made things much easier and has undoubtedly led to closer cooperation between the various bodies. The police, prosecutors and judges are geographically centralized in Paris and functionally specialized in terrorism-related matters. Thus, any terrorist attack carried out on French soil or where French interests abroad are affected is investigated and prosecuted by the judicial offices in Paris. It is also worth mentioning that judges cooperate with intelligence agencies in cases involving terrorism, particularly Islamic or separatist terrorism. One such agency is the General Directorate for Internal Security (Fr. *Direction générale de la sécurité intérieure*, DGSI), and its peculiarity is that it has a dual competence: judicial and intelligence⁹. It also coordinates investigations into acts committed abroad against French interests (embassies, French victims abroad, etc.). The DGSI is the only intelligence agency in the French Republic that works directly with judicial institutions, including the judicial police.

⁶ J. Shapiro. B. Suzan, *op.cit.*, p. 75.

⁷ I. Stoller, *Procureur à la 14e Section*, Paris, 2002, p. 107.

⁸ J. Shapiro. B. Suzan, *op.cit.*, p. 77.

⁹ *Direction Générale de la Sécurité Intérieure*, <https://tiny.pl/wm8ds> (23.08.2022).

This is aimed at protecting intelligence data collected by the agency, which cannot appear in court proceedings due to its classified status¹⁰.

This particular anti-terrorism system, centralized and based on the judicial apparatus, has many advantages, one of which is that it has allowed the creation of a seemingly small but specialized division of prosecutors and investigating judges who deal exclusively with terrorism-related cases and who are present at all stages of the proceedings: prosecution, investigation and execution of sentences.

III. The role of investigating judges in the fight against terrorism

The investigating judge (French: *juge d'instruction*) acts as both prosecutor and judge. The prosecutor is not the prosecution or defense counsel but is tasked with conducting an impartial investigation to determine whether a prosecutable crime has been committed. Thus, it is entrusted with discovering both incriminating and exculpatory evidence. The investigating judge may order arrests and wiretaps, searches of premises, injunctions to appear as witnesses or present documents, and demand that the police conduct any lawful inspection. When a suspect is brought before an investigating magistrate, the magistrate may order the person's release without charge or place him under formal investigation if there is solid and consistent plausible evidence that the suspect may have participated, either as a perpetrator or an accomplice, in the perpetration of the crimes under investigation. The judge may, in such circumstances, ask the prosecutor to transfer the detainee to pretrial detention¹¹. Judges can obtain information from intelligence agencies and through informal discussions with the police¹².

Investigating judges are supposed to be impartial arbitrators; they are not accountable, at least in theory, to any political authority and are given rel-

¹⁰ A. Olech, *Unique solutions of the French Republic in the fight against terrorism and radicalization*, 12-article_Olech_Terroryzm_1-2022.pdf, s. 131 (23.08.2022).

¹¹ *Counterterrorism Laws and Procedures in France. The Judicial Preemptive Approach*, <https://tiny.pl/wm8fm> (28.08.2022).

¹² O. Dutheillet de Lamothe, *French Legislation Against Terrorism: Constitutional Issues*, November 2006 <https://tiny.pl/wm8dz> (29.08.2022).

actively broad powers to initiate judicial investigations and issue search and wiretap warrants, including subpoenas. The creation of a system of specialized investigating judges in French law has helped to depoliticize the counterterrorism machine, although this may not have been the intention of the legislation. With the investigating judges becoming more visible to the public, they have also become more capable of ensuring their statutory independence from political authorities, if necessary, through recourse to the media. As a matter of fact, over time, the investigating judges have gained a public reputation as intransigent opponents of terrorism, a stark contrast to the timid image of politicians in the 1980's¹³. They are currently seen as a body of independent and relentless opponents of terrorism in all its forms.

IV. Role of the National Anti-Terrorist Prosecutor's Office

The law of 23 March 2019¹⁴ established the National Anti-Terrorist Prosecutor's Office (Fr. *Parquet National Antiterroriste*, PNAT), headed by the French anti-terrorist prosecutor at the Paris District Court. Although its remit is national, it also relates to international cooperation in the fight against terrorism. The PNAT has jurisdiction over cases such as crimes against humanity, war crimes, specific crimes, terrorism, distribution of weapons of mass destruction and their means of delivery, torture and kidnapping. The public prosecutor has particular authority over the most severe crimes, taking over such cases from local prosecutors' offices¹⁵. If a crime is potentially terrorist in nature, all prosecutors must approach the PNAT to assess whether the latter should handle the case. This allows the Paris District Court to exercise de facto exclusive jurisdiction over the most severe terrorist crimes and offenses (murder related to a terrorist operation, terrorist conspiracy, individual terrorist operation, etc.).¹⁶ Furthermore, information on actions taken by other

¹³ J. Shapiro. B. Suzan, *op.cit.*, pp. 78–79.

¹⁴ Loi no 2006–64 du 23 janvier 2006 relative à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers, <https://tiny.pl/wm8fq> (23.08.2022).

¹⁵ A. Olech, *op.cit.*, pp. 142–143.

¹⁶ Council of Europe Committee of Experts on Counter-Terrorism (Cdct). Profiles on Counter-Terrorist Capacity, France: Profiles France 2021 CDCT.pdf (24.08.2022), p. 4.

authorized entities (in compliance with the Law on Combating Terrorism) is transferred to the PNAT. Judges specialising in investigating terrorism and extremism perform their duties at the PNAT. The establishment of the National Anti-Terrorism Prosecutor's Office is part of President Emmanuel Macron's strategy to centralize the fight against terrorism by ensuring that an anti-terrorism prosecutor properly coordinates the agencies to enable faster and more effective action in the event of a threat¹⁷. The establishment of PNAT is a legal response to the continuing terrorist threats in France. It is an autonomous and specialized structure designed to have a visible presence at national and international levels.

V. Summary

Judicialization of the anti-terrorism system in France has many advantages. Centralization has contributed to improved coordination of the agencies and faster flow of information. In turn, strengthening the powers of judges has led to the creation of a specialized unit of anti-terrorist judges, who are able to prevent terrorist attacks through their extensive competences. Investigating judges can initiate investigations and use their knowledge and judicial tools before terrorist attacks occur, thus creating the capacity to punish those responsible for terrorist attacks post factum and prevent them entirely. That being said, according to the judges, arresting many people makes it possible to conduct corroborated interrogations to preserve knowledge of the constantly evolving networks¹⁸. Accordingly, we are also referring to pre-emptive actions against any attacks.

Undoubtedly, French legislation has created a veritable judicial strike force against terrorist threats. The greater competencies of judges and access to police and intelligence information have made it easier for judges to understand and uncover networks operating within the country and their international connections. Moreover, they also have access to all information that may be related to suspected terrorists. A non-hierarchical counter-terrorism system is an advantage; as such, a system works more efficiently and is adapted

¹⁷ A. Olech, *op.cit.*

¹⁸ Zob. J. Shapiro. B. Suzan, *op.cit.*, p. 85.

to modern terrorist threats, which are also similar. In turn, the depoliticisation of the system means that politicians are not held accountable if something goes wrong. So does such a system lead to abuse? In theory, it should not. In terms of obtaining and accessing information, the judiciary inspires more confidence in protecting this data than any other body. So this is an advantage, as there is no fear of misusing the data.

One frequent criticism is the lack of an organ to control the actions of anti-terrorism judges and that the 1986 and 1996 anti-terrorism laws give them excessive leeway to decide what constitutes terrorism or the intent to commit it¹⁹. The current legislation, which allows anti-terrorism judges to hold a terrorist suspect in police custody for six days (compared to 48 hours for most ordinary offences) without access to a lawyer for two days and to hold a defendant in pre-trial detention for three years (compared to two years under the common law)²⁰ should be seen as a flaw. It is also alleged that the French anti-terrorism system is based solely on criminal and administrative law. Even in matters directly related to the armed conflict in Syria, the French legal system refers neither to international humanitarian law nor international criminal law framework. Alternately, administrative and criminal law is increasingly expanded to include the perpetration or prevention of all kinds of acts, with an ever-increasing spectrum of offenses and penalties. There is no clear distinction in the treatment of those who have committed (or are suspected of having committed) violent crimes and those who participate in armed conflict and violate international humanitarian law²¹. The reason for this is that the proceedings are conducted in the context of state security.

It is without a doubt that the French anti-terrorism system is effective, although controversial. It should be noted, however, that all laws were adopted gradually, in line with the growing terrorist threats of various backgrounds and characters. What count as emergency measures in other countries is already standard practice in France. The judicization of this system is primari-

¹⁹ *Ibidem*, p. 85.

²⁰ P. Baudouin, *Les Juges Anti-Terroristes. La tentation de l'arbitraire*, p. 25, <https://tiny.pl/wm8d5> (29.08.2022).

²¹ S. Weill, *French foreign fighters: The engagement of administrative and criminal justice in France*, "International Review of the Red Cross. 150 years of humanitarian reflection" 2018, vol. 100, iss. 907-909, pp. 211-236.

ly based on preventive action, which yields results. Even so, this does not imply the complete elimination of the terrorist threat on French territory.

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