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France: Towards an « Arbitrary Regime ». A De Facto Police State Without a State of Emergency.

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In the context of the attacks claimed by Daesh, the French government is proceeding with a series of reforms which will considerably expand the powers of the police and the administration to the detriment of the judicial system. Given that these reforms have no bearing on the prevention of this type of attack, which primarily require political measures, it seems that France is moving towards the installation of an arbitrary regime.

On the 9th March 2016, by a large majority and almost without debate, the National Assembly adopted a new project for the reform of criminal law «... to reinforce the fight against terrorism and organised crime» [1]. The text still has to be reviewed by the Senate, but since it is an accelerated procedure, it only requires one reading per chamber.

The project introduces into common law certain dispositions which are usually considered «exceptional». Thus, in the text presented for the opinion of the State Council, the government confirms its intention to «... permanently reinforce the tools and means at the disposition of the administrative and judicial authorities, outside of the temporary legal framework implemented in the context of a state of emergency» [2].

A state of emergency without a state of emergency

Although the two texts are closely linked, this bill must not be confused with the law of the 20th November 2015, which prolongs the state of emergency for a new three-month period, while simultaneously increasing the restriction of private and public freedoms listed in the law of 1955 [3]. This new project is aimed not only at actions, but also intentions. Although the exceptional dispositions were once again prolonged, the government has not given up the idea of reforming criminal procedure. This is an attempt to introduce the liberticidal measures authorised by the state of emergency, but without a state of emergency being declared. The project thus aims at freeing the authorities from the principle of the separation of powers, at dissolving the judicial function, and concentrating all prerogatives in the hands of the Executive and the police. The project for criminal reform also has the same objective.

The text opens the way for the legal dispositions involved in the espionage of French citizens. As expressed in the the overview of the motives for the bill, «the arsenal of prevention» set up by the law concerning Intelligence [4], «must be completed by a judicial appendix» [5]. Thanks to this amendment, information obtained by false IMSI-catcher antennae, by video surveillance, image capture and the audio bugging of homes, can be used as a basis for criminal proceedings.

Formal reinforcement of the Public Prosecutor

The bill reinforces the prerogatives of the Public Prosecutor, a magistrate dependant on the Executive powers. It therefore plays its part in the continuing action of all governments – whatever the majority – which is the desire to minimise the role of the investigating magistrate, a function which is deemed too independent by the Executive. It is aimed at dispossessing the judge of the exclusivity of certain of his powers, such as the control of the procedure for intrusive enquiries, in order to hand them over to the Public Prosecutor of the Republic.

In the text voted by the National Assembly, the Prosecutor also becomes a «Director of Enquiries». He leads the «preliminary enquiries», and in this context, he is able to arraign the suspect before a court. Thereafter, he handles the prosecution during the trial which he has himself initiated. Working on all fronts, he will also bear the responsibility for verifying that the «enquiries carried out by the criminal investigation department have been carried out effectively both for the prosecution and the defence».

In enquiries placed under the direction of the Prosecutor, access to the case file is postponed until the end of the investigation. Thus, the suspect, at the moment of his accusation, has no possibility of contesting the legality or the necessity of an enquiry. Contrary to the procedure headed by the examining magistrate, access to the case file remains non-systematic. In order to «give new rights» to the suspect, and especially to perpetuate the Prosecutor's hold over the criminal procedure, the bill introduces a reform which enables the suspect to intervene in the process of enquiry. But a reform that seems to be headed in the right direction in fact reveals itself as a perversion of the judicial system and the rights of the defence.

A perversion of the criminal justice system

Thus, the bill introduces a major modification of the criminal justice system – the passage from an inquisitorial procedure centred around the magistrate to a system which is closer to the accusatory procedure currently in vogue in the Anglo-Saxon countries. [6]. The lawyers will have the possibility to ask the Prosecutor for certain determinant proofs, such as auditions or forensic examinations. The introduction of these new procedures means that, as in the United States, only the wealthy will be able to defend themselves. Indeed, for everyone else, the bill has already planned to simplify the mode of passage before the judge of freedoms and detention, in order to be able to judge them even faster within the framework of an immediate trial.

Today, in the absence of any suspicious or illegal behaviour, the Prosecutor has the faculty to authorise a preventive control of identity and the search of vehicles found in a given area, and for a specific period. The bill extends this procedure to the inspection of luggage, while currently, this can only be ordered in the context of a legally authorised investigation. We should remember that these inspections are not necessarily aimed at suspects, but also anyone who may be present in a particular location. The extension planned by the bill increases the powers of the police in particular. Inspections can take place not because the police has any hint of an illegal action, but simply because they have the right to do so, on the pretext that they are present in order to prevent or look out for offences.

Eviction of the examining magistrate

The Prosecutor of the Republic thus has at his disposition an increasing number of prerogatives which until now had been reserved for the examining magistrate, who is once again isolated by the bill, although in France, his functions are already limited to a very small number of cases.

The examining magistrate is irremovable – he can not be displaced by the Minister of Justice and can not be divested of a case by his hierarchy. Concerning his nomination, the opinion of the Superior Council of the Judiciary is decisive, and this also guarantees his autonomy. The magistrate, whose independence is statutory, is now bereft of the specificity of his action – to be able to decide on the arraignment of the accused before the court, and carry out investigations for the prosecution and the defence, to the advantage of both the Prosecutor and the police, who, let's remember, are under the authority not of the Minister for Justice, but the Minister for Internal Affairs. This clearly indicates the primacy of his function concerning the maintenance of law and order .

Video surveillance, image capture and audio bugging of a location or a home were also, until now, reserved for the judicial information handed to the examining magistrate. They can now be ordered from the beginning of the preliminary enquiry, after a simple authorisation by the judge for freedom and detention.

Let us note that the increase of the powers of the Prosecutor is being implemented without any modification of the status of the Prosecutor's Office, which allowed him a minimum of autonomy from the Executive. Even the reform, previously planned by François Hollande, which guaranteed that the government would nominate the Prosecutors on the advice of the High Council of the Judiciary, has not been implemented [7].

An uncontrolled police force

In reality, the reinforcement of the function of the Prosecutor only exists in comparison to the function of the examining magistrate. As far as the police are concerned, control by the magistrate is little more than a formality. In Belgium, before the Parliamentary Commission relative to the implementation, in 1999, of the comprehensive police force, known as the «two-level structure» [8], the Prosecutors made it known that, once the authorisation for the investigation has been given, they no longer have effective control over the investigative procedure. This reality is even more obvious in France. The Public Prosecutor's Office is presently loaded down with work, since, because they are so few, the Prosecutors have a quasi-jurisdictional function, and treat the great majority of the legal files. The new prerogatives given by this new bill can only increase their work-load and make any surveillance of police work impossible. The police are in fact the flat-out winners of these reforms, which confirm their central role in the present exercise of State power.

An omnipotent police force

The growth of police power is confirmed by the extension of the context of legitimate defence for the police. Policemen are considered legally «non-responsible» if they fire their weapons, in cases of «absolute necessity», at «a person who has killed or attempted to kill, and is about to try again». Since we know that there already exists jurisprudence which allows police the status of «legitimate defence» for having shot a fleeing suspect in the back [9], we understand that the object of this article is less to protect policemen from legal pursuit than to signify to citizens that they may be treated as enemies. There is an extreme example to illustrate this perspective. France was found guilty by the European Court of

Human Rights in an affair where the judiciary had dismissed the case of a gendarme who had shot in the back a handcuffed suspect who was fleeing police custody [10].

The law enforcement agencies may therefore detain a person, even a minor, without access to a lawyer, even if they are in possession of an identity card, and on the vague and hypothetical condition that there are «serious reasons» to believe that they may have a «link» with terrorist activity .

A previous draft of the bill went even further, by creating an offence called «obstruction of search». Though the article was abandoned, it clearly demonstrated the will of the government to criminalise all resistance to the arbitrary will of the police. The disposition was intended to silence demonstrations, following abuses during the wave of inspections authorised by the state of emergency. Furthermore, the older version of the bill indicated that the police could seize any object or document, without having to ask for permission from the Prosecutor [11]. Thus, the police may be freed from the final element of judicial control, that of the Prosecutor, a magistrate who, all the same, is directly governed by the Executive.

The judge of freedom and detention – an alibi

The Executive can not control the work of the police via the Prosecutor. The judiciary is absolutely helpless in the face of the other figure, officially named by the bill, that of the judge of freedom and detention. Yet he is the official responsible for most of the authorisations for the implementation of the dispositions of law. The control of the legality and proportionality of these measures can be no more than a formality, since the judge is not familiar with the whole file, to which he only has access when it is handed to him, at which time he must make his decision. Once the autorisation has been agreed, he has no way of controlling the actions of the Prosecutor and the police.

From the statutory point of view, the position of the judge for freedom and detention is weakened. He does not enjoy the degree of independence of an investigating magistrate, since he is not nominated by decree but by the President of the judiciary, who may decide to relieve him of his functions at any time – if, for example, he should refuse to authorise wire-tapping [12].

As far as terrorism is concerned, and with the prior authorisation of the judge for freedom and detention, night searches will be authorised in private homes from the very beginning of the preliminary investigation. This procedure replaces the authorisation given by the examining magistrate in the primary phase of the enquiry. (In the context of a state of emergency, autorisation may be given by the Prefect). From now on, searches may also be carried out as a preventive measure, on the grounds of possible danger, when it may be used to «prevent the risk of a threat to life or physical integrity» [13].

Night searches in private homes are trivialised. The text speaks of «the risk of a threat», without qualifying it as either current or imminent. This may cover a great number of situations where there may be a threat to life and physical integrity. Vague suspicions could lead to such intrusions on privacy. They may become generalised, if their limitation to terrorist offences is only temporary.

Computer searches without judicial guarantee

The text also plans for the extension of surveillance possibilities in public places, including the use of IMSI-catchers, or false relay-antennae which spy on telephones and computers without the knowledge of the user. They can also pick up all the mobile phones within their range of action. This represents a massive and undifferentiated system for data-capture. Its use will not be limited exclusively to anti-terrorist investigations, and will be renewable, from month to month, for very long periods, which opens the door to a potentially massive capture of information from French citizens. It will be authorised by the judge for freedom and detention, or, «in emergencies», by the Public Prosecutor, given that it is generally the police themselves who qualify the situation as an emergency.

Until now, IMSI-catchers could only be authorised in the context of judiciary information, but have been used only rarely by the investigating judge, due to the confusion which reigns in the legal system. The law concerning Intelligence has legalised their use by the secret services.

Article 3 of the bill relative to the criminal procedure also provides for the extension of data capture to data archives, which means that all the information contained in computer archives may be taken. This system does not only concern targeted bugs, which collect only current or future conversations, but also an inspection of very old data. This last procedure usually presents certain guarantees, such as the presence of the suspect or of two witnesses, as well as the creation of a secure copy, which limits the risk of modification or exterior intervention on the data collected. This is obviously not the case as far as data capture is concerned [14].

The Prefect – an agent of the permanent state of exception

As in the state of emergency, the action of the Prefect has been reinforced. The bill for the reform of criminal procedure is in close correspondence with the law of the 20th November 2015, which prolongs the state of emergency and criminalises intentions, instead of real actions. Terrorist intentions, which are attributed to persons returning from Syria, are also at the centre of the «surveillance» system authorised by the Prefect.

Today, «returns from Syria», are now a legal matter. The suspects are indicted, imprisoned or placed under judicial review. From now on, for one month, Prefects may place them under house arrest, and for three months, demand their telephone and computer codes, oblige them to give prior notice of their travels and forbid them to speak to certain people. These measures certainly present the attributes of a criminal procedure, but in fact are a purely administrative act, without the control of a judge. They leave the door wide open for random judgement, and give the suspect no possibility of confronting the allegations brought against him. It is the intention attributed to the person which is under attack, without him being able to defend himself. Thus, as in the state of emergency, the Minister of the Interior, by the intermediary of the Prefect, replaces the examining magistrate. This new bill gives him the power to deprive someone of their freedom, in the absence of any criminal offence.

The criminalisation of these «returns from Syria» reveals the use of a double language by the power structure. In August 2012, ex-Minister Laurent Fabius declared in public that «Bachar el-Assad did not deserve to be on this earth». He went even further when he declared to the media, in December 2012 – without being arrested for «supporting terrorism» [15] – that «the al-Nusra Front is doing a good job». The jihadist group that he mentioned had just been listed as a terrorist organisation by the United States [16]. At the same time as this affirmation of his support for terrorist groups, the government was

demonising and pursuing people who may have been influenced by his declarations.

The Administrative Judge – a *trompe l'œil* form of control

The bill gives the Administrative Judge the power to control the dispositions relative to the «returns from Syria». It is his job to «control the exactitude of the motives given by the administration, and back them up with his authority, or pronounce a dismissal when the motive invoked is based on materially inexact facts». Thus, in opposition to the principle of the separation of powers, the administration is tasked with controlling itself. Furthermore, the surveillance is purely formal. The Administrative Judge, contrary to the examining magistrate and the judge of freedom and detention, intervenes a posteriori, and his control is random. He only intervenes if the arrested person asks for his participation. Above all, he does not possess the concrete elements necessary for making his decision. He can only base his opinion on imprecise, non-sourced documents – notes produced by the Intelligence services, or unsigned, undated documents which lack official headings.

On the authorisation of the Prefect, and in the purely administrative context of the «prevention of terrorism», the police can therefore proceed with visual inspection, and the search of luggage and vehicles. It is therefore free from prior authorisation by the Prosecutor, in cases where establishments and installations have been declared «sensitive» by the Prefect, in facts named as such by the police themselves.

Thus, the text of the law consecrates «the entry of the Prefect into the code of criminal proceedings». But this is in fact a re-modelling of past status, since, before the reform of 1993 [17] which took it from him, the Prefect already enjoyed the powers of the criminal police. The old Article 10 of the code of criminal procedure allowed him, in case of an offence against national security or espionage, to play the part of a policeman, in other words, to order arrests and enquiries. This recurrent concentration of legal prerogatives in the hands of a Prefect shows that, in the country of Montesquieu, the separation of powers, claimed as part of the national heritage, has always been, at the least, erratic.

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Translation: Pete Kimberley, Voltaire.net

Notes:

[1] «Projet de loi renforçant la lutte contre le crime organisé et son fonctionnement, l'efficacité et les garanties de la procédure pénale», Assemblée nationale, 3 février 2016.

[2] Jean-Baptiste Jacquin, «Les pouvoirs de police renforcés pour se passer de l'état d'urgence», *Le Monde*, le 6 janvier 2016.

[3] «Loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence, version consolidée au 15 mars 2016».

[4] «Loi française sur le Renseignement, Société de surveillance ou société surmoïque», Jean-Claude Paye, *Réseau Voltaire*, le 28 novembre 2015.

[5] «Projet de loi renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale » (JUSD1532276L), Conseil des ministres du 3 février 2016

[6] Jean-Baptiste Jacquin, «Réforme pénale : les procureurs prennent la main sur les enquêtes», *Le Monde*, 4 mars 2016.

[7] Jean-Baptiste Jacquin, « Comment la réforme pénale renforce les pouvoirs des procureurs », *Le Monde*, le 4 mars 2016.

[8] Lire : Jean-Claude Paye, « Vers un État policier en Belgique?», *Le Monde diplomatique*, novembre 1999 et *Vers un État policier en Belgique*, EPO, Bruxelles 2000, 159 p.

[9] « Acquittement du policier qui avait tué un braqueur et colère des parties civiles», *L'express.fr*, 15 janvier 2016.

[10] «Le gendarme tue le gardé à vue : la France condamnée par la CEDH», *Net-iris.fr*, 18 avril 2014.

[11] Sylvain Rolland, «Sécurité : l'inquiétante dérive vers la surveillance de masse», *La Tribune.fr*, 4 décembre 2015.

[12] *Questions/réponses critiques du Syndicat de la magistrature sur le projet de loi criminalité organisée/terrorisme*, Syndicat de la Magistrature, 14 mars 2016, p. 9.

[13] Jean-Baptisque Jacquin, «Les pouvoirs de la police renforcés pour pouvoir se passer de l'état d'urgence», *Le Monde*, 6 janvier 2016.

[14] *Op. Cit*. p. 8.

[15] L'incrimination d'apologie du terrorisme a été créée par la Loi renforçant les dispositions relatives à la lutte contre le terrorisme du 14 novembre 2014. See : Jean-Claude Paye, «La criminalisation du Net en France», *Réseau Voltaire*, 13 septembre 2015.

[16] «Des Syriens demandent réparation à Fabius», *Le Figaro* avec AFP, 10 décembre 2014; et «Des Syriens attaquent l'État en appel», *Le Figaro* avec AFP, 7 septembre 2015.

[17] «Loi n° 93-2 du 4 janvier 1993 portant réforme de la procédure pénale, Version consolidée au 13 mars 2016», Légifrance.

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