

Terrorism(s), Intelligence, and Freedoms: France's Patriot Act Light?

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In the 1970s, the then interior minister, Raymond Marcellin, had a hunch that terrorism would become a major challenge. This led him to summon the head of the domestic intelligence agency, the Directorate of Territorial Surveillance (Direction de la Surveillance du Territoire; DST), and recommend that he set up a specialist terrorism unit. Taken aback—shocked, even—at being thus “distracted” from his vital work of counterespionage, the chief “let it slip his mind.” Marcellin, a Breton and typically stubborn, went ahead and simply ordered the unit into existence. The first modern reform of domestic intelligence was undertaken in 1990 at the instigation of the then prime minister, Michel Rocard, and his advisor, Prefect Rémy Pautrat, himself a former head of the DST. Nicolas Sarkozy set up the Central Directorate of Internal Intelligence (Direction centrale du renseignement intérieur; DCRI) and the Parliamentary Delegation for Intelligence between 2007 and 2012. A further step towards adopting relevant legislation was taken at the behest of interior minister Manuel Valls and Jean-Jacques Urvoas, chairman of the National Assembly Law Commission.

Once Valls had been moved to the prime minister's office at Matignon, the pair decided to add the finishing touches to this slow but tangible process by delivering modern legislation on intelligence that would be appropriate to the threats and technologies that had emerged since the fall of the Berlin Wall and the 2001 attacks.

The draft, which was of a very high standard, states that

the intelligence services research, gather, exploit, and make available to the government information relating to geopolitical and strategic challenges and to threats and risks likely to affect the life of the nation. They facilitate awareness and anticipation of these challenges as well as the prevention and reduction of these risks and threats.

The text sets out seven ultimate purposes for which the intelligence services would be able to apply sometimes exceptional investigative techniques:

- national security (national independence, territorial integrity, and national defense, together with the prevention of any form of foreign intervention or attacks on the republican system or the stability of institutions);

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- vital foreign policy interests and compliance with France's European and international commitments;
- France's vital economic and scientific interests;
- the prevention of terrorism;
- the prevention of the reformation or continuation of any previously dissolved groups;
- the prevention of organized crime and delinquency;
- the prevention of collective violence likely to result in serious disturbance of the public peace.

Six specialist intelligence services that may employ in a legal and controlled fashion highly intrusive measures to carry out their assigned tasks are identified: the General Directorate for External Security (Direction générale de la Sécurité extérieure; DGSE); the Defense Protection and Security Directorate (Direction de la Protection et de la Sécurité de la Défense; DPSD); the Military Intelligence Directorate (Direction du renseignement militaire; DRM), answerable to the Defense Ministry; the General Directorate for Internal Security (Direction générale de la sécurité intérieure; DGSI) at the Interior Ministry; and the National Directorate of Intelligence and Customs Investigations (Direction Nationale du Renseignement et des Enquêtes Douanières; DNRED) and Intelligence Processing and Action against Illegal Financial Networks (Traitement du renseignement et action contre les circuits financiers clandestins; TRACFIN) at the Economy Ministry.

I will not be reexamining here the details of what is a particularly detailed bill that will no doubt be fiercely debated in parliament. Rather, I will look at where further technical or legal improvements might be made.

Throughout the world, there is an intelligence community that is experiencing the same symptoms that can be observed in France. The first such intelligence community was set up in the United States in December 1981 by a Ronald Reagan irritated by the pointless and childish competition prevailing in the world of espionage. It brought together seventeen services (there are thought to have been more than 1,200 in the United States) from various ministries (for example, defense, security, justice, and energy) under the authority of the director of intelligence (who took office only in 2004).

In France, the 2008 White Paper would insist on the need to reform the Interministerial Intelligence Committee, founded in 1962 but largely underused despite an initial dusting off required by Michel Rocard in 1990.

In May 2011 and again in 2014, the prime minister set up an intelligence community (to be called special services) that defined the sector's "first division." It

includes military agencies (the DGSE, DPSD, and DRM), a police service (the DCRI, which has since become the DGSI) and two services subordinate to the Economy Ministry (the DNRED and TRACFIN). The latter was better known as an analysis service; its inclusion in the list owes as much to the need for an overall balance between civilian and military agencies as it does to the standard of its services, which are considered outstanding.

Domestic intelligence does not feature (the Central Directorate of General Intelligence having vanished with the birth of the DCRI); the Gendarmerie is passed over (it made great efforts not to be included in the sector and continues to pay the price for its squeamishness, despite the existence of a Subdirectorate of Advance Operational Information [Sous Direction de l'anticipation opérationnelle; SDAO], about which one might quite properly ask whether it is not in fact an intelligence service) and is squabbling about prison intelligence (even though there are constant reminders that it is a crucial issue). The potential role of municipal police services has been overlooked (even though they “belong to the locality,” while private operators, especially on public transport and at big stores, usually keep their eyes peeled).

And while the creation of a national intelligence coordinator seems like substantial progress, the special services community remains very small, since intelligence gathering, analysis, interception, and response are often combined.

The main room for progress, then, is in respect of the community itself, which would be better defined by abandoning the notion that it should be singular when its focus is plural.

What in fact exists is an intelligence-gathering community that has to embrace domestic police intelligence, the Gendarmerie's provision of advance operational information, prison intelligence, municipal police officers, and security operatives from the big public- and private-service operators (for example, postal services and transport), all of which are able to act as the eyes and ears of the nation.

Certainly, there is no need for any great change to the list of action-focused special services. However, between the extended circumference and the still small center, there is room for something essential and still very tenuous—a space for analysis.

Recruitment, training, and updating efforts have been announced and in some cases set in motion. The general rationale has not yet been sufficiently addressed, however.

A multitude of systems blithely compiles, still rarely trades, and applies the precautionary principle to drawing up ever fuller and less selective lists, making it possible to add to the use of belts, straps, and parachutes in seeking to avoid the risk of error. As it loses sight of what is essential and what is not, however, the system lays great stress on calling in particular for more resources. It reasons, as is often the way in these cases, that the burglar got away because the police station needed renovating. This does not mean that there is no need for better (and maybe even more) resources but, above all, that the process of change set in motion with the creation of the DCRI and its metamorphosis into the DGSI must be accepted and accelerated.

Whatever the formula that makes it possible to bring together all those who defend and protect the country so as to expand intelligence gathering and share its analysis in a process under the authority of the General Directorate of the National Police (Direction générale de la Police nationale; DGPN), the DGSI, and the DGPN, it will have to assert the existence of a General Intelligence Staff, dictated by circumstance and the will of the interior minister. For if there is a war, it will have to be well managed.

Beyond this key problem, it remains to be seen to what extent the National Commission for Control of Intelligence Techniques (Commission nationale de contrôle des techniques de renseignement; CNCTR) that has been established will be able to act given that it is rather small in composition and not open to persons with anything other than engineering qualifications. It is possible to defend basic rights while respecting the confidentiality of deliberations.

Jean Marie Delarue, incumbent president of the National Commission for the Control of Security Interceptions (Commission nationale de contrôle des interceptions de sécurité; CNCIS), offered some fairly harsh criticism that was reported by AEF Infos: “The draft law on intelligence is not compatible with public freedoms or with the security of the country. Thought must be given to comprehensive amendment of this document which, as it stands, merits severe criticism.” Delarue describes the future body as a “colossus with feet of clay. This draft law does not respect the conditions for effective control.” The state councilor is also worried about the data collection technologies introduced by the bill, which are clearly reminiscent of “dragnet techniques.”

The idea of investing the Council of State with the relevant authority to “inquire into the implementation of intelligence techniques” and to have it rule “in the first and last instance” on disputes about intelligence “through specialist training” makes perfect sense. The institution has proven its ability to defend individual and collective freedoms. There is still a question mark regarding the lack of any legal officer to authorize dispensatory, exceptional, and fast-track procedures.

In fact, at least one service continues to have a judicial remit (the DGSI), while terrorism as an organized crime still falls within that of the judicial authorities. In addition, since 1986, efficient and effective machinery that cannot be suspected of complacency has been established (antiterrorism judges and the Antiterrorist Section of the Prosecutor’s Office). One might legitimately wonder, therefore, why the government continues (the website-prohibition text was put together in precisely the same way at the end of 2014) not to invoke a legal officer who could be established as a national point of reference that is able to legitimize exceptionally intrusive measures in exceptionally serious circumstances—and to enable construction of a case that holds up in court without the use of timely anonymous reports or protected informers.

Numerous people will take fright at a document that nevertheless enables the regulation of intelligence procedures. It is a useful, brave, and fairly balanced move, weakened, paradoxically, by the lack of a judge offering protection in the most intrusive sector. We have already seen how difficult it has been to handle irregular or illegal intelligence in the context of never-ending legal proceedings and occasionally creative jurisprudence.

Parliament has an opportunity to take charge of this, and the Constitutional Council can give its opinion one way or another. There is room for the bill to advance.

The document's rapporteurs and the government are too astute to dispense with a more balanced but equally effective process.