

Belgium, Constitutional Court, n°31/2018, March, 15th 2018

Deciding bodies and decisions

Belgium, Constitutional Court, n°31/2018, March, 15th 2018

Area of law

Freedom of expression - hate speech

Subject matter

Which are the legitimate grounds for the limitation to freedom expression?

Can the legislator qualify as a crime the dissemination of messages that incite the perpetration of terrorist acts? Which is the proportionality test applicable in order to avoid an unjustified encroachment on freedom of expression?

Summary Facts Of The Case

The Belgian Human Rights League presented an action before the Constitutional court against the modification of a criminal provision to criminalize the dissemination of messages that incite the perpetration of terrorist acts or any other mean to make those messages available to the public, should the dissemination imply a risk of commitment of those acts or not.

The Belgian Constitutional Court evaluates the constitutionality of the Art.2 of the Law 3 August 2016 amending art 140 bis Criminal code against art 19 Belgian Constitution, as well art. 10 ECHR, art. 11 EU Charter and art. 19 ICCPR. Those provisions are qualified by the Constitutional court as an indissoluble whole.

The Constitutional court address the analysis of the amended criminal code provision taking into account that in 2015 a similar question of constitutionality was addressing the previous version of the provision, resulting in legitimate ground for the limitation of freedom of expression.

The Constitutional court starts from the assumption that the protection of democracy implies the protection of the values and principles of the ECHR against persons or organisations that try to undermine those fundamental values by inciting to commit violence and therefore to commit terrorism.

When an expressed opinion justifies that terrorism is committed to achieve the goals of the author of the opinion, national authorities can limit freedom of expression. Nevertheless, the criminalisation of public provocation to commit terrorist acts doesn't allow the repression of acts that have no relation with terrorism which can infringe freedom of expression.

According to this provision, the judge has to take several elements into account: the person who disseminates the message or makes it available to the public, the recipient of the message, the nature of the message, the context of the message. The person disseminating the message or making it available to the public can only be sanctioned if she acts with a special intent, i.e. incitement to terrorist acts.

According to the preparatory work of this provision, the criminalisation of such messages occurs only if there's a risk of terrorist acts. This condition is considered as a safeguard against the repression of offences unrelated to terrorism: the criminalisation cannot lead to the repression of offences that are unrelated to terrorism – which would infringe freedom of expression. Therefore, the criminalisation can only occur if there's serious evidence that there's a risk of terrorist act. The Constitutional court then acknowledges that the amended Art. 140bis Criminal Code deletes the requirement of the existence of a risk in order to simplify proof of incitement to terrorism. According to the preparatory works in Parliament, the range of this requirement is not clear and it can be difficult to prove the existence of such an element.

In the previous decision regarding the same provision, the Constitutional Court considered that the definition of risk is clear enough to be fully in line with the principle of legality. Besides the judge has to exercise his discretion and examine whether or not there's serious evidence of a risk depending on the identity of the person disseminating the message or making it available to the public, its recipient, nature and context.

The need to simplify the production of evidence cannot justify a sentence to imprisonment and the fine for terrorism incitement when there's no serious evidence of a risk of terrorist acts. A provision of a Council Framework Decision on combatting terrorism requires to examine if such a risk exists. Thus, the constitutional court affirms that the new version of art. 140bis Criminal Code containing various provisions in terms of counter-terrorism is a limitation to freedom of expression, it is not necessary in a democratic society and limits the freedom of expression to a disproportionate extent, therefore it must be annulled.

Relation to the scope of the Charter

The Charter is mentioned but not analysed in detail by the Constitutional court, neither in the decision of 2018 nor in the previous decision of 2015 on the same provision. However, it is important to note that the Constitutional court analyses the freedom of expression as guaranteed by the Constitution, ECHR and the Charter as a whole.
