

## **Identity checks and the law**

**Nathalie Ferré**

*In France, the issue of identity checks is at the heart of the thorny debate on how to ensure better relations between the police and the public. Against a backdrop of discussions on whether to issue “ID check receipts”, reintroduce uniform numbers or establish a new code of ethics, Nathalie Ferré here provides an overview of the current legal framework.*

The existence of proper legislation regarding identity checks in France is relatively recent. Until the 1980s, the national police acted on the basis of laws with limited scope, and so typically ended up acting illegally. Indeed, only a few disparate provisions of the French Code of Criminal Procedure allowed national police officers (mainly responsible for policing in large towns and cities) to intervene in this connection, and even then they had to be able to establish a link between the persons subjected to identity checks and a crime or offence that had been committed. Consequently, only judicial identity checks, carried out on the basis of a suspicion of wrongdoing, were allowed. National police were able to carry out checks either in the context of a preliminary enquiry,<sup>1</sup> or in the event of a person being caught in the act of committing an offence.<sup>2</sup> The *gendarmerie* (a military body mainly responsible for policing small towns and rural areas), on the other hand, was subject to fewer constraints, at least on paper: *gendarmes* could check the identity of any person travelling on a public highway, on the basis of old legislation from 1903, provided they act “politely, and exhibit no behaviour that might be described as harassment or abuse of power”<sup>3</sup>...

### **A turning point: the 1981 “Security and Freedom Act”**

The 1980s would prove to be a turning point. They were marked by the adoption of the *loi “Sécurité et liberté”* (“Security and Freedom Act”) of 2 February 1981<sup>4</sup> (just a few months before the election of François Mitterrand and the arrival of a left-wing government), which was described as draconian by its opponents. In the initial draft of this law, there was nothing about identity check procedures: a simple oversight? This is doubtful, as the justice ministry, like the interior ministry, was not indifferent to the appeals of the police, who were calling forcefully for a legal basis for arresting and carrying out identity checks, similar to that enjoyed by the *gendarmerie*. Specifically, police officers wanted to be able to act independently of any link with an offence committed or of any investigation, and therefore operate in the name of maintaining public order whenever this might be considered to be threatened (in the event of public gatherings, demonstrations, unrest on

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<sup>1</sup> Article 8 of the French law of 27 November 1943 provides that: “any person of whom it appears to be necessary, for the purpose of legal enquiries, to establish or confirm the identity shall, at the request of a police officer, make himself or herself available for said purpose”.

<sup>2</sup> Article 61 of the French Code of Criminal Procedure.

<sup>3</sup> Article 165 of the French order of 20 May 1903.

<sup>4</sup> French law no. 81-82 of 2 February 1981, reinforcing security and protecting individuals’ freedoms.

the streets, etc.). So-called “administrative identity checks”, which fit into this category, were not enshrined in law at this time. Although the Court of Cassation, in a decision rendered in 1973,<sup>5</sup> had authorised police to perform identity checks on protesters merely for taking part in an illegal gathering (the “special circumstances” justifying this measure), the absence of any law in this connection – essential given the impact on individuals’ freedom to come and go as they please – means that the basis for this decision was too fragile and inconsistent.

Finally, the Peyrefitte Act of 1981 included three articles on identity checks,<sup>6</sup> one of which legalised police practices in the name of public safety: national police officers were now permitted to carry out checks “to prevent breaches of public order, including breaches of safety of persons or property”. The evolving concept of public order is conventionally defined on the basis of three elements: keeping the peace (resolving night-time disturbances, for example), salubrity (in particular issues of health, hygiene and pollution) and safety (accidents, etc.). At the same time, this law also allows identity verification procedures, consisting of taking the individual in question to the police station if he or she is unable to prove their civil status. Such individuals may be detained for however long is necessary to establish their identity, up to a maximum of six hours (reduced to four hours in 1983). It should be noted that identity should not be confused with the notion of civil status, which includes other elements than those necessary for identification. Proof of identity may be achieved “by any means”. The possession of a national identity card has always been optional as far as the law is concerned.

### **Beyond reproach in legal terms; questionable in terms of legitimacy**

The French Constitutional Council, called upon at the time by the parliamentary opposition, considered these legal measures to be fully compliant with the Constitution. Indeed, it felt that the procedure was accompanied by sufficient guarantees, and that it would, in any event, be up to “the judicial and administrative authorities to ensure their full compliance, and the courts to censure and suppress any illegal acts committed, and potentially to provide for the reparation of their harmful consequences”.<sup>7</sup> This would remain the line adopted by the Constitutional Council whenever cases were brought before it concerning procedures for identity checks and verifications. On this matter, we have three remarks.

The first relates to the use made of the identity verification phase, an exceptional measure in practice when compared to the total number of checks carried out; and yet this measure is essential in determining the arrest procedure in accordance with the French Constitution.

The second is linked to the role that the Constitutional Council entrusts to judges. It turns out that in practice, most of the time, operations were not subject to any sort of judicial review, especially as police officers were not required to make known the reasons justifying an identity check. It was only in cases where the identity check resulted in judicial proceedings (or procedures to remove an individual from the French territory, in the case of foreigners) that a judge might be called upon to consider the conditions of arrest.

Finally, the constitutional authority never questioned the usefulness of administrative identity checks: what purpose do they serve, given that they certainly do not prevent any breach of public order, as described in the legislation? A simple police presence is usually adequate to achieve – or attempt to achieve – this goal.

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<sup>5</sup> See: Cass. crim. (Chambre criminelle de la Cour de cassation), 5 January 1973; Bull. crim. (Bulletin des arrêts de la Cour de cassation (Chambre criminelle)) no. 7.

<sup>6</sup> Then Articles 76, 77 and 78 of the French Code of Criminal Procedure.

<sup>7</sup> See: DC (déclaration de conformité) 19–20 January 1981.

## The Left retains preventive checks

With the change of government in May 1981, the “Security and Freedom Act” immediately came under the spotlight. President Mitterrand had, moreover, included its repeal in his 110 manifesto pledges (“110 Propositions for France”). But the overriding issue of the moment was to find a compromise between a justice minister who wanted to reform the act in the name of human rights and freedoms and thus put an end to administrative identity checks, and an interior minister who wanted to give police wider powers to act. The phasing out of administrative identity checks did not occur in the end. Instead, the legislature chose to base the legality of such checks on two conditions, the first linked to the scope of action, the second to the degree of urgency.<sup>8</sup> Furthermore, judicial identity checks instigated on the basis of suspicions or as part of an investigation – and adopted in a context of indifference, moreover – were reformulated to allow police officers new scopes of action. The police could now perform an identity check on individuals on the basis of “evidence”<sup>9</sup> suggesting they had committed an offence, had attempted to commit an offence or was about to commit an offence. Police officers were more comfortable with this legal framework, whose wording was closer to police terminology, when it came to justifying arrests after the event.

## When foreigners are targeted: “visible signs of foreignness”

In 1986, the government revealed its true position on the role and importance of identity checks in the process of removing undesirable aliens. Before then, even if practices reflected this reality, it had not been formally made public.<sup>10</sup> This was remedied with the new reform of the French Code of Criminal Procedure:<sup>11</sup> it provided for a specific treatment of foreigners, albeit without the relationship between identity checks and administrative verifications of the status of foreigners being made entirely clear.

But under what conditions could officers directly ask individuals to produce their residence permit (essential for establishing their foreign nationality)? To answer this question, the Court of Cassation invented the famous “visible signs of foreignness”<sup>12</sup> that made it possible to presume a person was foreign, thus eliminating the need to comply with the law on identity checks. At the time, by means of circulars, the interior and justice ministers took it upon themselves to define these “visible signs”: playing an instrument from a foreign tradition in public, reading a newspaper or a book written in a foreign language, or even travelling in a car registered outside France. In practice, police officers made little use of these specific checks in their reports to justify interventions.

## Growing police powers

The legislation underwent a final major reform, with the law of 10 August 1993.<sup>13</sup> This created two new legal frameworks for undertaking arrests.

<sup>8</sup> French law no. 83-466 of 10 June 1983 repealing or revising certain provisions of French law no. 81-82 of 2 February 1981 and complementing certain provisions of the French Penal Code and the French Code of Criminal Procedure. See Article 78-2 of the French Code of Criminal Procedure.

<sup>9</sup> The wording “*indices laissant présumer*” (“*prima facie* evidence”) would be replaced in 2003 by “*une ou plusieurs raisons plausibles de croire*” (“one or more plausible reasons to believe”), without changing the overall meaning of the text or the requirements for judges.

<sup>10</sup> The previous government had attempted to do this, but gave up in the face of strong reactions from members of parliament.

<sup>11</sup> French law no. 86-1004 of 3 September 1986 relating to identity checks and verifications.

<sup>12</sup> See: Cass. crim. 25 April 1985; Bull. crim. no. 159. The Court of Cassation, in order to establish the legality of specific checks on foreigners, even though the law did not provide for this at the time, had based its decision on the 1946 orders relating to the requisition of residence permits.

<sup>13</sup> French law no. 93-992 of 10 August 1993 relating to identity checks and verifications. Other laws have followed, but they have not modified the structure of the legal assumptions behind identity checks.

First, it allowed identity checks to be carried out at the request of the public prosecutor, who simply had to define a scope of intervention, establish a time frame for the action in question, and specify the offences to be investigated. The police would then need no further justification for its operations as long as it complied with the public prosecutor's instructions. This framework would be extensively used under Nicolas Sarkozy's presidency to arrest undocumented migrants. The competent ministers (interior and/or justice, as appropriate) issued circulars encouraging public prosecutors to enact requisitions<sup>14</sup> around hostels, near associations offering advice and services for foreign nationals, or in certain neighbourhoods of Paris. In this way, targeted checks developed, along with arrests at the public counters of prefectures and police operations in workplaces. These operations respond to a target-driven culture, defended by the government, that aims to achieve a certain number of deportations from France.

Second, the legislature established border controls, meant to offset the disappearance of borders and therefore internal controls within the Schengen area. The police, like customs officers, may conduct checks on the administrative status of anyone on French territory within 20 km of the national border, as well as anyone passing through a railway station, port or airport open to international traffic.<sup>15</sup>

This measure, which is complex while at the same time leaving officers comfortable room for manoeuvre, has suffered two attacks, first from the European courts<sup>16</sup> and then from the French courts,<sup>17</sup> which both condemned border controls and the verification of foreigners' administrative situations. They considered that in the absence of a better definition of the justifications for police action, these two frameworks produced an effect equivalent to border controls that the Schengen Agreement, now part of EU law, was supposed to abolish.

Moreover, under the leadership of the NGO Open Society,<sup>18</sup> a movement denouncing the ethnic profiling to which certain categories of the population are subjected, including young people perceived as being of foreign origin who live or spend time in certain neighbourhoods, and foreign nationals. A group of associations has raised a number of cases (priority preliminary rulings, action for damages against the French state as a result of discriminatory checks, still under investigation) and has called for a comprehensive reform of legislation<sup>19</sup> in a new political context, François Hollande having pledged in his presidential campaign to fight "against racial profiling in identity checks for a procedure that respects human rights".<sup>20</sup>

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<sup>14</sup> The worst of the circulars in this regard remains, at present, that of 21 February 2006 relating to conditions for the arrest of foreigners in an irregular situation. It is a veritable "guide" to cold legalism facilitating the entrapment of undocumented migrants.

<sup>15</sup> The ministerial order of 22 March 2012 provides the list of stations, ports and airports concerned.

<sup>16</sup> In particular ECJ, 22 June 2010, case C-188/10, Melki.

<sup>17</sup> See: Cass. QPC (Cour de Cassation, question prioritaire de constitutionnalité), 29 June 2010, pourvoi (appeal) no. 10-40001 ; Cass. civ. 1<sup>re</sup> (Première chambre civile de la Cour de cassation), 6 June 2012, pourvoi (appeal) no. 10-25233.

<sup>18</sup> Open Society financed a study highlighting the overrepresentation of black and Arab people in the population targeted by identity checks (entitled *Police et minorités visibles : les contrôles d'identité à Paris*, New York: Open Society Institute, 2009).

<sup>19</sup> See the open letter signed by a number of associations (Gisti, Ligue des Droits de l'Homme, Open Society, Syndicat des Avocats de France, Syndicat de la Magistrature, etc.), dated 4 October 2012.

<sup>20</sup> Excerpts of the commitments made by François Hollande in his manifesto as a presidential candidate.

## Reforms promised... and then forgotten

To date, no draft legislation<sup>21</sup> amending the law on identity checks, as requested by these organisations, has been tabled. Nor, indeed, has any more consideration been given to measures such as issuing “receipts” to persons arrested or subjected to ID checks, indicating the legal framework of the action taken, or to the adoption of clear rules on body searches, or to the reform of legal assumptions deemed too permissive.

The lack of political will to change a legal situation that is conducive to producing illegal practices and further exacerbating relations between the police and a section of the population is regrettable. The only measure taken so far by the French interior ministry, namely the reintroduction of uniform numbers for police officers, enabling their identification, is not only unlikely to reduce the number of discriminatory checks,<sup>22</sup> but also appears above all to be a ploy to bury the recommendations of the Human Rights Defender<sup>23</sup> and the promises made during the 2012 presidential campaign.

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<sup>21</sup> On the contrary, the draft legislation relating to detention in order to check residence permits, tabled on 28 September 2012, tends towards re-establishing the control procedures for foreigners (Art. L. 611-1 of the French Code for Entry and Residence of Foreigners in France and the Right of Asylum).

<sup>22</sup> On this subject, see the decision of the Human Rights Defender (no. MDS 2011-113) that condemns in particular the identity check operations to which migrants in the Calais area are subjected.

<sup>23</sup> Report by the Human Rights Defender on the subject of identity checks and relations between the police and the public, October 2012.