Issue N° 4 | March 2016

Montesquieu Law Review

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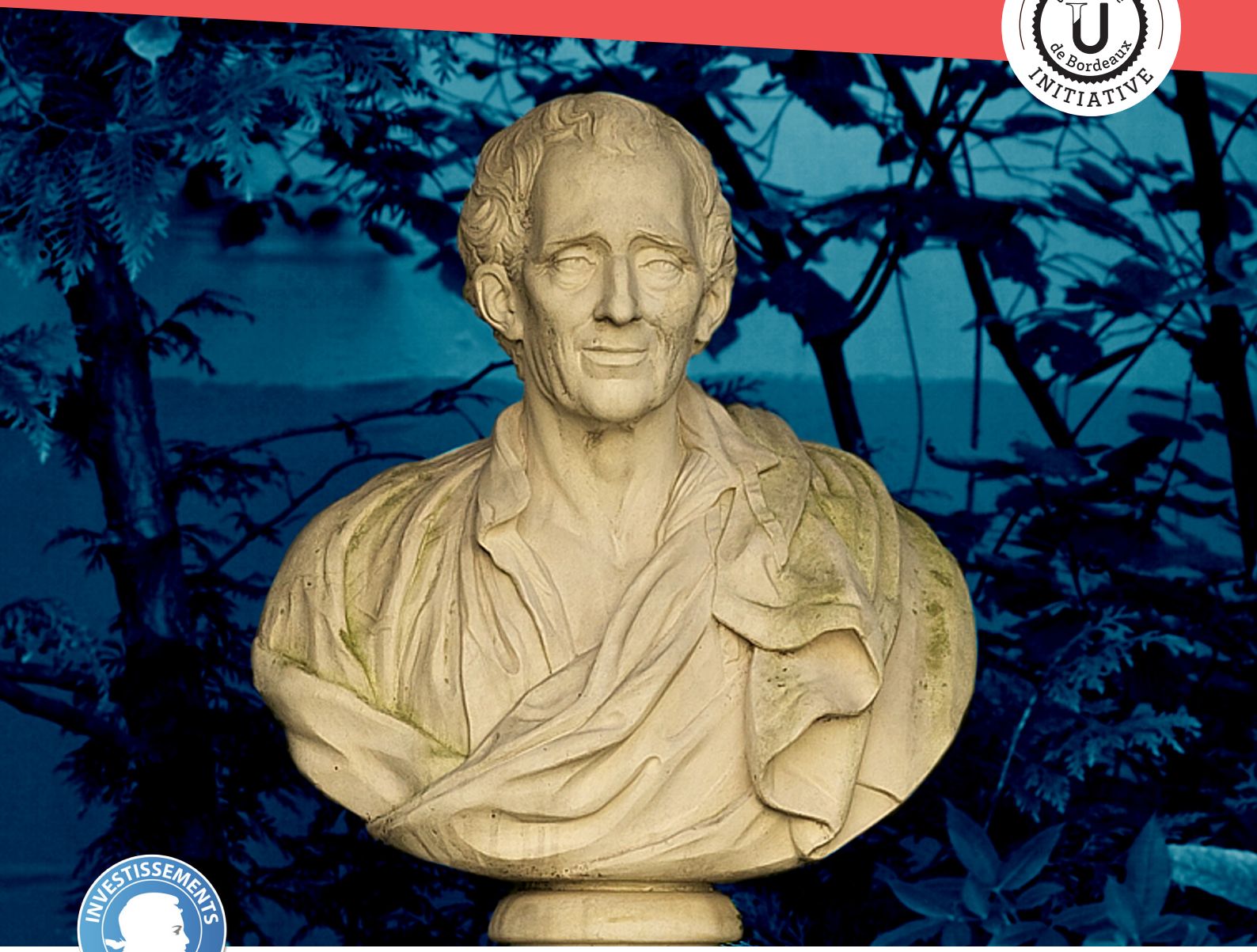

Program supported by the ANR
n°ANR-10-IDEX-03-02

Forum Montesquieu
Faculté de droit et science politique

université de Bordeaux

The distinction between administrative police and judicial police in light of the recent Law on Intelligence

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There are issues in law which, by their evidence, have endured through the centuries without incident. There are others which withstand the ravages of time owing to the endless debates they elicit. The distinction between the judicial police and the administrative police is one of them – and Law No. 2015-912 on intelligence of 24 July 2015 (1) has revived and breathed new life into the debate.

Commonly, the term "police" has many meanings, some of which are organic when referring to the police (National Police, National Gendarmerie, municipal police), while others are functional when referring to policing activity. In its functional form, the concept of police is a legacy of Antiquity. Originally, it had a much broader meaning than the one we know today. The etymology of the word “police” reflects this: it originates from the Greek *politia*, meaning political organisation, the government of the city. Thus, it means "the rational organisation of public order within a social group, giving rise to regulations" (2). It involves the enactment of rules and decisions in which members of society must comply. This task is entrusted to the police. However, the police are not confined solely to this normative or legislative function. It also refers to "material police" (3), which ensure compliance with the regulations enacted by the authorities. The task of implementing and concretising a rule or policy decision is undertaken by the police. In short, “police” refers both to the enactment of rules and decisions by the police authorities and their implementation by the police.

Traditionally, policing in France is divided into two categories: the judicial police and the administrative police. This relatively old distinction has been genuinely useful as it embodies two distinct legal systems, enacting different rules. It was enshrined by the Code of 3 Brumaire Year IV, according to which "*the police should look for crimes including administrative police could not prevent the board, collecting evidence and bring the perpetrators to justice*" (4). The administrative police consequently performed preventive tasks, intended to ensure the maintenance of public order in all its aspects, while the judicial police performed criminal functions where an offence had been committed. However, reducing this dichotomy to prevention/suppression is an oversimplification. In truth, the distinction is based on a much more subtle factor: the purpose of the police operation. According to this decisive factor, the judicial police cover all activities related to the search for the perpetrators and evidence of a specific criminal offence. “Administrative police” is defined as a general monitoring mission to prevent and stop any public disorder. The distinction is therefore based on the concept of the specific offence. But the offence does not have to have been committed for the police operation to be judicial (5). The classification is not subject to the actual commission of an unlawful act: it may be an offence about to be committed (6), an offence the commission of which is as yet unknown (7) or the commission of acts that are not criminal in nature (8). The distinction is therefore not just about prevention/suppression. The intention of the authorities or police forces (9) must be identified in order to discover the true

purpose of the operation (10). This factor then has the advantage of giving way to a kind of empiricism (11).

To these two categories of police, some authors add a third: the "information police" (12), whose function is the collection of information that will be made available to the Government. Originally secret, a framework for this category of police was gradually established by successive laws, until the adoption of the Law of 24 July 2015 on intelligence, which largely completes the legal framework of intelligence gathering, which had previously been *ad hoc* and incomplete. It creates a new Book VIII dedicated to intelligence within the *Code de la sécurité intérieure* (CSI – Code of Internal Security), which book enumerates the purposes and techniques for intelligence gathering together with the legal rules governing the same. It also establishes some elements of a definition that show that intelligence may be information sought, collected, used and made available to the Government in relation to geopolitical and strategic issues as well as threats and risks that may affect the life of the Nation (13).

This Law does not enshrine a third category of police alongside the other two. Nor does it enshrine the distinction, put forward by some authors, between administrative intelligence (which serves to maintain public order) and judicial intelligence (which allows "the identification, with a view to their arrest, of certain categories of criminals" (14). Intelligence falls squarely with the administrative police and remains completely outside the remit of the judicial police, as confirmed by the decision of the Constitutional Council on the Law (15).

Linking intelligence with the administrative police is not entirely innocent because it crowds out many of the judicial police's procedural safeguards. Moreover, this qualification impacts the distinction between administrative and judicial police by creating overlap between the two categories. Consequently, the Law has upset this distinction in policing as traditionally presented. Thus, it causes a "dissipation" of the police dichotomy (I) and constitutes an invitation to rebuild it (II).

I. The dissipation of the distinction between administrative and judicial police

In a manner that is paradoxical to say the least, the Law on Intelligence undermines the police dichotomy because, whilst reaffirming its usefulness indirectly (A), it significantly weakens the decisive factor on which it is based (B).

A. Reaffirming the usefulness of the distinction

First, the law indirectly reaffirms the usefulness of the distinction between administrative and judicial police. This reaffirmation is derived from the preservation of the specificity of the rules governing the administrative police in relation to those governing the judicial police. Indeed, while one can see a approximation between the two schemes, it remains limited.

The merger of the two schemes is the result of strengthened safeguards for intelligence gathering. The powers given to specially authorised services being likely to constitute a serious interference with private life, many have called for an approximation between the different schemes governing the judicial and administrative police. This appeal was partially heard by the legislature, which proceeded to strengthen existing safeguards, as is shown by the establishment of a double control.

Firstly, the Law establishes an administrative check carried out by an independent administrative authority, the *Commission nationale de contrôle des techniques de renseignement* (CNCTR – National commission for the control of intelligence-gathering techniques). Firstly, the CNCRT exercises *prior* control after an application for the implementation of such techniques is made. It issues an opinion, which is forwarded to the Prime Minister, to whom it falls to authorise intelligence gathering. However, the CNCRT opinion is not binding on the head of the French Government, who can authorise measures in spite of an unfavourable opinion. On the other hand, the CNRCT performs *a posteriori* checks (16) either on its own initiative or further to a complaint by any interested party (17), which is reflected in the use of techniques in accordance with legislation in a proportionate way. If it finds a discrepancy, it may issue a recommendation for the termination of the measure and the destruction of the intelligence gathered to the Prime Minister, the minister responsible for implementing the measures and the service in charge of intelligence gathering (18).

Next, the *Conseil d'Etat* performs a judicial review of first and last resort (19).The law provides several routes for applying to the *Conseil*: first, it may hear applications made by anyone wishing to check that they are not subject to any unlawful intelligence gathering, following a complaint to the CNCRT (20); second, applications may be made by the CNCTR itself (21) where no action has been taken on its unfavourable opinions or recommendations, or where any action taken is deemed insufficient; third, applications may be made for a preliminary ruling by an administrative or ordinary court on disputes the resolution of which depends on the lawfulness of intelligence gathering (22).

However, this approximation remains limited, thus safeguarding the specificity of each scheme.

The first limitation is the side-lining of ordinary courts in reviewing the lawfulness of the intelligence gathering, which was justified by the administrative nature of intelligence. Indeed, the principle of the separation of powers, which lies at the root of this duality in the judicial order, precludes the ordinary courts having jurisdiction to monitor the Administration's activities. In addition, Article 66 of the Constitution, under which the judiciary is the guardian of freedoms, does not require that the ordinary courts have jurisdiction to review intelligence gathering, as the right to respect for private life is not linked to individual liberty, following a decision handed down by the Constitutional Council on 23 July 1999 (23).

A second limitation stems from the lack of safeguards provided by law (24). Some authors deplore the fact that prior authorisation is issued for intelligence gathering by the Prime Minister, following a simple optional opinion from the CNRCT. They advocate a scheme modelled on that of the judicial police, which would have consisted in entrusting the task of authorising intelligence gathering to the administrative courts (25).

Safeguarding the specifics of each scheme maintains the interest and usefulness of the distinction. Paradoxically, the Law itself contributes to the challenges that it faces, by undermining the decisive criterion on which the distinction is based.

B. Undermining the basis for the distinction

Secondly, the Law weakens the decisive criterion, which is reflected in the concept of specific offence, whether current, future or merely possible. This concept is ambiguous and can give rise

to two interpretations: the first is legal and abstract; the second is material and practical. In its legal conception, “specific offence” refers to an offence identified abstractly: an offence identified by the relevant legislation, then, such as terrorism or organised crime. From the moment when an intelligence technique is used for the purposes of preventing one or more offence(s) identified and not just any crime, it becomes a matter for the police. In its material conception, it refers to an offence specifically identified on the facts. The police operation is therefore legal when it targets a specific offence committed or on the point of being committed. The Law on Intelligence undermines the decisive criterion in these two conceptions. On the one hand, in promoting the encroachment of the administrative police in the judicial police sphere, the Law invalidates the criterion in its legal dimension. Moreover, in aligning the administrative police’s investigative techniques with those of the judicial police, the law undermines the criterion in its material dimension.

Firstly, the Law of 24 July 2015 extends the administrative police sphere at the expense of the judicial police. The purposes of intelligence include preventing abstractly defined offences, i.e. terrorism, organised crime, subversion of the republican form of institutions, and collective violence likely to cause serious harm to public peace (26). It would appear that the prevention of abstractly defined offences falls within the remit of the administrative police. In this way, the law precludes the legal conception of the decisive criterion. However, it does not retain its material conception either.

Next, the Law aligns the administrative police’s investigative techniques with those of the judicial police and undermines the decisive criterion in terms of its material conception. It provides the intelligence services with the same means as those used by the police services, usually only in the context of a judicial investigation (27), and introduces new ones. Some of them allow widespread surveillance, such as the use of IMSI catchers (false antennas capturing the data sent by mobile phones in a given area), or the "algorithmic black box", which serves to detect connections that may present a terrorist threat (28). Others involve targeted surveillance of previously identified individuals, based on security intercepts (29), administrative access to connection data (30), geolocation (31), and the bugging of certain premises and vehicles as well as capturing images (32) or computer data (33). As regards persons previously identified as presenting a terrorist threat, the Law on Intelligence states, firstly, that their connection data can be collected in real time (34); and, secondly, that security intercepts can be extended to those around them.

The fact that intelligence services can implement targeted surveillance measures with regard to identified persons implies the existence of factors suggesting that they represent a potential threat. The latter concept, which legitimises the implementation of targeted surveillance, is likely to overlap with the reasonable suspicion of the commission of an offence, justifying a criminal investigation. Moreover, the surveillance of previously identified persons is not likely merely to concern "*the potential danger of a situation*" but also "*specific suspicions in respect of an individual*" (35). That said, by giving the administrative police the means to monitor the individual(s) identified, the implementation of which will be justified by the existence of suspicions relating to the possible commission of a specific offence, the Law supplants the decisive criterion in its material dimension.

The Law of 24 July 2015 therefore creates a paradox reaffirming the interest of the distinction whilst undermining the criterion on which it is based. It calls for the restructuring of the classification system.

II. The reconstruction of the "judicial police and administrative police" distinction

The reconstruction of the distinction necessarily entails the search for a new test. However, *de lege lata,* such an undertaking seems impossible (A). Only a reconstruction *de lege ferenda* is conceivable (B).

A. A possible reconstruction *de lege lata*

De lege lata, the search for a new test would be unsuccessful, as none of the possible criteria could restore the distinction consistently.

Firstly, the Law unequivocally precludes the material criterion, upheld for a time by French case law (36), which establishes the distinction between general and targeted surveillance. In applying this test, the administrative police implements general surveillance measures while the judicial police conducts the targeted surveillance of previously identified persons. However, as we have seen, the Law of 24 July 2015 grants the administrative police the means for general and targeted surveillance simultaneously. Moreover, some judicial police acts implement blanket surveillance measures. This is the case, for instance, for identity and vehicle checks provided under Article 78-2-2 of the *Code de procedure pénale* (Criminal Procedure Code), which allow judicial police officers, at the request of the prosecutor, to perform identity and vehicle checks in specific locations and for a specific period, for the purposes of investigating and prosecuting of certain specific offences, such as terrorism and drug trafficking. The material criterion is therefore not such that it could form the basis of the distinction between judicial and administrative police.

Next, if we consider the law only, a criterion "from another time" (37) is required. This is the functional criterion, pursuant to which the administrative police performs a preventive function, while the judicial police performs a repressive function. However, in terms of positive law, that criterion is irrelevant for two reasons. First, the judicial police sometimes pursues a preventive function. Indeed, criminal law criminalises actions increasingly early in the criminal process with preventive offences (38), the purpose of which is to neutralise criminal risk by ensuring early repression. The judicial police is therefore involved in this preventive function. Secondly, the administrative police can ensure a repressive function. For example, the prefect may impose the administrative closure of establishments whose activities disrupt public order, security or peace (39). Equally, the Law of 18 December 2013 (40) authorises the implementation of data processing measures by the Ministers for the Interior, Justice, Transport and Customs, for the purposes of preventing and ascertaining various offences (41), gathering evidence of these offences and pursuing offenders (42). By this provision, the legislature explicitly assigns judicial police tasks to the Administration. Under these conditions, the functional criterion cannot form the basis for the distinction between administrative police and judicial police.

The third criterion that may be considered is the organic criterion, according to which the classification of the police action depends on "the capacity of the officer involved in an operation or the authority which takes the disputed measure" (43). According to this criterion, when the officer has an administrative police mission, the action falls under this category, and vice versa. Reading the Law on Intelligence, this criterion is operative *a priori* (44), the perspective with

positive law calls this into question because the powers of the administrative and judicial police are sometimes combined in the same hands. For example, mayors, customs officers or rural police, holders of administrative powers, are also assigned judicial police duties by the Criminal Procedure Code (45).

Lastly, there is the formal criterion, according to which the administrative or judicial classification of a police operation depends on the basis for the police operation, be it legislation or an order. The police operation is judicial when officers act on the basis of the Criminal Procedure Code, or of an order or requisition issued by a judicial authority (46). Conversely, when the basis lies with a different branch of the law, the police operation is administrative. This criterion was initially adopted by case law (47), before being abandoned in favour of a decisive criterion. However, this criterion is no more satisfactory than its predecessors. On the one hand, the criterion is not operative in practice since the Criminal Procedure Code prescribes administrative police actions such as identity checks under Article 78-2, paragraphs 7 and 8. On the other hand, it is not satisfactory from a theoretical point of view because it would grant the legislature the freedom to determine the nature of police actions. Such power would increase the (existing) risk of the distinction being used to sideline the procedural safeguards of the judicial police. Moreover, the formal criterion would not allow the judge to call a police operation where there is doubt as to its formal foundation.

Finally, while a coherent reconstruction of the police dichotomy would appear to be permanently compromised *de lege lata,* a remedy can be found *lege ferenda.*

B. A possible reconstruction *lege ferenda*

An amendment to existing positive law would appear essential to consistently restoring the distinction between administrative and judicial police. Several scenarios are possible but only one, although improbable, would appear to be completely satisfactory.

One solution would be simply to do away with the dichotomy, as has been suggested by a number of authors. Jacques Buisson, in his thesis, explains that the police dichotomy is "not only useless in practice, as it does not cover any practical situation, but also and above all, it is a source of pitfalls or dangers" (48). However, while he rejects the importance of the dichotomy presented as a *summa divisio,* he does not deny the existence of the expressions "judicial police" and "administrative police": the first would be "all coercive measures that law enforcement officers (...) draw from criminal law and relevant procedure "; the second "would 'enclose' those coercive measures provided by other branches of law" (49). By his own admission, the distinction cannot simply be abandoned because it remains closely linked to the duality of the various courts and tribunals, the disappearance of which appears illusory.

A second solution would be to renew the distinction by identifying a specific criterion beforehand through the observance, not of the two categories, but rather of one of them. Indeed, each classification is based on a limited, closed category, and another residual, open category, which receives all concepts that do not fit in the first (50). As regards the police dichotomy, it is on the basis of the restrictive judicial police category that the criterion should be identified. If we confine ourselves to Article 14 of the Criminal Procedure Code, pursuant to which the judicial police "*is (...) responsible for reporting infringement of criminal law, to gather evidence and to find the perpetrators while a judicial investigation has not been opened*", it is effectively a decisive criterion

that must be selected. However, there remains the matter of refining the criterion (including settling the fate of investigations into offences) and above all, of undertaking a major reform in order to give substance and reality back to this test, so that it can play its role as "dispatcher" between the two categories.

Ultimately, the police dichotomy would appear to be extremely paradoxical: while timeless – that is characteristic of any "proper" classification (51) – it has barely managed to endure through the centuries, which underscores its failure. However, the Law on Intelligence does not sound the death knell for the distinction between administrative and judicial police, but rather calls for its revival.

Notes:

(1) For French commentaries of the Law on Intelligence, see *Dr. Pén*. 2015, étude 17, comm. O. Desaulnay et R. Ollard ; *JCP G* 2015, p. 961, comm. M.-H. Gozzi ; *RSC* 2015, p. 761, comm. C. Lazerges et H. Henrion-Stoffel ; *JCP A* 2015, p. 2286 comm. X. Latour ; *JCP G* 2015, doctr. 1077, comm. R. Parizot ; *AJDA* 2014, p. 2018, comm. W. Mastor.

(2) Online Dictionary, *Centre national de ressources textuelles et lexicales*.

(3) Jacques Buisson, *L'acte de police,* Lyon, (typed thesis), 1988.

(4) Jacques Buisson, « Les leçons de l'Histoire sur la notion de police judiciaire », *in Une certaine idée du droit. Mélanges en l'honneur du Professeur André Decocq*, Paris, Litec, p. 38..

(5) René Chapus, *Droit administratif général. Tome 1*, Paris, Montchrétien, 14ème éd., p. 722.

(6) TC, 27 June 1955, *dame Barbier*, req. n°1465, Rec. 624.

(7) TC, 15 July 1968, *consorts Tayeb*, req. n° 01909, Rec. 791.

(8) CE, 18 May 1981, *consorts Ferran*, req. n°17502, Rec. 148.

(9) René Chapus, *op. cit.,* p. 722.

(10) Bertrand Seiller, *Droit administratif*. *Tome 2*, Paris, Flammarion, 4ème éd., 2011, p. 83.

(11) René Chapus, *op. cit.,* p. 722; Bertrand Seiller, *op. cit.,* p. 83.

(12) Christophe Soullez, « Forces de police. Définitions et missions », *J-cl. Administratif*, 2012, p. 44.

(13) Art. L. 811-2 CSI.

(14) Christophe Soullez, cited above, p. 44.

(15) Cons. constit. No. 2015-713 DC, 23 July 2015.

(16) Art. L. 833-1 CSI.

(17) Art. L. 833-4 CSI.

(18) Art. L. 833-6 CSI.

(19) Art. L. 311-4-1 CJA.

(20) Art. L. 841-1 1 ° CSI.

(21) Art. L. 833-8, art. L. 841-1 2° CSI.

(22) Art. L. 841-1 CSI.

(23) Cons. constit., D. No. 99-416 DC, 23 July 1999.

(24) Pascale Gonod, « Loi du 24 juillet 2015 relative au renseignement : quels contrôles ? », *Procédures* 2015, étude10; Marie-Hélène Gozzi, cited above, p. 961; Xavier Latour, cited above, p. 2286; Christine Lazerges & Hervé Henrion-Stoffel, cited above, p. 761; Wanda Mastor, cited above, p. 2018.

(25) Pascale Gonod, cited above; Xavier Latour, cited above.

(26) Art. L. 811-3 CSI.

(27) This is particularly the case for interceptions of correspondence, image and sound capture, and geolocation.
(28) Art. L. 851-3 CSI.
(29) Art. L. 852-1 CSI.
(30) Art. L. 851-1 *et seq.*, CSI.
(31) Art. L. 851-5 CSI.
(32) Art. L. 853-1 CSI.
(33) Art. L. 853-2 CSI.
(34) Art. L. 851-2 CSI.
(35) Olivier Desaulnay & Romain Ollard, cited above
(36) Marc Anthony Granger, *Constitution et sécurité intérieure. Essai d'une modélisation*, Paris, LGDJ, 2011, p. 48.
(37) *Ibid.,* p. 204.
(38) Examples of preventive offences include: conspiracy (Article 450-1, Penal Code), criminal associations in relation to a terrorist enterprise (Article 421-2-1, Penal Code) or individual terrorist entreprise (Article 421-2-6, Penal Code).
(39) Article L. 2215-6 CGCL; Article 89, *Loi No. 2011-267 du 14 mars 2011 d'orientation et de programmation pour la performance de la sécurité intérieure* (Law No. 2011-267 of 14 March 2011 on orientation and programming for internal security).
(40) Law No. 2013-1168 of 18 December 2013, cited above.
(41) These are the offences mentioned at Article 695-23 of the Criminal Procedure Code as well as infringements of the fundamental interests of the Nation.
(42) Art. L. 232-7 CSI.
(43) J. Moreau, « Séparation des autorités », *Rép. contentieux administratif,* n°165.
(44) Intelligence services listed by law are not vested with judicial police missions.
(45) Art. 15 and Art. 22 *et seq.*, CPC.
(46) Marc Anthony Granger*, op. cit.,* p. 46-47.
(47) TC, 22 January 1921, Gilly, req. No. 00706.
(48) Jacques Buisson*, op. cit.,* p. 174.
(49) *Ibid.,* p. 617.
(50) Jean-Louis Bergel, « Différence de nature (égale) différence de régime », *RTD Civ.* 1984, p. 268.
(51) *Ibid.*