



Case Study: France

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'Citizens and governance in a knowledge-based society'



1. INTRODUCTION

France has a longstanding tradition of fighting against terrorism. Unlike most other European countries, she did not encounter this phenomenon only in the post-9/11 period, having been confronted to it practically constantly since the mid-20th century or, even, since the end of the 18th century. After all, it is not a coincidence that the term "terrorism" itself is of the French origin, being coined at the period of the French revolution, when it served to describe a certain type of political regime based on oppression and terror against its own population (namely the regime of the Jacobins). In the 19th century, by hosting some of the best-known anarchist philosophers and groups, France furthermore contributed to the reshaping of the term's meaning, making it centered on individuals' or non-state actors' acts.

The long tradition, however, is not the only factor that makes the French counter-terrorist experience particularly valuable. Another and at least as substantive one is the fact that over the decades or even centuries, France has been confronted with practically all imaginable types of terrorism. Via the actions of Algerian, Corsican and – to a lesser extent – Basque and Brittany movements, it has faced separatist terrorism. The activities of the OAS (Organisation de l'armée secrete) in the 50/60ies and of various fascist, nazi and white supremacist groups now has made her familiar with extreme right-wing terrorism. The attacks by the Action Directe in the 1980s have shown the destructive potential of left-wing, mainly pro-communist terrorism. And last but definitely not least, in the past decades, at numerous occasions France has had to cope with radical religious, mainly Islamist terrorism. The quoted examples furthermore reveal that France has experienced not only national but also, to a large extent, international or transnational terrorism, which again makes her an interesting case to study in the framework of the TTSRL project.

The current country study assesses the French counter-terrorism policy from the viewpoint of its legality and legitimacy. Doing that, it applies the standard definition of the terms "legality" and "legitimacy" used in the other TTSRL country studies, avoiding thus any subsequent debate on what "legal" or "legitimate" means in the specific French context. Moreover, in view of the general TTSRL scope of interest, the text mainly focuses on counter-terrorist policy aimed at international or transnational (not domestic) terrorism, although

the two forms of counter-terrorism are difficult to split altogether. Before accessing to the legality/legitimacy assessment of the French counter-terrorism policy, the country study – by way of introduction – offers a short historical overview of this policy in the modern post-World War II period and explains the different approaches used during that period to prevent, counter or accommodate terrorism.

2. FROM SANCTUARY DOCTRINE TO ACTIVE COUNTER-TERRORISM

The evolution of the modern, post-WW II French counter-terrorism policy may be split into two substantively different periods. The dividing milestone is not, as some might expect, the year 2001 but rather the decade of the 1980s. In this decade, France realized that its previous counter-terrorism strategy had substantive drawbacks and needed to be changed. The change took place in the late 1980s and early 1990s, and since then the French counter-terrorism policy has followed a relatively continual path of evolution that, despite several terrorist acts realized in the territory in the 1990s and 2000s¹, seems to be relatively successful.² The attacks of 9/11/2001, while actively commented upon in France, did not give way to any radical modification of the counter-terrorism strategy but rather came, together with what followed them, as yet another confirmation of the rightness of the French approach. Let us now shortly discuss the constitutive features of and the differences between the two indicated periods in the French counter-terrorism policy.

The period up to 1980s was dominated by the so called "sanctuary doctrine". This doctrine, shaped in the post-1945 years, presumed that France would be the best protected against international terrorists if it entered into an implicit agreement with them, offering its territory as a safe heaven in exchange for the immunity from attacks.³ Thus, international or simply foreign terrorists, for instance the Palestinian or the Basque ones, could use the French soil for the preparation and organizations of their attacks but had an unwritten obligation to refrain from any hostile acts against French targets. The sanctuary doctrine, as Shapiro and Suzan claims, was 'based on the belief that international terrorism was ultimately a political and foreign-policy problem distinct from law enforcement and as such had to take into account both the interests and capacities of the French state abroad' (Shapiro and Suzan, 2003: 69).

¹ These include, for instance, the attacks in Paris subway by the Algerian Armed Islamic Groups (Groupes Islamiques Armés, GIA) in 1995 or the explosion near the Indonesian embassy in Paris on October 8, 2004, claimed by the Front Islamique Français Armé (FIFA).

² For the last two decades, several planned attacks against French targets have been disrupted, including a plan to bomb the Paris metro in December 2002, a plot to attack tourist facilities on the French Island of Reunion in June 2003.

³ 'The sanctuary doctrine attempted to isolate the country from international terrorism by creating within France a sanctuary both for and from international terrorists.' (Shapiro and Suzan, 2003: 69)

The application of the sanctuary doctrine had three important practical impacts. First, France led quite a clear dividing line between domestic and international terrorism. While the former was considered as a threat to the country and strict measures (including special courts) were used to counter it, the latter was viewed somewhat more sympathetically, with the option of dialogue being left open and even encouraged. Moreover, there was also a competence and authority difference, since domestic terrorism was generally dealt with under the rubric of law-enforcement (with police, the Ministry of Interior and courts involved), international terrorism was ranked into the domain of foreign policy (with the Ministry of Foreign Affairs and foreign secret services responsible).

Secondly, maintaining relatively friendly relations with some of the world most notorious terrorist organizations, such as PLO, France showed a constant reluctance to embrace the concept of and the discourse on "terrorism" (both in the domestic and international area), giving preference to other less politically and emotionally charged terms such as criminals or political opponents. Thirdly, the accommodating approach towards international terrorists pushed France to refuse active participation in the international cooperation against terrorism. This was particularly true as far as demands for bilateral cooperation, for instance against the Basque or Palestine terrorists, were concerned, France having a "habit" to decline almost all of such demands under the pretext of the "political issue" motivation.

Despite its problematic political, legal and moral implications, on the practical level, the sanctuary doctrine seemed to work relatively well during several decades, probably sparing France from major terrorist attacks that were experienced in the same period by other Western European countries (Munich 1972, Bologna 1980 etc.). The 1980s, however, showed limits to the doctrine that was becoming somewhat obsolete as a result of the changing nature of international terrorism, the split that occurred in the terrorist organizations France traditionally sympathized with (especially the PLO) and the growing international pressure forcing France to take certain steps against some of the terrorist groups. When in 1980, Paris became the scene of a series of bomb attacks against Jewish targets, soon after attributed not to French neo-nazis, as originally presumed, but to Middle East terrorists, French organs got alerted but still did not see the real need to modify their general strategy.

The 1986 wave of attacks in various French cities, claimed by the pro-Palestinian Committee for Solidarity with Near Eastern Political Prisoners (CSPPA), went however as a strong signal that the peace with international terrorists, bargained for safe heaven, was no longer possible and France had to start reconsidering its counter-terrorism policy. Subsequent attacks against French targets both in and outside the country came as a further confirmation of the inefficiency and, hence, untenability, of that policy that, furthermore, became the object of an intensive public critique by then. Trying first, and relatively vainly, to find a middle way between the sanctuary doctrine and active counter-terrorism, French authorities later on decided for a radical shift in the policy, starting for the first time the process of elaborating measures aimed at deracinating terrorism in any of its forms, including international terrorism. In view of the complexness of those measures, the process took many years before reaching a certain level of comprehensiveness, and it still cannot be said to be fully achieved.

Though, the basis of the current French counter-terrorist system was largely laid down in the late 1980s and early 1990s. Facing first the serious – even if quite usual– problems of the lack of coordination between various State agencies dealing with some aspects of counter-terrorism and of the politicization of the issue, France managed to create a relatively well functioning system composed of severe but law-based anti-terrorist legislation (the 1986 *Law on the Fights against Terrorism (Loi no. 86-1020...)*, offering among others the definition of “terrorist acts”), some newly established institutions (such as Unité de Coordination de la Lutte Anti-Terroriste or Service pour Coordination de la Lutte Anti-Terroriste) coordinating the fight at the highest as well as operative levels and special institutes introduced into the legal order to cope with the particular threat of terrorism (specialized section of the Trial Court of Paris focusing on terrorist cases).

The complex and relatively well-functioning counter-terrorism system did not manage to completely spare France from the plight of terrorism in the new international climate after the end of the Cold War. Thus, in the mid-1990s, France served as a side battlefield of the Algerian civil war, being viewed as the main foreign supporter of the secular Algerian government as well as the main foreign enemy of the radical oppositional Islamic Salvation Front (FIS) and Armed Islamic Group (GIA). These events, in which many French civilian targets were attacked both in and outside its territory (hijacking of the Air France flight

from Algiers in 1995) also allowed to test the new counter-terrorist system, revealing it to be sufficient and efficient.

The rise in the Basque and Corsican separatist terrorism in the second half of the 1990s further blurred the line between the fight against domestic and international terrorism, since the same institutions and tools started being used in both spheres simultaneously and the cooperation between specialized bodies got enhanced. The new threats moreover pushed France to slightly modify its counter-terrorist legislation in 1995 and, again, in 1996, making it more adapted to the new forms of terrorism that it was facing. Thus, for instance, the notion of conspiracy to commit terrorist offences was introduced into the penal code (*Loi 92-683...; Code Pénal: 421-2-1*), reinforcing the capacities of state organs to prevent attacks but also increasing some of the criticisms against the human rights impacts of the counter-terrorism policy.

In view of its previous experiences with terrorism, including the radical Islamist one, the events of 9/11 did not mark the French approach towards counter-terrorism in the same way as they did for other countries.⁴ While France was among the first states to react to the attacks, expressing its abomination and sympathy for the victims, and while it was in France, where the well-known article declaring 'We are all Americans' appeared the day after the events (Colombani, 2001), France did not have to modify its counter-terrorism strategy to adapt it to the post-9/11 world in such a dramatic manner as many other states did. Though, its strategy has not been static and has undertaken changes in the past year, reflecting the strengthened emphasis on the fight against Islamist terrorism in the post-9/11, the deepening of the international cooperation in the sphere and the Europeization of counter-terrorism.

The changes have manifested themselves practically in all spheres of the French counter-terrorist system, from criminal legislation to operative measures used by secret services or the police. In 2006 France again amended its counter-terrorism legislation, adopting a new *Law on the Fights Against Terrorism and on Various Dispositions Concerning Security and Border Controls (Loi 2006-64...)*, and approved, for the first time in its history, a complex counter-terrorist

⁴ 'Whereas September 11, 2001, was a shock to the American counterterrorist establishment, it wasn't a *révolution des mentalités* in Paris. Two waves of terrorist attacks, the first in the mid-1980s and the second in the mid-1990s, have made France acutely aware of both state-supported Middle Eastern terrorism and freelancing but organized Islamic extremists.' (Gerecht and Schmitt, 2008)

document, entitled *Prevailing Against Terrorism: White Paper on Domestic Security Against Terrorism*. The document defines the main goals of the counter-terrorist efforts and enlists the means to be used to reach these goals. The striking feature of the document is that it exclusively concentrates on what it calls Islamist or Islamist-inspired terrorism, leaving all the other forms aside. In this way, it limits the French counter-terrorist policy to the fight against international terrorism, putting it thus in an interesting and sharp contrast with the approach used up to the 1980s, where France only fought against domestic terrorism (which it, at that time, did not call terrorism).

This contrast is, actually, not the only one distinguishing the current counter-terrorist era from the previous period. Looking back at the three features characterizing the French approach before the 1980s, it is quite clear that none of them applies nowadays: there is no clear distinction between domestic and international terrorism anymore; France does not hesitate to use the term terrorists to describe those it fights against; and it takes part in the international (multilateral and bilateral) counter-terrorist cooperation⁵. From a denying, non-cooperative and isolationist country, it has turned into an active, cooperative player that, in view of its long counter-terrorist experience, has a lot to offer to its partners. This is still more true taking into account the fact that the last years have yet again, and in repeated instances, confirmed the efficiency of the French counter-terrorism system: the country, having managed to dismantle several planned plots and timely intervene against some of the radical or radicalizing groups, has remained – unlike neighbouring Spain or the UK – safe from any big terrorist attacks.

The subsequent chapters will first present the measures the French counter-terrorist policy is based on and then assess, whether, in addition to efficiency, these measures also feature legality and legitimacy.

3. COUNTER-TERRORISM MEASURES IN FRANCE

The French counter-terrorist system is composed of a large set of measures adopted by various organs at different levels of the state apparatus. It is a

⁵ For instance, since 2002 France has taken part in a bilateral French-US counter-terrorism initiative known as Alliance Base (made public in July 2005). In 2004, a joint French-Spanish anti-terrorism investigation team was created, in the stark contrast to the past when France refused any cooperation with Spain in counter-terrorism.

mixture of strategic, tactical and operative tools that might be used to prevent, protect, pursue or respond to terrorism. The fundamental premises of the system are, as already mentioned, summarized in the 2006 *Prevailing Against Terrorism: White Paper on Domestic Security Against Terrorism* document. From the legal point of view, the system is based on the 1986 *Law on the Fight against Terrorism* and the subsequently adopted acts, such as the 2006 *Law on the Fight Against Terrorism and on Various Dispositions Concerning Security and Border Controls*. The list of sources should further include twelve universal⁶ and several regional⁷ counter-terrorism treaties that France ratified and the constantly expanding EU and EC legislation regulating various aspects of counter-terrorism in the European framework. Finally, it is worth mentioning the operative programs (known as Vigipirate Plan and the Pirate family of plans dealing with threats of attacks realized in specific areas or by means of specific means) that the executive has set out over the last years.

From the ***institutional*** perspective, the French counter-terrorism system is mainly composed of organs belonging to the executive branch of the state power. These are the Secret Service (Direction de la Surveillance du Territoire, DST), the General Intelligence Service (Renseignements Généraux, RG), the National Anti-Terrorism Division (DNAT), the External Intelligence Service (Direction Générale pour la Sécurité Extérieure, DGSE), the judicial police and the gendarmerie. The coordination between these different bodies is ensured by the Interministerial Liaison Committee against Terrorism (Comité Interministériel de Lutte Anti-Terrorist) and the Anti-Terrorist Operational Coordination Unit (Unité de Coordination de Lutte Antiterroriste, UCLAT). The former has among its members the prime minister, and the ministers of the Defense, Interior, Justice and Foreign Affairs. It develops and directs counter-terrorism policy. The latter

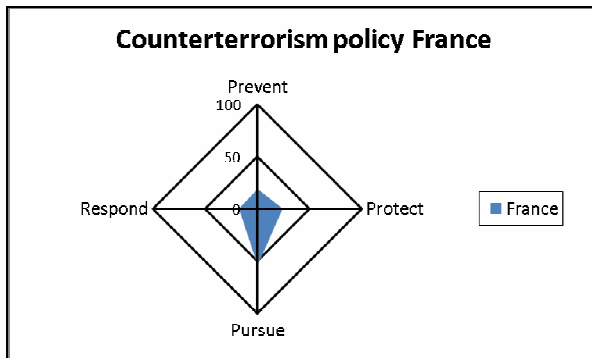
⁶ For instance, Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft (1963), Convention for the Suppression of Unlawful Seizure of Aircraft (1970), Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971), Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (1973), International Convention against the Taking of Hostages (1979), Convention on the Physical Protection of Nuclear Material (1979), Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988), Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991), International Convention for the Suppression of Terrorist Bombings (1997), International Convention for the Suppression of the Financing of Terrorism (1999).

⁷ For instance, or European Convention on the Suppression of Terrorism (1977).

includes agencies from the ministries of Defense and Interior. It works on an operative level, coordinating concrete actions. The level of coordination between various agencies, while recently improved, still has some limits.

Over the past two decades, the role of the judiciary in the fight against terrorism has become very important, especially as the result of the creation of specialized judicial bodies focusing on terrorist matters in the Tribunal de Grande Instance de Paris and the Paris Prosecution service (the Central Counterterrorism Department also known as the 14th division or Parquet) (cf. *Loi 86-1020...*). Moreover, the recent period has brought an unprecedented amelioration of the cooperation between the two branches of the state power, which manifests itself especially in the close coordination of activities between the agents of the DST and the courts magistrates. The parliament's role, on the contrary, remains largely limited to the adoption of new laws and some attempts to monitor the implementation and application of those laws.

Taking into account the complexity of French counter-terrorism measures, it is somewhat difficult to make any overall assessment thereof without being prone to over-generalizations and over-simplifications. The subsequent text therefore seeks to draw only such conclusions that may be corroborated by concrete examples and, at the same time, have a more general relevance. Previous research done in the framework of TTSRL work-package 6 has already shown that from the four strands identified in the EU counter-terrorism strategy (prevent, protect, pursue, respond), the French counter-terrorist system is particularly strong in the third strand, namely that of pursuing terrorists both to prevent their actions and punish them in case the action gets realized. Opting for what the Deliverable 11 labels as a confrontational approach, France – in the same way as, for instance, Portugal – favors measures that 'directly affect the terrorists themselves, or their assets [...] They take the fight against terrorism to the terrorists and are in this sense direct action' (TTSRL, 2008: 16).



Source: TTSRL, 2008: 16

Despite its emphasis on the pursue strategy, the French counter-terrorism policy does not omit the other three strands of the counter-terrorism strategy either. Thus, the 2006 *White Paper* describes the French system as being based on four equally important spheres. The first sphere consists in countering the risk by means of surveillance, detection and neutralization ("prevent" strand); the second in improving the system of protection of the population and of the territorial integrity ("protect" strand); the third has to do with the crisis management capabilities ("respond" strand), and the fourth with reparation for victims and sanctioning of perpetrators ("pursue" strand). Using a discourse very close to a wartime one, France in the *White Paper* furthermore describes its fight against terrorism as a battle taking place in three different battlefields, namely those of everyday life, technology and ideology. As already stressed above, "terrorism" in this context primarily covers Islamist terrorism of the Salafist orientation, that France has recently started facing both abroad, due to its foreign policy activities such as military engagement in Afghanistan, and at home, where it is brought to by extremist from the Middle East as well as, in the increasing way, by home-made terrorists born, grown up and living in France.

In spite of a large public support it generally enjoys, the French counter-terrorism policy has always been the object of a close monitoring and selected criticism, especially on the part of medias and NGOs (cf. HRW, 2007; HRW, 2008). The aspects, which have attracted most attention, are, quite naturally, the compatibility with and the respect of national and international human rights standards. The sensitivity to those aspects dates back to the pre-1980s period, when parallel structures, especially the special State Security Court created in 1963 were used to deal with terrorism issues, working far from the public scrutiny and, as was later found out, employing measures that clearly violated

some of the most fundamental human rights. This experience also makes the public authorities in France more cautious in the choice of counter-terrorism measures and more sensitive to how the general public views these measures.

4. COUNTER-TERRORISM MEASURES SELECTED FOR THE ANALYSIS OF LEGALITY AND LEGITIMACY

The main goal of this paper being to analyse legality and legitimacy of French counter-terrorism policy, three categories of specific measures have been selected to base this analysis upon. The selection is based on one main criterion shared by other country studies, namely the relevance of measures for individuals and their rights and freedoms. Since, however, almost any internal counter-terrorism measure may have impact upon people's lives and their legally protected interests, a narrower selection, maintaining only measures with high level of relevance (often identifiable by increased attention paid to them by medias, NGOs or public), has been realised to get a sample that would be workable and representative at the same time. This sample includes three categories of measures.

The first category concerns the ***definition of an act of terrorism***. Introduced into the French national legal order in 1986, the term was at first defined as combining a common crime *actus reus* (murder, robbery etc.) with a specific terrorist *mens rea* (the intent 'to trouble gravely the public order by intimidation or terror' (*Loi 86-1020...*)). Originally, thus, an act of terrorism was not seen as a truly autonomous offence but, rather, the terrorist purpose served as an aggravating circumstance affecting the procedural rules and the gravity of sanctions imposed. This situation changed in 1994, with the entry into force of a new Penal Code⁸ that already formally treated terrorism as separated from common crimes. However, and despite several minor amendments of the 1990s,⁹ the definition has remained largely similar to the original one, having the *actus reus* shared with common crimes.

⁸ The New Penal Code, together with three more specific laws, entered into force on 1 March 1994. (*Loi 92-683...*)

⁹ Cf. Act no. 96-647 of 22nd July 1996 Article 1 Official Journal 23 July 1996; Act no. 98-348 of 11th May 1998 Article 37 Official Journal 12 May 1998; Act no. 2001-1062 of 15 November 2001 Article 33 Official Journal 16 November 2001.

In its current wording, the French Penal Code (1994) in its Article 421-1 defines an act of terrorism as

'the following offences [...] where they are committed intentionally in connection with an individual or collective undertaking the purpose of which is seriously to disturb the public order through intimidation or terror:

1. willful attacks on life, willful attacks on the physical integrity of persons, abduction and unlawful detention and also as the hijacking of planes, vessels or any other means of transport, defined by Book II of the present Code;
2. theft, extortion, destruction, defacement and damage, and also computer offences, as defined under Book III of the present Code;
3. offences committed by combat organizations and disbanded movements as defined under articles 431-13 to 431-17, and the offences set out under articles 434-6, 441-2 to 441-5;
4. the production or keeping of machines, dangerous or explosive devices, set out under article 3 of the Act of 19th June 1871 which repealed the Decree of 4th September 1870 on the production of military grade weapons;
 - the production, sale, import or export of explosive substances as defined by article 6 of the Act no. 70-575 of 3rd July 1970 amending the regulations governing explosive powders and substances;
 - the purchase, keeping, transport or unlawful carrying of explosive substances or of devices made with such explosive substances, as defined by article 38 of the Ordinance of 18th April 1939 defining the regulations governing military equipment, weapons and ammunition;
 - the detention, carrying, and transport of weapons and ammunition falling under the first and fourth categories defined by articles 4, 28, 31 and 32 of the aforementioned Ordinance;
 - the offences defined by articles 1 and 4 of the Act no. 72-467 of 9th June 1972 forbidding the designing, production, keeping, stocking, purchase or sale of biological or toxin-based weapons;
 - the offences referred to under articles 58 to 63 of the Act no. 98-467 of 17th June 1998 on the application of the Convention of the 13th January 1993 on the prohibition of developing, producing, stocking and use of chemical weapons and on their destruction;
5. receiving the product of one of the offences set out in paragraphs 1 to 4 above.' (*Code Pénal*: Art. 421-1)

Moreover, in the 1990s and 2000s, the definition of an act of terrorism has been complemented by so called autonomous acts of terrorism that are independent of any other crimes. These autonomous acts included criminal association in relation to a terrorist undertaking (*association de malfaiteurs en relation avec une entreprise terroriste*)¹⁰, ecological terrorism¹¹, and financing of terrorism¹².

The second category of measures has to do with ***softened procedural guarantees*** offered to the persons suspected of having committed or planned a terrorist attack, or of having links with any terrorist organizations. Unlike common criminal offences, terrorist acts are dealt with in a specific procedure based on more flexible rules. Thus, terrorist suspects may be held for up to 96 or, in certain circumstances¹³, 144 hours (instead of 48 hours for common criminals) (*Code de Procédure Pénal*: Art. 706-88). They may get into contact with a lawyer only after three or, in urgent cases, six days, and then only for 30 minutes (*Ibid.*). The lawyer, furthermore, has limited access to the case file and limited information about what exactly his/her clients are charged with. Suspects can have anonymous witnesses testifying against them and be subjected to oppressive questionings without their lawyer present. Questionings seem to include extraordinary practice such as sleep deprivation, disorientation, and psychological pressure.

Once brought before a judge, 'minimal evidence of relation to an alleged terrorist network is usually sufficient to remand a suspect into a pretrial detention for months or in some cases years' (HRW, 2007: 2)¹⁴. In this atmosphere of what Human Rights Watch labels as 'presumption in favor of detention in terrorism cases' (HRW, 2007: 3), suspects are in a vulnerable

¹⁰ 'The participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles shall in addition be an act of terrorism.' (*Code Pénal*: Art. 421-2-1).

¹¹ 'The introduction into the atmosphere, on the ground, in the soil or in waters, including territorial waters, of any substance liable to imperil human or animal health or the natural environment is an act of terrorism where it is committed intentionally in connection with an individual or collective undertaking whose aim is to seriously disturb public order through intimidation or terror.' (*Code Pénal*: Art. 421-2).

¹² 'It also constitutes an act of terrorism to finance a terrorist organisation by providing, collecting or managing funds, securities or property of any kind, or by giving advice for this purpose, intending that such funds, security or property be used, or knowing that they are intended to be used, in whole or in part, for the commission of any of the acts of terrorism listed in the present chapter, irrespective of whether such an act takes place.' (*Code Pénal*: Art. 421-2-2).

¹³ Police custody may be extended to six days if there is a serious danger that acts of terrorism are imminent in France or abroad, or the requirements of international cooperation make this essential. (cf. *Code de Procédure Pénal*: Art. 706-88; for more details cf. Russel, 2007: 38-39).

¹⁴ In the French system, the recommendation to place suspects into pretrial detention is made by investigating judges (*juges d'instruction*) but the decision itself is taken by the liberty and custody judges (*juges des libertés et de la détention*), introduced in 2000.

position and have their rights of defense factually restrained. The more so that the proceedings make often use of evidence gained from intelligence sources, remaining inaccessible to suspects and their lawyers, and that evidence obtained from third countries where cases of torture or ill-treatment occur, seem to be allowed in some cases. While the burden of proof is not formally shifted to terrorism suspects, the level of proof is – especially when a person is accused of criminal association in relation to a terrorist undertaking – considerably lowered, since ‘evidence that a number of individuals know each other, are in regular contact, and share religious and political convictions’ (Ibid.) often suffices as a proof of the suspects’ terrorist involvement.

These softened rules are mainly used in proceedings seeking to unfold criminal associations in relation to a terrorist undertaking. Here, moreover, spectacular raids (known as *raffles* in French) occur frequently, piping into mass arrests of large number of people not suspected of any concrete criminal acts but having potentially some interesting information to share. While such raids were particularly popular in the early 1990s¹⁵, having their number turning down in the second half of the decade, they are still used, as the 2003 operation against the Iranian People’s Mojahedin (MKO) premises (165 people arrested, 17 investigated) or 2007 action against Kurdistan Workers’ Party (PKK) members (14 members arrested, none investigated) illustrate. Moreover, terrorist suspects, even if acquitted by a court, are often deported from France to their country of origin for alleged but rarely specified security reasons (*Code de l’entrée...: Art. L.521-1*). Also, a set of special investigative techniques such as vehicle inspections (*Code de Procédure Pénal: Art. 78-2-2*), identity checks on transnational trains (*Code de Procédure Pénal: Art. 78-2*), or tapping of phones (*Code de Procédure Pénal: Art. 70-696*), have been used for the purposes of the fight against terrorism (for more detail cf. CODEXTER, 2006: 2). All these practices, while probably motivated by legitimate reasons, namely the assurance of national security, exceeds what is seen as acceptable in a democratic society and may, in view of many monitoring bodies, ‘stretch the rule of law to the breaking point’ (HRW, 2007: 2).

¹⁵ For instance, in November 1993, 110 people were questioned and 87 taken into custody on suspicion of involvement in terrorism in the so called Operation Chrysanthemus (out of those, only three were placed under official investigation).

The third category of measures concerns the ***broad powers of counter-terrorism*** magistrates and little oversight over their work. As already mentioned, the judicial system dealing with terrorism is quite centralized in France, most work being done by a very limited number (less than ten) of specialized prosecutors and instruction judges (juge d'instruction) sitting at the Paris Tribunal de Grande Instance (*Code de Procédure Pénal*: Art. 706-17). These magistrates maintain privileged relations with agents from executive organs and secret services (especially the DST playing a dual role of an intelligence service and a judicial police force). Moreover, they have a heavy impact on the detention decisions taken by judicial and custody judges, who, while formally independent, depend heavily on prosecutors and investigative judges, preparing the files, and thus tend to follow their recommendation.¹⁶ Cases of direct pressure over judicial and custody judges by their superiors for not having followed recommendations of the specialized magistrates have also been registered (HRW, 2008: 38).

In view of the centralization and specialization of their work, the magistrates are not subject to any real external scrutiny and they dispose of a large space of freedom to decide in individual cases as well as to determine general principles of counter-terrorism policy at the operative level. Formally, some decisions of investigative judges (mainly those authorizing or denying the request to order particular inquiries presented by prosecutors, defendants or any civil party) may be appealed to the Investigative Chamber (Chambre d'Instruction). In practice, however, this venue is rarely used and in case it is, the higher instances tend to confirm the appealed decisions.

The lack of oversight also concerns intelligence services, whose information is often central for the proceedings. Up to 2007, as one of the few Western European countries, France had no mechanisms of parliamentary control over intelligence service. Heavily criticized by various NGOs as well as international monitoring bodies such as the Council of Europe Venice Commission (European Commission for Democracy through Law, 2007: par. 213), she created in October 2007 a special ad hoc parliamentary delegation composed of four representatives from each chamber of the parliament. The delegation

¹⁶ A 2006 parliamentary report showed 89.7% correspondence between investigative judges' recommendations and judicial and custody judges' decisions for 2004. The rate does not seem to have changed since then.

started its work in February 2008. It holds hearings closed to the public and its work is covered by national security. This situation, again, raises serious concerns, which the allegations of various mistreatments of suspects (including alleged torture and frequent violations of non-refoulement principle) do not but reinforce (cf. HRW, 2007).

3.2 LEGITIMACY OF FRENCH COUNTER-TERRORISM MEASURES

5. LEGALITY OF FRENCH COUNTER-TERRORISM MEASURES

In the framework of the TTSRL project, the criterion of legality of national counter-terrorism measures is mainly understood as covering the appropriate legal basis in national legislation, the conformity with the country’s international obligations and its compatibility with human rights standards.

5.1 THE APPROPRIATE LEGAL BASIS

French counter-terrorist measures have a strong legal basis in the national legislation, mainly the 1986 *Law on the Fight against Terrorism* and the subsequently adopted amendments to this law as well as new legal regulations. Indeed, the fact that French counter-terrorism policy, unlike that of the USA and other states, has a strong legislative basis and does not resort to extra-legal or administrative measures may be considered as one of the main assets of her approach. This element thus does not raise in our context any substantive problem, France having the potential to serve as a model case as far as the legal anchorage of the counter-terrorism measures is concerned.

LEGALITY – LEGAL BASIS	
Definitions: <ul style="list-style-type: none"> • Act of Terrorism • Ecological Terrorism • Criminal Association • Financing of Terrorism 	Penal Code: <ul style="list-style-type: none"> • Article 421-1 • Article 421-2 • Article 421-2-1 • Article 421-2-2
Procedural Guarantees: <ul style="list-style-type: none"> • Special Police Custody • Limited Lawyer’s Access • Anonymous Witnesses • Spectacular Raids 	<ul style="list-style-type: none"> • Article 706-88 CCP • Article 706-88 CCP • Article 706-58 CCP • Article 122 CCP

<ul style="list-style-type: none"> • Deportation of Aliens • Vehicle Inspections • Tapping of Phones 	<ul style="list-style-type: none"> • Article L.521-1 CESEDA • Article 78-2-2 CCP • Article 70-696 CCP
Power of and control over magistrates	Article 706-17 CCP

5.1 THE CONFORMITY WITH THE COUNTRY'S INTERNATIONAL OBLIGATIONS AND THE COMPATIBILITY WITH HUMAN RIGHTS STANDARDS

Since the two other criteria to determine the legality of counter-terrorism measures are closely intertwined, the "country's international obligations", the conformity of whom should be assessed, being largely understood as human rights obligations, they will be dealt with in one chapter in this country study. The impact of the French counter-terrorism measures on human rights standards has been constantly and assiduously monitored by national actors as well as international bodies (judicial or quasi-judicial bodies such as UN Human Rights Council and UN Human Rights Committee (UN, 2008), NGOs such as HRW or AI (HRW, 2007; HRW, 2008)). All the three categories of measures studied here have appeared problematic in view of such an assessment.

The **definition** of an act of terrorism has not in itself raised serious criticism, reflecting relatively well the definitions present in international law. On the contrary, the definitions of some of the autonomous terrorist acts, added during the 1990s and 2000s, seem much more problematic. This is especially the case of criminal association in relation to a terrorist undertaking, defined as 'the participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles' (*Code Pénal*: Art. 421-2-1). While inspired by the general notion of criminal association present in the French legal order for decades, the concept is easily open to misuse taking into account that the assessment of terrorist nature of various political groups might be quite uncertain or volatile.

As commented upon by the 2008 HRW report, the concept

'allows the authorities to intervene with the aim of preventing terrorism well before the commission of a crime. No specific terrorist act needs be planned, much less executed, to give rise to the offence. Intended to criminalize all

preparatory acts short of direct complicity in a terrorist plot, an association de malfaiteurs charge may be leveled for providing any kind of logistical or financial support to, or associating in a sustained fashion with, groups allegedly formed with the ultimate goal of engaging in terrorist activity.’ (HRW, 2008: 1)

Serious criticism was raised by the International Federation for Human rights, which, already in 1999, labeled the provision on criminal association in relation to a terrorist undertaking as ‘open-ended’ and lending itself to ‘arbitrary interpretation and implementation’ (FIDH, 1999: 9). This situation is alarming taking into account that about 90% of all persons suspected of terrorism have been so far charged with the criminal association in relation to a terrorist undertaking.

The ***softened procedural guarantees*** might be seen as potentially clashing with several human rights standards. Thus, the extensive period of the special police custody (4 or 6 instead of 2 days), combined with a limited access to a lawyer, and the practice of spectacular (and indiscriminate) raids, seems hardly compatible with the right to liberty to security, anchored in Article 5 of the European Convention on Human Rights and Fundamental Freedoms (hereafter ECHR). The extensive use of the anonymous witnesses institute, as well as, again, the limited access to and restrained rights of lawyers collide with the right to a free trial guaranteed by Article 6 of the same document. Finally, deportations of aliens and the utilization of various special investigative techniques seem problematic from the viewpoint of the right to privacy and to the family life (Article 8 ECHR). Moreover, some of those institutes, especially when applied in cases of criminal association in relation to a terrorist undertaking, might also indirectly impact upon other protected rights, such as the freedom of expression (Article 10 ECHR), the freedom of assembly and association (Article 11 ECHR), or the *nulla poena sine lege* principle (Article 7 ECHR).

The ***broad powers of counter-terrorism*** magistrates and little oversight over their work also raises questions from the viewpoint of their compatibility of human rights and also democratic standards. The rules more specifically challenged here include the right to a fair trial (Article 6 ECHR), the right to an effective remedy (Article 13 ECHR) or the principle of separation and mutual control of state powers.

LEGALITY – COMPATIBILITY WITH HUMAN RIGHTS OBLIGATIONS

Definitions:

The definitions of act of terrorism, ecological terrorism and financing of terrorism do not seem to contradict human rights standard, being relatively concrete and unambiguous. The definition of criminal association in relation to a terrorist undertaking is vague. This violates the principles of legality and legal certainty, since individuals do not know what conduct is exactly prohibited, and gives too much space to law enforcement authorities (Article 7 ECHR).

Softened Political Guarantees:

- Special Police Custody
- Limited Lawyer's Access
- Anonymous Witnesses
- Spectacular Raids
- Deportation of Aliens
- Vehicle Inspections
- Tapping of Phones

Clash with:

- Article 5 ECHR
- Article 5 and 6 ECHR
- Article 6 ECHR
- Article 5 and 6 ECHR
- Article 8 ECHR
- Article 8 ECHR
- Article 8 ECHR

Broad powers of counter-terrorism magistrates:

Broad powers of a relatively limited number of magistrates specialized in terrorist cases (prosecutors, investigative judges). Limited oversight over magistrates as well as over intelligence services (Articles 6 and 13 ECHR).

6. LEGITIMACY OF FRENCH COUNTER-TERRORISM MEASURES

To conceptualize "legitimacy", the TTSRL project uses the approach promoted by T. M. Franck, which is based on four indicators: determinacy, symbolic validation, coherence, and adherence. Since the indicators are explained in detail in the deliverable 12, only the aspects thereof relevant to this particular country study are further elaborated hereafter.

6.1 DETERMINACY

Determinacy has to do with the clarity of measures and the legal certainty and predictability surrounding the corresponding behavior. Indeterminacy of the substance might be, however still, be overcome by a process of clarification by an authority recognized as legitimate by those to whom the rule is addressed. (Franck, 1990: 61) As mentioned above, French counter-terrorism policy is often described as flexible, with executive and judiciary magistrates having a large space of freedom to decide on the application of rules in concrete cases. Whereas positive from the viewpoint of an easy adaptability of rules to the changing nature of terrorism, the flexibility at the same time makes the legal counter-

terrorist area somewhat difficult to interpret. Moreover, for the moment, only some of the institutions used in the counter-terrorism fight has been commented upon and clarified by competent, mainly judicial authorities.

The absence of determinacy affects all the three categories of measures studied in this paper. Among the **definitions**, that of the criminal association in relation to a terrorist undertaking particularly suffers of a lack of clarity, making it difficult to the general public to adjust its behavior in accordance with it. Furthermore, while frequently used in the proceedings against persons suspected of involvement in terrorism, the expression has not been so far unequivocally clarified in the jurisprudence of the French judicial institutions.

The same applies to some of the **procedural guarantees**. Here, again, large space of freedom is left to counter-terrorist magistrates to decide such questions as, for instance:

- Who to arrest: Since practically any link (kinship, friendship, business relations) with terrorist suspects may serve as *prima facie* evidence of an involvement in *criminal association in relation to a terrorist undertaking*, the circle of people who may get arrested is potentially very extensive. At the same time, there are no clear rules on who out of that circle will finally get arrested and how to adjust the behavior so as to avoid that scenario. The practice of raids and mass arrests confirms that magistrates use the latitude left to them also in real life.
- How long to detain terrorist suspects without a judge being involved: The French system allows to detain terrorist suspects up to four or, in exceptional cases, six days. Exceptional cases are understood as those involving a serious risk of an imminent terrorist attack or a complex case requiring international cooperation. The assessment of the situation is left to magistrates.¹⁷
- Who to start an official investigation against: According to the French Code of Criminal Procedure, an official investigation against a person should be started only when 'strong and concordant evidence makes it probable that [the suspect] may have participated, as perpetrator or accomplice, in the commission of the offences [the investigative judge] is investigating' (*Code de Procédure Pénal*: Art. 80-1). Since evidence, being largely based on

¹⁷ In practice, the extension of the period to four days (instead of two as in common criminal cases) has become a rule. On the contrary, additional extension up to six days seems to be resorted to very rarely, if at all. (for more details cf. HRW, 2008: 57)

intelligence sources, is often accessible only to magistrates making the decision, not to the defendants or their lawyers, there is usually no way to verify the “probability” of the suspects’ participation in an offence for the external world.

The lack of certainty surrounding the definition of terrorism as well as of the sphere of application of softened procedural guarantees has also for consequence the indeterminacy in the **powers** of the counter-terrorism magistrates that have to be interpreted not only in the light of formal prescriptions but also taking into account their various and not always homogenous practice.

LEGITIMACY – DETERMINACY
Definitions: The definition of <i>criminal association in relation to a terrorist undertaking</i> is very vague, not allowing the public to adjust its behavior to it and leaving large discretion to magistrates in the interpretation and application of the definition.
Procedural guarantees: Large space of freedom is left to counter-terrorism magistrates, who can decide, without any substantive oversight on such questions as who to arrest, how long to detain terrorist suspects without a judge being involved, or who to start an official investigation against (problems thus concern such measures as special police custody, limited lawyer’s access, spectacular raids, deportation of aliens).
Broad powers of counter-terrorism magistrates: Counter-terrorism magistrates may relatively autonomously decide on the interpretation of the terrorism’s definition and the application of softened counter-terrorism measures.

6.2 SYMBOLIC VALIDATION

Symbolic validation focuses on the authority or authenticity of measures, assessing their cultural and anthropological validity and their deep rootedness in the normative system of the given society. France counter-terrorism policy seems, in general, to fulfill these criteria relatively well. Having learnt the lessons from the extensive criticism of extraordinary measures adopted to fight internal enemies in the 1950s and 1960s, French authorities have, since then, always sought to reflect in the counter-terrorist strategy the expectations and requirements of the civil society and, also, of the international society. The current strategy thus enjoys quite a broad social consensus, with the French population, having made a direct and painful experience with terrorism, being in

principle willing to accept certain limitations of its rights in exchange for increased security.

Moreover, the current counter-terrorism strategy seems to be compatible with and even resulting from the long-term French tradition of dealing with internal and external enemies. Based primarily on the law-enforcement model (with some elements of warfare model added especially in the discourse), the strategy approaches terrorism as a form of serious criminality, that has to be as much as possible prevented and pursued but that will, probably, never be definitely defeated in any final battle between the good and the evil. From that perspective, the French standpoint, especially when compared with the US one, is more pragmatic, civilest and, probably, more realistic), which corresponds well to how France has traditionally treated similar social malaises.

As far as the three categories of measures covered in this study are concerned, it is possible to reach the following conclusions:

- An **offence** of terrorism had not constituted a part of the French legal system for a long time, being only added in 1986. Despite that, its construction based on a combination of general *actus reus* and specific *mens rea* corresponds to the traditional way offences are defined in the French legal order. The autonomous acts such as criminal association in relation to a terrorist undertaking also find precedents in the French law, criminal association being its traditional, though certainly not uncontroversial institute.
- Softening of **procedural guarantees** has been characteristic of the French approach towards the most serious forms of criminality. Thus, some of the exceptions applying to terrorism-related offences (such as the extension of the detention period) also apply to other exceptionally serious crimes such as drug offences or organized crime. While the procedural guarantees of terrorism-related offences are currently the most “softened” ones, they are far less radical than those used in France in the 1960s and 1970s, where parallel structures subject to no public scrutiny were put in place. From that perspective, softening of guarantees is seen as a lesser evil than the use of alternative mechanisms of extra-judicial or administrative nature.
- Centralization and specialization of **counter-terrorism magistrates** is usually seen as an important feature of the French counter-terrorism

system, substantively contributing to its efficiency. As such, it enjoys public support and has never been seriously questioned by experts. The same goes for the broad powers and large discretion granted to the magistrates, which are perceived as a necessary guarantee of flexibility and adaptability of the system.

LEGITIMACY - SYMBOLIC VALIDATION/PEDIGREE
<p>Definitions: The inclusion of terrorist-related offences to the French legal order enjoys public support. The way those offences are defined links up with the French legal tradition.</p>
<p>Procedural guarantees: Softening of procedural guarantees is used in France in relation to offences seen as particularly dangerous for the society. While the guarantees applied to terrorism-related offences are the most “softened”, they appear as lesser evil than alternatives consisting in the use of extra-judicial or administrative measures.</p>
<p>Broad powers of counter-terrorism magistrates: Centralization and specialization of counter-terrorism magistrates as well as broad powers and discretion granted to them are generally seen as a reasonable, useful, and legitimate elements of the French counter-terrorism system, ensuring its efficiency and flexibility.</p>

6.3 COHERENCE

Coherency requires that likes should in principle be treated alike and any distinction of treatment has to be justified in principled terms. This criterion has not only a personal dimension, monitoring the treatment accorded to various groups of people, but also a material dimension, assessing the compatibility of specific counter-terrorism measures with the counter-terrorism policy as a whole.

The personal dimension of the coherency criterion is in France mainly relevant as far as the treatment of nationals and non-nationals and of nationals of different origins is concerned. The French counter-terrorism policy, as explicitly stated in the White Paper on Domestic Security Against Terrorism, aims at Islamist terrorism and, therefore, immigrants from Muslim countries as well as French citizens from immigration communities are particularly exhibited to most of the measures. For instance, French intelligence services have built up a system of monitoring of Muslim communities, including the activities in mosques and in Islamic NGOs. Moreover, decision on the admission into the country and

the extradition/ deportation from its territory reveal a pattern of an anti-Muslim suspicion. While the existence of such a suspicion may be understandable to a certain extent, the level the differentiated treatment it reaches is highly problematic and can hardly be justified. Moreover, it is also contra-productive, since it has the unwanted impact of contributing to the radicalisation of French Muslim communities. It is necessary to add that the special treatment of Muslims is mainly based on political documents such as the White paper and the personal decisions of counter-terrorism magistrates, and does not have any explicit basis in the law, including the set of counter-terrorism regulations, which remain formally egalitarian.

The material dimension of the coherency criterion concerns the compatibility of specific counter-terrorism measures with the general counter-terrorism policy. Looking again at the three areas researched in that text, it is possible to conclude that neither the existence of an autonomous (and sometimes vaguely defined) terrorist offence, nor the centralisation and specialisation of counter-terrorism magistrates endowed with broad powers and discretion do raise problems from the standpoint of the general counter-terrorism policy. On the contrary, those elements reflect, as already stated, the leading opinion that terrorism is a social scourge to be dealt with by means of law-enforcement mechanisms, and that certain flexibility must be left to those in field to adapt legal instruments to specific needs of the practice. This logic also applies to procedural guarantees, whose limitation is seen as a necessary price to pay in order to ensure security. On the contrary, the practical application of counter-terrorism measures hitting disproportionately some parts of the society and involving practices such as mass arrest and ill-treatment, collides with the values, French policy in general is based on.

LEGITIMACY – COHERENCE
<p>Yes (de iure): <i>De iure</i>, the French counter-terrorism policy is coherent with other policies, ensuring of security being considered a serious and sufficient reason to limit certain rights.</p> <p>No (de facto): <i>De facto</i>, the French counter-terrorism policy, discriminating against Muslim population and using practices such as ill-treatment, collides with main principles and values France stands for as well as concrete policies (fight against racism etc.) promoted by her.</p>

6.4 ADHERENCE

Adherence is determined by the way in which the measure is embedded in the infrastructure of rules about rule-making. Its assessment thus has to take into account the compatibility with the rules defining how legal norms are to be made, interpreted, and applied. Furthermore, it reflects the fact that subjects are bound by norms not only on the basis of their consensus but also on the basis of their status. For counter-terrorism policy, norms of a higher hierarchical position, namely those relating to the protection of human and minority rights, public transparency, democracy and good governance are particularly relevant. Most of these areas have already been discussed above and, thus, only some basic points are summed up here: in principle, France has managed to base its counter-terrorism on premises that are fully compatible with most of the fundamental national as well as international norms.

Concrete measures, however, do not always meet the same standard, as the three areas researched in this paper show:

- The vague definition of *criminal association in relation to a terrorist undertaking* may be seen as clashing with human rights law, mainly the principle of legality constituting part of the *nullum crimen sine lege rule*. Moreover, it may have negative impact upon other protected rights, such as the freedom of speech or the freedom of assembly.
- Lowered procedural guarantees also clash with human rights law, especially the right to fair trial with its various components (right to equality of parties, right to the access to the lawyer etc.) and the right to liberty.

Broad powers and discretion accorded to counter-terrorism magistrates might infringe upon the basic principle of the limitation of state powers, underpinning the whole democratic system, as well as upon the principle of the separation of powers, counter-terrorism magistrates together with intelligence services being in reality uncontrolled masters of the counter-terrorism policy.

Moreover, the narrow orientation on Islamist terrorism and the flexibility left for the agents working in field may lead to situations of practical collision between measures taken to protect the population from the terrorist scourge and

rules aimed at guaranteeing individual or minority rights or at ensuring the respect for democratic principles.

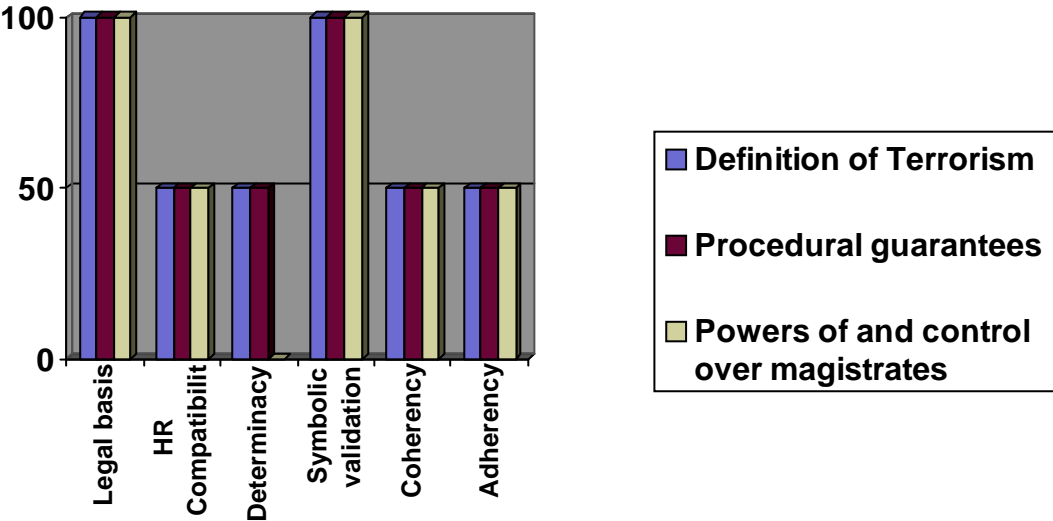
LEGITIMACY – ADHERENCY
Definitions: The vagueness of the definition of criminal association in relation to a terrorist undertaking clashes with human rights (<i>nullum crimen sine lege rule</i>).
Procedural guarantees: Lowered procedural guarantees clash with human rights (right to a fair trial and right to liberty).
Broad powers of counter-terrorism magistrates: Broad powers of counter-terrorism magistrates endanger the principles of limitation of state power and of separation of powers.

7. CONCLUSION

France disposes of one of the most comprehensive counter-terrorism systems in the EU and probably in the world. Shaped and reshaped in the light of the rich French experience of the fight against domestic as well as international terrorism in the past decades, the system, while showing a certain preference for the pursue strand, uses a balanced set of measures aimed at preventing terrorist attacks, protecting the population, pursuing the perpetrators and responding to any consequences of terrorism. The system, having a strong legal basis (especially the 1986 and 2006 Laws against Terrorism) and enjoying a large public support, demonstrates a relatively high degree of legality and legitimacy.

Despite that, it reveals also some problematic patterns: the vague definition of terrorist offences, softened procedural guarantees offered in terrorist cases and broad powers of counter-terrorism magistrates seem to collide with some of the fundamental human rights. The narrow orientation on Islamist terrorism and the ensuing differentiated treatment of some national and immigrant groups endanger the respect of non-discrimination norm, risking to jeopardize the fragile social peace in a multicultural country that France has become over the past decades. Finally, the flexibility of the system, while useful in practice if applied *bona fide* might decrease the transparency and predictability of the system, making it somewhat “illegible” for the public. On the whole, while the French counter-terrorist systems does not seem to need any radical reform, some modifications would be useful to further increase its legality and legitimacy.

Overall score of the French counter-terrorism policy



Explanation: the chart illustrates the degree of legality/legitimacy of three areas of measures on the scale from 0% (no legality/legitimacy) to 100% (full legality/legitimacy). As seen from the bars, French counter-terrorism measures have in principle a strong legal basis and enjoy symbolic validation, but have difficulties as far as their compatibility with human rights, determinacy, coherency, and adherence is concerned.

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