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Contagion, Counterterrorism and Criminology: The Case of France

Claire Hamilton,[1]* Giulia Berlusconi[2]

Abstract In the burgeoning criminological literature on security, risk and preventive justice which has followed the 9/11 attacks on the Twin Towers, 'contagion' or the deleterious effect of counterterrorist policies on the ordinary criminal law has been the subject of some discussion, mostly in the context of the threat which such 'exceptional' policies pose to mainstream procedural values. This article seeks to build on this literature through an examination of the impact of post 9/11 counterterrorism law and policy on the ordinary criminal justice system in France. Given the extent to which counterterrorist law now encroaches on various aspects of French criminal law, the argument is made for greater criminological attention to be paid to the 'trickle-down' effect of extraordinary law on the ordinary business of the criminal justice system.

Keywords counterterrorism, contagion, criminology, criminal justice, France.

Introduction

Coming from its historical position as a discipline of the Westphalian nation state or 'discipline of the inside' as Loader and Percy (2012) would have it, mainstream criminology traditionally has been reluctant to engage with the terrorism field, terrorism and warfare being seen as more properly the domain of international relations or critical security studies scholars (Aas, 2013). Notwithstanding much important work on the political construction and regulation of the 'new terrorism' (Mythen and Walklate, 2006; Walklate and Mythen, 2014) and a growing literature on the aetiology of terrorism (e.g., LaFree and Freilich, 2016), this absence has been particularly keenly felt in the counterterrorism area (Deflem, 2009: 538). Observing this lacuna, and calling for a general criminological theory of security, Zedner (2007a: 264) has argued that 'the temporal shift denoted by the war on terror poses a powerful challenge to the historic precincts of criminological scholarship. Where once terrorism and counter terrorism stood outside the normal boundaries of criminological knowledge, they now demand criminological attention….'. Couched within her broader arguments about the limitations of criminological nationalism, Aas (2013) too has highlighted the transformative potential of transnational threats such as terrorism for the governance of national security and justice issues, particularly in the context of a seemingly permanent 'war' on terror. In similar vein, Aradau and van Munster (2009) urge criminology to engage with the Schmittian theory of exceptionalism, more commonly the preserve of

[1] National University of Ireland, Maynooth, Ireland.
[2] University of Surrey, Guildford, United Kingdom.

*** Corresponding Author:**
Claire Hamilton, Department of Law, Maynooth University, Maynooth, Co. Kildare, Ireland
Email: claire.hamilton@mu.ie

the international relations field, in order to better understand the significance of the 'international' and the role of the exception in underwriting, rather than overwriting, the law. For them, viewing counterterrorism law through the lens of exceptionalism allows a focus on the manner in which such exceptional politics of fear 'feed back into society' thereby 'integrat[ing] the everyday mundane practices of policing with the exceptional practices of war' (Aradau and van Munster, 2009: 698).

From this somewhat slow starting point, however, criminology has moved incrementally to engage with counterterrorism law and policy. Ericson's (2007) work on 'counter-law' is a case in point, employing the twin monikers of 'Counter law 1' (laws that undermine other laws) and 'Counter law 2' (extra-legal surveillance) to capture the multiple forms of governance spawned by the security state. This work has in turn strongly informed the pioneering research of Murphy (2012) on the impact of the vast body of EU counterterrorism law, and particularly its implications for fundamental rights and the rule of law. As averred to above, scholars such as Zedner (2007a, 2007b, 2014) and Ashworth (Ashworth and Zedner, 2014) have also been active in debating the criminological implications of more general shifts from a 'post- to a pre-crime society' and, correspondingly, from criminal justice to security. Defining 'pre-crime' measures as those which permit the state to intervene and restrain an individual on the basis of anticipated harm rather than past wrongdoing, the relevance to (now familiar) counterterrorism measures such as control orders/terrorism prevention and investigation measures (TPIMs) and the criminalisation of association and preparatory offences is evident. Indeed, it is clear that the catastrophic risks posed by terrorism post 9/11, and the concomitant pressure to action, have acted as a significant spur to pre-emptive governmental action in the field of crime control more generally (Zedner, 2007b). This new security/justice landscape, with its blurring of familiar distinctions between politics and justice, war and crime, evidence and intelligence, is only beginning to be negotiated by criminologists in the past decade (Aas, 2012; McCulloch and Pickering, 2009).

Implicit within much of this work is a concern for the normalising impulses of counterterrorist law, and thus its migration to other substantive domains. While recognising that 'many elements of the post-crime criminal justice framework continue to exist', McCulloch and Pickering (2009: 641), for example, speak of pre-crime demarking a 'new frontline so that law is always catching up with the reality of policing'. Zedner (2007b: 201) voices similar concerns for the protection of established procedural rights, citing the use of the special advocate procedure, first pioneered as a response to national security concerns in immigration hearings, and subsequently 'infiltrat[ing] … the mainstream criminal process at alarming speed.' Further threats to the integrity of the criminal process involving a substantial expansion of criminal liability, threats to the trial and the principle of proportionate punishment are identified in later work which colourfully speaks of criminal law itself being 'terrorised' by supposedly 'exceptional' amendments to criminal law and procedure introduced in the name of counterterrorism (Zedner, 2014). Zedner's arguments in this regard are thought-provoking: might we be premature in celebrating the (partial) return in US counterterrorism law to a criminal justice model? Are there risks inherent in recourse to the criminal law when it comes to terrorism?

It is the aim of this article to support and develop these arguments through an elaboration of the various ways in which 'exceptional' criminal justice measures introduced to combat terrorism in France have come to be applied more widely, including in other areas of the criminal law viz. 'the contagion thesis'. While many different labels have been applied to describe this phenomenon, among them normalisation (Kilcommins and Vaughan, 2004), creep (Appleby and Williams, 2010), contamination (Fenwick and Phillipson, 2011) and transplantation (Donohue, 2012), contagion appeared to us the most appropriate term given the seriousness with which it conveyed the threat to the ordinary criminal justice system. A medical metaphor with its obvious connotations for public health also appeared to us to communicate more effectively the risks associated with the spread of policies not only in time (in terms

of temporary legislation becoming permanent), but also cross-sectorally. From this perspective, France appears particularly appropriate as a case study as a jurisdiction with long experience of terrorism but also one which since the 1950s has expressly rejected the adoption of (non-criminal) special measures to fight terrorism, preferring instead to adapt its ordinary criminal law and procedure (Cahn, 2010; Shapiro, 2010). While recent events have obviously led to the declaration of a formal state of emergency, the fact that the adaptation of the ordinary criminal law (and corresponding absence of exceptional legislation) can probably be regarded as the traditional hallmark of the French counterterrorist system (Cahn, 2010; Helmuth, 2015) makes it an ideal candidate for scrutiny with regard to the impact of counterterrorist legislation on the mainstream system. Detailed below are three ways in which we argue that French counterterrorist law, spanning September 2001 to June 2016, has exhibited a contaminatory effect on the ordinary criminal realm. Methods drawn on include: legal analysis of French counterterrorist legislation, including review of related legal and criminological literature, official reports, books and reports by experts and NGOs (e.g. Amnesty International) and historical newspaper reports. Where relevant these findings are supplemented by interviews conducted with French academics and civil society representatives. The final section of the paper moves from this analysis to conclude that contamination of the mainstream system occurs through a variety of subtle mechanisms which merit greater scrutiny by criminologists. With the seepage of extraordinary powers into other areas of the criminal law, the lines between crime and the more politicised terrain of the 'emergency' become blurred, thereby problematising analyses which tend to rely on this binary.

Forms of contagion in France

The legal literature on 'contagion', 'transplantation' or the transfer of counterterrorist laws to other areas, has burgeoned since 9/11 (Donohue, 2008, 2009, 2012, Gross, 2003, 2006; McGarrity et al, 2010), drawing on an earlier body of work examining the impact of the Northern Irish conflict on criminal justice systems either side of the border (Hillyard, 1983, 1993; Kilcommins and Vaughan, 2004; Vaughan and Kilcommins, 2008; Walsh, 1989). The categories outlined below are therefore informed by this literature, particularly the work of Laura Donohue (2012) who through her typology of 'transplantation' has probably done most to attempt to outline the contours of the phenomenon. While the three categories outlined below form distinct groupings in terms of their effects on the criminal law and other areas, they are not, however, rigid. As will be discussed further, sometimes two or more forms of contagion may combine and overlap, thereby working together to further entrench counterterrorist law in the mainstream system (Donohue, 2009: 378).

Use of terrorism as a 'picklock'

It barely needs stating that the 'politics of fear' (Kostakopoulou, 2008: 321) ensuing in the period following the commission of a terrorist attack may also represent something of a 'window of opportunity' for governments with the heat of the emergency providing convenient political cover for previously controversial legislative measures. Den Boer (2006), for example, has questioned whether the 9/11 attacks were used by the European Union as a means of legitimising the rapid adoption of highly contentious measures and technologies of security governance (Hassan, 2010). Walker (2006: 1143) has made similar observations in respect of the United Kingdom's response to the Twin Tower attacks, describing the legislation as 'opportunistic changes that would not have been sustained outside a period of crisis'. Even outside of the reaction-politics engendered by a terrorist attack, criminologists have observed the use of serious crimes such as organised crime and terrorism as a 'picklock' for the

introduction of controversial legislation that would otherwise be obstructed (Fijnaut and Paoli, 2004: 5; Cesoni, 2007). Significantly, these authors have also observed that since the 9/11 attacks terrorism has begun to replace organised crime in the extension and consolidation of the *droit d'exception* (exceptional law).

In the French context perhaps the best example of the potential of terrorism to leverage broader reforms is the Intelligence Act of 24th July 2015. Dubbed the 'French Patriot Act' (Chardel et al., 2016), the Act provides for mass surveillance techniques for the purpose inter alia of preventing terrorism and was the first legislative response after the Charlie Hebdo attack of 7th January 2015. Given the sweeping nature of the provisions contained within the Act, the International Federation of Human Rights (FIDH) has claimed that the attack 'legitimised a law that would have certainly been difficult to get approved' (FIDH, 2016: 27). Certainly, the context of the attacks provided a convenient cover for the introduction of legislation that served to legalise – and extend ─ highly intrusive surveillance that was already being carried out illegally by intelligence services. Launched in 2008, France's large-scale internet surveillance programme lacked a valid legal basis, prompting calls for a new legal framework and expanded powers to collect metadata (Chardel et al., 2016; Tréguer, 2017). The subsequent Snowden revelations in 2013, however, made the introduction of legislation regulating surveillance 'politically risky and unpredictable' (Tréguer, 2017: 17) and it was only with the Paris attacks of January 2015 that the opportunity arose for the passage of the controversial legislation.

The main provisions of the Act include the possibility for intelligence agencies to access data retained by internet and telephone service providers and to conduct, for terrorism prevention purposes, real-time analysis of electronic metadata relating to a person 'previously identified as a threat'.[3] The Act controversially replaces the judicial authorisation previously needed for tapping of phones and emails with administrative oversight by the Prime Minister after seeking the (nonbinding) views of a new body, the National Committee of Intelligence Techniques Control (FIDH, 2016; Hellmuth, 2015). This lack of independent oversight has been heavily criticised by Amnesty International (2015), among others, 'as a major blow to human rights' with many questioning the compliance of the legislation with European law (Cahn, 2016). From the instant perspective, however, the main issue concerns the scope of the Act which was presented as a counterterrorism tool but actually goes far beyond this to incorporate seven other situations where intelligence powers can be invoked (FIDH, 2016). Besides the prevention of terrorism, surveillance measures can be authorised for a wide range of purposes including: the protection of economic or overarching foreign policy interests, the prevention of 'collective violence constituting a serious threat to public order' and 'organised criminality'. All of these grounds have been criticised by the CNCDH (2015) for their lack of legal precision, amid fears that this would in practice lead to (among other things) systematic and widespread surveillance of social movements. Even leaving aside claims that the Act provides 'carte blanche for mass data interception' (Amnesty International, 2017), it is difficult to disagree with FIDH (2016: 28) that the expansion of the grounds for authorising intelligence collection 'amounts to the generalisation of an exceptional — and highly objectionable — system of derogations that legalise large-scale surveillance'.

An earlier example of this form of contagion dates back to the initial legislative response to the 9/11 attacks, which in France came largely in the form of amendments to a pre-existing bill on 'daily security'.[4] This bill was heavily amended after 11th September but not resubmitted to either the *Conseil Constitutionnel* (Constitutional Council) or *Conseil d'Etat* (Council of State) despite criticisms by human rights associations (Oehmichen, 2009). As observed by the *Commission Nationale Consultative*

[3] Art. 5.
[4] *Loi no. 2001-1062 du 15 novembre*.

des Droits de l'Homme (CNCDH, 2001) this lack of scrutiny was particularly unfortunate given that the amendments to the bill ─ which primarily aimed to prevent terrorism by targeting its financing ─ also contained provisions of more general application modifying sensitive provisions of the Code of Criminal Procedure. For instance, art. 24 of the Act extended the possibility to carry out house searches at night during preliminary investigations (excluding places of residence) in respect of not only terrorism, but also offences relating to weapons and drug trafficking. Notably, this provision had been proposed as far back in 1996 but had been censured by the *Conseil Constitutionnel* as a provision which excessively interfered with liberty rights. Of similarly general application is art. 23 of the Act granting powers to search moving or parked cars in the case of an investigation on terrorism, but also on offences related to arms and explosives and drug offences, including mere possession (Oehmichen, 2009). The scope of these provisions was criticised by the CNCDH (2001: 2), which argued that the use of such exceptional provisions in respect of offences such as the possession of narcotic drugs does not appear to be justified ('irrespective of their intrinsic seriousness, drug offenses are not necessarily related to the financing of terrorist activities'). In 2003, Law no. 2003-239 of 18 March 2003 on Internal Security further extended these powers to the offences of theft and receiving stolen goods, despite the objections of the CNDH (2002) that this amounted to a 'generalisation' of police powers (Oehmichen, 2009). The net effect of this amendment was that vehicle searches were authorised for purely preventive purposes (Art. 78-2-4), without the need for probable cause or warrants (only judicial requisition orders), again contravening earlier jurisprudence of the *Conseil Constitutionnel* (Dagron, 2004). The potential for discriminatory application of these type of stop and search provisions of this nature is clear[5] and it is perhaps unsurprising to note reports in The Economist (2002) that the new powers on vehicle searches had been used 'mainly to police drug offences'. The effect is further compounded by powers enshrined in the legislation permitting the use of incriminating evidence found during these searches in subsequent, unrelated criminal proceedings (CNCDH, 2001).

'Blank cheque' legislation

A related, yet distinct, form of contagion can be identified as that deriving from counterterrorism provisions specifically aimed at terrorism and its related offences, yet broadly drafted and therefore susceptible to abuse. While equally pertaining to what Donohue (2012: 71) terms 'a lack of specificity in the initial statutory authorities' this type of contagion does not seek to apply exceptional security provisions to areas unrelated to terrorism, but rather to target terrorism and terrorist-related behaviour through broadly drawn ('blank cheque') legislation (Donohue, 2012: 71). The contagion – to non-terrorist crimes— thus occurs in the implementation phase although it is a direct consequence of the drafting process (Donohue, 2008). One of the best-known examples of this type of contagion in Britain is perhaps the use of section 44 of the Terrorism Act 2000, which introduced powers to stop and search without the need for any prior suspicion in areas where it was considered 'expedient' for the prevention of acts of terrorism, and which has been used extensively against protestors, journalists and civilians (Fenwick and Phillipson, 2011). Indeed, by the time of its amendment under ss. 59–62 of the Protection of Freedoms Act 2012, following a challenge in the European Court of Human Rights, hundreds of thousands of searches had been carried out under this provision without any recorded convictions for terrorism (Hodgson, 2013).

The broad drafting of terrorism and terrorism-related offences has a long history in France, with one of the key weapons in the French counter-terrorist arsenal being the ill-defined criminal conspiracy or

[5] See, for example, the 2009 study of the Open Society Justice Initiative which found that Arabs and blacks in France were eight times more likely than whites to be stopped by police (New York Times, 3 October 2013).

'*association de malfaiteurs*' offence (De Villepin, 2006). This offence, introduced in 1996, took the controversial step of autonomously criminalising participation in a criminal group in relation to terrorism but at a very early stage in the *iter criminalis*, namely, membership of a group 'established for the purpose of preparation, characterized by one or more material facts'. It has been severely criticised for its affront to principles of legal certainty as well as the very low thresholds of evidence for establishing participation in such a network (Human Rights Watch, 2008; Cahn, 2010; Hodgson, 2013). As one French judge, interviewed by Human Rights Watch (2008: 23) for its report on French counterterrorism, candidly observed:

> 'You send people to prison in counterterrorism matters for very weak reasons. There was usually some kind of evidence, but of what? You had numbers in cell phones, trips, intense religiousness, consultation of certain websites … '.

Despite the very wide net cast by this offence, its 'success' in terms of securing convictions for terrorism offences has consolidated and extended a trend towards pre-emption in subsequent French legislation (Bonelli, 2008; Human Rights Watch, 2008). Among the long list of ancillary criminal offences enacted since 2001 are those criminalising: an inability to justify one's lifestyle while being in regular contact with persons engaged in acts of terrorism; recruitment to participate in an *association de malfaiteurs* or acts of terrorism; provoking acts of terrorism and the promotion of terrorist acts; engaging in an individual terrorist enterprise; dissemination of data which justifies or provokes acts of terrorism; and the regular consultation of websites which endorse acts of terrorism (Cahn, 2016). This highly 'inventive policy of incrimination' (Mayaud, 2013) clearly criminalises offences of opinion or acts preparatory to a preparatory act, thereby pushing out the boundaries of the criminal law and the criminal justice 'net' (Cahn, 2016). In terms of the law's application, it would appear that it is the offence of 'apology of terrorism', introduced by act 2014-1353 of 13th November 2014, which has been relied on most heavily by prosecutors. In the first year of its application, the 2014 Act had been used to prosecute 700 individuals which 'in many cases did not constitute incitement to violence and thus f[e]ll within the scope of legitimate exercise of freedom of expression' (Amnesty International, 2016: 33). In the fortnight following the attacks in Paris in January 2015 alone, there were 298 judicial procedures for 'apology for terrorism', with numbers rising to 570 in the period following the November 2015 attacks (Amnesty International, 2017: 40).

Perhaps the most egregious example of broadly drafted legislation which has been applied outside of the counterterrorism field is the legislation establishing the state of emergency itself. On the night of the attacks of 13th November 2015 in Paris, the then President, François Hollande, declared a state of emergency, originally provided for in a 1955 law adopted to deal with the situation in Algeria, thereby granting powers to law enforcement bodies to conduct warrantless house searches, order house arrests and ban demonstrations. Despite the obvious connection with terrorism as the trigger for the current state of emergency powers (as included in derogation notifications to the UN and Council of Europe), the courts have endorsed an interpretation of the provisions of the 1955 Act that permits their use in other contexts. Following legal challenges taken to orders for house arrest placed on 26 environmental activists during the 2015 United Nations Conference on Climate Change in Paris, the *Conseil d'Etat*, France's highest administrative body, upheld the government's views that this did not constitute a disproportionate interference with the freedom to come and go.[6] Other abusive applications of the emergency powers included bans issued against labour law protestors and measures taken within the

[6] *Conseil d'Etat*, decision no. 395009 of 11 December 2015.

framework of the state of emergency to control illegal immigration (Amnesty International, 2015, 2016, 2017; CNCDH, 2016).

Of further concern are reports detailing the application of these powers to the ordinary criminal sphere and particularly offences related to drugs. In line with previous legislation extending the use of counterterrorist powers to drugs offences, FIDH (2016: 19) reports that most of the searches authorised by the Prefecture (local authority) under the state of emergency were carried out by members of the drugs squad, in an effort to 'boost the number of searches conducted and opportunistically issue search orders for persons linked to ordinary crimes by claiming the existence of a direct link between drug trafficking and terrorism'. These claims, by members of the *Union Syndicale des Magistrats* (USM), are supported by the statistics from the Ministry of the Interior which reveal that out of the 576 legal proceedings opened on foot of the over 4,000 searches carried out under the state of emergency only six have been initiated by the specialist national anti-terrorist unit (CNCDH, 2016). The majority of these measures have instead been used to institute proceedings in the ordinary courts relating to possession of weapons, drugs trafficking or apology of terrorism.

The 'new normal'

In this final category we return to more familiar arguments concerning the role of counterterrorism legislation in diluting core procedural safeguards (Zedner, 2007b). The inclusion in counterterrorism legislation of exceptional measures limiting procedural rights means that courts are often called upon to address constitutionality concerns and to approve constitutional limits on policing, especially when the provisions are broadly or vaguely worded. However, as observed by Stuntz (2002), such limits are also transubstantive, in that they are not limited to terrorist suspects but rather apply equally to all suspects. When a court approves derogations from procedural safeguards in the name of security, such derogations become equally applicable outside the counterterrorism domain, creating a new constitutional or legislative template, and thereby becoming 'the new normalcy' (Donohue, 2009; Stuntz, 2002; Kilcommins and Vaughan, 2004, 2008). Important here also is what Bigo (2002: 13) describes as the 'bureaucratic tendency to return to old law and order solutions', to the extent that governments reconfigure the problem to match the solutions they have already prepared. By becoming the yardstick against which legislators and the public measure their ability to counteract other serious crime, powers previously described as 'extraordinary' or even 'draconian' become part of the everyday administration of justice (Cobane, 2003; Hillyard, 1987; Vaughan and Kilcommins, 2004). In the French context, what Cahn describes as the 'hegemonic tendency' (Cahn, 2010: 487) of counter-terrorist legislation is particularly evident and will be examined here in two main ways: first, the extension of the procedural rules created in the counterterrorist context to organised crime, and secondly, the introduction into the ordinary criminal law of measures inspired by the state of emergency regime.

The existence in France since 1986 of a parallel criminal procedure or criminal procedure bis, comprising a series of special procedural rules and diluted procedural safeguards for terrorist crimes, has undoubtedly greatly increased the risk of normalisation (Lazerges, 2003). As in other jurisdictions, the extension of special measures is most likely to occur in relation to other serious crimes, particularly organised crime,[7] and it is therefore unsurprising to observe in the French criminal justice system an almost 'reciprocal' relation between the two areas, 'with exceptions in one sphere, seamlessly applying to the other' (Hodgson, 2013: 17). Following the introduction of wider police powers to search vehicles and residences in the 2001 and 2003 Acts ─which, as already noted, applied to both terrorist, weapons

[7] See further Kilcommins and Vaughan (2004: 74) on the 'metaphoric pathways' which are often forged between terrorism and organised crime.

and drugs offences ─ the ultimate fusion between organised crime and terrorism occurred with Act 2004-204 of 9th March 2004 (Cahn, 2010; Hodgson, 2013). The Act, whose stated aim was to adapt justice to the evolution of criminality, introduced the offence of organised crime not by defining it as such, but rather through the simple listing of nineteen qualifying offences, terrorism being the 11th in the list (Oehmichen, 2009). Criminal acts ranging from murder to theft can thus be categorised as organised crime when they are committed in a criminal group (*bande organisée*), 'established for the preparation of one or more offences, characterised by one or more material acts'. Most significantly, the Act applied the procedural tools that were originally confined to terrorist offences to this wider range of crimes, among them an array of covert surveillance measures, powers to conduct night searches in places of residence, an extended period of detention (96 hours), and delayed access to a lawyer. While the ostensible aims of the Act were to adapt the justice system to new forms of crime in general, there is little doubt that the origins of the legislation lie in the 'special zone' constructed by counterterrorist laws enacted since 1986. Indeed, it is telling that, in justifying the new 96 hour detention period to the *Assemblee Nationale*, the government stressed that the Act merely extends existing custody periods to the most serious forms of crime (Warsmann, 2003). This becomes particularly problematic when the sheer scope of application of the law is considered. Referred to by the CNCDH (2016: 18) as, 'vast, fluctuating and inconsistent', the highly fluid nature of the definition of organised crime in France means that, as Hodgson (2013: 18) notes, '[a] group of boys who come together in order to steal another boy's bus pass would fall within [it]'.

After the paths of terrorism and organised crime formally crossed in 2004, the conceptual fusion of the two concepts continued, further increasing the likelihood of contagion. Thus, in the wake of the November 2015 attacks on Paris, the government announced 'the need to adapt legislative provisions on organised crime and, more specifically, on terrorism in order to strengthen in a long-term way the tools and resources available to the administrative and judicial authorities, beyond the temporary legal framework that is in place under the state of emergency' (FIDH, 2016: 29, emphasis added). The ensuing legislation, Act 2016-731 of 3rd June 2016, can be viewed as perpetuating the construction of a permanent exceptional criminal procedure that began with the 2004 Act (Cahn, 2016). The Act further expanded the inventory of organised crimes by adding several offences relating to weapons, explosives and financial crime. Significantly, the Act extended to police and the prosecutors investigating organised crimes and other serious offences (including terrorism) the controversial new surveillance powers granted to intelligence services in the July 2015 Act. Thus, prosecuting authorities can now gain access, remotely and without the suspect's knowledge, to electronic communication data protected by username/password once it is judicially authorised. Indeed, in emergency situations, 'arising from an imminent risk of loss of evidence or serious harm to persons or property' electronic surveillance technology can now be deployed without prior judicial approval (although an ex-post judicial authorisation after a maximum of 24 hours is still required) (International Commission of Jurists, 2016). Thus, powers initially justified as a proportionate and necessary response to a terrorist emergency (the Charlie Hebdo attacks) have now come to be 'judicialised', to borrow Cahn's (2016) term, with, as he further observes, important knock-on effects for the distinction between intelligence services/the police and intelligence/evidence.

The June 2016 Act is also interesting from another perspective, namely, the institutionalisation of state of emergency measures and their transposition into the ordinary, permanent criminal justice system. Several such measures can be identified, namely, assigned residency/house arrest and powers to search residences (CNCDH, 2016). In relation to orders for house arrest, these are aimed at individuals travelling to or from a 'terrorist theatre of operation' like Syria or Iraq and have been justified by the French government in terms of the need to exercise control over individuals who have thus far been able

to avoid criminal prosecution, namely, Muslim women (FIDH, 2016). The 2016 provisions permit house arrest for up to one month upon return to France with a variety of restrictions such as reporting requirements. As with the assigned residency orders authorised under the state of emergency regime, they are imposed by the administrative authorities (subject only to judicial review a posteriori), on a much lower standard of proof than required under the existing Criminal Code, with stiff penalties of up to three years in the event of breach (Amnesty International, 2016; CNCDH, 2016). In placing these powers on a permanent the path has no doubt been cleared by the earlier decision of the *Conseil Constitutionnel* on the state of emergency measures to the effect that house arrest does not comprise a deprivation of liberty provided it does not exceed 12 hours day.[8]

The provision on house searches, regulated by the 1955 Act, was amended by the November act 2015-1501 extending the state of emergency to allow night searches without prior judicial authorisation in the case of threat to public security and order, and in any case in which 'there are serious grounds for believing that the place is frequented by a person whose behaviour constitutes a threat to public security and order' (art. 4 of act 2015-1501). The June 2016 Act permanently allowed night searches during preliminary investigations of terrorist offences in the event of an 'emergency' ('to prevent the risk of harm to life or physical integrity') whereas the existing Criminal Code allowed night searches only in the case of the main (flagrant) investigation or in the immediate risk of concealment or destruction of evidence (art. 706-90 of the Criminal Procedural Code). Again, what is notable about the new provisions is their interchangeability with the state of emergency measures; indeed Lacaze (2017) directly links the dropping of the night search powers from the May 2016 extension of the state of emergency to the enactment of this more permanent provision.

Criminology and counterterrorism *a la Française*

Fifteen years ago, Didier Bigo (2002) expressed his concern that terrorism could be used as a 'catchall category' in France justifying repressive policies in areas beyond terrorism and thus giving rise to a 'routinisation' of exceptional procedures. As Cahn (2010) has written, his words have proved highly prescient in terms of French criminal justice reform post 9/11. Beginning with the initial response to the 9/11 attacks, enhanced powers to search vehicles and residences, previously declared unconstitutional, were introduced by the government. As with subsequent reforms, provisions have been included permitting the use of evidence discovered relating to other offences in subsequent proceedings, something which is not without significance given wider impact of these powers and the possibility of knowing abusive use of derogatory procedures (CNCDH, 2001). Taken together with other examples such as the Intelligence Act 2015, we may wonder, with Cahn (2016), FIDH (2016) and other commentators (Lazerges and Henrion-Stoffel, 2016), about the utility of terrorism as a means of justifying broader reforms. As has also been observed, exceptional powers, accrued as part of the fight against terror, are consistently applied to 'related' crimes such as drugs and weapons offences, despite the absence of any obvious link with minor offences such as possession of drugs. This trend, again evident since 2001, was consolidated with the 2004 Act applying counterterrorist powers to organised crime more broadly, including minor forms of delinquency. More recently, it has been continued, not only with the steady accretion of new offences under the organised crime banner, but with the 'opportunistic' application of state of emergency search powers to drugs and weapons offences to now

[8] *Conseil Constitutionnel*, decision no. 2015-527 QPC of 22 December 2015.

form the majority of prosecutions resulting from the state of emergency measures (CNCDH, 2016; FIDH, 2016).

Both normatively and practically, therefore, these new prerogatives are highly significant. As a conversation with any practising criminal lawyer will reveal, drugs offences form the 'bread and butter' of a criminal law practice in most jurisdictions (Kutateladze, 2009). Combined with the heavy use of the offence of 'apology for terrorism' these initiatives provide a broad array of legal tools for the discipline and control of young people from Muslim communities, particularly Maghrebis in low-income communities (Fassin, 2016). While apology for terrorism is prosecuted in the ordinary courts and therefore subject to ordinary investigation methods, it is nevertheless processed very quickly, requiring a person's 'immediate appearance' before a judge and also triggering the use of a number of special techniques for surveillance, infiltration and interception (Amnesty International, 2017; Lacaze, 2015). Amnesty International (2017) provide several examples of prosecutions brought for this offence against young Muslims France, including those based on comments that young people have posted on Facebook and minor acts of graffiti.

On a normative level, offences related to terrorism have arguably spearheaded a trend towards preemptive criminalisation in France with the autonomous criminalisation, particularly since 2001, of highly equivocal acts 'preparatory to the preparation' for the offence (CNCDH, 2014). Linked with this is the significant increase in preventive powers, such as those of house arrest, being given to administrative authorities at the expense of the traditional law enforcement bodies (CNCDH, 2016). While the concern accompanying these trends, as in other jurisdictions, is the emergence of a parallel criminal procedure without the requisite procedural safeguards, in France this blurring of roles is particularly significant given the strict separation between the administrative police, (charged with upholding public order) and the judicial police (charged with the investigation of crimes) and the constitutional protection given to same. Even more concerning is the emerging scholarly debate ─ prompted by both the steady expansion of the list of organised crimes attracting special measures and the exemption of the offence of apology of terrorism from the protections of the criminal law code for the press ─ of the possible 'eviction' of the ordinary criminal law in favour of a *droit d'exception* (Lazerges and Henrion-Stoffel, 2016; Mayaud, 2013). Gloomy though such prognoses may be, they serve to underline the serious implications of counterterrorist legislation and policy for the direction of travel of the criminal law in general. Unfortunately, moreover, these trends show no sign of slowing down with recent plans for a new bill ending the state of emergency but incorporating or 'repackaging' several state of emergency provisions into ordinary administrative and criminal law (Le Monde, 2017).

But is France a special case, an exception when it comes to states of exceptions (if one will forgive the tautology)? As already observed, the existence since 1986 of a special category of offences derogating from the common law or criminal law *bis* has no doubt helped accelerate the process of contagion in France. This much was heavily stressed by interviewees and, indeed, is perhaps to be expected in a jurisdiction which has purposefully sought to disrupt potential terrorism-crime linkages (Hellmuth, 2015). Yet it would be misleading not to acknowledge the existence of these trends elsewhere. The prolific use of suspicionless stop and search powers in the UK (until 2012) has already been noted, and this has been accompanied by concerns about the spread of the special advocate procedure to other areas of the criminal law (Fenwick and Phillipson, 2011) as well as the abuse of surveillance powers to monitor minor criminal activity such as dog fouling (Longstaff and Graham, 2008). In Poland, another country included in the current study, recent counterterrorist legislation concerning 'terrorism' and 'terrorist incidents' has been drafted so broadly and with such a lack of imprecision that Amnesty International has called into serious question the connection of the examples provided (e.g. loss of a passport abroad) with terrorist activity (Amnesty International, 2017: 25). Even

beyond the instant study, comparative accounts from countries such as Norway (Husabø, 2013) and Australia (Ananian-Welsh and Williams, 2015; Appleby and Williams, 2010) are quickly accumulating detailing the substantial impact of counterterrorist legislation on the criminal justice system more broadly.

While far from suggesting that contagion is inevitable the above account nevertheless serves to raise questions the complementarity between the ordinary criminal law and the counterterrorism field. Writing in the early days of the 'war on terror', Zedner (2007a, 2007b) was quick to recognise the hegemonic power of terrorism and the securitisation agenda more generally. In her later work important questions about the transformative potential of terrorism for criminal law were posed: is there a danger it will be 'terrorised' (Zedner, 2014)? The above discussion outlining the variety of subtle mechanisms in which contamination of the mainstream system occurs both substantiates this thesis and also prompts further criminological reflection on the connections, both normative and practical, being forged between 'exceptional' and 'ordinary' legal regimes. If, as Aradau and van Munster (2009: 688) contend, 'existing criminological interpretations show how exceptional politics *overwrites* the law', while for international relations it 'also *underwrites* the law', perhaps it is timely also to acknowledge the exception may *become* the law? All the more so in the context of a permanent 'war on terror', we may struggle to 'tell the dancer from the dance', and thus the ordinary business of criminal justice from its more politicised cousin (Kilcommins and Vaughan, 2004: 57). Looking to the French example again, for example, is it still correct to speak of France reserving the 'hard' face of its criminal law for terrorists while treating other criminals more leniently as observed by comparative scholars such as Whitman (2005: 127)? Is such a division sustainable, particularly in light of recent events? For how would a French criminologist credibly navigate the contemporary criminal realm in France without reference to the politics and policies of the emergency?

Better engagement with counterterrorism brings, as other authors have observed, both challenges and opportunities (Deflem, 2009). Challenges include the frequent absence, unlike with crime, of hard data on the actual implementation of counterterrorist legislation as well the shroud of secrecy usually accompanying counterterrorist operations (see, e.g., Lum et al., 2006). But opportunities also abound. First, as previously observed by Lennon (2015) in this journal, the substantial literature already accumulated within criminology on precautionary measures in the context of counterterrorism may also find an application in the counterterrorist activities of security and police organisations 'on the ground'. Because policing and prosecutorial bodies are inevitably targeted at the criminal components of terrorist incidents, their activities in terrorism-related activities are ideally suited for criminological analysis (Deflem, 2009). Secondly, connected as it is to broader debates on transformation in the penal field and the various political transformations which have gone before them, criminology remains well-positioned to reflect on these developments (Loader, 2007). This vantage point is important for, as observed by both Lea (2005, 2015) and Donohue (2012), a contamination effect is by no means one-way; just as important as 'trickle-down' is 'trickle-up' where policies based on the strategies developed for surveillance and control of the poor in the ordinary criminal realm migrate (often inappropriately) to the counterterrorism field. While the obvious example in the UK is the ASBO and the control order, this is evident in France also with the inclusion as far back as 1994 in the ordinary criminal code of a range of offences criminalising risky behaviour whose consequences in terms of harm were far from certain, or indeed probable (Lazerges and Henrion-Stoffel, 2016). In assessing such developments and their migration to the counterterrorist sphere (and back) the unique province of criminology is its ability to reconcile policies aimed at twenty first century 'super-terrorism' (Lazarus and Goold, 2007) with the pursuit of security of a more anodyne kind. Indeed, it is perhaps in this more sociologically informed

analysis that the beginnings of a process of social contestation of contagion and its associated effects may be found.

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Author biographies

Claire Hamilton, LL.B. (Ling. Franc.), B.L., M. Litt., Ph.D., MA, PG Diploma in Human Rights Law is a Senior Lecturer in Law in the Department of Law, Maynooth University, Ireland. Her research and teaching interests include punitiveness, comparative penology and counterterrorism.

Giulia Berlusconi is a Lecturer in Criminology in the Department of Sociology at the University of Surrey. Her research interests include: co-offending networks; social network analysis; counterterrorism; organised crime; drug markets.