

SUPPRESSION OF THE EXAMINING MAGISTRATES

The committee of reflection on criminal justice, chaired by Philippe LEGER, presented his report on the reform of the French penal procedure, on September 1st, 2009 to Nicolas SARKOSY.

It makes seven proposals among which suppression of the phase of instruction and the replacement of the examining magistrate by a “judge of the investigation and freedoms”, invested exclusively of judicial offices.

The purpose of this suppression would be to institute a single procedure in which all acts of prosecution, of research and of investigation would be carried out under the leadership of the Public prosecutor which would lead the investigation “to burden and discharge”.

The judge of the investigation would control the work of the Prosecutor and would be the only one to be authorised to order certain acts, in particular the most dangerous acts of investigation for individual freedoms, such as phone-tapping or searches.

Moreover, at the request of the prosecutor, the judge could deliver summons or arrest warrants, he could prolong a measure of police custody or pronounce a placement on probation.

He would rule on requests for acts formulated by the parties, if the Prosecution has rejected them. Thus, he would ensure “the respect of the rights” of those parties during the investigations and would be “a recourse” for them if the Prosecution does not do anything.

The legality of the acts carried out by the Prosecution could be disputed before the “room of the investigation and freedoms”.

This project is largely criticized, on the one hand for it makes the Prosecutor as the director of the investigation and on the other hand because of inequality of means that it generates between the defence and the prosecution.

Indeed, since always, the Prosecution is under the leadership of the executive who gives him its instructions. The Prosecution represents the Society, injured in its interests and saw its independence questioned by the CEDH in its July 10th, 2008 decision (Medvedyev C France) in which it judged that the Prosecutor is not a judicial authority in the meaning of the convention. Moreover, the fair trial principle means that investigations must be done both on the culpability and the innocence of the pursued person. But the LEGER Committee does not propose any modification.

In addition, there is in this reform a risk of inequality of means between the individuals and the prosecution since the examining magistrate will not be there anymore to order investigations at the Society’s expenses.

Lastly, making disappeared the instruction deprives the victim of its principal means of action, the “constitution de partie civile”, leaving her only the “citation directe”, under the conditions which one knows, namely to have identified the author of the offence and to have gathered the evidences necessary to its judgment.

The LEGER committee defends this proposal by writing that the instruction “is not adapted any more to our days...” and “has no more any equivalent in Europe”. In particular he criticizes “the ambiguity” of the function of the examining magistrate which is at the same time judge and investigator. He considers that “the Prosecution is the legal institution which is best adapted” for “working in equip on investigations which is necessary for the complex affairs “because the flexibility and the reactivity which govern the organization of the Prosecution “would improve the effectiveness of all the investigations and would reduce their deadlines”. However let us recall that this slowness is, for an essential part, due to the exercise of the rights recognized to the parties...