

Guest editorial

TERRORISM AND CONSTITUTIONAL AMENDMENT IN FRANCE

In Paris on 13 November 2015, a terrorist group claiming to belong to Daesh blindly massacred 130 people, some on the terraces where they were spending the evening, others in a theatre where they were attending a concert by the Eagles of Death Metal. Three days later, the French president, for the first time in his presidency, spoke to both Houses of Parliament assembled in Congress at Versailles and announced two amendments to the Constitution. The first was to lay down written foundations for the state of emergency, the second was to extend the possibility of deprivation of nationality. Let us try to give both a legal explanation and an analysis in terms of political science.

Constitutionalising the state of emergency

The proposal at first hardly raised any controversy. Even those who are radically hostile to the state of emergency should wish its entrenchment. The first reason is given by the government, which is to provide the state of emergency with a solid legal basis.

The state of emergency was invented during the war in Algeria, in 1955. It has sometimes allowed terrible attacks on public liberties. Each time the state of emergency was decreed (1961; 2005) the statute listed restrictions on freedoms. To leave the state of emergency at the level of a simple statute provides few limits to the introduction of new repressive measures. Just imagine the coming to power of an authoritarian government. With the rise of the far right, no one in today's France will consider that to be a pure fantasy. It could too easily introduce much more repressive provisions, even abusive ones.

True, there is the safeguard of seizing the Constitutional Council, but this would only rule after several months and in the meantime, the evil of ultra-repression would have spread.

In fact, the French Constitution provides for a much more serious, quasi-dictatorial emergency rule: Article 16. It allows the President of the Republic, if the regular functioning of authorities is interrupted, to take all measures he wants, such as arbitrary arrests, special courts, etc. So it is for good reasons that we do not use it. Is it not better to have, then, an instrument at the level of the Constitution that is less draconian and can be used?

Far from an authoritarian measure, the entrenchment of the state of emergency is protective of our freedoms.

The constitutional bill sets out, in the new Article 36-1, how the state of emergency is decreed: 'A statute shall establish the administrative police measures that civilian authorities may take, under administrative judicial review'. *Voilà*, a real guarantee!

Those who object to the state of emergency and the conditions for its implementation mainly focus on the decommissioning of the ordinary courts. They view these courts as the only protectors of freedoms. But the administrative court is at least as protective. Take the procedure of *référé liberté*, under which 365 days year, round the clock, each administrative court and the Council of State is staffed to receive your appeal and gives judgment on the same day. There is nothing of the sort in an ordinary court.

The administrative judiciary has often demonstrated its real protection of freedoms. Let me recall how in 1962, it saved some heads by daring to annul a decree of General de Gaulle creating a special court on the basis of an act adopted by referendum. More recently, in 1997, it annulled a decision of the Interior Ministry banning Tibet supporters from protesting during the visit of the Chinese President to Paris. And most recently, on 22 January 2016, the Council of State in this same manner annulled a judicial measure of house arrest.

We have now reached a new stage in terrorism. We never thought, or maybe only thought abstractly, that killers could stage an indiscriminate killing at café terraces in central Paris. In such a completely new situation, it is quite understandable for the government to want to take measures that were not quite conceivable before. There is no doubt that laws proposed or passed in late 2015 and early 2016 have a strong security bias, more in the tradition of the Right than of the Socialists in power. Critics, however, tend to exaggerate. To compare this state of emergency to the special powers Mollet used in Algeria in 1956 is absurd. They empowered military justice, which then allowed torture and internment camps. There is nothing like that today. To say we abandon the rule of law in favour of a police state is grossly inaccurate.

True, the times tend to the Right, even the extreme Right and one should resist such ill winds. This should not, however, lead us to refuse everything. It is normal that in time of war, crisis or mass terrorism, there should be a shift in the balance between freedom and security.

Deprivation of nationality

Certain words may for a long time leave people indifferent, then suddenly set them aflame. *Forfeiture of nationality*, an age-old legal measure, bothered no one. Loss of nationality within 10 years of obtaining it, for bringing harm to the fundamental interests of the nation or committing a crime related to terrorism: no criticism. In 2006 this period was extended from 10 to 15 years for terrorism: no protest. And then, suddenly, the fire.

The fuse was placed on 16 November 2015 by the President of the Republic, in his speech before Parliament convened in Congress at Versailles: 'Deprivation of nationality must not have the effect of making someone stateless, but we need to take French nationality from a person convicted of a violation of fundamental interests of the nation or a terrorist act, even if born French, I say "even if born French", as soon as that person enjoys another nationality'.

Three weeks passed. Then the fuse was lit by some protests. It did not take long for the spark to reach the explosive: deprivation of nationality of dual nationals *born in France*. And then nothing seemed able to stop the fire.

Let us try to clarify what is involved in terms of law and then to understand the political inflammation.

Legal reasons

The proposal made by François Hollande marginally expands the possibility to strip nationality from a French citizen. Instead of being applicable only to French nationals by acquisition, it could also become applicable to those born on French soil. It brings no new exception to the principle of equality: for a century there has been a difference between dual nationals born outside France and mono-nationals. It only reduces this exception, or, if preferred, moves the cursor to place it between all the dual nationals on the one side, and those who only have French nationality on the other.

Why lay this down in the Constitution? The legal reason is that all laws since the Third Republic authorising the deprivation of nationality have excluded it for those born in France. The government's experts have deduced from this that it is a 'fundamental principle recognized by the laws of the Republic', and that therefore the Constitutional Council would censor ordinary legislation making this extension. Indeed, the Declaration of the Rights of Man and of the Citizen and the Preamble of the 1946 Constitution have constitutional status, since the Council consecrated them as such on 16 July 1971 (Decision on freedom of association). And the said Preamble mentions the fundamental principles. The Constitutional Council has, over the years, recognised several of them in its case law. It has not yet done so for the non-forfeiture of a French-born national. But it

would most likely adopt the same view as the Council of State, which in its opinion of 11 December 2015, released by the government 12 days later, stated that: 'French nationality at birth is an element of the person. It gives its owner fundamental rights whose deprivation by the ordinary legislator might be regarded as an excessive and disproportionate infringement of those rights, which, consequently, would be unconstitutional.'

In other words, this extension of the power to strip a terrorist criminal of his nationality, even if it in practice would have been limited to some very rare cases in over 15 years, requires a revision of the Constitution.

But politics is not limited to the law; reason does not preclude passion, and political passions often outweigh legal reason.

Political passions

Let us first agree on the obvious. François Hollande's speech was not driven by the sole concern of legal consistency.

He decided to take a whole series of measures to demonstrate his determination in the fight against terrorism, including a revision of the Constitution, with the two components discussed. This revision cannot succeed without adoption first by majorities in both the National Assembly and the Senate (where the Right has a majority) and subsequently by a majority of three-fifths of the votes cast by the two meeting in Congress. Therefore it was necessary to introduce in the draft revision an idea appealing to the Right, from which (as a matter of fact) it originated.

This is where the shoe pinches first: in the proposal's adoption of an idea advanced by the Right or the extreme Right. Had not Sarkozy as president provoked outrage, from the Left and beyond, in his speech in Grenoble on 30 July 2010, advocating the extension of the forfeiture? To be sure, this concerned 'any person of foreign origin who deliberately harms the life of a police officer or of a member of the military police or any other person holding public authority' - much wider, and very different, but who cares, the same inflammatory terms.

And where the shoe hurts next is in the proposal's ignoble historical precedents.

Shamelessly, critics recall how the Vichy regime, after De Gaulle's ousting, stripped seven thousand Jews of foreign origin of their nationality, to which one can object that denaturalisation was invented in 1848, together with the abolition of slavery, and was to be applied against its supporters. But who cares, Vichy suffices, its memory alone is killing.

From one hurt to the next, the cries become stronger. For some, the pain arises from a sincere concern about the risk of heightening xenophobic passions. For others, the Left, when in power, must not force its voters to swallow all the bitter pills. After making the social-liberal turn it should not impose another, social-nationalist one. And then there are those that hit just for the sake of hitting.

President Hollande is now left with the choice of either sticking to and making credible his rightist turn, or backing down and discrediting his presidential speech. But beyond this politician's dilemma, of course, looms the fundamental question of how best to strengthen the Constitution and its freedoms against colluding attacks from terrorism and from the far Right.

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