The French Antiterrorist Bill: A Permanent State of Emergency

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A government bill against terrorism has been introduced at the end of June before the Senate to replace the state of emergency, which is in force since the terrorist attacks of November 2015. It was adopted on July 18 by 229 senators against 106 and will now proceed to the National Assembly.
The bill has raised a lot of concern. The national ombudsman, Jacques Toubon, has described the bill as a "poisoned pill". Others have termed it "state of emergency light". Academics have spoken about making the state of emergency permanent (appeal signed by 300 academics) and about a "soft despotism".
The Home secretary has insisted that, compared to the state of emergency, the bill only aims at terrorists, respects the powers of the judiciary, and increases freedoms. In reality, the bill looks like a partly softened and partly strengthened version of the state of emergency. The French authorities have clearly chosen to reduce freedoms in order to promote security.

The 2017 bill confirms an evolution in French law which can be traced back to 1986. After terrorist attacks, the authorities drafted exceptional measures. Since 2001, at least fifteen Acts of Parliament have created new offenses related to terrorism, such as the catch-all "criminal association in relation to a terrorist undertaking" and given wide powers to the police and intelligence services. The new bill confirms and worsens this evolution. The bill provides for measures in order to tackle risks of terrorism (I), to increase the powers of the intelligence services (II) and to control borders (III).

I. Tackling risks of terrorism

The prefects (head of the administration in the 100 French departments) will be entitled to define areas of protection (périmètres de protection). In those areas, the freedom of movement of persons would be limited. The police could be authorized to search people and vehicles, with the assent of the persons involved. If they do not consent, they would have to leave the area.
This provision looks very much like a provision of the legislation on the state of emergency, under which the prefect could give search powers for periods of 24 hours. Yet there are two differences: The bill suppresses the time-limit (strengthening effect) and requires the assent of the persons involved (softening effect)."In order to prevent acts of terrorism", the prefects will be allowed to order the closure of places of worship in which speeches encourage or promote terrorism and violence. The closure is decided for six months after a contradictory procedure possibility to appeal the decision. The violation of a closure decision is a criminal offence, punishable by six months in prison and a EUR 7.500 fine.
Here again, the provision is almost copied from the Act of July 2016. The only differences are the time-limit, the contradictory procedure.possibility to appeal (softening effect) and the criminal offence (strengthening effect). "In order to prevent acts of terrorism", the Home Secretary will be able to issue a control order against a person "against whom there are serious grounds to think that his/her behaviour represents a serious threat to public order and security". The control order may impose to stay in a given municipality, to report to the police once a day or to wear an electronic bracelet, to declare his/her residence and change of residence, to give the numbers of his/her means of communications, and to avoid meeting certain persons. The control order must be written and substantiated. It is a criminal offence not to respect a control order. The crime is punished by a three-year prison sentence and a EUR 45.000 fine.
The provision raises a number of criticisms. It is vague enough. What are "serious grounds"? What is a "serious threat to public order and security"? They will surely be assessed by the intelligence services, as during the state of

emergency. Their reports are neither signed nor do they provide justification. They do not ensure that the rights of the defense are respected. It is a softened and permanent version of the state of emergency.

Since November 20. 2015, the Home secretary has been allowed to impose house arrest and to require that the person reports to the police several times a day. The bill replaces house arrest by “municipality arrest” and several reports by a single one. It is still a wide restriction to the freedom of movement, with little judicial control. The administrative courts will have jurisdiction over control orders but they only decide after the order is applied.
House arrests have sometimes been used against people who had been convicted and released but were still deemed dangerous. The new “municipality arrest” could serve the same purpose and look like a permanent sentence without trial. House arrests have also been used against persons deemed dangerous without a previous criminal sentence. Their freedom is seriously restricted by a mere administrative decision based on police information. Most of them have not been indicted afterwards.
The prefects will also be allowed to order “visits” – which sounds milder than the usual term of search whilst meaning exactly the same – and seizure of any document or item in spaces used by a person “against whom there are serious grounds to think that his/her behavior represents a serious threat for public order and security”. The measures must be authorized by a specialized Parisian judge. The public prosecutor of Paris must also be informed. The criminal proceedings for terrorism are centralized in Paris. As a rule, the search and seizure must take place during daytime. If the judge authorizes it, the police may order the persons involved to stay in the room for a maximum of 4 hours. The judge may also authorize the analysis of computer data after its seizure.

Since the first Act of Parliament of November 2015, the prefects had powers to order search and seizure at any time, including at night. They did not have to get an authorization. Since a decision of the Constitutional Council, computer data could only be used by the administration if a judge agreed.
The new powers to order “visits” and seizures look very much like the powers given to the prefects under the state of emergency. The main difference is that they have to be authorized by a judge (softening effect) and that the person can be ordered to stay for a few hours (strengthening effect). There was no need to create new rules. Ordinary criminal law allows the judges to order searches, seizures and arrests during criminal proceedings. The new rules blur the distinction between administrative law, aimed at prevention, and criminal law, aimed at repression. They increase the powers of the administration against an ill-defined danger and thus weaken the rule of law.

II. Increasing the powers of intelligence services

The bill allows the intelligence services to intercept wireless communications according to the same procedural rules as the interception of electronic communications, because of a decision of the Constitutional Council.
The powers of the intelligence services had already been increased by an Act of July 2015, which has transferred the powers given to the judges during criminal proceedings to the intelligence services as long as they are used to prevent terrorism or for a number of other purposes. Those services may hide a spying device in a car, they may hide microphones in private dwellings or IMSI catchers in the streets, they may intercept electronic communications and require Internet service providers to give them data. Those measures have to be authorized by the Prime minister after an advisory body of only nine persons, the National Commission for the Control of Intelligence Techniques (CNCTR) has given its opinion.
There are at least six intelligence services which have wide-ranging powers since July 2015 and will have even more powers when the bill is adopted.

Those powers raise matter of principle first: is it really necessary to infringe the right to private life to such an extent? Of course, the government argues that it is necessary but has never managed to prove it. There is also a practical issue. As a former intelligence officer explained, politicians tend to be fascinated by the technical possibilities but they forget that most of the information gathered is utterly useless. Moreover, some attacks cannot be predicted. If an isolated individual decides to take a knife and attack policemen or to drive a lorry into a crowd, nothing can be done to prevent it.
In addition to the increasing powers of the intelligence services, a number of members of the government are

allowed to create automated computer files, There are already more than 80 automated computer police files in France. Was it really necessary to allow the government to create others?

III. Controlling borders

The bill intends to broaden the powers to control the surroundings of the borders. Police and customs officers can ask for identification documents in a perimeter of twenty kilometers around the borders in order to “prevent and investigate offences linked to trans-border criminality”, if the border is “vulnerable” and frequently crossed. The same powers are granted to the authorities around railway stations and on motorways which begin at a border. Those powers are wide-ranging. Any border is vulnerable. Most of them are frequently crossed, at least by cross-border workers. This means that controls may take place around all the French borders. They may also take place around the many French railway stations and on the many motorways beginning at a border. These provisions are meant to supersede the controls at internal borders which have been reinstated in November 2015. The Schengen regulation compels to lifts these controls after 18 months but it authorizes controls around the border. According to the government, the statistics show that many offences have appeared in the police files after border controls. It fails to distinguish between petty offences and serious offences such as terrorism and does not give information about the link between controls around the borders and the fight against terrorism.

The ECJ has confirmed on 21 June 2017, the day before the bill was sent to the Senate, that controls around the borders should obey a number of rules. The case involved the control at a railway station close to the Franco-German border. The control around the borders should not be equivalent to border controls and the national legislation should provide “detailed rules and limitations determining the intensity, frequency and selectivity of the checks”. We can assume that the bill does not respect those conditions.
The French authorities tend to play with the fears of the population instead of alleviating them. We are still waiting for a President or Prime minister who takes the rule of law seriously. They should explain that we do not need more special rules against terrorism, and also that, sadly enough, some terrorist attacks cannot be prevented.

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