The State of Emergency in France: Days Without End?

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State of emergency in France – Historical origins of the legal regime – Ways in which it was adapted and normalised between 2015 and 2017 – Application against rule of law principles and human rights standards – Institutional balance between powers – In-depth study of 700 court decisions – Legal challenges to state of emergency measures – Challenges to judicial scrutiny

Introduction

Fionnuala Ni Aolain, the newly-appointed UN Special Rapporteur on the protection and promotion of human rights while countering terrorism, chose France for the first official visit of her new mandate in May 2018. The Special Rapporteur's autumn 2017 request for an official visit was triggered by the fact that France had activated a special legal regime (the 'state of emergency') in the wake of the terrorist attacks at the Bataclan and the Stade de France on 13 November 2015, maintaining it for a duration of nearly two years, and was at the time preparing to find a way out of this 'state of exception'. She thus wanted to analyse and monitor the ways in which France was planning to lift the so-called state of emergency.[1] Since, as a Special Rapporteur whose previous academic work[2] in addition to her first official reports in this new capacity[3] indicated that she would be willing to pay attention to 'complex emergencies' as well as '*de facto* states of exception', France turned out to be a very appropriate choice for her first official visit.

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[1] *See* Interview with Fionnuala Ni Aolain (by S. Hennette Vauchez), 14 *Revue des droits de l'Homme* (2018), available at <journals.openedition.org/revdh/>, visited 22 October 2018.

[2] O. Gross and F. Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006).

[3] Report to the UN Secretary General, 27 September 2017, A/72/43280, <www.ohchr.org/Documents/Issues/Terrorism/A_72_43280_EN.pdf>, visited 22 October 2018.

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The Special Rapporteur's report on France will be presented to the UN in March 2019. But the preliminary findings, published on 23 May 2018 as her visit was coming to an end, already point out several causes for concern:

> 'notwithstanding many commendable aspects of French counter-terrorism law and practice, the Special Rapporteur would like to share some observations, concerns and recommendations with regard to various aspects of counter-terrorism regulation including accountability and review of measures applied during the formal state of emergency in France (November 2015–October 2017), the legal status of new administrative measures (Law SILT October 30, 2017), the independence and robustness of both non-judicial and judicial oversight related to contemporary counter-terrorism measures, the protection of procedural and substantive due process rights in the context of administrative measures, the cumulative effects of layered and multifaceted administrative and individual measures taken over several years on specific individuals, the effects on the enjoyment of and protection for freedom of expression in the context of the crime of "apology for terrorism", the concerns of racial and religious profiling in the anti-terrorism context with consequent effects on the enjoyment of rights for particular minorities, the human rights obligations that accrue to French citizens overseas, and the necessity of undertaking prevention strategies in a human rights compliant and non-discriminatory manner'.[4]

The 'state of emergency' is a special legal regime that dates back to a 1955 legislative act. Although its recent activation has repeatedly been presented (and justified) as a *temporary* response to the November 2015 attacks, it was prolonged six times by Parliament, and only formally came to an end on 1 November 2017 (almost two years later), upon the expiration of the last legislative extension of the regime.[5] Furthermore, it was only lifted after the main, special powers that the 1955 Act grants to administrative authorities were made permanent by the *Sécurité Intérieure et Lutte contre le Terrorisme* (SILT) Act of 30 October 2017.[6] This situation, under a lasting state of emergency, and the fact that it was only lifted

[4] Preliminary findings of the visit: UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to France, <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23128&LangID=E>, visited 22 October 2018.

[5] For literature on this last application of the state of emergency *see* O. Beaud and C. Guérin-Bargues, *L'état d'urgence. Etude constitutionnelle, historique et critique* (LGDJ 2016); J.-L. Halpérin, S. Hennette Vauchez and E. Millard (eds.), *L'état d'urgence. De l'exception à la banalisation* (Presses universitaires de Paris Nanterre 2017); P. Cassia, *Contre l'état d'urgence* (Dalloz 2016); S. Hennette Vauchez (ed.), *Ce qui reste(ra) toujours de l'urgence* (LGDJ/Varenne forthcoming).

[6] Law 2017-1510 of 30 October 2017. For a reading that rather insists on the differences between the 2017 SILT Act and the 1955 regime *see* O. Le Bot, 'L'état d'urgence permanent', *Revue Française de Droit Administratif* (2017) p. 1115.

after its main features had lost their exceptional nature and become part and parcel of normal legislation, makes the recent situation in France a textbook example of the normalisation thesis that many legal and political theorists point to as critical evidence of a negative trend in contemporary responses to terrorism.[7] This article attempts to address the question of whether France has moved towards a permanent state of exception by looking at this specific instance of state of emergency against the wider context of contemporary legal responses to terrorism and issues of national security. It also intends to echo some of the main concerns they give rise to, with special attention paid to rule of law standards on the one hand, and human rights protection on the other.

A permanent state of exception? The main features and trends of anti-terrorist legislation in contemporary France

It was during the night of 13 November 2015 that France proclaimed a state of emergency – reactivating a legal regime whose history was tightly intertwined with France's colonial past.[8] Together with the previous application of the state of emergency in 2005 (in response to urban riots), this last episode seems to indicate a shift in the types of situation that can trigger the executive's recourse to the state of emergency regime: no longer just actual threats to the territorial and national integrity of the country, but forms of imminent threat to the public order as well. The shift in reasons that trigger recourse to a regime such as the state of emergency can instructively be read in parallel with theoretical interpretations of the state of exception. Although the present contribution does not aim to analyse the state of emergency in theoretical terms, it stems from a particular epistemology of such regimes. In particular, the 'classical' conceptualisation of states of exception – as either the exercise of fully sovereign executive decisions (à la Schmitt[9]), or as the suspension of an otherwise applicable legal order (à la Agamben[10]) – seems to fail to grasp the particular ways in which the state of emergency as it was applied in France from 14 November 2015 to 1 November 2017 has indeed existed within the constitutional order, heavily relying on legal norms and procedures. The present contribution, however, relies more on the theoretical starting point that sustains Bernard Harcourt's recent *Counterrevolution*,[11] i.e. that the state of

[7] B. Ackerman, 'The Emergency Constitution', 113(8) *Yale Law Journal* (2004) p. 1030; O. Gross, 'What 'Emergency' Regime?', 13(1) *Constellations* (2006) p. 74.

[8] S. Thénault, 'L'état d'urgence (1955-2005). De l'Algérie coloniale à la France contemporaine: destin d'une loi', 1(218) *Le Mouvement Social* (2007) p. 122.

[9] C. Schmitt, *La Dictature* (Seuil 2015).

[10] G. Agamben, *L'état d'exception. Homo Sacer II* (Seuil 2013).

[11] B. Harcourt, *The Counterrevolution: How Our Government Went to War Against Its Own Citizens* (Basic Books 2018).

emergency is a new mode of governance in the field of national security that, rather than destined to be merely temporary or 'exceptional', affirms its hold on the 'normal' and permanent structure of the legal order.[12] This theoretical approach to the state of emergency is grounded on two main arguments. The first involves the ways in which powers unavailable to administrative authorities prior to 2015 had now been granted on a permanent basis by a 2017 Act that normalised several aspects of the state of emergency. The second involves the instrumental role of law in both the application and justification of the state of emergency in the French legal order. The features of the recent French state of exception illustrate Harcourt's notion that contemporary governance in the field of national security (among others) rests on the production of 'legalities'[13] that turn this model into a pervasive, permanent and ultimately, utterly unexceptional mode of government.

Towards a permanent state of exception: the 1955 Act and its normalisation

In April 1955, as the situation in colonial Algeria was becoming insurrectionary, the French parliament passed a law that significantly increased the powers of administrative authorities to restrict and monitor individual freedom of movement and circulation, freedom of assembly and freedom of the press. It was largely an ad hoc piece of legislation that was then immediately applied to colonial Algeria. In fact, two other applications of the 1955 special state of emergency regime in 1958 and 1961 were also related to the situation in Algeria – thus confirming the regime's tight entanglement with colonial politics.[14] The regime was revived only twenty years later during an outburst of separatist conflict in New Caledonia; again, the integrity of the Republic and the territory were at stake. The fifth application of the 1955 regime marked a turning point, as the state of emergency was proclaimed in a context of urban riots that took place after the death of two adolescents that had been hunted down by the police.[15] As

[12] Harcourt, *supra* n. 11, p. 213: 'Many commentators argue that we now live, in the United States and in the West more broadly, in a "state of exception" characterized by suspended legality (…). This view, however, misperceives one particular tactic of counterinsurgency – namely, the state of emergency – for the broader rationality of our new political regime. It fails to capture the larger ambition of our new mode of governing. The fact is, our government does everything possible to *legalize* its counterinsurgency measures and to place them solidly within the rule of law (...). the idea is not to put law on hold, not even temporarily. It is not to create an exception, literally or figuratively. On the contrary, the central animating idea is to turn the counterinsurgency model into a fully legal strategy. So the governing paradigm is not one of exceptionality, but of counterinsurgency *and* legality'.

[13] *Ibid.*, p. 214 ff.

[14] On which, *see* Thénault, *supra* n. 8.

[15] 10 years after the events took place, there finally was a verdict in the trial of the policemen that were chasing the adolescents that night. The policemen were charged with non-assistance to people

constitutional law scholar Dominique Rousseau noted at the time, this was the first time that a regime such as the state of emergency was used to manage a conflict that involved profound and violent social conflict – yet had nothing to do with threats to the unity or integrity of the Republic and its territory.[16] It was against that historical backdrop of five preceding applications that the President of the Republic decided to proclaim a state of emergency at midnight on 14 November 2015, while police were still struggling with the chaotic situation in the streets of Paris and Saint Denis, not to mention inside the Bataclan Theatre.

The 1955 Act essentially increased the powers of administrative authorities. House searches and arrests, administrative ordinances that had the effect of shutting down places where people congregate (bars and theatres), measures restricting the free circulation of people in specified areas and/or forbidding demonstrations are among the main types of administrative measure that were allowed under the regime of the state of emergency. Only several days after the state of emergency regime was activated in 2015 did the Parliament vote for an initial three-month extension, while simultaneously amending the up-to-then largely untouched text of 1955;[17] it subsequently voted for five further extensions of the state of emergency, many of which also amended the 1955 Act. All the substantial amendments adopted between November 2015 and November 2017 increased the rigour of the restrictions to individual freedoms allowed under the special regime: they ultimately converged, all headed in the same aggravating direction. As a result, and as the Table 1 illustrates, the state of emergency in effect in France between 2015 and 2017 was indeed much more rigorous than the one colonial France had equipped itself with in the wake of the Algerian war of independence.

Table 1. The state of emergency regime in 1955 and in 2015-17

Type of measure	1955 initial Act	1955 Act in its 2015-17 amended version
Duration of the state of emergency	Needs to be established by an act of Parliament. Can arguably be extended only once	Indeterminate. With the exception of the technically unclear third activation of the 1955 Act in 1961-62, the 2015-17 episode will have been the longest application of the state of emergency in French history.

in danger. They were found not guilty. *See* Le Monde, <www.lemonde.fr/societe/article/2015/05/18/mort-de-zyed-et-bouna-relaxe-definitive-des-deux-policiers_4635109_3224.html>, visited 22 October 2018.

[16] D. Rousseau, 'L'état d'urgence, un état vide de droit(s)', 2 *Projet* (2006) p. 19.

[17] Law n° 2015-1501 of 20 November 2015.

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Table 1 (Continued)

Type of measure	1955 initial Act	1955 Act in its 2015-17 amended version
		It is also the only time that Parliament has passed six extension Bills.
House arrest (*assignation à résidence*)	Possible for individuals 'whose activities turn out to constitute a threat to public order and security'	Possible for individuals 'towards whom there exist serious reasons to believe that their behaviour constitutes a threat to public order and security'
House arrest + daily obligation to check in with the police /appear at a police station	No	Law explicitly allows house arrest for up to 12 hours daily. Law explicitly allows requiring an individual to check in with the police / appear at a police station up to three times daily
House arrest + wearing an ankle monitor	No	Yes
House arrest + prohibition against contacting designated persons	No	Yes, and the prohibition against contacting designated persons can outlast the expiration of a house arrest measure
Administrative house search	Yes	Yes + repeat searches (if a search reveals that another location might be of interest, police may immediately conduct a search at that other location without need of a formal, written search warrant – a technicality that the amended Act explicitly indicates is subject to posterior regularisation)
Administrative house search + seizure of electronic data	No	Yes The Act also allows the interruption of internet connections
Administrative house search + administrative detention	No	Yes (up to 4 hours)
Other measures	- Administrative closure of bars, theatres and concert halls - Administrative prohibition of meetings and assemblies that could provoke or sustain disorder	Provisions retained, with two important additions: - Administrative closure of 'places of worship within which speech constitutive of provocation to hatred or violence or provocation to the

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Table 1 (Continued)

Type of measure	1955 initial Act	1955 Act in its 2015-17 amended version
		commission of terrorist acts or apologetic of such acts' - Administrative prohibition of 'street processions, parades and gatherings', if and when 'the administrative authorities can substantiate that they are not in a material position to ensure their security'
Dissolution of associations	No	Yes, for associations 'that participate in the commission of acts that constitute a grave threat to the public order or whose activities facilitate or encourage the commission of such acts'
Geographical bans	Yes	Yes

Not only is the 2015-17 version of the state of emergency more rigorous than the one that resulted from the (up until then essentially untouched) 1955 Act, it was also applied in a strikingly vigorous fashion. Overall, it is estimated that approximately 10,000 administrative measures were taken during this latest application of the state of emergency, among which were over 4,444 house searches, 754 house arrests, 656 geographical bans, 59 protection and security zones, 39 bans on demonstrations, 29 closures of bars and theatres, etc.[18] These figures need to be broken down and commented upon.

First, it is noteworthy that, as the state of emergency was activated in response to terrorist attacks perpetrated by assailants claiming to act in the name of the Islamist organisation ISIS, the circles and networks maintaining (suspected) links with 'radical Islam' were a primary target. The elevation of 'radical Islam' to the rank of relevant and acceptable legal category does, however, trigger a number of important questions. An in-depth study of the litigation triggered by state of emergency measures[19] reveals the extent to which intelligence service '*notes*

[18] Figures established by compiling the data published by the parliamentary monitoring commission: <www2.assemblee-nationale.fr/15/commissions-permanentes/commission-des-lois/controle-parlementaire-de-l-etat-d-urgence/controle-parlementaire-de-l-etat-d-urgence>.

[19] It is impossible to directly analyse the 10,000 or so administrative measures that effectively constituted the state of emergency; they were individual and confidential measures that, as such, remain inaccessible. In order nonetheless to provide an in-depth analysis of this significant legal

blanches' [white memos],[20] administrative measures and court decisions have relied on this newly-founded legal category – and were therefore used to implicate individuals based on their religion (actual or presumed). Furthermore, such references were at times strikingly vague. Some of the state of emergency measures appear to have been based on imprecise references to an individual's 'Salafism', 'rigorous practice of Islam' or links with 'radical Islamist movements', to the extent that unchecked miscalculations and error could not be avoided. In several litigation files, the notion surfaced that the 'radical practice' of Islam was, as such, a sign of 'radicalisation', or even constituted a threat to public order and security. This is illustrated, for instance, by the case of the search ordered at a cinema in the small town of Avesnes sur Helpe in Northern France. The administrative order was essentially triggered by the conversion, to Islam, of the theatre manager, a descendant of Italian immigrants who then prayed at the local mosque, had a beard and wore the djellaba; he had been deemed, by the préfet, to constitute 'a threat to public security and order'. In fact, one year later, the administrative measure ordering the house search was quashed by the administrative court, as the administrative authority had failed to refer to anything other than 'a context of terrorist threat' to substantiate its appraisal. Examples such as this, in which the practice of, or conversion to, Islam is elevated to a national security threat, testify to the risks associated with elevating 'radical Islam' to the status of legal category in this context. In fact, such dangers had been noted by human rights organisations from the outset of the state of emergency.[21]

A second observation based on statistical analysis of 775 court decisions that resulted from challenges to administrative measures based on the 1955 Act is that there is a second prominent cohort of petitioners composed of political activists, although they represent a much smaller share of judicial applications than those

episode, a group of researchers at the CREDOF of University Paris Nanterre secured access to the totality of court decisions that resulted from litigation triggered by those measures. With the support of both the Council of State (which granted access to the administrative court internal database) and the *Défenseur des droits* (who supported the research), we gathered and analysed a corpus of 775 administrative court decisions handed down between November 2015 and January 2017. For another batch of articles on the French experience under the state of emergency of 2015-17, *see* the collection gathered by Joël Andriantsimbazovina, Benjamin Francos, Julia Schmitz, Mathieu Touzeil Divina in *Journal du droit administrative* (2016), < www.journal-du-droit-administratif.fr/?page_id=2 > , visited 22 October 2018.

[20] *Notes blanches* are anonymous, unsigned and undated memos provided by intelligence services concerning individuals under surveillance. During the state of emergency, a large share of the measures based on the 1955 Act originated in such *notes blanches*. Such notes are explicitly mentioned in 49.6% of the court decisions we analysed.

[21] *See* for instance Amnesty International, 'Des vies bouleversées. L'impact disproportionné de l'état d'urgence en France', January 2016, < www.amnesty.org/fr/documents/eur21/3364/2016/fr/ > , visited 22 October 2018.

initiated by individuals who had been associated with 'radical Islam'. Approximately 9% of those who challenged such measures in court were indeed individuals who had been barred, either through house arrest measures or the imposition of geographical bans, from participating in planned demonstrations or whose political activism (often referred to as 'membership in radical anti-establishment groups') was interpreted as constituting a potential threat to public order and security. That the special powers bestowed on administrative authorities by the state of emergency regime have been used to target political activists is extremely important in that this illustrates the fact that such state of exception measures can barely be restricted to the motives that had initially triggered their activation. In fact, several high profile political events took place during the two years of the state of emergency, ranging from the COP21 climate change event in Paris weeks after the November 2015 attacks to the heated political contestation of a major reform of employment law in the Spring of 2016, to take just two examples. All in all, individual as well as more collective restrictions on such basic political rights as the right to demonstrate were deemed important enough for Amnesty International to issue a major report documenting and criticising them in 2017.[22]

Finally, it is important to note that state of emergency measures seem to have been very unevenly resorted to by administrative authorities throughout the territory. Overall, it is interesting to note that extensions of the state of emergency had all been applied to both mainland and overseas territories. Although it is difficult to establish whether, locally, administrative authorities have indeed used the exceptional powers thus bestowed on them, it cannot be denied that they were entitled to do so – notwithstanding the fact that the 'imminent threat' of terrorist attack has so far been restricted to the mainland. Furthermore, analysis of measures based on the 1955 state of emergency Act that were litigated reveals a very uneven geographical spread. For instance, in some parts of France, 60% of petitioners had been targeted because of their suspected links to 'radical Islam'[23] – and the percentage even rose to above 90% in certain areas on the outskirts of Paris, notably in those areas where radical Islam networks had indeed been found to be in operation.[24] In other places, the 'profile' is much lower.[25] The same can be said with respect to the second cohort of litigants – political activists. Their overall share, 9% of the total number of plaintiffs, conceals stark differences in terms of

[22] Amnesty International, 'Un droit, pas une menace', 31 May 2017, <www.amnesty.org/fr/documents/eur21/6104/2017/fr/>, visited 22 October 2018.

[23] In the Lyon judicial district, the share is 59%; it is 57.4% in the Bordeaux district and 65% in the district of Nancy.

[24] 98%, i.e. 50 rulings out of a total of 51 in the Melun judicial district. This has to do with the presence of an important mosque that has been identified as a hub of radical Islam.

[25] As low as 22% in the judicial district of Nantes.

geography: 23% in Paris and as high as 71% in Rennes.[26] In other words, it appears that the state of emergency has operated, to a certain extent, as a form of culling, interpreted and used locally in various ways and proportions by the administrative authorities.

Legalities: the iterative coproduction of 'national security' law by criminal and administrative law

From a more qualitative standpoint, it should be noted that all measures available to authorities based on the 1955 Act are administrative in nature. French law draws a distinction between administrative versus judicial police orders and measures. Police administrative measures are preventive in nature, typically taken if and when there is a threat to the public order, regardless of the actual commission of any offence. Examples of such preventive administrative police measures include residence permits for foreigners, local ordinances restricting freedom of assembly on the grounds that specific circumstances render it dangerous, etc. Judicial police measures can be identified by their repressive goal, typically imposed on persons who have committed an offence or otherwise fall under provisions of the Penal code. State of emergency measures can all essentially be classified as administrative measures, which means that the house arrests, house searches and further restrictions on freedom of movement, as well as closures of places for social gathering or worship, have been taken against individuals and organisations that were not otherwise under judicial inquiry. As administrative measures, they were also not subject to prior judicial authorisation or control – only to potential *ex post facto* review by administrative courts. The basic structure of the legal context in which the state of emergency effectively existed is important in at least two regards. First, it immediately raises questions about the level of judicial scrutiny applied to the review of state of emergency measures by the administrative courts. This question is further examined below. Second, it also triggers the question of the role and relative position of these administrative law-oriented legal responses to terrorism and wider threats to national security. In fact, it has been abundantly documented that counterterrorism laws and policies, in France and elsewhere, have been taking a preventive turn. Although it is understandable that political actors would want to be able to target and constrain individuals *before* they commit terrorist or violent acts, it is well understood that such ambitions might conflict with a number of rule of law standards and

[26] 71% of the judicial rulings in the district of Rennes initiated in suits brought by political activists who had been subjected to house arrests or geographical bans. For more on this statistical analysis *see* S. Hennette Vauchez et al., 'L'état d'urgence au prisme contentieux : analyse transversale de corpus', in Hennette Vauchez, *supra* n. 5.

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principles.[27] In France for instance, several features of contemporary counterterrorist criminal law have been found to be either questionable in terms of their compatibility with constitutional principles resulting from the 1789 Declaration of the Rights of Man and the Citizen, such as the principles of legality or the necessity of criminal offences,[28] or at risk of being insufficiently precise.[29] The increase in criminal offences designed to implicate individuals who have not committed terrorist acts, but who have merely planned or intended to participate in one, is also a cause of concern shared by many criminal law specialists. Against this background, it is very important to underline the importance of the recent intensification of administrative law measures, of which the state of emergency is only one example. A new legislative code has appeared and rapidly developed since 2012, the *Code de la sécurité intérieure*.[30] This code essentially increases the powers and competences granted to a number of administrative authorities in the field of national security. The new competences include surveillance powers,[31] but also

[27] For France, *see* J. Alix, *Terrorisme et droit pénal. Etude critique des infractions terroristes* (Dalloz 2010) and J. Alix, 'La place du droit pénal dans la lutte contre le terrorisme', in *Mélanges en l'honneur de G. Giudicelli-Delage* (Dalloz 2016) p. 423. *See also* C. Lazerges and H. Henrion-Stoffel, 'Le déclin du droit pénal: l'émergence d'une politique criminelle de l'ennemi', *Revue des sciences criminelles* (2016) p. 649; P. Le Monnier de Gouville, 'De la répression à la prévention. Réflexion sur la politique criminelle antiterroriste', 2 *Les Cahiers de la Justice* (2017) p. 209; and A. Ponseille, 'Les infractions de prévention, argonautes de la lutte contre le terrorisme', *Revue des droits et libertés fondamentaux* (2017) <www.revuedlf.com/droit-penal/les-infractions-de-prevention-argonautes-de-la-lutte-contre-le-terrorisme/>, visited 22 October 2018.

[28] *See* for instance Art. 8 of the Declaration ('The Law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except by virtue of a Law drawn up and promulgated before the offence is committed, and legally applied'), that has led to standards of precision and strict interpretation of legislatively defined criminal offences. For a recent instance of a ruling by the *Conseil constitutionnel* striking down a piece of counterterrorist legislation on the grounds that it was not necessary in that respect: CC, 2017-625QPC of 7 April 2017, <www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2017-625-qpc/version-en-anglais.149217.html>, visited 22 October 2018: '7. However, by including the material facts that constitute a preparatory act of "searching for … objects or substances that create a danger to others", without defining the acts that constitute such a search within the framework of an individual terrorist undertaking, the legislature allowed punishment for actions that have not materialised in, by themselves, the desire to prepare for an infraction. 18. It follows from the foregoing that the words "searching for", as appearing in Section 1 of Paragraph I of Article 421-2-6 are manifestly contrary to the principle of the necessity of offences and penalties. They should be declared unconstitutional'.

[29] *See generally* C. Lazerges and G. Giudicelli-Delage (eds.), *La dangerosité saisie par le droit penal* (PUF 2011).

[30] M. Touillier (ed.), *Le Code de la sécurité intérieure, artisan d'un nouvel ordre ou semeur de désordre?* (Dalloz 2017).

[31] Wiretapping, GPS localisation of vehicles, etc.

the possibility of issuing administrative bans from the national territory[32] (including against French citizens, which of course is highly questionable with respect to international human rights standards); and this is in addition to other sources of administrative (preventive) measures aimed at combating terrorism, such as asset freezes.[33] In other words, and without even mentioning the recent and long-lasting reactivation of the state of emergency based on the 1955 Act, an entire body of administrative law is emerging and rapidly growing. This is of course highly significant in that it raises questions as to the deeper logic of the public actions involved. Indeed, several authors have underlined the transformation of the mode of governance that counterterrorism rests upon:[34] as criminal and administrative law become increasingly intertwined, the objectives of prevention (of crime) and prediction (of individual behaviour) tend to overlap, thus raising a number of daunting questions concerning human rights protection.[35]

A rough ride for the rule of law

Beyond this broad issue of the normalisation of the exception, which has been identified by many legal scholars and international human rights bodies as a problematic move, the French 2015-17 situation under a state of emergency is also worth examining in detail with respect to the rough ride given to a number of standards and *modus operandi* that are readily associated with the rule of law and often taken for granted in a number of Western liberal democracies. It is also important to keep in mind the fact that, concurrently with a number of internal

[32] F. Doré, 'Champ d'application de l'interdiction de sortie du territoire', *Actualité juridique droit administratif* (2017) p. 1345; F. Doré and P. Nguyen Duy, 'Le contrôle du juge administratif à l'épreuve du terrorisme, l'exemple des interdictions de sortie du territoire', *Actualité juridique droit administratif* (2016) p. 886.

[33] D. Burriez, 'Le dispositif national de gel des avoirs : discrète mais contestable mesure de police administrative en matière de lutte contre le terrorisme', *Revue Française de Droit Administratif* (2017) p. 139.

[34] M. Chambon, 'Une redéfinition de la police administrative', in J. Alix and O. Cahn (eds.), *L'hypothèse de la guerre contre le terrorisme* (Dalloz 2017) p. 133.

[35] To be sure, these questions are not exclusively raised by administrative measures in the field of national security and counterterrorism. Several important rulings upholding bans on dwarf-throwing (CE, Ass., 27 Oct. 1995, *Cne de Morsang sur Orge*, n° 136727), the distribution of pork soups (CE, réf., 5 Jan. 2007, n° 300311) or anti-Semitic shows (CE, réf., 9 Jan. 2014, n° 374508) have already triggered much debate on the frontiers of 'prevention' of threats to the public order as a valid means for the justification of administrative measures. It is – notably – in the field of counterterrorism, though, that 'prevention' seems to morph into 'prediction'; public authorities are increasingly allowed (or required) to identify individual before they commit any illegal act, i.e. to predict their future behaviour.

juridical moves that will be examined hereunder, France repeatedly derogated from its international obligations during the 2015-17 state of emergency – in particular the European Convention on Human Rights and the International Covenant for Civil and Political Rights – thus joining a select club of countries including Turkey and Ukraine. Again, on this particular topic, the UN Special Rapporteur's pending report on the protection and promotion of human rights while countering terrorism will be an important milestone. Meanwhile, and more narrowly, the present section attempts to document the ways in which parliamentary procedures, constitutional review and, more generally, judicial review were all subject to strong pressure and important challenges as the emergency regime tightened its grip on the French constitutional regime.

Parliamentary procedures, or the paralysis of Parliament's balancing role

A mere six days after the 13 November attacks in Paris, the French Parliament voted for a three-month extension of the state of emergency that had been activated by the president of the Republic by means of an executive order.[36] The Act of 3 April 1955 that serves as the legal basis for the state of emergency includes a provision according to which it is up to Parliament to authorise 'an extension' of this exceptional regime. Some authors have argued that the singular in this provision indicates that parliamentary extensions are to be granted only once.[37] This latest instance of state of emergency has, however, proven otherwise: the initial extension was followed by five more, thus maintaining the special regime until 1 November 2017.

But there is much more to be said beyond this technicality about the role of the Parliament in the 2015-17 French state of emergency. The parliamentary debates triggered by the six extension Bills make for very interesting reading; they indicate that, throughout the duration of the state of emergency, the Parliament exerted hardly any countervailing influence on the executive. Rather, it went along with and indeed at times reinforced the tough stance of the government. One example of this particular positioning had to do with the duration of the granted extensions. Not once did Parliament seek to reduce the duration of the proposed extensions; indeed, it once went even further, granting a six-month extension although the government had only asked for three.[38] In fact, each of the six times

[36] According to the Act of 3 April 1955, the initial application of the state of emergency by presidential decree on 14 November 2015 could last a maximum of 12 days; beyond that, an Act of Parliament was required.

[37] P. Cassia, 'Prorogation bis de l'état d'urgence: difficultés juridiques en perspective?', *Mediapart*, 12 February 2016, <blogs.mediapart.fr/paul-cassia/blog/120216/prorogation-bis-de-l-etat-d-urgence-difficultes-juridiques-en-perspective>, visited 22 October 2018.

[38] Law 2016-987 of 21 July 2016.

an extension Bill was under consideration, there were members of parliament who claimed that it would be more reasonable to have the state of emergency last even longer – often up to a year. And, after the state of emergency was effectively lifted in November 2017, and the attacks continued, those parliamentarians and others called for reinstating the state of emergency. This issue – the duration of the extensions – is thus very important; it reveals a particular institutional context in which the Parliament rarely operates as a check or balance on government action. It is furthermore a testimonial to the fact that issues of national security readily trump human rights concerns[39] and the regular functioning of the constitutional equilibrium; arguments stemming from those perspectives were rarely heard and, even when they were, were easily sidelined in parliamentary debate.

At the same time, the minutes of the debates also gives rise to concerns related to the quality of the decision-making process. The data and information routinely put forward as the basis for deciding on extensions of the state of emergency was often of very poor quality. The 1955 Act establishes that a state of emergency can be justified by either a national calamity or an imminent threat to the public order. It is impossible, however, to determine who the ultimate arbiter is of whether such conditions still apply, which data ought to be relied upon and who (if anyone) should review or verify that determination. Therefore, every time an extension of the state of emergency was envisaged, the government would communicate certain information to the Council of State which, upstream of the parliamentary procedure and in its advisory capacity,[40] would always agree that the conditions for a continued state of emergency had been met.[41] The Bill would then go to Parliament, where parliamentarians would typically rely on the Council of State's opinion and ultimately defer to the government's request for a new extension. In other words, there was no conspicuous level or method of review for the determinations made by the government: parliamentarians relied on the Council of State's opinions, which itself relied on the 'information provided by the

[39] This of course is hardly unique to France; *see* Theresa May's famous intervention declaring that she was ready to 'rip up' those human rights laws that impeded the strengthening of counterterrorist legislation: < www.theguardian.com/politics/2017/jun/06/theresa-may-rip-up-human-rights-laws-impede-new-terror-legislation > , visited 22 October 2018.

[40] Art. 38 of the Constitution: 'Government Bills shall be discussed in the Council of Ministers *after consultation with the Conseil d'État* and shall be tabled in one or other of the two Houses' [emphasis added].

[41] From the second extension onwards, the Council of State repeatedly insisted that the state of emergency was a special regime that was temporary in nature and should not be prolonged indefinitely (*see* Advisory Opinion n° INTX1602418L of 2 Feb. 2016: 'un régime de pouvoirs exceptionnels a des effets qui dans un Etat de droit sont par nature limités dans le temps et dans l'espace'). This affirmation was, however, somewhat incantatory as not once did it lead the Council of State to deliver a negative opinion on the extension Bills presented by the Government.

government'.[42] The executive was, to all intents and purposes, the sole master on board.

Sidelining constitutional review

There are two forms of constitutional review in France. The first takes place *ex ante*: Bills can be brought to the *Conseil constitutionnel* after being adopted by Parliament but before their entry into force; this abstract form of review was the only one that existed from 1958 to 2010.[43] Only a handful of political institutions can pull the trigger: the president of the Republic, the Prime Minister, the presidents of both Parliamentary assemblies or a group of 60 parliamentarians. The inclusion of this latter entity only dates back to 1974 and is universally read as one of the main reasons for the actual birth of any significant form of constitutional review in France;[44] it allowed the political minority to frame its opposition to any given piece of legislation in terms of a constitutional challenge.[45] However, and significantly, this form of judicial review was never used against the state of emergency regime. It was certainly not used, for historically obvious reasons, in 1955 when the regime was legislatively designed (the Constitution of the 5th Republic, which created the *Conseil constitutionnel* dates from only 1958); nor was it used on later occasions when the Parliament agreed to extensions of the 1955 Act activation.[46] And it was not used between 2015 and 2017 either, although

[42] *See* for instance Advisory Opinion n° 391519 of 28 April 2016: '[le Conseil d'Etat] *constate sur la base des informations fournies par le Gouvernement*: que plusieurs attaques terroristes ont frappé des métropoles d'Europe, du Proche et du Moyen-Orient et, enfin, d'Afrique de l'Ouest, notamment des ressortissants et des intérêts français en Côte d'Ivoire le 13 mai dernier; que le double attentat de Bruxelles commis le 22 mars 2016 est en lien avec les auteurs des attentats récents de Paris (…); le Conseil d'Etat est par conséquent d'avis que la conjonction d'une menace terroriste persistante d'intensité élevée et de [deux] très grands évènements sportifs caractérise un "péril imminent" résultant d'atteintes graves à l'ordre public au sens de l'article 1er de la loi du 3 avril 1955' (emphasis added).

[43] Art. 61 of the Constitution: 'Institutional Acts, before their promulgation, Private Members' Bills mentioned in article 11 before they are submitted to referendum, and the rules of procedure of the Houses of Parliament shall, before coming into force, be referred to the Constitutional Council, which shall rule on their conformity with the Constitution. To the same end, Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators'.

[44] On this, *see* A. Stone, *The Birth of Judicial Politics in France* (Oxford University Press 1992).

[45] Figures are compelling: while there had been only a little over 50 decisions on the grounds of Art. 61 of the Constitution between 1958 and 1974, the figure rose to 180 in the next 12 years.

[46] For the sake of exactitude, it should be noted that the 1984-85 activation of the state of emergency in New Caledonia did trigger a petition to the *Conseil constitutionnel*. The constitutional court, however, declined to exercise any form of review on the 1955 Act, arguing that although it had

there were no less than six Acts voted for in Parliament either prolonging or amending (or both) the 1955 Act. In fact, in November 2015 when the first prolongation and amendment of the Act were being voted on in Parliament, Prime Minister Manuel Valls persuasively urged members of Parliament *not* to challenge the text before the constitutional court, arguing that both the times and stakes were too dramatically important for juridical games to be played.[47] This seems to have set the tone, for no member of Parliament later seriously considered referring legislative acts prolonging the state of emergency to the *Conseil constitutionnel*, despite the fact that the potential unconstitutionality of several of the amendments up for vote surfaced frequently in debate.[48]

Since the major constitutional reform of 2008, another *ex post* form of constitutional review also currently exists in France.[49] This allows any person involved in court proceedings to challenge the constitutionality of a legislative provision that is to be applied to his or her case, subject only to the condition that the provision in question must infringe upon 'rights and freedoms guaranteed by the Constitution'. The court proceedings may then be suspended until the matter has been settled by the *Conseil constitutionnel*.[50] The procedure is referred to as the *Question Prioritaire de Constitutionnalité* (QPC). This particular judicial route has proven much more useful for challenging the constitutionality of the state of emergency regime; 9 such QPC procedures have led to findings of unconstitutionality with respect to several aspects of the 1955 Act, including both original and amended provisions.[51] Despite these findings, however, QPC

been activated, it had been neither amended nor modified by the 1984 Act that put the state of emergency into force; *see* CC, 85-157 DC, 25 January 1985, *Etat d'urgence en Nouvelle Calédonie*.

[47] He urged: 'Pas de juridisme': M. Valls, National Assembly, 20 November 2015.

[48] The constitutionality of several measures typical of the state of emergency, such as the possibility of administrative house searches or new provisions pertaining to the possibility of complementing house arrests with electronic tagging devices, was discussed both in Parliament (briefly) and in legal scholarship.

[49] Art. 61-1 of the Constitution: 'If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council, within a determined period'.

[50] The court before which the Question *Prioritaire de Constitutionnalité* is raised first assesses its seriousness and, if necessary, refers it to the supreme court of the relevant jurisdictional order (*Cour de cassation* for judicial courts, *Conseil d'Etat* for administrative courts). These two supreme courts then re-examine the seriousness and novelty of the question of constitutionality that is raised and may refer it to the Conseil constitutionnel. If they do, the Conseil has three months to deliver its judgment. For more on this procedure, *see* <www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/eng_dispositions_reglementaires_QPC.pdf>.

[51] Decisions 2015-527QPC, 22 December 2015 (not unconstitutional); 2016-535QPC, 19 February 2016 (unconstitutionality of the regime of data seizure during house searches); 2016-567/568QPC, 23 September 2016 (unconstitutionality of the regime of house searches); 2016-600QPC,

procedures do nothing to dash the overall impression that constitutional review was essentially sidelined by the state of emergency; indeed, they have revealed how fragile constitutional review is in France. Article 62 of the Constitution states that 'a provision declared unconstitutional on the basis of Article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council *or as of a subsequent date determined by said decision*'.[52] Taking advantage of this provision, the Conseil has almost systematically chosen to neutralise its findings of unconstitutionality by postponing the effects of its rulings.[53] At least three observations can be made with respect to those choices. First, they considerably weaken the effectiveness of the constitutional protection of 'rights and freedoms guaranteed by the constitution' afforded by the QPC; individuals who had been subject to house arrests, house searches or seizures of electronic data based on legislative provisions – and whose petitions led the Conseil to deem them unconstitutional – did not benefit from said findings. Secondly, they resulted in a number of unconstitutional legislative provisions being allowed to stand as such for months at a time, thus leading to an awkward situation whereby the constitutional court had itself sanctioned (albeit temporarily) the validity of unconstitutional provisions.[54] Thirdly, they revealed a form of political weakness on the part of the Conseil in the overall French constitutional order – one that makes it a weak or superficial protector of human rights on a global scale. This, of course, has deeper roots and is not necessarily linked to any particular legal situation arising under the state of emergency.[55]

The challenges of judicial review

Constitutional review is certainly not the only form of review that the state of emergency was subject to. All administrative in nature, the measures based on the 1955 Act (such as house arrest, house search, closure of places of worship,

23 September 2016 (unconstitutionality of the regime of storage of some of the data that can be seized during house searches); 2017-624QPC, 16 March 2017 (unconstitutionality of a judicial authorisation mechanism in case of the extension of house arrest measures beyond one year in duration); 2017-677QPC, 1 December 2017 (unconstitutionality of the regime of identity checks and luggage searches in the public space); 2017-635QPC, 9 June 2017 (unconstitutionality of geographical bans); 2017-648QPC, 4 August 2017 (unconstitutionality of real-time date interception); 2017-684QPC, 11 January 2018 (unconstitutionality of the regime allowing administrative authorities to limit the right to circulate in certain zones).

[52] Emphasis added.

[53] V. Champeil Desplats, 'L'état d'urgence devant le Conseil constitutionnel, ou quand l'Etat de droit s'accommode de normes inconstitutionnelles', in Hennette Vauchez, *supra* n. 5.

[54] *Ibid.*

[55] Again, on the *Conseil Constitutionnel* and its institutional and political importance, *see* Stone, *supra* n. 44.

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ordinances restricting access and circulation in specific areas) were potentially subject to review by administrative courts. A group of researchers at the CREDOF of University Paris Nanterre gathered an exhaustive collection of 775 such court decisions handed down between 14 November 2015 and January 2017, and analysed them with a view to assessing the level of scrutiny exercised by the courts. This is not only an important issue as such, but also because affirmation of both the existence and the effectiveness of this form of judicial review was instrumental in the justifications provided by legal and political actors in support of the six legislative extensions of the state of emergency regime, as well as of the adoption of the SILT Act of 30 October 2017 that preceded its termination.

The specific issue of the standard of scrutiny to be applied to state of emergency measures was taken seriously by the *Conseil d'Etat*, the French supreme administrative court. In an important series of rulings handed down on 11 December 2015, the *Conseil d'Etat* formally defined a strict level of scrutiny for such measures, and affirmed that a 'fully extended' level of scrutiny was to be applied – one that was later referred to as a proportionality check (i.e. the highest existing level of judicial scrutiny whereby the judge applies a triple test to verify that the contested measure is appropriate, necessary, and proportionate[56]). However, analysis of the entirety of the corpus of 775 court decisions unearths the fact that this standard was essentially unevenly applied throughout the country; in fact, a lower standard was frequently applied.[57] Moreover, analysis of these court decisions revealed that the quality of judicial review was strongly dependant on the findings presented by the intelligence services. '*Notes blanches*' produced by these services are very frequently referred to in the proceedings pertaining to state of emergency measures; they are explicitly referred to in 49.6% of the total rulings analysed, although this certainly does not rule out their presence in the many other cases in which they might not have been referred to explicitly. However, analysis of the rulings does make it seem as if no clear standard exists for assessing the acceptability or the refutability of the notes. Rather, we have found only rare instances – such as when their assertions have been successfully challenged by defendants, thus leading the administrative authorities to rely on such *notes blanche* – in which something like a reversal of the burden of the proof has been imposed, leaving plaintiffs with the difficult task of proving the intelligence services wrong.

[56] On which, *see* C. Roulhac, 'La mutation du contrôle des mesures de police administrative. Retour sur l'appropriation par le juge administratif du triple test de proportionnalité', *Revue Française de Droit Administratif* (2018) p. 843.

[57] Either a 'contrôle de l'erreur d'appréciation' or a 'contrôle de la matérialité des faits'.

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Human rights as disposable standards?

The 1955 Act on the state of emergency does not in itself make France an outlier in the landscape of contemporary liberal democracies: most states do have juridical iterations of states of exception, either constitutional or legislative, and the fact that terrorism would count among the events that trigger their activation is not surprising, per se. The fact that the state of emergency remained in force in France for almost two years, thus transforming a regime tailored for situations of 'imminent threat' into a sustainable mode of governance, is slightly more noteworthy. Because of structural issues that relate to the difficulty of restricting the use of exceptional measures for specific purposes and ends, the impact of the 2015-17 situation with respect to certain fundamental rights has been significant; administrative authorities have tended to use the exceptional powers they were endowed with for purposes at times unrelated to counterterrorism.

As early as a few weeks after the state of emergency had been activated, and after a number of climate-change and leftist activists had been given house arrest in order to prevent them from taking part in planned protests related to the COP 21 that was held in Paris from 30 November to 12 December 2015, the *Conseil d'Etat* delivered an important ruling that effectively upheld those administrative measures based on the 1955 Act, even though said activists were not under suspicion of engaging in terrorist activities. The ruling thus resulted in the legalised notion that administrative authorities could use the exceptional powers granted by the 1955 Act for any reason or purpose whatsoever since such powers were not restricted to use for countering terrorism. In other words, the interpretation of the state of emergency was temporal (during a state of emergency, administrative authorities can use the 1955 Act) rather than material (the state of emergency powers are to be used in relation to the reasons for which the legal regime was activated). This of course led a number of administrative authorities to use their 1955 Act special powers for a variety of reasons ranging from difficult issues they saw fit (and efficient) to deal with using this newly available legal ground, to petty matters of public order maintenance.

Two examples help illustrate the variety of motives for using the 1955 special powers: management of the migrant situation in the North of France (Calais) and an anecdotal variety of administrative police measure used at sporting events.

Fabienne Buccio, the *préfet* of Pas de Calais until February 2017, had issued many administrative orders based on the 1955 Act in relation to the management of the Calais migrant camp. On 1 December 2015, she ordered a *Zone de Protection et de Sécurité* (ZPS) [a zone, access to which and circulation of persons within are regulated] in the vicinity of the camp; on 19 January 2016, she ordered the expulsion of migrants from a part of the camp; on 4 February 2016, she banned a planned demonstration; on 19 February 2016 she ordered the expulsion

of migrants from yet another part of the camp; and finally, on 23 October 2016, she ordered a new ZPS in order to limit access to the camp while it was being dismantled (this last prefectural order was, legally, highly questionable; lawyers were barred from accessing the ZPS). All these measures were taken using the legal basis provided by the 1955 Act although they had, of course, no relation to the fight against terrorism. This is a telling example of the ways in which the logic of the state of emergency has spread throughout the administrative state and been used by administrative authorities to enhance either the efficiency, authority or legitimacy of decisions they would otherwise be obliged to take in terms of managing public order.

There are many more examples of such spread, some of which appear to be merely anecdotal. The collective study produced by the researchers at the CREDOF has, for instance, identified a number of police orders limiting or affecting sporting events. At least twenty municipal orders have been identified banning soccer fans from attending games (even minor ones, such as FC Nantes-Bordeaux[58] or Troyes-PSG[59]). Bars located in the vicinity of soccer fields have been forced to close on the grounds that brawls had previously taken place.[60] The 1955 Act even justified a municipal order prohibiting a drone from flying over a thalassotherapy hotel the Spanish national soccer team was staying at during Euro 2016, even though this last order was effectively quashed by the administrative court for lack of justification.[61]

Many more examples could no doubt be found to drive home the main point: there is no containing the effects of a legal regime such as the state of emergency. Once activated, it operates as a form of dispensation allowing administrative authorities to use the exceptional powers it endows them with, irrespective of the reasons they may have for doing so. In fact, the no-containment policy applied to the state of emergency is current judicial policy. As already noted, this largely stems from the December 2015 ordinances issued by the *Conseil d'Etat*. Notably, these also rely on a particular line of logic according to which, during the state of emergency, administrative authorities are justified in taking measures that restrict rights and freedoms in ways that they would not normally do, under the proviso that they claim and establish that counterterrorism demands are using up all their capacity and resources, thus resulting in situations in which they no longer have the means to ensure the security of given demonstrations or events, and therefore have no other option than to cancel and prohibit them. Developed by the Council

[58] TA de Nantes, réf., 21 January 2016, *Association nationale des supporters*, n° 1600410 (rejet) et 22 janvier 2016, *Association nationale des supporters*, 1600413 (rejet).

[59] TA de Châlons en Champagne, réf., 12 March 2016, Association de défense et d'assistance juridique des intérêts des supporters, n° 1600463 (rejet).

[60] TA de Nice, réf., 20 June 2016, *SARL Le Café Le Populaire*, n° 1602682.

[61] TA Poitiers, 9 November 2016, n° 1601342.

of State, this line of logic was subsequently taken up by the legislature: since July 2016, the 1955 Act has been amended to explicitly allow 'street processions, parades and gatherings' to be prohibited if and when 'administrative authorities justify that they are not in a material position to ensure their security'.[62]

Measures based on the state of emergency are often cumulative: typically, targeted individuals are often subject to a bundle of measures based on the 1955 Act, such as house arrests, house searches (sometimes renewed multiple times), in addition to which other measures (such as asset freezes) are sometimes also taken. Because these measures also raise the issue of their potentially discriminatory impact (see above for the questions and concerns raised by the centrality of 'radical Islam' as a legal category at the heart of the application of the state of emergency), it has been contended that the two-year application of the state of emergency in France made a significant impact both within and beyond the policy scope of counterterrorism.

Conclusion

The conclusions stemming from the recent situation in French are varied in nature. They illustrate the erosion of human rights protection standards coextensive to the state of emergency regime. The extended application of the state of emergency in France has indeed led to a number of human rights restrictions and violations, not all of which can be justified as necessary in the fight against terrorism. Furthermore, they illustrate the impact made by states of exception on the institutional balance of the constitutional order as well as the difficulty (if not impossibility) of merely lifting a regime such as the state of emergency and the correlative pressure to normalise the formerly 'exceptional' powers that it bestows upon public authorities. Both the application of this state of exception and its normalisation illustrate a deep transformation of the legal response to terrorism and issues of national security. Although a very robust body of law exists in the field of counterterrorism which already allows for the investigation and prosecution of terrorist 'projects' and 'intentions', the addition of a legal arsenal of administrative measures signals an important evolution in the legal and political treatment of those issues. Corresponding safeguards have not, however, been imagined or implemented. The legal guarantees that usually accompany criminal investigations do not apply to administrative actions; and the existing forms of political and judicial control date back to older times when repression and prevention were more clearly distinguished – conceptually, institutionally and legally.

[62] Law of 3 April 1955, Art. 8.

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