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Terrorism and anti-terror legislation - the terrorised legislator? A comparison of counter-terrorism legislation and its implications on human rights in the legal systems of the United Kingdom, Spain, Germany, and France

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4. Anti-Terror Legislation in France

Il appartient au législateur d'assurer la conciliation entre, d'une part, la prévention des atteintes à l'ordre public et la recherche des auteurs d'infractions, toutes deux nécessaires à la sauvegarde de droits et de principes de valeur constitutionnelle, et d'autre part, l'exercice des libertés constitutionnellement garanties.[1]

(It is the legislator's task to assure the conciliation between, on the one hand, the prevention of attacks against public order and the prosecution of offenders, both necessary for the safeguard of rights and principles of constitutional value, and, on the other, the exercise of constitutionally guaranteed freedoms.)

[1] French Constitutional Court (*Conseil Constitutionnel*), Decision no. 2003-467 of 13 March 2003 on the Law on Internal Security.

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4.1. Introduction

In comparison to the UK, Spain, and Germany, France's current anti-terror laws are not as deeply embedded, dating back to 1986. However, prior to that, France already had applied far-reaching laws relating to prevention of crimes against state security during the French-Algerian war (1954-1962). These laws constituted emergency legislation that significantly reduced the basic human rights, *inter alia* by creating the so-called State Security Court (*Cour de Sûreté de l'État*). This was not abolished until 1982. Until 1986 no special anti-terror legislation was in place.

France's current anti-terror legislation has been developed in three phases: Following the terror attacks of 1986 a first anti-terror law was adopted, which did not create any new crimes, but put certain crimes committed in a terrorist context under a special regime, to which certain special procedural rules applied. Moreover, the combat of terrorism was centralised in Paris. The next important counter-terrorist measures were adopted in the 1990s: Two waves of (mainly Algerian) Islamic terrorism in 1993-4 and 1995-6 led to legislative and policy changes in France. The *plan vigipirate*, a tool of the government to enhance security and vigilance in sensitive areas like railway stations and airports,[2] was implemented, and further legislative changes took place (e.g. introduction of video surveillance on public places, introduction of new offences including participation to a terrorist association, and night searches), in addition to mass detentions and prolonged detentions on remand, in some cases amounting to a violation of Article 5(3), ECHR. A third turning point being, as in most other countries, the year of 2001: after September 11th, several new laws were adopted, with the aim of increasing internal security. The new legislation includes the creation of new terrorist offences, as well as many amendments in the law of criminal procedure, in particular that governing the police investigations. The laws extend coercive and covert investigation tools of the police, and they make increased use of new technologies, such as video surveillance, DNA storage, and the automated photographing of cars. This generally resulted in police, prosecution, and secret services being equipped with more powers, whilst the powers of the judiciary are reduced.

4.2. Relevant legal sources

Like Germany and Spain, France has a continental legal system. The primacy of written law (*loi*) is therefore the rule.[3] The most important legal instruments for the present study are

(a) the European Convention of Human Rights (ECHR)
(b) the French Constitutional texts
(c) the Criminal Code (*Code Pénal*, *CP*), and
(d) the Code of Criminal Procedure (*Code de Procédure Pénale*, *CPP*).[4]

[2] See below, at 4.3.1.
[3] Bell (2001), at v, vi (preface).
[4] Most French legislation is available online, at http://www.legifrance.gouv.fr/, with the particularity, that several statutes, such as the Criminal Code and the Code of Criminal Procedure, are even available in English and Spanish language.

Ad (a):

The ECHR was ratified by France on 31 December 1973. France has a monist tradition; pursuant to Art. 55 of the French Constitution, the ECHR is directly applicable in French law. It has an intermediary position between the French Constitution and ordinary law.[5] While Art. 55 of the French Constitution establishes that international treaties have a superiour position than laws, according to recent case-law of the *Conseil d'Etat*[6] in case of conflict between an international treaty provision and French constitutional law, the latter prevails. This approach has been confirmed by the *Cour de Cassation.*[7] The relationship between international treaties and national (ordinary) law which was previously adopted was problematic under Art. 55 of the Constitution during a long time. However, since the *Nicolo* decision, the *Conseil d'État* has declared its competence to check the compliance of a national law with a posterior treaty.[8] Thus, if a litigant considers that a French law is contrary to an international treaty, he or she can contest the exception of 'unconventionality' (*exception d'inconventionnalité*), that is, request the court not to apply the respective (ordinary) law.

Ad (b):

Like in Spain and Germany, basic individual rights and freedoms are guaranteed in France by virtue of constitutional law, mainly provided by *la Constitution de 1958* (the 1958 Constitution). However, there are several constitutional texts that form the "constitutionality block" (*bloc de constitutionnalité*), consisting mainly of four sources: First, the 1958 Constitution; second, the Declaration of 1789 (because the Preamble of the Constitution of 1958 makes allusion to the French commitment to the Rights of Man and principles of national sovereignty enshrined in this declaration); third, these rights are supplemented by the Preamble of the 1946 Constitution. This latter source also refers to the "fundamental principles recognised by the laws of the Republic" (*les principes fondamentaux reconnus par les lois de la République*). Thus, as a fourth source of constitutional law, there are certain fundamental principles which underlie the law of the Republic.[9]

Ad (c):

[5] Hamon and Troper (2005), at 749.

[6] CE, *Sarran et autres*, 30 October 1998. The Decisions of the *Conseil d'Etat* can be retrieved at http://www.conseil-etat.fr/ce/jurisp/index_ju.shtml.

[7] C. Cass., *Fraisse*, 2 June 2000. However, it seems that the Constitutional Council has a more nuanced view on this: In *Reseda* (Decision no. 98-399 DC of 5 May 1998), the Council held that it was possible to derogate from a principle of constitutional value 'to the necessary extent in order to implement an international engagement, and subject to the reservation that it is not contrary to the essential conditions to exercise national sovereignty' ('*dans la mesure nécessaire à la mise en œuvre d'un engagement international et sous reserve qu'il ne soit pas porté atteinte aux conditions essentielles d'exercice de la souveraineté nationale*'). Hamon/Troper interpret this as meaning that the Constitutional Council actually considers that there is another hierarchy within the ensemble of constitutional norms (Hamon and Troper (2005), at 749, note 3).

[8] CE Ass., decision of 20 October 1989. The Court of Cassation (*Cour de Cassation*) had already adopted this position in its decision of 24 May 1975**. (**Kortmann and Thomas (2004), at 295).

[9] Rudden (1991), at 23.

Like the Spanish and the German Criminal Code, the French *Code Pénal* (*CP*) is divided into a general and a special part. Terrorism is regulated in Book IV (on felonies and misdemeanours against the nation, the state and public peace), Title 2 (on terrorism), Arts. 421-1 to 422-7 *CP*.

Ad (d):
The French Code of Criminal Procedure (*Code de Procédure Pénale, CPP)* is very detailed and not only regulates the Criminal Procedure, but also what in Germany would be called *Gerichtsverfassung*, i.e. the constitution and competencies of the courts. Moreover, like in the Spanish *LECrim* (but unlike in the German *StPO*), the execution of sentences is also partially regulated in this Code. The criminal procedure is thus understood in a wider sense than in Germany. The structure of the Code shows the hierarchical concept of the French state, rather than a participatory concept: there is no section provided to regulate the position of the defence, while the intervention of the *partie civile* is already provided for in the preliminary title (Art. 2).[10] Several provisions of the *CPP* refer to terrorism (e.g. Arts. 706-16 to 706-19, 706-23 to 706-29 *CPP*).

4.3. Anti-terror legislation prior to September 11th

4.3.1. Early anti-terror laws

In the case of France it may be instructive to start with a rather ancient law, the ***Law of 29 July 1881 on the freedom of the press***[11] as it is still in force today, albeit in an amended form. The Law is of particular interest for the present study since the application of its Art. 14 was subject to proceedings before the Strasbourg Court.[12] Art. 14 provides that "the circulation, distribution or sale in France of newspapers or texts written in a foreign language, whether periodicals or not, may be prohibited by a decision of the Minister of the Interior. Newspapers and texts of foreign origin written in French and printed abroad or in France may also be prohibited." In the first case in question (*Association Ekin v France*)[13] the Basque association Ekin published a book entitled "Euskadi at war" in 1987, which it distributed in French, Spanish, English and Basque in France. Subsequently, the French Ministry of the Interior issued an order under Art. 14 of the Law of 29 July 1881, banning the circulation, distribution and sale of the book in France on the ground that "the circulation in France of this book, which promotes separatism and vindicates recourse to violence, is likely to constitute a threat to public order." The applicant association lodged a complaint with the European Court

[10] Kühne (2006), at 660.
[11] *Loi du 29 Juillet 1881 modifiée sur la liberté de la presse*.
[12] Also Art. 23bis of the Act, which was introduced into the Law in 1993, was discussed in Strasbourg, but in the context of a case not related to terrorism. This case concerned the publication of a book in which the existence of the *holocaust* was denied. Following the publication, criminal proceedings were instituted against the author, on the charges of denying and aiding and abetting the denial of a crime against humanity respectively. In this case, the ECtHR dismissed the application that Art. 23bis of the Act infringed the right under Art. 10 ECHR. See *Garaudy v France*, Judgment of 24 June 2003 (application no. 65831/01).
[13] Judgment of 17 July 2001 (application no. 39288/98).

of Human Rights. It contended that Art. 14 of the Law violated Arts. 6(1), 10 and 14 of the ECHR. The Ekin association argued the proceedings had taken too long, meaning that Ekin had not been granted a hearing in reasonable time, as guaranteed under Art. 6(1) ECHR. Further, they held that the formulation of Art. 14 lacked the necessary clarity for a legal rule and did not meet the requirement of being accessible and foreseeable in its effect. Nor was the interference necessary in a democratic society, pursuant to the applicant association. The Strasbourg Court agreed that the provision was very wide and left considerable margin of discretion to the Minister of the Interior. It also agreed with the applicants in that the interference arising from Art. 14 of the Law could not be considered as 'necessary in a democratic society', so that Art. 10 was indeed breached. In addition, the Court established that Art. 6(1) ECHR had also been violated as the proceedings lasting more than nine years exceeded the threshold of a reasonable time, within the meaning of the law. In 2004, Art. 14 of the Law of 1881 on the freedom of the press was eventually abolished.[14]

As already mentioned earlier,[15] during the Algerian war of independence (1954-63) special laws were adopted concerning ‘offences against state security’. In response to the military putsch in Algeria the French President invoked Art. 16 of the French Constitution (extraordinary powers of the president in a state of emergency) from 23 April to 30 September 1961. It has been argued that the continued application of Art. 16 until 30 September was unconstitutional, considering that the putsch had already been suppressed on 25 April.[16]

The provisions adopted during the Algerian crisis include, *inter alia*, the extension of police custody (*garde à vue*) to 96 hours.[17] The *Ordonnance 60-529* of 4 June 1960[18] led to the creation of the Court of State Security, headed by a specialised judge exclusively competent in the whole national territory for offences against state security and "other acts aiming at replacing the authority of the state by an illegal authority".[19] The court was partially composed of military officers, its proceedings were secret and no right to appeal was granted. Thus, it stood completely outside the normal system of French justice and was often regarded as an instrument of political oppression.[20] The Court was in existence for eighteen years before being eventually abolished by the Law 81-737 of 4 August 1981.[21] Besides these legislative acts, it is now known that torture and rape were practiced and tolerated by the French government during the Algerian crisis. Innumerable crimes committed during this time were never subject to any criminal prosecution after the independence of Algeria; a

[14] By Decree no. 2004-1044 of 4 October 2004 – Art. 1 (V) *Journal Officiel de la République Française* (Official Bulletin of the French Republic, in the following: JORF) of 5 October 2004.
[15] See above, 4.1.
[16] Kortmann and Thomas (2004), at 253.
[17] See the *Ordonnance* 60-121 of 13 February 1960 (*Ordonnance 60-121 de 13 février de 1960*), Art. 1 JORF of 14 February 1960, Bulletin Legislatif, Dalloz, 1960, at 188.
[18] Art. 2 JORF of 8 June 1960, Bulletin Legislatif, Dalloz, 1960, 433.
[19] The Court was regulated by the Laws 63-22 and 63-23 of 15 January 1963. (*Lois 63-22 et 63-23 du 15 janvier 1963*. JORF of 3 February 1981, Bulletin Legislatif, Dalloz, 1963, 48).
[20] Shapiro and Suzan (2003), at 77.
[21] *Loi n°81-737 du 4 août 1981 portant suppression de la cour de sûreté de l'état*, JORF of 5 August 1981, at 2142.

general amnesty for all crimes committed in the context of the Algerian war was granted.[22] Only many years later after the conclusion of the conflict (in 2002) was the subject put on the agenda of the National Assembly.[23]

Besides the legal measures, the *plan vigipirate* has been repeatedly applied in security sensitive times: This plan consists in a preventive vigilance action taken by the government to increase security in sensitive areas. It comprises the mobilisation of civilian and, on a secondary level, also military resources, and leads to the multiplication of controls in the border areas, ports, airports, and schools. It was first applied in 1978, and subsequently re-applied with modifications in 1985, 1986, 1991, 1995, 1996, and 1998.[24] Since 12 September 2001, it has been in force again, and was further reinforced on 19 March 2003. Not only does the plan affect large parts of the French population, it is also an extremely expensive measure.[25] After the attacks of 11 March 2004, the plan has reached level orange (on a scale from white – suspension – to red – urgency) and level red at train stations. After the London bombings in July 2005 it has been elevated to level red.[26] The legal basis for the adoption of this plan is apparently no more than a ministerial order (*ordonnance n°59-147 du 7 janvier 1959).*[27]

4.3.2. Combat of terrorism in the 1980s

The legislation of the 1980s was marked by laws adopted in response to attacks by Corsican, and later, Islamic terrorism. Yet, it must not be forgotten that with respect to Basque terrorism, France still followed the sanctuary doctrine, which aimed at keeping terrorism outside of France (see above at Part II, Chapter 2 (Spain), 2.3.5.). Under this doctrine, France did not extradite to Spain ETA activists, whom they considered as political refugees. However, from 1986 France abandoned this policy and French-Spanish relations improved. France ratified the European Convention on the Suppression of Terrorism in 1987. This obliged the country to accept to extradite ETArras to Spain. In the same year, France suffered several Algerian Islamic terrorist attacks. As a consequence, the French legislator criminalised terrorism.[28]

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[22] *Loi n°68-697 du 31 juillet 1968 portant amnistie (Algerie),* JORF of 2 August 1968, at 7521.

[23] Die Zeit online (12/2002): *Untergang einer Staatslüge. Vierzig Jahre nach dem Ende des Algerienkriegs: Ein Gespräch mit dem französischen Historiker Pierre Nora über die Wunden der Geschichte*.

[24] In Corsica, it was also applied in the year of 2000.

[25] In 2002 the costs amounted to 5,64 M€ for vigipirate on the ground, plus 2,8 M€ for vigipirate on earth (official web site of the French senate, see: http://www.senat.fr/rap/l02-068-342/l02-068-34214.html, last visited on 23 September 2008).

[26] See official site of the French Prime Minister (archives), at: http://www.archives.premier-ministre.gouv.fr/villepin/information/actualites_20/attentats_londres_53499.html. An overview of the different levels of threat is also available on the French Prime Minister's site (archives) at http://www.archives.premier-ministre.gouv.fr/raffarin_version2/information/fiches_52/plan_vigipirate_50932.html (both sites last visited on 23 September 2008).

[27] See the site of Frederic Rolin (professor for constitutional law) who has started a blog initiative to trace the legal basis with the help of other readers: http://frederic-rolin.blogspirit.com/archive/2007/06/06/grand-jeu-de-piste-a-la-recherche-du-statut-juridique-du-pla.html (last visited on 23 September 2008).

[28] See below at 4.3.2.3.

4.3.2.1. Law no. 81-82 of 2 February 1981 on Security and Liberty

On 16 April 1981, shortly after the arrival of the then-president Valéry Giscard d'Estaing at Ajaccio, Corsica, an explosion took place at the Ajaccio airport, killing one person and injuring eight others. In response to this attack, ***Law No. 81-82 of 2 February 1981*** was adopted, the denominated Law on Security and Liberty.[29] This Law prolonged the duration of police custody (*garde à vue*) for certain serious crimes to a period of up to three days.[30] Moreover, the police were empowered to carry out identity controls which allowed retaining a person in a police car or at the police station.[31] Furthermore, criminal proceedings were accelerated by suppressing the intervention of the investigating judge (*juge d'instruction*)[32] whenever his intervention was not indispensable. This was criticised by the doctrine, as it posed a danger of arbitrariness and the absence of control.[33] The Law also introduced a new crime, the denominated crime of 'audience', which allowed the tribunal to proscribe a lawyer for disturbing the 'serenity of the debates'.[34]

The most restrictive aspects of the Law were examined by the *Conseil Constitutionnel* (CC) on 20 December 1980.[35] On 19 and 20 January 1981, the *Conseil* adopted a resolution rejecting most remedies, with only a few exceptions (e.g. Art. 66 referring to the crime of audience).[36]

4.3.2.2. Special courts and extension of police powers in the early 1980s

Only a year after the special Court for State Security had been abolished in 1981, the ***Law n°82-621 of 21 July 1982***[37] installed a new special court for crimes against state security: the 'army tribunal in peace times' (*tribunal aux armées en temps de paix*). It

[29] *Loi de Sécurité et Liberté* (*Loi n° 81-82 du 2 février 1981*, JORF of 3 February 1981, Bulletin Legislatif, Dalloz, 1981, at 85.
[30] Art. 63-1 *CPP*.
[31] Arts. 76 to 78 of the Law.
[32] The *juge d'instruction* is the central organ during criminal investigations. He exercises two functions: the investigatory function (acting as an investigator), and the judiciary function (acting as a judge). The *juge d'instruction*, on request of the public prosecutor, opens judicial pre-trial investigations (*information judiciaire*) for cases of a certain complexity. The judicial pre-trial investigations are then limited to those criminal acts to which the prosecutor referred to in his request; if the judge discovers other criminal acts, he has to ask the prosecutor to extend its request for judiciary pre-trial investigation to include also these crimes. Once the *juge d'instruction* has been called to open pre-trial investigations, he is guiding the investigations. He gives orders (*commissions rogatoires*) to the police to carry out the necessary investigations. E.g. it is the *juge d'instruction* who orders telephone tapping and other coercive measures (Verrest (2001), at 39). With respect to the liberty of the suspect (*mise en examen*), the juge's powers were limited by the Law of 15 June 2000: Since then, *the juge d'instruction* has to request the *juge des libertés et de la détention* to place the suspect under judicial control or detention on remand (Guinchard and Buisson (2008), at 828).
[33] Morange, Jean: Les Contrôles d'identité, l'Actualité Juridique-Droit Administratif, 20 décember 1986, at 640-644, cited after Diego López Garrido (1987) at 78.
[34] Art. 66 of the Law.
[35] Decision of the Constitutional Council n° 80-127 of 20 January 1980.
[36] The Council held that thereby, the principle of not going beyond the punishment strictly and evidently necessary, was violated, which is, in fact, a reflection of the principle of proportionality.
[37] *Loi n°82-621 du 21 juillet 1982 relative à l'instruction et au jugement des infractions en matière militaire et de sûreté de l'état* (JORF of 22 July 1982, 2318).

was composed only of professional judges (one president and between two and six assessors, depending on the gravity of the crime), with no jury.

On 13 September 1983, the General Secretary of the Department of Haute-Corse, Pierre-Jean Massimi, was assassinated by the clandestine FLNC. In response to this event, ***Law no. 83-866 of 10 June of 1983*** was adopted.[38] It modified and tightened the Law of Security and Liberty, by extending identity controls: Digital fingerprints and photographs could now be taken from any person, either on the grounds that the person was under the suspicion of having committed or attempted to commit an offence, or because they had been the object of investigations ordered by a judicial authority.

4.3.2.3. Law no. 86-1020 of 9 September 1986

In 1986, France was one of the first countries to experience a new form of Islamic terrorism (earlier forms, which related to Lebanon, Iran, and Algeria, were not yet 'de-territorialised'), with several attacks taking place, mainly in Paris.[39]

The proliferation of Islamic terrorist attacks in France led to the adoption of ***Law no. 86-1020 of 9 September 1986 on the combat against terrorism and against the attack to state safety***.[40] The law has been described as the "cornerstone of the current legislation on the subject".[41] Its purpose was to repress acts of terrorism and develop aid mechanisms for the victims of terror acts. The French legislator was reluctant to create a legal definition of terrorism and limited itself to establish a list of crimes, which, under certain conditions, were subjected to a more severe special regime (also on the level of punishment).[42] The law consisted of a part creating new special

[38] *Loi no. 83-866 de 10 juin de 1983, portant abrogation ou révision de certaines dispositions dde la loi no. 81-82 du 2 fév. 1981 et complétant certaines dispoistions du code pénal et du code de la procédure pénale* (JORF 11 June, 1755), Bulletin Legislatif, Dalloz, 1983 at 282.

[39] The main non-national terrorist attacks on the French mainland (and specifically in Paris) in 1985-1986 were :

07/12/85	Galeries Lafayette (37 wounded) Printemps (5 wounded)
03/02/86	Eiffel Tower (no victims) Galerie du Claridge (8 wounded)
04/02/86	Librairie Joseph Gibert (7 wounded)
05/02/86	Fnac Sport (32 wounded)
17/03/86	TGV Paris-Lyon (5 wounded)
20/03/86	Galerie Elysée-Point Show (2 killed and 4 wounded) RER Châtelet (no victims)
04/09/86	RER Gare de Lyon (no victims)
08/09/86	Bureau de poste de l'Hôtel de Ville (1 killed and 22 wounded)
12/09/86	Cafétéria La Défense (54 wounded)
14/09/86	Pub Renault (2 killed and 1 wounded)
15/09/86	Préfecture de police (1 killed and 60 wounded)
17/09/86	Magasin Tati (7 killed and 54 wounded)

Source: *Projet de loi relatif à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers*, http://www.senat.fr/rap/l05-117/l05-1171.html, visited on 23 September 2008.

[40] JORF, 10 September 1986, 10956 (modified by law no. 86-1322 and law no. 96-647).

[41] Dagron (2004), at 271; Bigos and Camus (2006), at 2.

[42] The Law systematically increased the punishment for the listed offences (for details, cf. Art. 421-3 *CP*). Also, it introduced a so-called safety period (Art. 132-23 *CP*), thus ensuring that the detainee would

centralised competences with respect to terrorism, and of a part establishing special rules of criminal procedure which applied to the listed 'terrorist' offences.[43]

The most noteworthy characteristic of the new French anti-terrorism legislation initiated by this Law has been the vast centralisation of the investigation and prosecution as well as of the trial itself. Trials proceed before a group of specialised judges whose jurisdiction extends to the entire country. According to the newly introduced Art. 706-25 *CPP*, the Court for terrorist cases shall be an Assize Court (*Cour d'assises*) constituted of seven professional judges (one president and six assessors), without any lay judges.[44] This court has so-called concurring jurisdiction over provincial courts which would be competent if the affair did not involve terrorism.[45] Not only terrorist jurisdiction, but prosecution has also been centralised in Paris by the 1986 Law: the 14th "anti-terrorism" Division of the Paris prosecution service (*parquet de Paris*),[46] also known as the Anti-Terrorism Fight Central Service (*service central de lutte anti-terroriste - SCLAT*), exclusively deals with terrorism cases, cf. Art.706-17 *CPP*.[47] The *juge d'instruction* is authorised to carry out a wide range of acts (e.g. the right to interrogate, to put under investigation and to indict). These acts may be delegated to the police authorities where appropriate. These powers aim to provide the judge with a growing knowledge of terrorist networks. The system of specialised investigating judges was also supposed to help to de-politicise the issue of anti-terrorism.[48] The idea to concentrate the competence in terrorist affairs in the hands of a few specialised investigating judges was based on the previous experience whereby four judges investigated the terrorist attacks perpetrated by Georges Ibrahim Abdallah. It was at the request of these judges that the French legislator decided to centralise all terrorist cases in Paris.[49] Specialisation also reflected the need to have access concentrated in one place to all relevant information on the matter and to permit the judges to exercise competence over the whole territory of France.[50] The lay persons were replaced by professional judges due to past experience in terrorist cases, which

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not benefit from the provisions concerning the suspension or splitting of the penalty during a certain period. Moreover, the law allowed repentance: a person could avoid being found guilty or could reduce his or her sentence (Art. 422-1 *CP* provides: "that any person who has attempted to commit an act of terrorism is not liable to punishment if he or she by notifying the judicial or administrative authorities was able to avoid the commission of the offence and if the case arises to identify the other guilty persons"). The purpose of this provision was to minimise the consequences of acts of terror. However, it has been considered as "absolutely contrary to" the French culture and has raised some concern because of this change of legal culture (Garapon (2005), at 6).

[43] Koering-Joulin (1987)at 622.

[44] This is contrary to the usual French criminal procedure which requires the participation of a jury for serious cases tried by the ordinary Assize Court (Bell (2001), at 139). It is interesting to note that while in France, the participation of laymen is limited to the most serious offences, in Germany laymen are only allowed to participate in the judgments concerning minor offences. This reflects the different weight attributed to laymen in both countries: While in Germany, society trusts more in the opinion of a professional judge than in that of a layman, in France the symbolic value of the layman as representative of the democratic society, representing 'the people', is higher, and requires public participation at least in cases that deal with serious crimes.

[45] See Art. 706-17 *CPP*.

[46] Arts. 706-17 to 706-22 *CPP*.

[47] Garapon (2005), at 5.

[48] Bigos and Camus (2006), at 11 et seq.

[49] Garapon (2005), at 5.

[50] Dagron (2004), at 293.

had taught that lay judges were exposed to threats from terrorist groups; hence they frequently applied to be excused from their jury service, thus making it difficult for the court to reach a verdict. The replacement of lay people did not encounter large criticism. Garapon attributes this to the political context: it was Robert Badinter, famous and popular for having abolished the death penalty in 1981, who introduced the Bill to establish a special Assize Court.[51]

French scholars have praised the establishment of this small, specialised corps of judges and prosecutors as over time it has created "a competency that almost amounted to an intelligence service in and of itself."[52] Two investigating judges from Paris, Jean-François Ricard and Marie-Antoinette Houyvet, pointed to various advantages of this high degree of specialisation, such as the specific accumulated knowledge, the more global overview on the subject, and the fact that the small number of competent judges facilitated international collaboration.[53] However, the concentration of powers in this small group of judges also provoked severe criticism from human rights organisations. It was argued that the investigating judge, empowered to order the detention of a suspect, could act in total autarchy. In order to guarantee justice, the International Federation of Human Rights *(Fédération Internationale des Ligues des Droits de l'Homme - FIDH*) found that the decision on granting or denying liberty to a person could not be taken by one single individual, but had to be taken by an independent investigating tribunal, before which each party could present his or her arguments. Moreover, many defence counsels had experienced that the evidence brought against their arrested clients often lacked substance, so that it did not justify either the arrest or the detention.[54]

The composition of the Assize Court has been challenged in court, on the grounds that Art. 6(1), 6(3) and 14 of the ECHR were breached as those accused of terrorist crimes were, unlike other accused, deprived of a trial by jury. In its decision of 24 November 2004, the Cassation Court held that neither of the named provisions was violated. It argued that the rights of the defence could be exercised without any discrimination.[55]

As far as criminal procedure is concerned, the Law of 1986 increased the maximum time periods of police custody (*garde à vue)* by an additional 48 hours, bringing the total time of detention in cases of terrorism to four days. As Touchot notes, to increase the maximum duration of police custody was actually no new invention in France. In delinquency related to drugs, the police custody time had already been doubled, for the same reasons, but under different modalities. Likewise, for crimes against state security special laws had allowed police custody of up to six days in normal times and up to twelve days in states of emergency.[56] It is important to note that this additional prolongation of police custody in terrorist cases could only be ordered by

[51] Garapon (2005), at 6.
[52] Shapiro and Suzan (2003), at 78.
[53] Charbonnier (2004).
[54] Mc Colgan and Attanasio (1999), at 14.
[55] Cass. Crim. 24 nov. 2004, Bull. Crim. No. 296, cited in: Commaret (2005), at 332. The court actually repeated the formulation of an earlier judgment (see judgment of 7 May 1987, Bull. Crim. No. 186).
[56] Touchot (2004), at 240, citing *Loi 70-643 du 17 juilllet 1970 modifiant la loi du 15 janvier 1963*, Cf Pradel, Dalloz-Sirez 1972, Chronique XXI, at 30.

a judge (either an investigating judge, or the President of the Tribunal of First Instance, or a judge delegated by the latter), while the ordinary extension of police custody could be ordered by the *Procureur* (which has the role of the public prosecutor, but who, as a *magistrat*, also enjoys judicial status[57]).[58] The legislative decision to restrict the exceptional prolongation of the detention to the competency of a *judge* was taken in view of the ECtHR case *Schiesser v Switzerland* of 4 December 1979.[59] In this decision, the ECtHR stressed that, for the purposes of Art. 5(3) of the Convention, "a judge or other officer authorised by law to exercise judicial power" had to be independent of the executive and of the parties when ordering the prolongation of detention on remand.[60] Apparently, the French legislator did not deem it necessary to also amend the competency with respect to ordinary prolongation of *garde à vue*, probably because the ordinary prolongation could, in any case, not exceed two days.

The 1986 Law also extended police powers concerning house searches. By virtue of the newly introduced Art. 706-24 *CPP* (exception to the ordinary rule in Art. 76 *CPP*), in the course of preliminary investigations a police officer could, when authorised by a judge, carry out a house search without the consent of the concerned person. This rule was extended by the Law of 15 November 2001 to other similar crimes. Thus, the constitutionally guaranteed inviolability of the home was further undermined.

In addition, the Law extended the administrative possibilities to dissolve associations or groups engaged in the organisation of terrorist acts in France or abroad. In 2002, the group *Unité radicale* was dissolved in this way.[61]

The Law of 1986 was submitted to the *Conseil constitutionnel* before its enactment.[62] The *Conseil* accepted it as being precise enough to comply with the legality principle enshrined in Art. 8 of the Declaration of Human and Civic Rights of 26 August 1789.[63] The *Conseil* accepted the justification for the special regime of centralised competences in the case of terrorism as a justified exception to the general rule.[64] However, it rejected the extension of the application of the rules enshrined in Arts. 706-17 to 706-25 of the *CPP* (which establish a special procedural regime applicable in the case of terrorism) to other offences against state security foreseen in Arts. 70 to 103 of the *CP*. In the Council's view, this extension was contrary to the principle of equality before justice enshrined in the 1789 Declaration.[65]

The decision of the *Conseil Constitutionnel* was criticised by Jean-Pierre Marguénaud who contested that the subjective element of the crime of terrorism was

[57] Hodgson (2004), at 164 (note 2).
[58] Cf. Arts. 63 and 77 *CPP*.
[59] Touchot (2004), at 240.
[60] ECtHR, *Schießer v Switzerland*, judgment of 4 December 1979 (application no. 7710/76), at para. 31.
[61] Dagron (2004), at 290.
[62] It should be noted that the submission to the CC is not obligatory and the decision to allow its intervention may only be taken by political authorities, see Art. 61 para. 2 of the Constitution) An English of the French Constitution is available at: http://www.oefre.unibe.ch/law/icl/fr00000_.html (last visited on 1 October 2008).
[63] See*: Conseil Constitutionnel (CC)*, Decision DC 86-213, 3 September 1986, Receuil 122.
[64] As defined by Art. 43, 52, 382 and 663-3 of the *CPP* attributing the competence to the local judge.
[65] CC, 3 September 1986, Decision DC 86-213, Rec. 122.

sufficiently precise to fulfil the requirements of legality and certainty. Marguénaud reproached the *Conseil* that the latter had only stated that the norm was sufficiently precise, without giving further reasons for this assessment.[66]

4.3.2.4. European Convention on the Suppression of Terrorism

One year later, Law No. 87-542 of 16 July 1987 authorising the ratification of the European Convention on the Suppression of Terrorism of 27 January 1977[67] was adopted. The Convention sets out which crimes can be considered as acts of terror and trigger extradition.[68] As a consequence, France was now obliged to extradite terrorists without being permitted to impede extradition because of the political character of the crime or the political goal behind it. At the same time, the Convention allowed France to disregard as a political crime or politically motivated crime 'an offence involving kidnapping, the taking of a hostage or serious unlawful detention; an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons'.[69] The ratification forced France to abandon their hitherto practiced *sanctuary* doctrine.

4.3.3. Developments in the 1990s

As in other countries, France also started in the 1990s to legalise telephone tapping; hitherto this had been applied in practice without any legal basis, like in other countries. Furthermore, the 1990s were marked by waves of Algerian terrorism. This led to the reinforcement of the *plan vigipirate*, to several mass detentions by police, and to the adoption of new legislation. Moreover, two decrees issuing solitary confinement were adopted in those years.

4.3.3.1. Privacy issues

In 1991 a Law reinforcing the right to privacy was adopted, ***Law no. 91-646 of 10 July 1991, concerning the interception of private communications issued, transmitted or received by way of telecommunication.***[70] The law defined the procedures and conditions under which public authorities could be authorised to infringe upon the right to privacy. The necessity of legal regulation of such issues had emerged after two cases were heard by the ECtHR (*Huvig v France*[71] and *Kruslin v France*[72]), in which France had been condemned for intercepting telecommunications. In *Huvig* French authorities had carried out various interceptions of telecommunications during the 1980s for national security reasons. In the second case, Kruslin's telephone had been tapped for investigations concerning a particular murder case, but the data was subsequently used

[66] Marguénaud (1990), at 11.
[67] *Loi n° 87-542 du 16 juillet 1987 autorisant la ratification de la convention européenne pour la répression du terrorisme,* JORF of 18 July 1987.
[68] On the qualifying criteria with respect to terrorist crimes adopted by this law, see also Marguénaud (1990), at 14 -17. He criticises the penal qualification of terrorism under French law, for being disturbingly imprecise.
[69] Cartier (1995), at 227.
[70] *Loi no. 91-646, du 10 Juillet de 1991, relative au secret des correspondances émises par voie de telecommunications* (JORF, 13 July 1991, 9167).
[71] Judgment of 24 April 1990 (application no. 11105/84).
[72] Judgment of 24 April 1990 (application no. 11801/85).

as evidence in a different case against Kruslin. In both cases, the Strasbourg Court established that the interference had not been 'in accordance with the law', as French legislation did not provide a legal basis that qualified as 'law'.[73]

The Law of 1991 provided specific sanctions in cases where an interception was considered to be an infringement upon private life. Moreover, so-called security interceptions were allowed in exceptional cases. These were authorised by the Prime Minister, in accordance with a proposal given by the Ministers of the Interior, Defence and Economy, or Finance.[74] This interception enjoyed no judicial control, but instead was subject to the control of the National Commission of Control for Security Interceptions (*commission nationale de contrôle des interceptions de sécurité*). The ECtHR considered the new provision as compatible with Art. 8 ECHR.[75]

However, in the very same year Decree no. 91-1052 of 14 October was adopted, which concerned a computerised terrorism database created by the general intelligence services of the Ministry of the Interior.[76] Its purpose was to collect information in order to fulfil the intelligence services' mission for "the fight against individual or collective undertakings that pursue the goal to seriously damage public order by means of intimidation or terror" (Art. 1 of the Decree). To this end, information on persons who might threaten state security or public order could be collected and centralised. This database was going to be significantly further extended in 2008 (see above, at 4.5.).

4.3.3.2. Developments in 1993-4

In 1993 the Code of Criminal Procedure was amended by ***Law No. 93-2 of 4 January 1993,***[77] which was further modified by ***Law 93-1013 of 24 August 1993.***[78] The laws restricted defence rights in terrorist cases. Thus the Bill of the modifying Law of 24 August 1993 originally provided that, while under the normal regulations a person in police custody could see his lawyer after 20 hours of detention, this right could not be *exercised at all* if the custody was subject to the particular prolongation rules that applied to cases of terrorism and drug-related offences. The constitutionality of this provision was examined by the *Conseil Constitutionnel,* which ruled in its decision of 11 August 1993[79] that the right to see his lawyer during the *garde à vue* could be modified according to the different areas it concerned, but that it could not be abolished

[73] The Court stated that both written and unwritten French law did not '*indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities.* (In *Kruslin v France* (see above, note 72), at 36; in *Huvig v France* (see above, note 71), at 35).
[74] See Art. 226-15 and 432-9 *CP* which were introduced by this law. For further details, see Dagron (2004), at 286, with further references.
[75] ECtHR, case of *Lambert v France,* Judgment of 24 August 1998 (application no. 88/1997/872/1084).
[76] *Décret n° 91-1052 du 14 octobre 1991 (Décret relatif au fichier informatisé du terrorisme mis en oeuvre par les services des renseignements généraux du ministère de l'intérieur).*
[77] *Loi n°93-2 du 4 janvier 1993 portant réforme de la procédure pénale* (Art. 231 J. O. of 5 January 1993, in force since 1 March 1993).
[78] *Loi no 93-1013 du 24 août 1993 modifiant la loi no 93-2 du 4 janvier 1993 portant réforme de la procédure pénale,* JORF of 25 August 1993, 11997.
[79] JORF of 15 August 1993.

entirely.[80] Therefore, the bills were changed, no longer abolishing the right to see a defence lawyer as such, but postponing it to the 72nd hour.[81] The constitutionality of the new provision has been confirmed by the *Conseil Constitutionnel* in two decisions.[82]

Besides these legal measures, the years of 1993 and 1994 were marked by mass detentions carried out by the French authorities to put an end to Algerian Islamic terrorism, which was sweeping over French territory.[83] In response to the kidnapping of three French consular agents on 24 October 1993 in Algier, the French authorities lodged the '*Operation chrysanthemum'* on 9 and 10 November 1993, arresting 87 people. After French police had started to dismantle the *Chalabi* network (the most important support group for Algerian rebels) by arresting 93 people, the GIA (*Groupes Islamique Armées,* Armed Islamic Groups) hijacked an Air France flight from Algiers to Paris. Subsequently, French authorities increased the pressure on the Islamist networks in France and throughout Europe. They arrested at least a further 93 people in June 1995.[84] The arrests were again answered by a series of attacks between July and October of the same year, killing 10 and wounding over 150 people. [85]

In spite of the attacks, the reactions of the anti-terrorism judges were often fiercely criticised by the media and public opinion. The centralisation of the judiciary and the close relationship between the judges and the domestic intelligence service DST[86] have been criticised in the media and by human-rights organisations.[87] The indiscriminate detentions were also harshly condemned, as well as the broad powers given to the judges to conduct these 'sweeps' and detentions with very little oversight.[88]

In the Judgment of 9 November 1999, the European Court of Human Rights had occasion to rule on one case of prolonged detention, concerning *Debboub alias Husseini Ali*.[89] Ali had been arrested in November 1994, in the course of one of the raids mentioned previously, under suspicion of association with wrongdoers with the aim to prepare acts of terrorism (*inter alia)*. The detentions were aimed at dismantling a vast logistic network of the GIA. Debboub was held in detention on remand from 12 November 1994 until 22 January 1999, thus for more than four years. The orders issuing detention on remand (and subsequently prolonging it) were based on Arts. 144,

[80] Bouloc, Stefani and Levasseur (2006), at 93.
[81] Touchot (2004), at 241.
[82] Decision n° 93-334 DC of 20 January 1994, at para. 16 to 19, and Decision n° 2004-492 of 2 March 2004, at para. 28 to 34.
[83] France was the main target of Algerian Islamic terrorists, not only as representative of the West and as destructor of Algeria by its colonialism but also because it was (unofficially) supporting the ruling junta in Algeria (Mc Colgan and Attanasio (1999), at 12.
[84] The numbers of arrests cited were contradictory. According to Shapiro, 93 were arrested, while Mc Colgan and Attanasio speak of 169 (ibid.; Shapiro and Suzan (2003), at 80).
[85] Ibid. at 80.
[86] *Direction de la surveillance du territoire,* a French intelligence service of the *police nationale,* which originally was created to counter spy activity, but its tasks were extended after the cold war to anti-terrorist actions.
[87] See e.g. Jean Pierre Versini-Campinchi : La legitimité des sources d'informations exploitée par l'institution judiciaire, le figaro, 6 february 2002 (cited by Ibid. (note 46)).
[88] Ibid. at 84 et seq.
[89] Application no. 37786/97.

145, 145-1 and 145-2 *CPP* (as amended by the Law 93-2 of 4 January). Besides the gravity of the alleged crime, the orders were based on the risk of flight of the applicant, the maintenance of public order, the necessity to prevent recurrence of the offence, and the risk of collusion between the co-accused. The Strasbourg Court held that these reasons justified the initial detention on remand, but not its duration of over four years. The Court judged that the French Courts had failed to conduct the proceedings with the necessary promptness, so that the excessive duration of detention on remand amounted to a breach of Art. 5(3) ECHR.

With respect to anti-terrorist legislation, the ***reform of the French Penal Code in 1994*** also deserves mention. In the course of this reform, terrorist offences were organised under a separate, independent chapter in the new Penal Code. Besides this organisational amendment, no substantial changes took place with respect to anti-terrorist legislation.[90]

4.3.3.3. Terrorist and legislative activity in 1995 and 1996

In the course of 1995 and 1996, France faced another wave of Islamist (mainly Algerian/GIA) terrorist attacks.[91] France reacted to the attacks on different levels. New legislation was introduced, the *plan vigipirate* reinforced, and French police carried out several mass detentions in Islamic circles.

As to the legislative changes, the following measures are worth mentioning:

The ***Law no. 95-73 of 21 January 1995, on guidance and planning with security***,[92] was adopted, introducing video surveillance in order to ensure 'the protection of public buildings and installations and their surroundings, the protection of installations for national defence, or the prevention of attacks against the security of persons or goods in places that are particularly exposed to risks of aggression or theft'.[93]

[90] For further details, see Cartier (1995) who takes a "globally positive stock" of the amendments; see also Mayaud (1997).

[91] The following attacks took place during this period:

11/07/95	Double assassination in the rue Myrha (Paris XVIIIe)
25/07/95	Station RER St-Michel (7 killed et 85 wounded)
17/08/95	Avenue de Friedland (17 wounded)
26/08/95	TGV Lyon-Paris (no victims)
03/09/95	Marché Richard Lenoir (3 wounded)
04/09/95	Sanisette place Charles Vallin (no victims)
07/09/95	Voiture piégée devant une école israélite à Villeurbanne (30 wounded)
06/10/95	Station de métro Maison Blanche (10 wounded)
17/10/95	RER station Musée d'Orsay (4 killed, 29 wounded)
3/12/96	RER station Port-Royal (4 killed, 170 wounded)

Shapiro and Suzan (2003): *Projet de loi relatif à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers*, http://www.senat.fr/rap/l05-117/l05-1171.html, visited on 3 October 2008).

[92] *Loi no. 95-73 de 21 janvier 1995, d'orientation et de programmation relative à la sécurité* (JORF of 24 January 1995, 1249), Bulletin legislative, Dalloz 1995, at 90.

[93] Art. 10(2) of the Law.

In addition, ***Law no. 95-125 of 8 February 1995 concerning the organisation of jurisdiction and civil, penal and administrative procedure***[94] was adopted, increasing prescription periods for terrorist crimes by 20 and 30 years (for felonies and misdemeanours, respectively). In this context, it should be taken into account that French law differentiates between two sorts of prescription: the prescription of public action (*prescription de l'action publique*),[95] to be distinguished from the prescription of the punishment (*prescription de la peine*).[96] While the first time period starts running at the moment when the investigations are opened, the second only begins once the convicted person has started to serve his or her sentence. This differentiation is necessary due to the fact that under French law, trials *in absentia* are permitted under certain conditions,[97] meaning that a person may be convicted in his absence, even though he may not be caught by the police for many years.

Another anti-terror law of this time was the ***Law no. 96-647 of 22 July 1996, concerning the repression of terrorism.***[98] This law emphasised the subjective element of terrorist crimes by adding that the acts had to be 'intentionally' connected to an individual or collective undertaking. The purpose of this amendment was to stress the existence of a '*dol aggravé'*, a special form of intent,[99] for which the motives of the act were taken into account and which had to be committed with premeditation (malice aforethought).[100]

With respect to criminal procedure, initially, the Bill of this law foresaw the possibility of night searches during police preliminary inquiries (*enquête préliminaire*), flagrancy inquiries (*enquête de flagrance*), as well as during the preliminary judicial investigation (*instruction préparatoire*).[101] However, when the law was submitted to the *Conseil Constitutionnel*, the *Conseil* censured the dispositions which authorised night searches in the case of preliminary police inquiries and preliminary judicial

[94] *Loi no. 95-125, de 8 février 1995, relative à l'organisation des juridictions et à la procédure civile, pénale et administrative* (JORF of 9 February 1995).

[95] For felonies, the prescription of public action was raised from ten to thirty years, for misdemeanours, it was increased from three to twenty years, cf. Art. 706-25-1 *CPP*.

[96] For felonies, the prescription of the punishment was raised from twenty to thirty years, for misdemeanours from five to twenty years, cf. Art. 706-25-1 *CPP*.

[97] Cf. Arts. 410, 411 *CPP*, see also Art. 379-2 *CPP*.

[98] *Loi no 96-647 du 22 juillet 1996 tendant à renforcer la répression du terrorisme et des atteintes aux personnes dépositaires de l'autorité publique ou chargées d'une mission de service public et comportant des dispositions relatives à la police judiciaire* (JORF of 23 July 1996, 11104). For further details on the Law, see also Mayaud (1997).

[99] However, to be distinguished from the *dol special.* See, for details, Mayaud (1997), at 37 et seq.

[100] This qualified intention was already planned by the previous version of 1986, so that the Law of 1996 did not actually change the positive law in substance, but served the rather declaratory purpose of reiterating the existence of this 'aggravated intent' (Desportes and Le Gunehec (1998), at 385). See more on the element of intentionality at Mayaud (1997), at 37-41.

[101] Police preliminary inquiries and flagrancy inquiries are the first preliminary investigations carried out by the police. A main difference between them is that for preliminary inquiries, in principle, no coercive measures are authorised, except for the detention of a person for a maximum of 48 hours (*garde à vue*). The flagrancy inquiries were originally destined to apply only to cases where the person was caught red-handed. However, today, flagrancy inquiries can also be triggered in other cases, such as public unrest (*clameur publique*) or when arms are found, cf. Art. 53 *CPP*. It cannot last longer than eight days (Art. 53(2) *CPP*). In both cases, the judiciary police (*police judiciaire*, see below, note 107) is competent. The public prosecution applies for a preliminary judicial investigation at the investigating judge in the case of a felony, Art. 79, 80 *CPP*. While formally, this investigation is still preliminary, it is actually the main procedural stage for the taking of evidence. (Kühne (2006), at 660 et seq.).

investigations, allowing night searches only in the case of flagrance, under the condition that procedural guarantees were met.[102] The Council found that also allowing for such a possibility in the case of preliminary police inquiries and preliminary judicial investigations affected the individual liberty to an excessive extent, for two reasons: first, the operations would not have been limited temporarily in the case of preliminary police inquiry or preparatory judicial investigations (flagrancy police inquiries, on the other hand, could in any case last no longer than eight days), and second, because the intervening authorities had too much autonomy;[103] however, following the attack on the metro Port-Royal in December 1996, the government introduced an emergency amendment to the Bill concerning remand detention (*détention provisoire*). Through this new amendment, under Art. 706-24-1 *CPP* a rule was reintroduced that allowed night searches, in the context of a preliminary judicial investigation, taking into account the rulings of the Constitutional Council, i.e. limiting drastically the possible cases in which this regulation could be applied.[104]

The Law also introduced a new crime (Art. 421-2-1 *CP*); 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."[105] The crime has some similarities to that of conspiracy, as it criminalises the association of people who are preparing a terrorist act, but who have not yet started to commit it. The underlying purpose of this new crime was to give police the instrument to dismantle terrorist networks on the basis of such an offence. Based on this offence, a suspect could be brought into custody for four days. During this period the necessary checks could be made and the necessary confrontations and hearings held. According to Cettina[106] this has proven to be an invaluable tool for the services of the *police judiciaire*,[107] and has become the fundamental legal justification for their activity. Without it, the combat of Islamist terrorism since 1994 would not have been as effective. On the other hand, for the FIDH[108] the introduction of the new crime opened the door to arbitrary enforcement because a number of acts which were in essence not illegal became so when a judge decided they occurred in the context of intent to commit terrorism. It was argued that the broad definition of the offence contravened the principle of legal certainty. The FIDH pointed out that the law was all

[102] Decision no. 96-377 of the *Conseil Constitutionnel* of 16 July 1996.
[103] Touchot (2004), at 236, citing Mayaud (1997), at 97.
[104] Since then, the night searches are authorised in the case of emergency if the necessities of the investigations require it, and provided that terrorist acts punished with at least 10 years of prison are at stake, and provided that the following conditions are met:

- flagrant crime
- immediate risk that evidence could disappear
- presumption that one or more persons who are in the places to be searched are prepared to commit new acts of terrorism

(Touchot (2004), at 237, 238).
[105] *participer à un groupement formé ou à une entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d'un des actes de terrorisme mentionnés aux articles précédents.*
[106] Cettina (2003), at 87.
[107] The *police judiciare* is the organ in charge of establishing violations of criminal law, collecting evidence and searching for the perpetrators (Art. 14 *CPP*). Its agents are those of the *police nationale* and of the *gendarmerie nationale*. For further details, see Guinchard and Buisson (2008), at 463 et seqq.
[108] *Fédération Internationale des Ligues des Droits de l'Homme*, see above, 4.3.2.3.

the more destructive to liberty because it failed to require the judge to attach the allegation of participation to any specific terrorist act.[109] The crime of participation in a group established with the view to the preparation of terrorist acts allowed police to act pre-emptively, instead of reactively, focussing on prevention rather than on the traditional repression. Retrospectively, the French legislation can therefore be considered as the 'ancestor' of the reasoning used everywhere else after 2001.[110]

By the end of 1996, another Law regarding terrorism was enacted, ***Law no. 96-1235 of 30 December 1996, concerning detention on remand and searches at night in cases of terrorism***.[111] It specified the conditions of detention on remand, emphasising its exceptional character, and limiting the duration of detention to a "reasonable duration, in view of the gravity of the alleged facts and the complexity of the investigations necessary for the truth-finding process."[112] In spite of this precision, which had been drafted in clear consideration of Art. 5(3) ECHR (but which, as it turned out, was not precise enough, the word 'reasonable' being open to multiple interpretations), since 1 January 2000, France has been criticised in no fewer than seven cases by the Strasbourg Court, for violating Art. 5(3) ECHR.[113]

Further, the law introduced the amendment to night searches referred to previously, and hence allowed seizures of evidence, searches and house searches to be conducted at night (i.e. between 10 pm and 6 am) as well as during the day. This is both within the framework of an investigation and in the case of an emergency,[114] and without the consent of the searched person (Art. 706-24-1 *CPP*), provided that the investigations concerned acts of terrorism punishable by at least ten years of imprisonment. Thereby, the Law departed from the ordinary law which authorised property searches only during the time (cf. Art. 59 *CPP*).[115] In addition, it derogated from the general principle enshrined in Art. 76 *CPP*, to respect the constitutional right to property, also protected by virtue of Arts. 2 and 17 of the Declaration of 1789.

Besides these legislative measures, France also reacted to the attacks by reinforcing the *plan vigipirate*, by increasing police and even military presence at public places, and, again, by mass detentions. In fact, between 1995 and 1999, wide-ranging police operations and the investigation and further prosecution of the Chalabi case caused a general outcry from lawyers associations, which was spread by the FIDH and the media. In particular, the establishment of a detention centre in Folebray by the French

[109] Mc Colgan and Attanasio (1999), at 9 et seq.
[110] Bigos and Camus (2006), at 23.
[111] *Loi no 96-1235 du 30 décembre 1996 relative à la détention provisoire et aux perquisitions de nuit en matière de terrorisme* (JORF, 1 January 1997, 9).
[112] See, in particular, Arts. 3 and 4 of the Law.
[113] For the period 1/1/2000 – 23/9/2008, in the following cases a violation of Article 5(3) ECHR was established: *P.B. v France*, 1 August 2000 (application no. 38781/9); *Gombert et Gochgarian v France*, 13 February 2001 (application nos. 39779/98 and 39781/98); *Richet v France*, 13 February 2001 (application no. 34947/97); *Zannouti v France*, 31 July 2001 (application no. 42211/98); *Blondet v France*, 5 October 2004 (application no. 49451/99*); Dumont-Maliverg v France*, 31 May 2005 (application nos. 57547/00 and 68591/01); *Gosselin v France*, 13 September 2005 (application no. 66224/01) (also noted by Marguénaud and Roets (2006), at 10).
[114] Cettina (2003), at 87.
[115] See above.

Minister of the Interior for foreign Islamists in France likely to support or take part in terrorist activities (before their exile) encountered criticism, as well as the mass detentions from Islamist circles throughout France between 1995 and 1998. Also criminal proceedings against the Chalabi network were the subject of much controversy, with regards to the duration of preliminary investigations, irregularities in the course of the interrogations, excessive use of the charge for "participation in any group formed or association established with a view to the preparation (…) of any of the acts of terrorism", the inadequacy of the evidence, and the lack of sufficient distance between the judges and the public prosecutor's office, the bench judges (*juges de siège*) and the police officers.[116] In addition, the French justice authorities were criticised for being too slow, for keeping several suspects for almost four years in detention on remand (1994-8), while most evidence had already been collected after 24 June 1995. According to the FIDH, these delays led to a violation of Art. 5(3) of the ECHR. In most cases examined by the FIDH, the investigations had already been practically terminated at the moment of arrest, so that the length of pre-trial detention seemed unjustified.[117] Moreover, it was claimed that during the process most of the witnesses who had already been previously heard were not heard again in trial. This seems particularly worrying as the credibility of many of the witnesses, among them police officers, secret agents or co-perpetrators, could be doubtful.[118] Moreover, the fact that witnesses were not heard any more during the trial was contrary to a fundamental principle of the criminal procedure, under common law known as the rule against hearsay, or, in a softer form, which is known under German law as the so-called principle of immediacy or directness (*Unmittelbarkeitsprinzip*, cf., for instance, § 250 of the German *StPO*) which establishes the rule that witnesses shall be heard directly in court, a rule from which the judge may only depart in certain explicitly enumerated cases. While this principle is not known under the same denomination in French law, the term 'contradiction' is similar, as it requires discussing the evidence in the presence of all parties, Art. 427(2) *CPP*.[119]

4.3.3.4. Solitary confinement

Art. D. 283-1 and D. 283-2 *CCP*, regulating solitary confinement, were amended by two Decrees: Decree no. 96-287 of 2 April 1996, concerning the disciplinary regime of detainees, and Decree no. 98-1099 of 8 December 1998 amending the Code of Criminal Procedure.[120] In addition, on 8 December 1998 a circular was issued to implement the decree amending the Code of Criminal Procedure.[121] Art. 283-1 *CPP* allows the prison governor to order solitary confinement at the prisoner's request or as a precautionary or

[116] Cettina (2003), at 89, with further references.
[117] Mc Colgan and Attanasio (1999)at 12.
[118] Ibid at 21
[119] Kühne (2006), at 672.
[120] *Décret no 96-287 du 2 avril 1996 relatif au régime disciplinaire des détenus et modifiant certaines dispositions du code de procédure pénale (troisième partie : Décrets)*, and *Décret no 98-1099 du 8 décembre 1998 modifiant le code de procédure pénale (troisième partie : Décrets) et relatif à l'organisation et au fonctionnement des établissements pénitentiaires.*
[121] See ECtHR, *Ramirez-Sanchez v France*, Judgment of 27 January 2005 (application no. 59450/00), at 63.

security measure. The decision has to be founded upon specific reasons; the nature of the offence committed by the concerned prisoner does not suffice as a reason. The person subjected to solitary confinement is checked by the prison's medical team on a regular basis.[122] Solitary confinement can last for up to three months on the basis of a new report and as a result of a decision of the regional director; it may exceed one year if the Minister of Justice so decides on the basis of a reasoned report by the regional director (see Art. 283-1 *CPP*).[123] The circular specified that solitary confinement could not be ordered for disciplinary reasons. It further stated that no judicial review of the decision to order solitary confinement was necessary, because "the courts consider on the basis of Art. D. 283-2 that 'solitary confinement does not make conditions of detention worse and is not liable to affect the legal position of the person so held' (*Conseil d'État*, 28 February 1996, *Fauqueux* judgment; and *Conseil d'État*, 22 September 1997, *Trébutien* judgment)."[124] The situation changed substantially in 2003, when the *Conseil d'État* finally recognised that a person who has been placed into solitary confinement against his own will can actually appeal against this decision at the administrative court.[125]

Solitary confinement was challenged in the case *Ramirez-Sanchez v France*. The applicant, who had been prosecuted in connection with investigations into several terrorist attacks carried out in France, was convicted to life imprisonment for the murder of three police officers. He spent eight years and two months in French prisons in solitary confinement. The Strasbourg Court considered that this form of solitary confinement, which allowed the prisoner to receive frequent visits by his lawyer and his cleric, did not reach the threshold of gravity required by Art. 3 of the ECHR (torture and inhuman or degrading treatment), as the prisoner had not been subjected to sensory isolation or total social isolation, but 'only' to relative social isolation (the applicant had indeed received visits by his lawyer, who was also his fiancée, and by his doctors, on a very regular basis). Notwithstanding, the Strasbourg Court found that the French Government had violated Art. 13 of the Convention, as French law did not provide a remedy for the applicant to contest the decision to prolong his detention in solitary confinement.[126]

4.3.4. The Football World Cup and reinforcement of the presumption of innocence

In 1998, on occasion of the Football World Cup held in France, the *plan vigipirate* was again applied. Moreover, French police carried out preventative round-ups on 26 May

[122] At least twice a week, cf. Art. D. 283-1 (4) in conjunction with Art. D. 381 *CPP*.
[123] The regime on solitary confinement has been recently amended again, see below at 4.4.6.
[124] ECtHR, *Ramirez-Sanchez v France* (loc. cit.), at para. 81.
[125] *Conseil d'Ètat* 30 July 2003 *Remli*. The case (together with the ECtHR's judgment in Ramirez Sanchez) is discussed by Poncela (2005).
[126] When the case was referred to the Grand Chamber of the ECtHR under Art. 43 ECHR, the Grand Chamber confirmed the former Decision, recognising the possible long-term effects of the applicant's isolation, but having regard in particular to the character of the prisoner and the danger he posed, as well as the fact that since 5 January 2006 he had been held under the ordinary prison regime (ECtHR, *Ramirez Sanchez v France*, Grand Chamber Judgment of 4 July 2006 (application no. 59450/00)).

1998, detaining fifty-three people, of which forty were released within forty-eight hours. This was done to prevent planned attacks on the *Stade de France*.[127]

While not particularly related to terrorism, ***Law No. 2000-516 of 15 June 2000 reinforcing the presumption of innocence***[128] needs brief mention. It strengthened the rights of the accused, particularly his right to effective defence, adapting them to the requirements set out by the ECtHR. An important change introduced by this Law was the creation of a *juge des libertés et de la detention*, a liberty and custody judge, who can be appointed by motivated decision of the investigating judge, and whose task is to order, prolong or withdraw detention on remand (*détention provisoire*).[129] Also, the remedies against decisions in first instance at the Assize Court were extended to appeals on points of facts.[130] Further, it was finally regulated that arrested people had to be informed of the charges against them and the reason for their arrest.[131] The Law was modified again in 2002.[132]

4.4. Post September 11th anti-terror legislation

Like in many countries around the world, France reacted promptly to the events in New York in September 2001, by adopting the Law of 15 November 2001, the Law on "daily security". This was not however the only legislative reaction to September 11th; other special anti-terror Acts were adopted in 2003, 2004, and 2006. Moreover, terrorism was also considered in the legislation of 2002.

4.4.1. Law no. 2001-1062 of 15 November 2001 on Daily Security

The first immediate reaction to September 11th, ***Law No. 2001-1062 of 15 November 2001***, ***concerning daily security***,[133] presented, similar to both the English Anti-Terrorism, Crime and Security Act 2001 and German 'Security-Package', a bundle of new provisions covering multiple areas of law. The law was actually submitted to the National Assembly in March 2001. Subsequently, it was amended thirteen times. This permitted the inclusion of counter terrorism legislation in response to the events of September 11th 2001.[134] Human rights defenders contested the legislative process of this Law, notably the fact that the Bill, after having been amended in view of the new threat of terrorism, was not again submitted to the Constitutional Council. This is even more worrisome considering that the decision not to submit the Bill to the *Conseil Constitutionnel* was the result of a *political agreement* between the parliamentarians,

[127] Shapiro and Suzan (2003), at 86.
[128] See Lazerges (2001).
[129] Kühne (2006), at 678.
[130] Before, there was no appeal on the point of facts possible before the Assize Court. By the Law of 15 June 2000, this situation has changed (cf. Art. 380-1 *CPP*), which can be considered as nearly 'revolutionary', for breaking with a tradition of two hundred years.(Ibid. at 665.)
[131] Ibid. at 677 (with further references).
[132] *Loi no. 2002-307, du 4 mars 2002*, JORF of 5 March 2002, 4169. For details, see Bouloc (2004), at 138.
[133] *La loi no. 2001-1062, du 15 novembre 2001, relative à la sécurité quotidienne* (JORF of 16 November 2001, 18215).
[134] Gleizal (2002), at 901.

who considered that the urgency and exceptionality of the situation had to prevail over any other consideration.[135]

The Law not only related to terrorism, but also included amendments to the law governing route traffic, the powers of the Mayor in security matters, and the organisation of open-air parties, amongst others. It focuses on the prevention of terrorism by eradicating the financial means of it. Therefore, related offences such as weapon trade and drug trafficking were particularly targeted, the possibilities to confiscate money were extended, and the powers of institutions in charge of monitoring financial transactions were also strengthened. At the same time, in view of the new technologies of communication at the disposal of terrorists, new possibilities for police to make use of these technologies were also created. The objective was to combat a new form of 'hybrid' terrorism, adding a dimension of technical and financial organisation 'of such high calibre that modern terrorism is sometimes considered a substitute to war'.[136] Chapter V of the Law was dedicated to the combat of terrorism. In this context, in particular, the following measures were adopted:

- Art. 23 of the Law introduced Art. 78-2-2[137] into the Code of Criminal Procedure, which authorises police, on order of the public prosecutor, to search moving or parked cars (in principle, in the presence of the car owner or driver), for the purpose of investigating or prosecuting terrorist crimes, or crimes related to arms and explosives. Until then, car searches had only been possible in the case of an offence to the Highway Code, a flagrancy inquiry or a preliminary judicial investigation.[138]
- Art. 24 extended the police's powers to search houses, and to secure pieces of evidence without the concerned person's consent (when ordered so by the liberty and custody judge, on request of the prosecutor). The possibilities to carry out house searches at night were extended, also allowing it now during the preliminary police inquiry (but restricting it to places others than living places – *locaux d'habitation*). This provision is in fact contrary to the Decision of the *Conseil Constitutionnel* of 1996 which explicitly held that night searches were not constitutional during this phase of investigation (see above at 4.3.3.3).[139]
- The security at airports and maritime harbours was further enhanced, by authorising police officers to search people, their luggage, freights, packages, airships and vehicles present in zones that were not freely accessible to the public (Arts. 25, 26 of the Law).
- Under Art. 27 private security agents were also conferred inspection and search powers with respect to hand luggage.[140]

[135] Ibid. at 903.
[136] Dagron (2004), at 274.
[137] Amended by Act n° 2003-239 of 18 March 2003.
[138] Bigos and Camus (2006), at 33.
[139] Touchot reaches the same conclusion, i.e. that the principles established by the CC were only partially respected when drafting this Law. (Touchot (2004), at 238).
[140] The search is only permitted if the proprietor consents to it, cf Art. 27, second paragraph.

- Moreover, telecommunication operators were obliged to keep personal data connexions allowing users' identification, for a maximum time period of one year, and to put them at the judicial authority's disposal (Art. 29 of the Law).
- Art. 33 introduced new terrorist offences related to finances: thus, insider trading and money-laundering were included in the list of offences possibly connected with terrorism (Art. 421-1-6 and 421-1-7 *CP*), and the financing of terrorism was incriminated (Art. 421-2-2 *CP*). The latter provision was introduced as a result of European influence, notably the Common Position of the Council J.A.I. of the European Union, no. 2001-154, of 26 February 2001.[141] Moreover, Arts. 422-6 and 422-7 *CP* were introduced, which provide for the confiscation of assets of convicted terrorists as a complementary penalty, of which the result shall be given to the victims guarantee fund for terrorist victims.
- In addition, the number of offences for which genetic information of the offender shall be registered in a national automated database for DNA profiles, previously restricted to sexual offences, was largely extended to many different sorts of crimes, including theft, extortion, destruction, and acts of terrorism.[142] As the law does not establish any minimum age for registration, this leads to the perverse situation that the national database may even collect genetic information of children of eight years or younger, who take a game in the supermarket without paying.[143]
- A sunset clause under Art. 22 of the Law provided that the special provisions directed at the fight against terrorism were only applicable until 31 December 2003. However, Art. 31 of the Law of 18 March modified this provision (see below at 4.4.3.).[144]

Some provisions of the Law of 2001 have been identified notably by the National Consultative Commission of Human Rights as a threat to the fundamental rights of individuals. In its advisory opinion given in October 2001 the Commission, in the first place, denounced the procedure followed by the government to impose these provisions on terrorism.[145] In fact, the provisions have been introduced by way of amendments

[141] Pradel and Danti-Juan (2004), at 805.
[142] Art. 56 of the Law, introducing a new Art. 706-54 to the *CPP*.
[143] This indeed happened. Two children of 8 and 11 years were caught in a supermarket stealing games. Subsequently, the police wanted to take their digital finger prints. The father refused to give the DNA of his sons, and thereby occasioned a nation-wide debate on the matter, discussed broadly in the media, cf. Liberation (www.liberation.fr), QUOTIDIEN : 8 Mars 2007 (2007): *La justice recule, après la menace de prélèvement d'empreintes sur deux enfants. Des voleurs de joujoux évitent de peu le fichage ADN* (The Articile was originally posted at: http://www.liberation.fr//actualite/societe/252380.FR.php?utk=0005b105 [visited on 21-02-08] and can now still be retrieved at: http://refusadn.free.fr/spip.php?article78 [visited on 1-12-08]).
[144] According to this provision, only Arts. 24, 25, and 26 shall be temporary duration (before, also Arts. 22, 23, 27-30 were included in the sunset clause), and this duration will not end in December 2003, as foreseen in 2001, but on 31 December 2005. (*Art. 22. - Les dispositions du présent chapitre répondent à la nécessité de disposer des moyens impérieusement nécessaires à la lutte contre le terrorisme alimenté notamment par le trafic de stupéfiants et les trafics d'armes et qui peut s'appuyer sur l'utilisation des nouvelles technologies de l'information et de la communication. Toutefois, les articles 24, 25 et 26 sont adoptés pour une durée allant jusqu'au 31 décembre 2005.)*
[145] See: www.commission-droits-homme.fr (visited on 1 October 2008).

into a draft that had already been discussed by the different commissions in Parliament. This way, it avoided being subject to the scrutiny of either the *Conseil Constituionnel* or the *Conseil d'Etat*.[146]

Besides, the grouping of diverse provisions together in one law concerning terrorism, but also juvenile delinquency, the powers of the Mayor in security matters, the organisation of open-air parties and the regime of weapon trade, could lead to serious confusion as to the government's purpose. Additionally, the Commission criticised the content of the law. In particular, it denounced the duration of the application of these special provisions, as well as the powers given to individuals belonging to private companies to perform body-searches and other forms of control, under certain conditions, in ports and airports. Finally, it also criticised the extensive powers given to the police in order to search vehicles.[147] Other criticism targeted the new offences: They were perceived as a restriction of personal freedom that would have no effect on terrorists, but instead strike at the very heart of democracy. The extended checks carried out on people and their cars have been denounced as attacks on people's privacy and their freedom of movement. It was alleged that the sole effect of the law would be an exponential increase in the number of checks directed at those who looked like foreigners, and in the number of people without papers sent to detention centres.[148]

4.4.2. Laws adopted in 2002

In 2002, three more laws were adopted in France: by virtue of ***Law no. 2002-1062 of 6 August 2002, on amnesty***, a rule was adopted, stating that individuals convicted for acts of terrorism can never benefit from amnesty. In the framework of ***Law no. 2002-1094 of 29 August 2002, on the Orientation and Planning for Internal Security***[149], the fight against terrorism was included in the list of priorities for police services until 2007. The law further enhanced co-operation and information flows on a European and international level, involving the participation of various services (police, customs, and intelligence services, and, more recently, financial intelligence services). Additionally, the ***Law no. 2002-1138 of 9 September 2002, on Orientation and Programming for Justice*** (also known as 'Law *Perben*', in remembrance to the then Minister of Justice, Dominique Perben) was adopted, which was not directly oriented towards terrorism, but rather concerned the criminal justice system in general, thereby also affecting terrorism legislation (*inter alia* the law regarding minor offenders, the penitentiary system, the detention on remand – including its maximum duration – and criminal procedure in general were amended, with the objective to reach more efficiency).[150] The *Conseil Constitutionnel* considered the latter law as constitutional.[151]

[146] Dagron (2004), at 274.
[147] Commission nationale consultative des droits de l'homme (2001).
[148] Cettina (2003), at 89.
[149] JORF of 30 August 2002, 14398.
[150] *Loi no. 2002-1138, de 9 Septembre 2002 d'orientation et de programmation de la justice.* An overview on the Law is provided by Bouloc (2004), at 139 et seqq.
[151] See Decision 2002-461 DC of 29 August 2002. See also the comment by Luchaire (2002).

4.4.3. Law no. 2003-239 of 18 March 2003 on Internal Security

The year 2003 was marked with another special security law, ***Law no. 2003-239 of 18 March 2003***, which concerned internal security (also known as '*loi Sarkozy*', in allusion to the then Minister of the Interior).[152] The law again presented an accumulation of diverse provisions not exclusively concerning terrorism, but also prostitution, illegal occupation of property belonging to other persons, protection of persons holding public authority, alien law etc.[153] The Law reinforced the tendency to give more powers to the police and judiciary. Thus, it extended the validity of Arts. 24 to 26 of the Law of 2001, relating to house searches and airport and seaport zones' controls, until the end of 2005, and perpetuated the rest of the legislative bundle of 2001.[154] Pursuant to its Arts. 11-13, the previously introduced provision of Art. 78-2-2 *CPP*, concerning the police power to search moving or parked vehicles, was further extended to investigations other than terrorism, such as theft,[155] and receipt of stolen goods offences;[156] pursuant to the new Art. 78-2-4 *CPP*, car searches are also authorised for merely preventive purposes, i.e. to prevent a severe attack against the security of persons or goods. As Dagron[157] notes, the *Conseil Constitutionnel* had already decided on similar provisions in 1977. Then, it considered that preventive car searches, in the absence of any concrete committed crime, were contrary to individual liberties because of the broadness of the powers given to the judicial police and the indirect connection with a real threat to the public order.[158] Nonetheless, when the Law of 2003 was submitted to the *Conseil Constitutionnel*, this time the CC considered that human rights like the right to privacy, the inviolability of the home, the freedom of movement and individual liberty were not threatened. The *Conseil* merely placed certain restrictions[159] upon its application.[160] It found that it was up to the legislator to find the appropriate balance between public order and detection of the offenders, on the one hand, and the constitutionally guaranteed rights and freedoms, on the other.[161]

Art. 18 of the Law introduces a norm to further restrict privacy: pursuant to the new Art. 60-1 *CPP*, a judicial police officer may order any person, establishment or organisation, whether public or private, or any public services likely to possess any documents relevant to the inquiry in progress, to turn in these documents.

Moreover, through the simple deletion of one sentence, Art. 19 of the Law in fact abolishes the 'miranda rule', which concerns the obligation of police officers to inform an arrested person about his right to remain silent.[162]

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[152] For details on the Law, see Bouloc (2004), at 145. et seqq.
[153] This is noted by Dagron (2004), at 275.
[154] Cf. Art. 31 of the Law.
[155] Cf. 311-3 to 311-11 *CP*.
[156] Art. 321-1 and 2 *CP*.
[157] Dagron (2004), at 285.
[158] CC, 12 January 1977, Decision DC 76-75, Rec., 33 or JORF of 13 January 1977, 344.
[159] For example, that the controls could not last longer than strictly necessary, and that they should be conducted in the presence of the driver or owner of the vehicle, or, if these were not available, by a third party appointed to this end by the police officer.
[160] CC, Décision no. 2003-467 DC, of 13 March 2003 (*Loi pour la sécurité intérieure*), JORF of 19 March 2003, 4789.
[161] Ibid, at para. 8.
[162] Kühne (2006), at 677.

Under Arts. 21 et seq, the police are authorised to survey personal files contained in police data-processing systems.[163] These provisions were criticised by the National Commission on Information and Liberty.[164] The CNIL in particular criticised that access to personal files could also be granted if a person had already been acquitted but the files had not yet been destroyed. It argued that the management of the databases was not as transparent as in the case of criminal records, and that the age of the concerned person was irrelevant in order to be filed in such a data system.[165] However, again the Constitutional Council ruled that in view of the existing guarantees, it could be assured that the conciliation between the respect for private life and the maintenance of public order was not 'manifestly unbalanced'.[166]

Another provision of the law allows in certain high-risk areas the computerised checking of vehicle registration data, as well as the photographing of occupants (Art. 26 of the Law).[167]

In addition, the provisions introduced in 2001 concerning the storage of DNA data of offenders,[168] were further extended to about a hundred offences (cf. Art. 29 of the Law). Since the adoption of this law, the number of DNA entries has exponentially increased: from 2807 entries in 2003 to more than 330 000 in 2006.[169]

Finally, the Law also created a new crime: the new Art. 421-2-3 *CP* provides punishment for up to seven years imprisonment for persons "unable to account for resources corresponding to one's lifestyle when habitually in close contact with a person or persons who engage in one or more of the activities provided for by articles 421-1 to 421-2-2". By this formulation, the burden of proof is reversed. It is now the accused who has to account for his resources. The provision is therefore dubiously compatible with the presumption of innocence.

4.4.4. Law no. 2004-204 of 9 March 2004 to Adapt Justice to the Evolutions of Criminality

In 2004, two days before the devastating 11 March bombings of Madrid took place, ***Law no. 2004-204 of 9 March 2004 to adapt justice to the evolutions of criminality***[170] was enacted, also known as Law Perben II. In the same spirit of Law Perben I[171] Law Perben II is also mainly directed at criminal justice (in particular: organised crime), and not restricted to terrorism. It introduces new offences, extends existing powers of the police during preliminary investigations, and creates additional special investigative tools. Thus, the specific offence of criminal organisation or organised crime was

[163] This data processings may not be confused with the criminal record (cf. Dagron (2004), at 287 (note 71).
[164] *Commission nationale de l'informatique et des libertés, CNIL*. This is a commission in charge of the protection of personal data stored in data processing systems.
[165] Dagron (2004), with further references, at 288.
[166] Decision no. 2003-467 of 13 March 2003, at para. 27.
[167] amended by art. 8 of Act. No. 2006-64 of 23 January 2006.
[168] Art. 706-55 *CPP*.
[169] Le Monde online (article paru dans l'édition du 19.12.06) (18 December 2006): *Sécurité le Fichage génétique contesté, les refus de prélèvements génétiques pour des petits délits se multiplient.*
[170] Loi portant sur l'adaptation de la justice aux évolutions de la criminalité (art.47 5° JORF of 10 March 2004). An overview on the Law is provided by Bouloc (2005).
[171] See above at 4.4.2.

introduced. However, the offence is not defined, but instead, in the Code of Criminal Procedure a new Title is introduced,[172] concerning the "procedure applicable to organised crime and delinquency", in which the first Article[173] lists a number of crimes that are henceforth considered as organised crimes (including, *inter alia*, acts of terrorism). The French legislator thus applies the same legislative technique it had already used in 1986: in order to avoid a legal definition of a debatable crime it makes a list of crimes qualifying as terrorist / organised crimes. This has two advantages: first, the principle of certainty is followed, as the crimes listed are concrete, and second, a certain level of flexibility is also assured – if offences other than those listed turn out to be preferably committed by 'terrorists' or 'criminal organisations', the list can simply be updated by adding these offences. The second possibility entails certain risks, since the list of offences also implies extended procedural powers. Due to the technique of referral, one is not immediately aware of the far-reaching consequences the listing has on a procedural level. For the listed offences of organised crime, new special procedural tools apply. For instance, the police are equipped with new surveillance powers; they are allowed to observe people suspected to be involved in organised crimes throughout the national territory.[174] The secret observation via infiltration is put on legal grounds, by the adoption of Art. 706-81 *CPP*. Many other covert surveillance measures have been regulated by the new Law, among them interceptions of telecommunications (new Art. 706-95 *CPP*), (audio and visual) bugging operations in private or public places, including cars (new Art. 706-96), and the freezing of assets (new Art. 706-103 *CPP*). Before, surveillance was already provided for by the Law of 19 December 1991, but this only applied to drug delinquency (former Art. 706-32 *CPP*, which was abolished by the Law of 9 March 2004).[175]

Furthermore, the Law extended the prolongations of police custody for the listed offences: "if the necessities of an inquiry or investigation concerning crimes enlisted under Art. 706-73 *CPP* [i.e.: organised crimes] require it, police custody of a person can be subject to two prolongations, each of them of 24 hours", thus amounting to a total time in police custody of 96 hours. We should note that this prolongation brings us back to 1960: during the Algerian crisis, a similar law had been in place.[176] In general, the detainee may request to talk to his lawyer after 48 hours, then again after 72 hours of police custody. However, in terrorist and drug affairs, he or she can only talk to his lawyer after 72 hours.[177] Contrary to the previous norm, this provision now also applies to minors between sixteen and eighteen years old, and is no longer restricted to terrorist offences, but applies to any form of organised crime as enumerated under Art. 706-73 *CPP*. Similarly, the police's abilities to carry out night searches were extended under certain circumstances (and only in cases of emergency) to places where people live.

[172] Title XXV in Book IV, *CPP*.
[173] Art. 706-73 *CPP*.
[174] Art. 706-80 *CPP*.
[175] Bouloc, Stefani and Levasseur (2006), at 378.
[176] See above at 4.3.1.
[177] Art. 706-88 *CPP*.

In addition, the 2004 Law introduced a number of new crimes,[178] among them a new terrorist offence: the directing or organising of a terrorist group, which is punished by 20 years imprisonment and a fine of 500,000 €. Moreover, sentence reductions or remissions of sentences are now provided for for co-perpetrators who attempted to commit a crime, but refrained from finalising it, and subsequently helped the authorities preventing the planned crime and prosecuting the other co-perpetrators.[179]

The Law also regulates infiltration by police in the case of organised crime. The infiltration must be authorised by the prosecutor or the investigating judge. The under-cover agent is allowed to pretend to be a co-perpetrator, accomplice or receiver of stolen goods. He may take a new identity, and he may even commit certain determined crimes (transport, keeping of products or documents, and other conducts enumerated under Art. 706-82 *CPP*). However, he is not allowed to incite these crimes.[180] It is rather disturbing that the French law legitimates the commission of crimes at the hands of the state. This is not permitted under German law, although some argue that at least the commission of crimes *typical* for the respective environment ("*Milieu-Straftaten*") should be possible, in order to strengthen the credibility of the infiltrator within the criminal gang. However, this view must be rejected. We cannot allow police to break the law and thereby harm the legal interests of citizens who may have no criminal link whatsoever. Moreover, the efficiency of such a regulation must be doubted. If infiltrators are only allowed to commit harmless offences, the perpetrators, if doubting the credibility of the infiltrator, are unlikely to require the infiltrator to commit those crimes that are permitted by the law, but rather those that are not.[181]

The Law of 2004 further introduced a special plea-bargaining procedure.[182] Finally, it should be mentioned that the flagrancy inquiry, which before could only last for eight days, can now be prolonged for a further eight days.[183] This means that special police measures (such as night searches, for instance),[184] which were originally only allowed during flagrancy inquiry because of the special brevity of this procedure, can now be also applied for the double duration.

Chapter II of the 2004 Law regulates European and international cooperation in the fight against organised crime, such as the creation of joint investigation teams, or the European Arrest Warrant[185], the collaboration with Eurojust, and extradition matters.

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[178] See Art. 6 of the Law.
[179] Cf. Art. 12 of the Law, introducing Art. 132-78 *CP*.
[180] Art. 706-81, 706-82 *CPP*.
[181] Kühne (2006), at margin no. 536.
[182] See Arts. 69 et seqq and 137 et seqq of the Law.
[183] This means, in fact, that the flagrancy inquiry can last up to two weeks (not 16 days, as the text seems to suggest), see Pradel (2004), at 499, note 2.
[184] See above at 4.3.3.3.
[185] In this context, the earlier constitutional Law no. 2003-267 concerning the European Arrest Warrant (*Loi constitutionnelle n° 2003-267 relative au mandat d'arrêt européen adoptée par le Parlement réuni en Congrès le 17 mars 2003*, JORF n° 72, http://www.senat.fr/dossierleg/pjl02-102.html) should also be mentioned, as it created the constitutional conditions to implement the European Arrest Warrant in France. For case-law on this new measure, cf. Commaret (2005)

The Law was submitted to the *Conseil Constitutionnel*, which declared some of its provisions unconstitutional: The Bill had foreseen a new Art. 706-104 *CPP*[186] which provided that in the case of organised crime inquiries, it did not present a ground for voidability if after the application of the special measures it turned out that the requirements for the application of these measures, i.e. the existence of an organised crime, were not met. The *Conseil Constitutionnel* found that such a provision unduly endangered personal freedoms, and that the legislator was deprived of a means to control these far-reaching powers if they could not be nullified in the case of abuse.[187]

The Law Perben II was criticised for many reasons. Henri Leclerc, honourable president of the League of Human Rights, called it a "legislation of exception that risks becoming common rule."[188] Different lawyers associations[189] denounced the dangers of the new investigative tools. The new plea-bargaining procedure was attacked for reducing the judge's role to that of a marionette of the prosecutor. The former minister of Justice, Robert Badinter, considered the law as a 'regression', jeopardising equality of arms and fair trial, by only enhancing powers on one side: that of the prosecution. Moreover, Badinter criticised that this extension of powers had not been sufficiently justified by the government, so that it seemed unproportional to the related human right restriction, notably the restriction of the human right of security against arbitrary and excessive state power. [190]

4.4.5. London Bombings of 2005 and urban riots in Paris' *Banlieues*

The London bombings triggered yet another special anti-terror law in France, ***Law no. 2006-64, of 23 January, pertaining to the fight against terrorism and containing various provisions concerning security and border controls***.[191] The Law was drafted at a tense time in France: October and November of 2005 were shadowed by riots in several places in France, in particular in the suburbs (*Banlieues)* of Paris. The riots were occasioned by the deaths of two French youths of Malian and Tunisian descent who were electrocuted when they fled the police in the Parisian suburb of Clichy-sous-Bois. The deaths of the teenagers led to an outcry among young immigrants from the poorer regions in many cities of France, who reacted with vandalism. [192] The torching of cars was followed by mass detentions which led to a declaration of a state of

[186] The drafted Art. 706-104 *CPP* read as follows: "*Le fait qu'à l'issue de l'enquête ou de l'information ou devant la jurisdiction de jugement la circonstance aggravante de bande organisée ne sois pas retenue ne constitue pas une cause de nullité des actes régulièrement accomplish en application des dispositions du present titre."*

[187] CC, Decision no. 2004-492 DC of 2 March 2004, paras. 67-71. A comment on the Decision is given by Bück (2005).

[188] La Libération (online edition) (14 January 2004): *Dernière plaidoirie contre une dérive liberticide*.

[189] *The Conseil national des barreaux, Conférence des bâtonniers, Ordre des avocats de Paris and Unions des jeunes avocats.*

[190] Le Monde (online edition) (28 January 2004): *Les cinq points inquiétants pour les libertés publiques*.

[191] *Loi n° 2006-64 du 23 janvier 2006 relative à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers* JORF of 24 January 2006. An overview on the new regulations adopted by this law is given by Seuvic (2006), and by Bouloc (2006a).

[192] For background information (in English language) on the events from a social scientists' perspective, see http://riotsfrance.ssrc.org/ (last visited on 23 September 2008).

emergency[193] on 8 November 2005 for the metropolitan territory. As the state of emergency could only last for twelve days, unless prolonged by law, ***Law no. 2005-1425 of 18 November 2005*** was adopted, which prolonged the state of emergency for a maximum of three more months. The *Conseil d'Etat* confirmed the legality of the prolongation.[194] However, as the suburbs calmed down by the end of 2005, the state of emergency was suspended on 3 January 2006.[195] It was thus in this atmosphere of civil unrest that the Law no. 2006-64 was drafted. The rationale was to follow the UK strategy and therefore homogenize anti-terrorism strategy between the UK and France.[196] Bigos and Camus describe the Law as follows: "Even if this law has been evocated just after the London events on July 2005, and is presented as proceeding from immediate reaction and consideration of the present threat (which justify the "emergency proceedings"), [it] has been prepared before the events. This law inscribes itself in the continuity as it comes to complete the existing arsenal, deepening the preventive and proactive side by an intensive use of new information and communication technologies."[197] The main goals of the Law were to develop video surveillance, based on the UK's experience, to strengthen the control of movement as well as phone and electronic exchanges of people suspected of taking part in terrorist action, to enhance personal data processing, and to strengthen substantive criminal law with respect to terrorism.[198]

In particular, the 2006 Law led to the following changes:

- The powers of the authorities to control the movement of persons (in particular to "risky" countries like Pakistan, for instance), to monitor exchanges of telecommunication and electronic communication have been considerably strengthened.[199] For example, Art. 8 allows an automated control of vehicles by photographing their occupants; this data will be automatically linked to the police records of stolen cars (this possibility had already been created by the Law of 2003,[200] however, the modalities have been considerably widened in 2006). Cyber cafes, internet and telecommunication providers in general are obliged to keep all their connection data for one year and to give information to the authorities when requested. Moreover, anti-terrorist investigators and police will gain easier access to various files (registrations, passports, residence permits, etc.) and to specific information such as train, plane or ship passengers' data. [201]

[193] The legal basis to declare the state of emergency was the Law no. 55-385, of 3 April 1955, instituting a state of emergency and declaring the application in Algeria (*loi n° 55-385 du 3 avril 1955**,** instituant un état d'urgence et en déclarant l'application en Algérie*). See also decrees no. 2005-1386 and 2005-1387 of 8 November 2005, in application of the Law no. 55-385 of 3 April 1955 (*décret n° 2005-1386 / 2005-1387 du 8 novembre 2005 portant / relatif à l' application de la loi n° 55-385 du 3 avril 1955)*. See Hyest (2005/2006).

[194] *Conseil d'Etat, ord. réf., 9 décembre 2005* – 287777 – *Demandeur* : Allouache (Recueil Dalloz 2006 no. 1 at 12).

[195] By Decree of the council of ministers (*décret en conseil des ministres*) no. 2006-2 of 3 January 2006 (JORF of 4 January, 122).

[196] Bigos and Camus (2006), at 54.

[197] Ibid. at 52.

[198] For an overview and positive comment on the Law, see Chrestia (2006b).

[199] Chapter II of the Law, Arts. 3-6.

[200] See above at 4.4.3.

[201] Bigos and Camus (2006), at 55.

- Like in the UK, video surveillance has been further expanded. Legal entities are now allowed to film around their buildings, on public highways, and investigators are entitled to view these images.[202]
- Once more, the duration of police custody has been prolonged and can now last for up to six days (instead of the previous four days). In addition, the moment when the arrested person has the right to meet with his or her lawyer has been further delayed, to the 96th, or, in the given case, to the 120th hour.[203] The denial of access to a defence attorney during the first five days of police custody constitutes a severe limitation of the fundamental right to effective defence enshrined in Art. 6(1), 6(3)(b), ECHR. It is difficult to imagine cases in which such a far-reaching limitation might be justified.
- Concerning substantive criminal law, sentences were increased; for instance, the punishment was doubled (from ten to twenty years) for the crime of participation in a terrorist entity[204] if this group aimed at preparing certain acts listed under the new Art. 421-6 *CP*.[205] Terrorist leaders can now expect thirty instead of twenty years of punishment, and aidors and abettors twenty instead of ten years for helping in a terrorist enterprise.[206]
- In addition, the execution of sentences has been centralised in Paris.[207]

The circumstances of the adoption of this Law provoked severe criticism. Democratic debate was a 'farce', in view of the emergency provisions, which raised concerns even among those who supported the conservative UMP party. The exceptional nature of the new laws as well as the type and scope of the measures encountered harsh criticism, and, above all, the supremacy granted to police and intelligence services over judicial authorities was criticised. Bigos and Camus even find that "subjected to strong tensions since anti-terrorism measures existed, the liberty-security balance has never been challenged to such a point and security has never been valued to the detriment of liberty to such extent."[208]

Furthermore, the CNIL criticised the Bill, when it was submitted to it prior adoption.[209] Some of its comments were taken into account when drafting the final law, others were not.[210] The CNIL generally criticised the 'multiform, imprecise and large' character of the preventive goal of the law, which risked to threaten the freedom of too many people and also the overlap with other goals such as the fight against illegal immigration or organised crime. The CNIL also criticised the systematic photographing of people in cars, the lack of a definition of persons offering access to the internet, and the creation of a central file for controlling the movements from or to countries outside of the European Union, as CNIL considered that the limits of these provisions as well

[202] Chapter I of the 2006 Law = Arts. 1-2.
[203] See new Art. 706-88.
[204] Art. 421-2-1 *CP*.
[205] Chapter IV of the Law, Art. 11; cf. the new Art. 421-6 *CP*.
[206] Bigos and Camus (2006), at 53 et seq.
[207] See new Art. 706-22-1 *CPP* (Art. 14 of the Law).
[208] Bigos and Camus (2006), at 56.
[209] See www.cnil.fr/index.php?id=1957 (last visited on 1 October 2008).
[210] For details, see Chrestia (2006a), at 6.

as the guarantees of individual rights lacked precision. Moreover, CNIL desired a limited application of Arts. 1 and 2 regarding video surveillance. The legislator ignored all of these recommendations. With regard to other areas CNIL's recommendations were followed; for instance, CNIL demanded further precision for the access for police officers to data when combating terrorism, and it requested to observe the requirements of the Law on Information Technology and Liberties in the context of bugging operations.[211]

When the Law was submitted to the *Conseil Constitutionnel*, the latter declared some of its provisions as unconstitutional.[212] Thus, it rejected the repressive objective for administrative data requests by police and gendarmerie officials regarding communication data, on the grounds that the separation of powers demanded that this purely administrative procedure could only be used for preventive, but not for repressive purposes.[213] As to the rest of the provisions governing this procedure on communication data requests, the *Conseil* estimated that the legislator had provided suitable limitations and safeguards ensuring the necessary reconciliation between the right to privacy, on the one hand, and the prevention of terrorism, on the other. With respect to the possibility to automatically photograph occupants of vehicles and use the obtained data, the CC found that such a provision, by its nature, did not violate the freedom of movement, nor *habeas corpus*. The Constitutional Council only specified that, if this method was used by the judicial police (as opposed to the administrative police), it needed to be subjected to judicial control, in order to comply with the separation of powers.

4.4.6. Solitary confinement decrees

On 21 March 2006, two Decrees were adopted to reform prison sentences.[214] The Decrees were adopted in response to administrative case-law constraining the application of solitary confinement, as well as following the demands of the European Committee on the Prevention of Torture.[215] We should recall that solitary confinement under French law does not preclude the prisoner from receiving visits.[216] It can be ordered for security or precautionary reasons, and it can even be adopted at the request of the detainee himself.[217] Decree no. 2006-338 regulates the modalities of solitary confinement as to its duration (up to six months; previously, it was limited to three months; however, after the six months have elapsed, the measure can be re-adopted for

[211] Ibid. at 6.
[212] CC, Décision n° 2005-532 DC du 19 janvier 2006, online at http://www.conseil-constitutionnel.fr/decision/2006/2005532/2005532dc.htm.
[213] Cf. Art. 6 of the Law. For further details, see Chrestia (2006a).
[214] The simple Decree no. 2006-338, concerning isolation detention, and a Decree adopted by the *Conseil d'État*, the Decree no. 2006-337 concerning decisions taken by penitentiary administration.
[215] See reports on its visit to France of 27 October to 8 November 1991, at 53, and on its visit of 14 May to 26 May 2000, at 52, no. 114 (cited after Herzog-Evans (2006), at 1196).
[216] See above at 4.3.3.4.
[217] Herzog-Evans (2006).

another duration not specified by the law, but, in principle, limited to six months; the minister of justice can order isolation for one year or longer) and regime.[218]

4.4.7. Criticism by the ECtHR for extensive detention and violations of the fair trial principle

France has been criticised by the ECtHR repeatedly for too prolonged periods of detention on remand (Art. 5(3) and 6(1) ECHR), in relation to terrorist investigations. Detention on remand amounted in one case to two years, eleven months and thirteen days,[219] in another one to three years, nine months and eighteen days,[220] and in one case to even over four years.[221] Further, in *Mouesca v France*, the Strasbourg Court stated that a criminal procedure against a terrorist that lasted longer than two years and two months constituted a breach of Art. 6(1) ECHR.[222] In another case concerning a member of *action directe*, the Strasbourg Court established that the administrative complaint procedure against treatment in prison had taken too long to be compatible with the requirements of Art. 6(1) ECHR.[223] In two other cases concerning alleged

[218] For details on the Decrees, see Ibid. With respect to Decree no. 2006-338, see also Bouloc (2006b), at 650 et seqq.

[219] *Gérard Bernard v France*, Judgment of 26 September 2006 (application no. 27678/02). The applicant was suspected to be a member of the Breton Revolutionary Army (*Armée Révolutionnaire Bretonne*, ARB*)* and of having lodged ETA members who had stolen explosives in Plévin. Bernard was arrested on the grounds of being associated to wrong-doers with the objective to commit acts of terrorism and storage of explosives, and he was put in detention on remand. During his detention Bernard lodged 179 requests for release. He was held in detention on remand for two years, eleven months and thirteen days. The Strasbourg Court noted that the competent judges had invoked the following reasons for the detention (besides the gravity of the charges against the applicant): preservation of evidence, the risk of intimidation of witnesses and victims, risk of collaboration with the accomplices, prevention of the same crime being committed again, termination of the crime, the guarantee to keep the applicant at the disposition of justice, and the exceptional and persistent trouble to public order. The Court considered that the initial existence of these motives did not justify the length of the detention on remand. In consequence, it found that Art. 5(3) had been violated.

[220] *Morgani v France*, EComHR, Report of 30 November 1994 (application no. 17831/91). The applicant was a presumed member of the paramilitary organisation GAL (*Grupos Antiterroristas de Liberación*, the "Anti-Terrorist Liberation Group", which was a Spanish paramilitary organisation, see above, Part II Chapter 2, 2.3.5.1.), engaged in criminal activities against presumed members of ETA. In this context, it is interesting that the European Commission uses the term 'terrorist activities', which the Spanish Supreme Court refused to use in application to GAL members. Morgani was charged with attempted assassination, participation in an association of wrong-doers, possession of arms and munitions without authorisation and transporting them without a legitimate motive, and subsequently held in detention on remand for three years, nine months and eighteen days. The Commission noted that the French courts had rejected the applications for release on the grounds that the alleged acts were of a very serious nature, that public order needed to be preserved, in particular in the Basque region, and that there was a high probability that the applicant would evade justice. The Commission reiterated that the seriousness of the alleged crimes, by itself, did not suffice to justify keeping a person in detention on remand, because until the conviction, the accused was to be presumed innocent. The Commission held that some of the grounds for detention were pertinent, but insufficient to justify the detention. Moreover, the French courts had not acted with the necessary promptness. The Commission concluded that Art. 5(3) ECHR was violated.

[221] *Debboub alias Husseini Ali v France*, Judgment of 9 November 1999 (application no. 37786/97). See above, at 4.3.3.2.

[222] Judgment of 3 June 2003 (application no. 52189/99).

[223] *Frerot v France*, Judgment of 12 June 2007 (application no. 70204/01). Frerot was a former member of the left-wing terrorist organisation 'action directe', serving a life sentence. In 1994, he lodged an administrative remedy against a *circulair* issued by the Ministry of Justice in 1986, concerning body searches and interception of written and telegraphic communications. The remedy was rejected for being inadmissible by the Council of State in 2000. In the course of the searches, the applicant had refused to

terrorists, the Strasbourg Court also criticised France for violations of the fair trial principle. In *Karatas v France*[224] the applicants had been convicted *in absentia*, without their lawyers being heard (although they were attending the trial). The Strasbourg Court found that the restriction of their right of access to a tribunal (Art. 6(1) ECHR) was justified since the applicants had provoked their absence purposefully. However, the Court found that this situation did not justify depriving them of their right to legal assistance, so that it recognised a violation of Art. 6(3) ECHR. In another case, a French court convicted *Mariani in absentia* to twenty years in prison, while the applicant had already been convicted by an Italian court to twelve years in prison for acts of terrorism.[225] The ECtHR considered that Arts. 6(1), (3)(c), (d), (e) of the Convention, as well as Art. 2 of Protocol no. 7 were violated.

4.5. Current developments

The recent creation of two new databases (called "Edvige" and "Cristina") has fuelled public discussion on privacy issues. 'Edvige' serves the collection of data of criminals and criminal suspects, 'Cristina' the collection of data to combat terrorism. Both databases were introduced by governmental decree. To improve state security and public order in general, the Decree of 27 June 2008 was adopted, concerning the creation of an automated treatment of personal data named "EDVIGE" (*Exploitation documentaire et valorisation de l'information générale*).[226] This Decree, which was adopted on the basis of Art. 26 of the law 78-17 of 6 January 1978 relating to

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open his mouth and to bend down and cough, as he considered both degrading, within the meaning of Art. 3 ECHR. Further, he argued that his right to respect his correspondence (Art. 8 ECHR) had been violated. Moreover, he found that his right to effective remedy under Art. 13 ECHR was violated. Finally, the applicant alleged that the administrative procedure had taken too long to present a reasonable delay, for the purposes of Art. 6(1) ECHR. The Court stated that these corporal inspections were admissible when they were done in the search of a prohibited object that could jeopardise the prison's security and order. However, the Court noted that the applicant had been subjected to anal inspections only in one prison (Fresnes), where the presumption existed that every detainee was hiding objects or substances in the most intimate parts of their body. In these conditions the Court understood that the detainees felt degraded and subjected to arbitrary measures. He concluded that Art. 3 ECHR had been violated. The fact that the prison director had not passed a letter from the applicant to a detainee of another prison amounted to a violation of Art. 8 of the ECHR, according to the Court. Finally, it also found that Art. 13 ECHR had also been breached, and that the length of the administrative procedure of more than six years had been excessive, amounting to a violation of Art. 6(1) ECHR.

[224] Judgment of 16 May 2002 (application no. 38396/97).

[225] *Mariani v France*, Judgment of 31 March 2005 (application no. 43640/98). In 1988 Mariani was arrested at the border to Italy and subsequently detained in Italy, where he was searched for acts of terrorism. Eventually he was convicted to twelve years of prison for these acts. At the same time, the applicant was also searched in France for presumed implication in two armed robberies in Paris in 1987 and 1988, during which several persons had been injured. In 1995, the Paris court held that Mariani was detained for a different cause in Turin, and that he had to appear before the Assize Court on charges of armed robbery and attempted armed robbery, and attempted murder. By judgment of 1 October 1997, the applicant was declared culpable of the alleged acts and condemned to twenty years of prison, after having stated that he was 'on the run' ('*en fuite*'). The applicant alleged that his right to fair trial were violated, notably Art. 6(1),(3)(c), (d),(e) ECHR, as well as Art. 2 of Protocol no. 7 (right of appeal in criminal matters). The Court reiterated the major importance of the presence of the accused during the criminal trial and the accused's right to be defended during the trial, and concluded that the invoked provisions were violated.

[226] *Décret n° 2008-632 du 27 juin 2008 portant création d'un traitement automatisé de données à caractère personnel dénommé « EDVIGE »* (ORF n°0152 of 1 July 2008).

informatics, files and liberties, created a police database to gather information on suspects as young as thirteen and on political, religious and trade union activists.[227] The database is actually a prolongation of another database created in 1991 of the secret services (see above, at 4.3.3.1). However, the new police database holds much more sensitive personal information of the concerned people, including intimate information such as sexual orientation or sicknesses of the concerned persons. Its adoption was followed by a public outcry.[228] Twelve trade unions have lodged remedies against the Decree before the *Conseil d'État*.[229] The French socialist party requested that the database be put under judicial control.[230] Even conservative newspapers such as *Le Figaro* criticised the decree as going too far; it was not obvious why the sexual orientation or health of a political leader, a trade unionist or a pop star was relevant for police services. Moreover, it was astonishing that public debate about the decree arose only in September, thus three months after its adoption, and only due to a disagreement between the Minister of the Interior and the Minister of the Defence, on the topic.[231] Following the debate and criticism on the database from all sides, on 9 September 2008 the French President, Nicolas Sarkozy, requested that the Decree be reconsidered and reformulated.[232]

The database is seen as the continuation of a general development of gathering more and more private information on citizens (the "liberticide" society), towards a surveillance state following Orwell's model of "Big Brother" in 1984.[233] A sympathetic girl's name for the database (Edvige = "Hedwig" in German) reminds us of the Orwellian tendency to give lovely names to things that actually restrict our liberty.

The other database, named "CRISTINA" ("*Centralisation du renseignement intérieur pour la sécurité du territoire et les intérêts nationaux*"), is run by the state's counter-terrorism agency and classified top secret. It was created by an *unpublished* Decree in June 2008.[234] This database specifically aims at the prevention of terrorism.[235] Eleven associations have issued a complaint at the *Conseil d'État* aimed at annulling the Decree, on the grounds that the purposes of the database, as well as the nature or

[227] The targeted groups are "physical persons or legal entities that have requested, exercised or that are still exercising a political, trade union or economical mandate or which play an important institutional, economical, social or religious role, provided that the information is necessary for the government or its representatives for the exercise of their responsibilities" (Art. 1(1) of the Decree).

[228] See e.g. the press review of radio france internationale (www.rfi.fr) (10 September 2008): *EDVIGE unter Beschuss (Presseschau 10. September 2008)*; La Libération (online edition) (4 September 2008): *La vigilance autour d'Edvige*; Le Figaro (10 September 2008): *Les maladresses du fichier Edvige*.

[229] La Libération (online edition) (4 September 2008): *La vigilance autour d'Edvige*.

[230] The Times (online edition) (9 September 2008): *French revolt over Edvige: Nicolas Sarkozy's Big Brother spy computer*.

[231] Le Figaro (10 September 2008): *Les maladresses du fichier Edvige*.

[232] France-Soir (online edition) (19 September 2008): *Edvige - Le gouvernement recule*.

[233] La Libération (online edition) (4 September 2008): *La vigilance autour d'Edvige*; The Times (online edition) (9 September 2008): *French revolt over Edvige: Nicolas Sarkozy's Big Brother spy computer*.

[234] Only the related Decree no. 2008-631 of 27 June 2008, modifying the Decree no. 91-1051 of 14 October (see above, at 4.3.3.1.) is published in the JORF (*Décret n° 2008-631 du 27 juin 2008 portant modification du décret n° 91-1051 du 14 octobre 1991 relatif aux fichiers gérés par les services des renseignements généraux et du décret n° 2007-914 du 15 mai 2007 pris pour l'application du I de l'article 30 de la loi n° 78-17 du 6 janvier 1978*, JORF n°0152 of 1 July 2008).

[235] Neue Zürcher Zeitung (Online edition) (11 September 2008): *Sarkozy lenkt ein im Streit um den Datenschutz*.

categories of data that could be retrieved, collected, and registered in this database were not disclosed.[236]

Besides these new databases, the French Ministry of the Interior has several plans with the aim of improving the fight against terrorism and interior security in general: currently a bill is pending to authorise the ratification of the Council of Europe's Convention for the Prevention of Terrorism.[237] In addition, the Ministry of the Interior plans to triple the number of video cameras in public places in 2008-9, so that by 2009, it will amount to one million cameras. Moreover, the creation of a "large modern ministry of interior security" is envisaged. Furthermore, the two French intelligence services, *renseignements généraux (RG)* and *DST*[238] shall in the future be merged. In addition, there are plans that the Gendarmerie shall be attached to the Ministry of the Interior. [239] All these projects lean towards a concentration of powers and accumulation of information regarding personal data of large parts of the population within the Ministry of the Interior, a development that is alarmingly similar to the organisation of a totalitarian state.

4.6. Summary

4.6.1. Main developments

The main characteristic of the combat against terrorism in France is the centralisation and specialisation of the judiciary and the prosecution. Moreover, the *plan vigipirate* was a main counter-terror measure, thus the increase of military and police presence in public places, and the extension of their competences. When tracing the historical development of counter-terrorism in France, we note that this country had, besides the exceptional laws adopted during the crisis with Algeria (1954-63), four main phases of terrorism combat:

- In the early 1980s France adopted special legislation in response to Corsican terrorism. These laws were characterised by the extension of police custody to up to three days, extension of identity controls, and the creation of a special tribunal (the 'army tribunal in peace times'). With respect to Basque terrorism,

[236] The complaint is published on the website of the French NGO *Ligue des Droits de l'Homme* at: http://www.ldh-france.org/media/actualites/Recours%20Cristina.pdf (last visited on 28 September 2008).

[237] *Projet du loi adopté par le sénat, autorisant la ratification d'une convention du Conseil de l'Europe pour la prévention du terrorisme (Document mis en distribution le 14 janvier 2008[e] enregistré à la Présidence de l'Assemblée nationale le 20 décembre 2007, n° 516 de l'Assemblée Nationale, 13[ème] législature*, online retrievable at http://www.assemblee-nationale.fr/13/projets/pl0516.asp, http://www.assemblee-nationale.fr/13/dossiers/terrorisme_ce.asp (last visited on 23 September 2008).

[238] See above, note 86.

[239] See information provided by the official site of the French government, online available at: http://www.premier-ministre.gouv.fr/chantiers/securite_854/un_million_cameras_videosurveillance_59200.html; http://www.premier-ministre.gouv.fr/chantiers/securite_854/nouveau_visage_services_renseignement_59191.html; and http://www.premier-ministre.gouv.fr/chantiers/securite_854/securite_interieure_vers_une_58440.html (all last visited on 23 September 2008).

until 1986 France followed the sanctuary doctrine, under which terrorists (especially from ETA) mostly encountered impunity in France. However, when French-Spanish relations improved and terrorist attacks were committed also on French territory, France ratified the European Convention on the Suppression of Terrorism, and thereby accepted to change its extradition policy.

- The Law of 1986 introduced new counter-terrorism legislation in the area of criminal law and criminal procedure. A characteristic element of this Law (besides the already mentioned centralisation and concentration of the judges and prosecutors) was that terrorism was not defined, but instead, a list of certain offences was created which, in combination with an additional subjective element, were subjected to different procedural and sentencing rules. These special rules include prolonged police custody (*garde à vue)* of up to four days and house searches without needing the consent of the owner. Similarly to the UK's policy, the French legislator also removed lay judges from courts dealing with terrorist offences, and attributed the competence of trying terrorist cases to a special Assize Court.

- In the 1990s France, like Germany and the UK, started to legalise telephone tapping, which had been hitherto applied in practice without any legal basis. This development was triggered by Strasbourg's criticism in the cases *Huvig* and *Kruslin*, in which Strasbourg had considered the challenged telephone tapping as illegal. The Law of 1991 introduced so-called security interceptions, which were authorised not by a judge, but by the Prime Minister. The Strasbourg Court found that the new Law was compatible with Article 8 of the ECHR. Two laws in 1993 were adopted, which postponed a detained terrorist suspect's right to see his lawyer to the 72nd hour of his detention (during *garde à vue)*. In 1993-4, new waves of Algerian Islamic terrorism swept over France, and were responded to from French police by mass detentions. Besides the great number of detentions that took place during those years, the long duration of detention on remand of the suspected terrorists is also conspicuous. The ECtHR held that in the case of *Debboub alias Husseini Ali* the detention on remand of over four years was excessive, and hence breached Article 5(3) of the ECHR. In 1994 the French Penal Code was reformed, including now a specific chapter dedicated to terrorism. More Algerian/GIA terrorist attacks in 1995-6 led to further legislative changes. Thus video surveillance was introduced, prescription periods for terrorist offences were increased, and the police competences for night searches were extended. The Constitutional Council declared parts of the law as unconstitutional; it only allowed night searches for flagrance police inquiries (which then were limited to eight days), but not for preliminary police inquires and for preliminary judicial investigations. Notwithstanding, the bill was subsequently amended (following an attack on the metro Port-Royal), also allowing night searches in the case of preliminary judicial investigations, albeit under very narrow circumstances. With respect to substantive law, a specific

intent was now required for terrorist offences. In addition, a new crime was introduced (Art. 421-2-1 *CPP*), by which the participation to a terrorist association was criminalised. Besides these legislative measures, again mass detentions took place to dismantle terrorist networks. The investigations and trial proceedings in relation to the Chalabi network met particular criticism for several procedural irregularities. In these and other terrorist proceedings the French justice system was criticised by the ECtHR for being too slow. In addition to these developments, in 1996 and 1998 two decrees were adopted regulating solitary confinement at a prisoner's request or as a precautionary or security measure. It was problematic that under these decrees, prisoners had no judicial remedies to challenge the decision of their solitary confinement. However, in 2003 the *Conseil d'État* clarified that prisoners were in fact entitled to appeal against this decision. The Strasbourg Court held that the solitary confinement of *Ramirez Sanchez*, which had lasted over eight years, did not constitute a breach of Art. 3 ECHR, as he had been only 'relatively', not absolutely, socially isolated.

- The legislation adopted after September 11th was characterised by further extensions of police powers and thereby further restrictions of human rights. It should be recalled that the immediate response to September 11th, the Law of 15 November 2001, was adopted without the special anti-terror provisions being subjected to the scrutiny of the *Conseil Constitutionnel*. This raises serious doubts as to its constitutionality, especially when one considers that a constitutional review *ex post* is not possible under French law. Further, it is notable that the law also covered other areas, completely unrelated to terrorism. This suggests that terrorism served in a certain way as a pretext to push through other laws which otherwise would not have found parliamentary consensus. Other specific features of French anti-terror legislation after September 11th include the introduction of private security officers, who were conferred with far-reaching search and control powers in certain areas; new powers to search vehicles and to photograph their occupants; legal provisions allowing for police infiltration, and many others. Moreover, new offences have been introduced, including an offence that implies a reversed burden of proof.[240]

4.6.2. General observations

France has increasingly departed from the human rights the country so proudly declared 120 years ago. Some criminal proceedings in terrorist cases were extremely long (up to nine years), amounting to violations of Arts. 5(3) and 6(1) ECHR.[241] During the Algerian conflict, human rights were significantly restricted in special anti-terror legislation; some fundamental procedural rights, such as the right to effective remedy,

[240] Cf. Art. 421-2-3 *CP*.
[241] Cf. e.g. the case *Ekin v France*, see also above at 4.3.1. and 4.4.7.

were abolished completely in these days. The *plan vigipirate*, which has emerged in 1986 and since then been applied repetitively in threat situations, has extended general police control of ordinary citizens and thereby affects the daily life not only of criminal suspects, but of everybody. Further, the overview shows that France – like Spain – has had a certain "tradition" of special counter-terrorism courts. After the abolition of the "*Cour de Sûreté de l'État*", this court was replaced by the "*tribunal aux armées en temps de paix"*, and, eventually, jurisdiction for terrorist cases was conferred to a special Assize Court in Paris.

The French anti-terror legislation is further characterised by centralisation in different areas: Jurisdiction, prosecution, and, since 2006, also execution of sentences is thus centralised in Paris for terrorist affairs. Along with this centralisation goes an enhanced specialisation of the competent judges and prosecutors. Although this specialisation provides enhanced knowledge and expertise for terrorist affairs, at the same time it leads to a dangerous concentration of very far-reaching powers in the hands of a few.

The rulings of the *Conseil Constitutionnel* have put certain restrictions on the legislator as to possible limitations of fundamental rights; however, particularly in recent days the legislator has not always followed these rulings.[242] At the same time, the CC has stated that it is not within its competence to balance security against individual rights, but that this task is conferred to the legislator.[243] Considering this, it is doubtful in how far the CC will critically check the compatibility of future anti-terror legislation with individual rights.

Moreover, it is notable that the French anti-terror legislation follows in several aspects the example of the UK counter-terrorism approach (e.g. video surveillance, DNA storage, infiltration, introduction of plea-bargaining procedure, control of movements, telephone and electronic conversations, etc.).

However, more worrying than the past legislation are in fact the plans for the future. The planned creation of a "large modern ministry of interior security", as well as the attachment of the Gendarmerie to the Ministry of the Interior, will considerably strengthen this institution. This development, combined with the systematic collection of information on citizens that have no relation to terrorism, but are only suspicious because of their involvement in trade unions, politics, or religion, are the typical preconditions for the installation of state terror, and are therefore extremely concerning.

[242] For instance, the *Conseil's* restrictions on night searches, which were ignored when the law of 15 November 2001 was adopted, see above at 4.4.1. Furthermore, in the 1970s the Constitutional Council had prohibited preventive car searches. It changed opinion after September 11th on this point, see above at 4.4.3.

[243] *Conseil Constitutionnel*, Decision no. 2003-467 of 13 March 2003 on the Law on Internal Security.