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## **THE STATE OF EMERGENCY IN FRANCE**

### **A GLOBAL OVERVIEW**

Dr. Bernard EVEN, vice-president of AEAJ,  
President of a chamber in the Administrative Court of Appeal of Paris,  
Presiding judge in the French National Asylum Court

## **INTRODUCTION**

### **Preamble**

What does this concept mean ? Why it was declared ? How it is implemented ? Is there an evolution ?

Mr. Bernard Stirn, Chairman of the Judicial Department of the Council of State, presented a lecture at the Institute of Political Studies of Aix-en-Provence, on September 21, 2016 entitled " Fight against terrorism, a state of emergency and the state of law ". I was inspired by this text to write my own presentation for today.

The fight against terrorism and the application of the state of emergency remain a big debate in France.

Since the attacks of 11 September 2001 in the USA, democracies have suffered the shock of unprecedented terrorist attacks. They have sought to confront these new dangers by increasing the capacity of the police and intelligence services and adapting their legislation. By the end of 2001, the “Patriot Act” was passed in the United States, and the “Antiterrorism, crime and security act” was passed in Britain. In France, criminal legislation and the provisions on administrative police have been deeply modified. During the night of the attacks of 13 November 2015 in Paris, a state of emergency was decreed by the President of the French Republic and subsequently extended by Parliament on several occasions, until today and probably until November 2017.

This regime raises a lot of questions. Some of them deal with its effectiveness in the fight against terrorism. The others concern the risks to the freedoms which can result from a prolonged application. There is no doubt that a balance must be found between the need for action against terrorism and respect for the fundamental guarantees of the rule of law.

The state of emergency is one of the elements of the fight against terrorism. It obeys a legal regime which ensures its integration into the rule of law.

### **Which are the reasons of this situation in France: a context of several big terrorist attacks**

In 2015 and 2016, 316 innocent people had been assassinated in France by Jihadists. You can't understand why the state of Emergency had been declared in France and is still implemented if you are forgetting that.

#### **On 7 January 2015**

From 7 January 2015 to 9 January 2015, several terrorist attacks occurred across the Île-de-France region, particularly in Paris.

Two gunmen attacked the headquarters of a famous satirical newspaper *Charlie Hebdo*, killing 12 people and wounding 12 others attending a meeting, mainly journalists, before escaping and killing a policeman in the street nearby.

Another gunman shot a police officer on 8 January. Then he killed four more victims and took hostages on January 9 at a Jewish supermarket near the Porte de Vincennes in Paris.

French armed forces and police conducted simultaneous raids in Dammartin and Porte de Vincennes, killing those three attackers.

Al-Qaeda in the Arabian Peninsula claimed responsibility and said that it was coordinated attacks.

Those events created a very big choc in the French population.

### **On 13 November 2015**

A series of coordinated terrorist attacks, during 5 hours, occurred on Friday 13 November 2015 in Paris and the city's northern suburb, Saint-Denis. At the beginning at 21:16 CET, three suicide bombers struck outside the Stade de France in Saint-Denis, during a football match. This was followed by several mass shootings, and a suicide bombing, at 8 cafés and restaurants. Gunmen carried out another mass shooting and took hostages during a concert in the Bataclan theatre. The attackers were shot or blew themselves up when police raided the theatre.

The attackers killed 130 people, including 89 at the Bataclan theatre. Another 368 people were injured, almost 100 seriously. Seven of the attackers also died. The attacks were the deadliest on France since World War II, and the deadliest in the European Union since the Madrid train bombings in 2004.

The Islamic State of Iraq and the Levant (ISIL) claimed responsibility for the attacks. The President of the French Republic, François Hollande, said the attacks were an act of war by ISIL. The attacks were planned in Syria and organised by a terrorist cell based in Belgium. Most of the Paris attackers had French or Belgian citizenship, two were Iraqis, and all had fought in Syria. Some of them had entered Europe among the flow of migrants and refugees.

In response to the attacks, a state of emergency was declared across the country.

On 18 November, the main leader of these attacks, was killed in a police raid in Saint-Denis, along with two other people.

### **On 14 July 2016 in Nice**

On the evening of 14 July 2016, a 19 tonne cargo truck was deliberately driven into crowds celebrating Bastille Day on the Promenade des Anglais in Nice, France, resulting in the deaths of 86 people and injuring 434. The driver was a Tunisian resident of France. The attack ended following an exchange of gunfire, during which he was shot and killed by police.

### **Several other horrible terrorist attacks, with less victims, happened during the same period**

The double murder of two married police officers at their home in front of their young son, 3 years old, on 13 June 2016 in the Paris west suburbs (Magnanville).

The murder of a priest during a service in the church of Saint-Étienne-du-Rouvray near Rouen, July 26, 2016.

The murder of a policeman on the Avenue des Champs-Élysées in Paris on 20 April 2017.

And also several other attacks which have failed or which have ended with only the death of the terrorists killed by the police.

### **SUMMARY**

## **1. The state of emergency is only one element among others in the fight against terrorism**

- 1.1. Reinforcement of criminal law
- 1.2. The Law of 24 July 2015 on Intelligence
- 1.3. The strengthening of administrative police measures

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The concept of State of emergency

The States of emergency in France

### **2.1. Legal framework in the French Constitution**

- 2.1.1. Article 36 of the Constitution – *État de siège*
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### **2.2. The state of emergency in France (French: *état d'urgence*)**

The definition of a state of emergency

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#### **2.2.2. An historical background**

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There is a possibility of derogations to the ECHR in time of emergency

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**Conclusion**

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**1. The state of emergency is only one element among others in the fight against terrorism**

Temporary by nature, the state of emergency combines with other permanent ways. Several laws have been adopted to strengthen criminal legislation, to regulate the activity of the intelligence services and to increase the means of preventive (administrative) police.

Three main reforms:

**1.1. Reinforcement of criminal law**

Criminal law and criminal procedure have been adapted to reinforce the repression of terrorism (laws of 13 November 2014 reinforcing provisions on the fight against terrorism and of 3 June 2016 strengthening the fight against organized crime, terrorism and their financing). A national prosecutor's office and anti-terrorism investigating courts were set up in Paris. Specific offenses have been created, such as individual terrorist acts. The means of investigation, in particular the prosecution service, have been strengthened. The system of custody and pre-trial detention is governed by a special regime for terrorism. The penalties and conditions for their execution are aggravated.

**1.2. The Law of 24 July 2015 on Intelligence services**

This law organizes for the first time the activity of the intelligence services in France. It establishes a new independent authority to ensure the implementation of its provisions. Finally, it entrusts the Council of State with the task of exercising judicial control under specific conditions.

This law specifies new means to which services can rely: access to connection data, geolocation, security interceptions, listening to places and vehicles, and capturing images and computer data.

A National Commission for the Control of Intelligence Techniques shall ensure the regular use of these various methods and may formulate any observations or recommendations which it considers useful. It comprises nine members: two deputies, two senators, two members of the Council of State, two magistrates of the Court of Cassation and a qualified personality. Its

president is appointed by the President of the Republic from among the members of the Council of State or the Court of Cassation.

The law confers on the Council of State the disputes about intelligence. It can be seized directly by any person concerned wishing to verify that no intelligence technique is irregularly implemented. The National Intelligence Technology Commission, or its chairman or three members of the Commission, may also refer the same matters to the Commission.

An original procedure, which ensures the full information of the judge while preserving the secrecy of National Defense, is provided for. The Council of State shall act in a specialized chamber. All documents are communicated to this formation, which keep secret the documents covered by the defense secret. The president of the formation of judgment may order the *in camera*, if the secret of the national defense imposes it. This asymmetrical contradictory procedure is extended by law to the files concerning the security of the State.

### **1.3. The strengthening of administrative police measures**

The law of 13 November 2014 establishes a prohibition on leaving the country, which can be applied to any French citizen when there are serious reasons to believe that he (or she) is planning to travel abroad for the purpose of participation in terrorist activities or in a theater of terrorist group operations (for example in Syria and Iraq).

It also creates a system of administrative prohibition of entrance on the French territory, which concerns any foreigner who does not ordinarily reside in France, whose presence on the national territory constitutes a serious threat to public order or public security.

The Law of 3 June 2016 permits detention for identity verification during four hours of a person suspected of involvement in activities of a terrorist nature.

This law organizes also an administrative control of persons returning to France after a trip of which there are serious reasons to believe that it was intended to join a theater of operations of terrorist groups. In fact this administrative measure is not really useful, because now those people are immediately arrested by the police according to criminal law and under the control of criminal judges.

## **2. The state of emergency regime**

### **The concept of State of emergency**

A government or another public authority (a municipality, a provincial state...) may declare that their area is in a state of emergency. This means that the government can suspend and/or change some functions of the executive, the legislative and/or the judiciary during this period of time. It alerts citizens to change their normal behavior and orders government agencies to implement emergency plans. A government can declare a state of emergency during a time of natural or human-made disaster, during a period of civil unrest, or following a declaration of war or situation of international/internal armed conflict.

### **The States of emergency in France**

There is 3 kind of "state of emergency" in France : two of those provisions are written in the Constitution of 1958, and the third one came from an ordinary law:

-Article 16 of the Constitution of 1958 provides, in time of crisis, "extraordinary powers" to the President of the Republic.

-Article 36 of the constitution regulates the "state of siege" (*état de siège*).

-An ordinary law, the Act of 3 April 1955 allows the the President of the Republic to declare a "state of emergency" in the Council of Ministers.

There are distinctions between article 16, article 36 and the 1955 Act, which concerns mainly the distribution of powers. Under the article 16 or the article 38 of the Constitution, the regular procedures of the Republic are suspended, not according to the 1955 Act.

## **2.1. Legal framework in the French Constitution**

The current French Constitution, adopted in October 1958, was drafted from the difficulties experienced by the executive power in mai-june 1940 during the Battle of France and later during the Algerian war (1954-1962).

### **2.1.1. Article 36 of the Constitution – *État de siège***

The “state of siege” (in French), can be decreed by the President in the Council of Ministers for a period of twelve days, which can only be extended with the approval of the Parliament. A state of siege may be declared in case of an "imminent peril resulting from a foreign war [*guerre étrangère*, or simply "war"] or an armed insurrection (*une insurrection à main armée*).

**Military authorities may take police powers if they judge it necessary.** Fundamental liberties may be restricted, such as the right of association, legalization of searches in private places, day and night, the power to expel people who have been condemned for common law matters or people who do not have the right of residence in the territory, etc.

It was never implemented.

### **2.1.2. Article 16 of the Constitution – *Pouvoirs exceptionnels***

Article 16 of the Constitution gives the President of the Republic "extraordinary powers" in exceptional cases, leading to an effective "state of exception":

When the institutions of the Republic, the independence of the nation, the integrity of its territory, or the fulfillment of its international commitments are under grave and immediate threat and when the proper functioning of the constitutional governmental authorities is interrupted, the President of the Republic shall take the measures (nb: it can be also legislative measures) demanded by these circumstances after official consultation with the Prime Minister, the presidents of the Assemblies, and the Constitutional Council.

He shall inform the nation of these measures by a message.

These measures must be prompted by a will to ensure within the shortest possible time that the constitutional governmental authorities have the means of fulfilling their duties. The Constitutional Council shall be consulted with regard to such measures.

Parliament shall meet ipso jure.

The National Assembly may not be dissolved during the exercise of emergency powers.

After thirty days of exercise of the exceptional powers, the Constitutional Council can be referred to by the President of the National Assembly, the President of the Senate, sixty *députés* or *sénateurs* (members of each chamber), to determine if the conditions provided in the first paragraph are still met. The Council shall rule in the shortest time possible by a public ruling. The Council rules *ipso jure* and rules in the same conditions after sixty days of exercise of the exceptional powers and at any moment beyond this period.

The conditions are both that the state is confronted to exceptional circumstances and that the regular institutions are disrupted and cannot effectively govern. This amendment to the Constitution of the Fifth Republic has been qualified as "liberticide" by critics.

It was implemented one time, during several month, after a two days putch made by 4 generals of the French army, which were against the independence of Algeria, on 23 April 1961 in Alger.

In the judgment *Rubin de Servens* of 2 March 1962, the *Conseil d'État* judged that it could not itself invoke Article 16, as that constituted an "act of government". Furthermore, the State Council considered that it could only pronounce on rulings which were not legislative acts carried out during this period. Thus, a legislative measure (although the role of Parliament is not specified, just that it is not to be dissolved) which breaches fundamental liberties cannot be appealed against before the Council of State.

## **2.2. The state of emergency in France (French: *état d'urgence*)**

The state of emergency in France is framed by an ordinary Law n°55-385 of 3 April 1955 (pre-dating the Constitution of the Fifth Republic). It was created in the context of the Algerian war, to allow the authorities to manage crisis without having to declare the "*état de siège*", which allows the military to take over a large part of the civilian authorities and which was conceived for wartime. This regime grants special powers to the executive branch in case of exceptional circumstances.

### **The definition of a state of emergency**

The state of emergency allows the police powers of the Minister of the Interior and Prefects to be extended, for a specified period, within a framework determined by law and controlled by the administrative judges. The law sets out the general framework within which these expanded powers are exercised.

#### **2.2.1. The failure of the constitutional reform of November 2015**

A draft constitutional law for the protection of the Nation was announced by the President of the Republic at the congress held in Versailles on 16 November 2015, two days after the Paris attacks, with two articles intended to constitutionalize the state of emergency, this regime until now is only fixed by an ordinary law, and to introduce a possibility of cancellation of the french nationality for bi-nationals condemned for very serious crimes.

But this proposal for constitutional reform didn't succeed because of a political blockage, notably on the deprivation of nationality, which is not directly inked to the state of emergency.



### **2.2.2. Historical background**

Since 1955, a state of emergency has been decreed six times:

-From 1955 to 1962 in Algeria, during the war between France and the independantist movement

-In 1985, 1986 and 1987, in 3 overseas french territories : New Caledonia, Wallis-et-Futuna and Polynesia, due to independentist troubles;

-It was also applied during the severe urban violence that occurred in autumn 2005 in several north-east suburbs of Paris, for 2 months, from 8 November 2005 to 3 January 2006.

### **Since 13 November 2013**

After the attacks in January 2015, the Prime Minister's Office drafted a report on the decisions to be taken in the event of a major attack, where a state of emergency is mentioned.

On the evening of November 13, 2015, as I told you, a series of suicide attacks were perpetrated in Paris and Saint-Denis by three separate commandos. While the hostage-taking of the Bataclan is still under way, the President of the Republic Francois Hollande announces on television the application of the state of emergency. A Council of Ministers is immediately organized during the night and a state of emergency is decreed throughout the metropolitan territory and Corsica. On 18 November 2015, the state of emergency was extended to the overseas departments (Guadeloupe, Martinique, Guyana, La Réunion and Mayotte) and two overseas communities (Saint-Barthélemy and Saint-Martin).

### **2.2.3. Successive declarations and extensions of the state of emergency**

This state of emergency was extended several times, in the context of the Euro football, then the Tour de France, then the attack of 14 July 2016 in Nice and then the 2017 presidential election: by 5 laws : the law of 20 November 2015, the law of 19 February 2016, the law of 20 May 2016, the law of 21 July 2016 and the law of 19 December 2016, until 15 July 2017. The last one will be debated in the Parliament in July 2017.

The last extension of 19 December 2016 extending until 15 July 2017 the state of emergency in force since the attacks of 13 November 2015, aimed at "encompassing all electoral operations" of the presidential elections (23 April and 7 May) and the legislative elections (11 and 18 June).

The Council of State, by its last opinion on this subject of 12 December 2016, considered that the extension of the state of emergency until 15 July 2017 was justified by the "particular institutional context", but stressed, as it had already made in its previous opinions of 2 February, 28 April and 18 July 2016, that "renewals of the state of emergency can not succeed indefinitely and that a state of emergency must remain temporary".

On 24 May 2017, following a defense council meeting, just after the Manchester terrorist attack, the Office of the President of the Republic announced that the government would submit to Parliament in July 2017 a draft law extending the state of emergency until 1 November 2017.

### **2.2.4. The current content of the 1955 Act**

The law of 20 November 2015 extending the state of emergency has largely rewritten the general framework laid down by the law of 3 April 1955 to adapt it to the current context, the new constitutional regime of 1958 and the new guarantees of fundamental rights.

#### **1°) The procedure for triggering and prolonging the state of emergency**

Unlike the state of siege, a state of emergency is not mentioned in the Constitution. It may be declared by a decree of the President of the Republic deliberated in the Council of Ministers "in the event of imminent danger resulting from serious breaches of public order, or in the event of events which, by their nature are very serious".

Its extension beyond twelve days may be authorized only by law, passed regularly through the Parliament. It may be terminated at any time by a decree of the Council of Ministers before the expiry of the period fixed by law.

#### **2°) The powers conferred to the administrative police authorities during a state of emergency**

Several categories of measures can be taken by the executive power under the state of emergency:

- Residential assignments (house arrest);
- Searches, including computer and telephone equipment in private houses;
- Setting of special security zones with restrictions on the movement of persons and vehicles and / or identity checks and searches;
- Bans on meetings or demonstrations;
- Closures of theaters, drinking places and other places of meeting;
- Dissolutions of association including religious;
- Closures of websites;
- Confiscation of authorized weapons.

The 2015 law, on the other hand, removed the restrictive measures of freedom of the press.

Those measures have 3 main characteristics:

- they can be decided only when the state of emergency is implemented;
- it preventive measures, against suspects ;
- decided by the administration or the police under the control of administrative judges, by without authorization of ordinary judges;

### **3°) The control of measures taken under the state of emergency**

Controls are exercised over these different powers. There are several categories of controls of different kinds. This topic is very important. Those controls are working in France !

#### **a) By the Council of Europe and the ECHR**

At the international level, control is exercised by the Council of Europe. France declared in November 2015 that it made use of the possibilities offered by Article 15 of the European Convention on Human Rights, which allows a member State to derogate from the normal obligations in the event of war or other public emergency threatening the life of the nation. The measures taken must be proportionate to the exigencies of the situation and the institutions of the Council of Europe, including the European Court of Human Rights, ensure that this proportionality requirement is respected.

#### **There is a possibility of derogations to the ECHR in time of emergency**

Article 15 (derogation in time of emergency) of the European Convention on Human Rights<sup>1</sup> affords to the governments of the States parties, in exceptional circumstances, the possibility of derogating, in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the Convention.

The use of that provision is governed by the following procedural and substantive conditions:

- the right to derogate can be invoked only in time of war or other public emergency threatening the life of the nation;
- a State may take measures derogating from its obligations under the Convention only to the extent strictly required by the exigencies of the situation;
- any derogations may not be inconsistent with the State's other obligations under international law;
- certain Convention rights do not allow of any derogation: Article 15 § 2 thus prohibits any derogation in respect of the right to life, except in the context of lawful acts of war, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, and the rule of "no punishment without law"; similarly, there can be no derogation from Article 1 of Protocol No. 6 (abolishing the death penalty in peacetime) to the Convention, Article 1 of Protocol No. 13 (abolishing the death penalty in all circumstances) to the Convention and Article 4 (the right not to be tried or punished twice) of Protocol No. 7 to the Convention;
- lastly, on a procedural level, the State availing itself of this right of derogation must keep the Secretary General of the Council of Europe fully informed.

**In the past, eight States parties to the European Convention on Human Rights – Albania, Armenia, France, Georgia, Greece, Ireland, Turkey and the United Kingdom – have relied on their right of derogation. At the moment, three countries currently officially derogate from the ECHR: France, Ukraine and Turkey.**

On 5 June 2015 Ukraine notified the Secretary General of the Council of Europe that given the emergency situation in the country, the authorities of Ukraine had decided to use Article 15 of the European Convention on Human Rights to derogate from certain rights enshrined in the Convention.

On 24 November 2015 the French authorities informed the Secretary General of the Council of Europe about a number of state of emergency measures taken following the large scale terrorist attacks in Paris and which may involve a derogation from certain rights guaranteed by the European Convention on Human Rights, article 15.

On 21 July 2016 Turkey notified a derogation from the European Convention on Human Rights under Article 15 of the Convention.

Cf The press release published on the Secretary General's website on 25 November 2015. See also the French Government's declarations related to the Convention on the Protection of Human Rights and Fundamental Freedoms registered by the Secretariat General on 26 February 2016, 30 May 2016, 25 July 2016 and 22 December 2016.

I don't know precisely how is the situation in Ukraine and Turkey? I can just say that neither the Council of Europe (General Secretary or committee of minister), nor the ECHR said the the state of emergency in France is not in compatibility with the provisions of the European Convention. But those European institutions are discussing with Ukraine and Turkey...

#### **b) Parliamentary controls**

The law of 20 November 2015 provided that the National Assembly and the Senate shall be informed without delay of the measures taken by the Government during the state of emergency. The committees of the Laws of the National Assembly and of the Senate have established permanent control of the state of emergency. Those commissions have the possibility to request documents from the Ministry of the Interior, which are made public on their website. And they are using this power.

According to the parliamentary commission of inquiry into the means used to fight terrorism, which issued its report on 5 July 2016, the measures taken under the regime of the state of emergency, had a destabilizing effect on criminal and terrorists networks and led to an increase of the quality of informations of the public authorities. However, the report stresses that "in the area of counter-terrorism, the judicial process remains predominant.

#### **c) By the Constitutional Council**

Several law provisions related to the state of emergency had been cancelled.

The law of 20 November 2015 and the subsequent legislative extensions have not been referred to the Constitutional Council. But several priority issues of constitutionality transmitted by the administrative judge allowed the Constitutional Council to ensure that the legislative provisions comply with the constitutional requirements.

By a decision of 22 December 2015, the Constitutional Council found the provisions of the law relating to house arrest to be in conformity with the Constitution. In particular, it noted that the maximum hours to stay at home is set at twelve hours a day, so this obligation can't be regarded as deprivation of liberty. This restrictive measure of freedom can therefore be

taken by the police, under the supervision of the administrative judge, who is responsible for ensuring that it is "appropriate, necessary and proportionate".

Rendered on 19 February 2016, two other QPC decisions validated the police provisions for meetings and public places, and administrative searches. This second decision censures the law only in one respect. The seizure and exploitation of the computer data collected during the search is not accompanied by appropriate safeguards with regard to the requirements of respect for private life.

The new law of 21 July 2016 about the exploitation of the computer data seized during a search, created an authorization issued at the request of the Prefect, within 48 hours, by the administrative judges.

The Constitutional Council has censored the new system of house arrest: the minister of the interior wished to extend it beyond one year. But this provision of the law of December 19, 2016 was censored by the Constitutional Council.

Two weeks ago the Constitutionnal Court censured the restrictions for freedom of public meetings and demonstrations : this provision has to be strictly connected with the fight against terrorism only.

#### **d) The control by the administrative courts**

All measures taken during the state of emergency may be annulled by the administrative courts, and some are !

The administrative jurisdiction has thus seen the scope of its control expanded in proportion to the increased powers that the state of emergency attributes to the police authorities. Provided that they are not deprived of their liberty, the various measures taken under the state of emergency are administrative police measures, which are under the control of administrative courts. This criterion of division of powers between the criminal judge and the administrative judge is traditional. The judicial judge intervenes if criminal proceedings are taken.

Numerous claims have been brought to the administrative courts to challenge the measures related to the implementation of the state of emergency.

The jurisprudence has been built on the basis of these various applications.

I am not going to analyse all the measures taken under the state of emergency, only the most symbolic and debated.

#### **About the decision of the President of the Republic to resort to the State of Emergency**

The decision of the President of the Republic to declare a state of emergency and not to put an end to it before the deadline set by Parliament could be appealed to the Council of State. In 2005 this High Court recalled that, in a State governed by the rule of law, a regime of exceptional powers had effects which "were inherently limited in time and space". However, it recognized the President of the Republic a broad discretion to end or not the state of emergency.

In January 2016, the League of Human Rights (LDH) applied to the Conseil d'Etat for interim measures to suspend the state of emergency, or to order the President of the Republic to end it. This motion was dismissed by ordinance of January 27, 2016.

"The imminent danger which led, following attacks of an exceptional gravity, to declare a state of emergency has not disappeared". The Council of State considers that the President of the Republic's decision not to put an end to the state of emergency does not constitute a serious and manifestly unlawful interference with a fundamental freedom".

As regards the application for suspension, the Council of State recalled that it was the law which had decided to extend the state of emergency. The state of emergency no longer results from the decree of 14 November 2015 but from the law of 20 November 2015. So It can not therefore suspend it.

As regards the request for an injunction to the President of the Republic, the President of the Republic considers that the imminent danger justifying the state of emergency has not disappeared in view of the continuation of the terrorist threat and the risk of attacks. Therefore the Council of State refused to pronounce the injunctions requested.

### **About Residential Assignments (or house arrest)**

By decisions handed down on December 11, 2015, Cédric Domenjoud and others, the Conseil d'Etat set the framework within which house arrest can be taken and defined the scope of the administrative judge's control.

The administrative judge now exercises full control over these measures.

Urgency is presumed in the case of a house arrest. The judge must therefore hold a hearing to determine whether a serious and manifest illegality appears.

The special procedure of interim measures for freedom allows the administrative judge to pronounce itself within a very short period of time on the validity of measures which impose severe restrictions on individual freedom. Contradictory exchanges may take place during the oral hearing. The judge hearing the application for interim measures may order supplementary investigations and sometimes hold a second hearing.

A person may be placed under residential assignment for serious reasons to believe that his or her behavior may constitute a threat to public order and security, even if the threat is different from the peril that justified the onset of a state of emergency. Objective and precise elements are necessary. They may result from the indications appearing on a "white document" coming from intelligence services, provided that they are sufficiently circumstantial and not successfully contradicted by the adversarial debate.

Approximately one-third of the disputed claims were suspended in whole or in part following the interim relief proceedings, half of which were initiated by the administration itself, in the other half by the decision of the Court. The judge was able to use the wide range of injunctive powers available, including ordering a relaxation of the conditions for the execution of the measure, which was found to be legal in principle but excessively binding in its terms.

### **About Search in private flats or houses ("Perquisitions" in French)**

The application for interim measures can not be used, because the judge can not be seized before the end of this administrative measure.

The Council of State determined on July 6, 2016, in the case Napol and Thomas the power of administrative judges on this matter.

The search orders must be reasoned. But it is not necessary to indicate any evidence of criminal offenses.

On the merits, they must be based on serious reasons to believe that the places which are the subject of the search, are frequented by at least one person whose behavior constitutes a threat to public order and security. The administrative judge exercises full control of proportionality by ensuring that the ordered measure is adapted, necessary and proportionate, according to the informations available to the authority which decided it.

The responsibility of the State can be engaged for damages of any kind which would result directly and for certain from the unlawfulness of the search decision. A fault in the material conditions for the execution of the search is also liable to involve the responsibility of the State.

### **6<sup>th</sup> of July 2016 – Opinion (*Avis contentieux*)**

Cf Question from the Administrative court of Cergy-Pontoise (north suburbs of Paris).

#### **Key points:**

- Searches carried out under the state of emergency are only possible if there is serious cause to believe that a person who is a threat to public safety is on the premises.
- The administrative judge examines the probable cause provided for the search warrant.
- Persons affected by such a search shall be compensated if the action was illegal, or if misconduct occurred in its execution.
- Other persons may be compensated if the search results in damages, even if the State services acted without fault.

#### **Part of the clarification concerns the legality of search measures under administrative law:**

An administrative search can only be ordered if there are serious reasons to believe that the premises in question are frequented by a person whose behaviour constitutes a threat to public safety and order.

The Conseil d'État noted that the administrative judge must verify the probable cause justifying the measure, and determine the necessity of the search and the proportional appropriateness of the response, with regard to the information available to the authorities when the decision was made.

The Conseil d'État held that a search warrant must be justified by the statement of the reasons that led the administrative authority to issue the warrant. The decision must indicate the place and the starting time of execution of the search warrant. However, the sufficiency of the justification must also be assessed in light of the urgency of action required and of the particular circumstances of each case.

#### **The Conseil d'État also specified the applicable compensation regime:**

When a search is illegal, in particular when there is no credible evidence that raises the suspicion of a threat to public order, or if the measure is disproportionate with regard to the risk, this is a fault rendering the State liable for damages caused by the action.

Furthermore, even if the search is legal, wrongful acts may be committed in the execution of the warrant (forcing open a door without good reason, use of restraint or disproportionate property damage, minor children treated without concern for their particular vulnerability,

etc.). Such misconduct engages the liability of the State, which must compensate victims for the consequences.

However, if no fault or misconduct occurs, the persons affected by the search warrant are not entitled to compensation for the consequences of the search. This is not true for third parties, which shall be compensated even if no misconduct occurred, in application of the principle of equitably sharing public costs among citizens. For example, the owner of premises subject to a search warrant, who does not have any ties to the persons suspected of posing a threat to public safety other than a rental contract, shall be compensated for damage to his property, even if the search was legal and the police services were not at fault.

### **About the exploitation of computer data**

After the cancellation by the Constitutional Court, pursuant to the Act of 21 July 2016, only the administrative judge of the first instance court hearing the application for interim measures and, on appeal, the President of the Conseil d'État, may authorize an administrative authority to operate computer systems or elements seized during the search.

It is for the President of the Court of First Instance to grant or refuse to grant the authorization sought by verifying, on the basis of the evidence disclosed in the search, the regularity of the procedure and elements relate to a threat to public safety and public order, by the conduct of the person concerned.

### **How the administrative judges are controlling the facts by under the state of emergency: problematic and questions**

The administration who took the measure, minister of interior or prefect, has the burden of prove. The administration is giving to the administrative court a “white paper” (“*note blanche*” in French) which is put into the file and communicated to the claimant.

It is a sort of non confidential information made from secret documents coming from intelligence services.

The quality of these documents is not very good : no author mentioned (intelligence services), no date, sometimes not many details.

A judge could ask more details, even secret documents. But usually we are not doing that because this proceeding concerns only suspects: the administration doesn't have to prove that the measure concerns a terrorist. Is there a doubt?

And normal administrative judges are not checking how the intelligence services got the informations (there is a special proceeding about that : cf supra Law of 24 July 2015 on Intelligence services).

### **Conclusion**

The regime of the state of emergency is part of the rule of law in France. It supplements the traditional law for a temporary period. It is based on a legislative provision. Parliament and national and European courts play their full role in monitoring their implementation. Its objective is to allow the return to the peaceful exercise of life in common while respecting public order and republican values.

In their diversity, origins, beliefs and opinions all have the same place in a democratic society. Ensuring their equal fulfillment is the first duty of the public authorities. Circumstances may make the state of emergency one of the means necessary for them to assume it.



Like all the legislative measures adopted to combat terrorism, the state of emergency aims to restore freedoms.

Soon the state of emergency will end in France, probably in November 2017. The new government appointed by Emmanuel Macron, the new President of the Republic, is preparing a new law in order to introduce permanent administrative mechanism in order to fight against terrorism, coming from the state of emergency regime.

**Decision no. 2016-600 QPC of 2 December 2016 - Mr. Raïme A. - Administrative Searches Under the State of Emergency**

THE CONSTITUTIONAL COUNCIL WAS ASKED TO DECIDE UPON a priority matter of constitutionality on 16 September 2016 by the Conseil d'État (decision no. 402941 of that same date), under the conditions set out in Article 61-1 of the Constitution. This matter was put forth for Mr. Raïme A. by Ms. Amandine Dravigny, Esq., attorney admitted to the Besançon bar. It was recorded by the General Secretariat of the Constitutional Council under number 2016-600 QPC. It relates to compliance with the rights and freedoms that the Constitution guarantees in the third through the tenth sub-paragraphs of paragraph I of Article II of Law number 55-385 of 3 April 1955 relating to states of emergency, in its report from Law number 2016-987 of 21 July 2016, extending the enforcement of Law number 55-385 of 3 April 1955 relating to states of emergency and regarding reinforcement measures in the fight against terrorism.

In light of the following texts:

- the Constitution;
- Ordinance no. 58-1067 of 7 November 1958 as amended, concerning the Basic Law on the Constitutional Council;
- Law no. 55-385 of 3 April 1955 on states of emergency;
- Law no. 2016-987 of 21 July 2016 extending the application of Law no. 55-385 of 3 April 1955 on states of emergency and regarding reinforcement measures in the fight against terrorism;
- Decision no. 2016-536 QPC of the Constitutional Council of 19 February 2016;
- The Regulation of 4 February 2010 on the procedure applicable before the Constitutional Council with respect to applications for priority preliminary rulings on the issue of constitutionality;

In light of the following items:

- the observations presented on behalf of the applicant by Ms. Dravigny, Esq., registered on 24 October 2016;
- the observations presented by the Prime Minister, registered on 10 October 2016;
- the observations in response presented by SCP Spinosi et Sureau, attorneys at the Conseil d'État and the Cour de cassation, recorded on 10 and 21 October 2016 for the associations La Ligue des droits de l'Homme [the French Human Rights League], La Quadrature du Net [a French digital rights advocacy group], the French Data Network and the Internet Service Providers Association;
- the documents produced and appended to the case file;

Having heard Ms. Dravigny, Esq. for the applicant, Mr. Patrice Spinosi, Esq., attorney at the

Conseil d'État and the Cour de cassation, for the intervening parties, and Mr. Xavier Pottier, appointed by the Prime Minister, at the public hearing of 22 November 2016;

And having heard the rapporteur;

THE CONSTITUTIONAL COUNCIL CONCLUDES AS FOLLOWS:

1. Paragraph I of Article 11 of the Law of 3 April 1955 mentioned hereinabove, in its report from the Law of 21 July 2016 mentioned hereinabove, determines the rules for searches and administrative seizures within the framework of states of emergency, Its third through its tenth sub-paragraphs state:

"When a search reveals that another location meets the conditions established in the first sub-paragraph of this Article I, the administrative authority may authorise, by any means, a search thereof. This authorisation shall be legitimised as soon as possible. The Public Prosecutor shall be informed without delay.

"Access may be gained using a computer system or terminal equipment present at the locations where the search is carried out to data stored on the said system or equipment or in another computer system or terminal equipment, provided that this data is accessible from the initial system or available to the initial system.

"If the search reveals the existence of elements, specifically computer technology elements, related to threats to security and public safety brought on by the behaviour of the person in question, the data contained on any computer system or terminal equipment present on the location of this search may be seized, either the copy of it or the medium it is stored on when the copy cannot be obtained or finished during the time of the search.

"Copying data or seizing computer systems or terminal equipment shall be carried out in the presence of a police officer. The agent responsible for the search shall draw up a report of the seizure that will include the motives and an inventory of the seized equipment. A copy of this seizure report shall be supplied to the persons mentioned in the second sub-paragraph of this Article I. The seized data and media shall be held under the responsibility of the official having initiated the search. From the time of the seizure, no one may have access to it without the authorisation of a judge.

"The administrative authority, once the search is concluded, shall seek authorisation from the urgent applications judge of the competent court to examine the seized equipment. In light of the elements of the search, the judge shall decide on the regularity of the seizure and the administrative authority's request, within forty-eight hours from the seizure. Excluded from authorisation are the elements related to any threat to public security and safety brought on by the behaviour of the person in question. In the event the urgent applications judge refuses, and subject to the appeal mentioned in the tenth sub-paragraph of this Article I, the copied data shall be destroyed and the seized media shall be returned to their owner.

"During the time that is strictly required for their examination authorised by the urgent applications judge, the seized data and media shall be held under the responsibility of the official having initiated the search. The computer systems or the terminal equipment shall be returned to their owner, depending on the case, once a copy of the data contained has been made, within a maximum time frame of fifteen days from the date of their seizure or the date when the urgent applications judge, within the time frame set out, authorised the examination

of the data it contains. With the exception of those elements that are related to any threat to security and public safety brought on by the behaviour of the person in question, the copied data shall be destroyed within a maximum time frame of three months from the date of the search or the date when the urgent applications judge, within the time frame set out, authorised the examination of the data.

"In the event there is difficulty in accessing the data contained on the seized media or in accessing the copied data, when it is necessary, the aforementioned deadlines in the eighth sub-paragraph of this Article I may be extended, for the same time frame, by the competent urgent applications judge within forty-eight hours of these deadlines expiring. The urgent applications judge shall decide on the extension requested by the administrative authority within forty-eight hours. If examination of the seized data and media leads to findings of an infraction, these data and media shall be held according to the applicable regulations regarding criminal procedure.

"Pursuant to this Article, the urgent applications judge shall be from the administrative court where the search is performed. He or she shall rule under the procedures described in Volume V of the Code of Administrative Justice, subject to this Article. The decisions are subject to appeal before the urgent applications judge of the Conseil d'État within forty-eight hours from their notification. The urgent applications judge of the Conseil d'État shall decide within forty-eight hours. In the case of an appeal, the seized data and media shall remain held under the conditions mentioned in the eighth sub-paragraph of this Article 1".

2. According to the applicant, in allowing the seizure of data and computer equipment during an administrative search within the framework of states of emergency, without prior authorisation of a judge and without sufficiently limiting the conditions for accessing the seized data, these provisions disregard the right to respect for private life and the right to property. For these same reasons, the intervening parties deem that, on the one hand, these provisions infringe disproportionately on the right to respect for private life and the right to effective legal recourse, and on the other hand, that the legislature disregarded the extent of its competence in the conditions that affect these same rights.

3. As a result, the application for a priority preliminary ruling on the issue of constitutionality concerns the fourth through the tenth sub-paragraphs of Article 11 of the Law of 3 April 1955;

- On admissibility:

4. Pursuant to the provisions of the third sub-paragraph of Article 23-2 and the third sub-paragraph of Article 23-5 of the Ordinance of 7 November 1958 mentioned hereinabove, the Constitutional Council shall not decide on a priority preliminary ruling on a provision already declared constitutional on the grounds and procedures of a decision of the Constitutional Council, except due to a change in circumstances.

5. In its decision of 19 February 2016 mentioned hereinabove, the Constitutional Council specifically examined the provisions of the first sentence of the third sub-paragraph of paragraph I of Article 11 of the Law of 3 April 1955. It declared them constitutional on the grounds and procedures of this decision. Henceforth, in the absence of a change in circumstances, there cannot be a new examination of these provisions, now contained in the fourth sub-paragraph of this same paragraph I, in its report from the Law of 21 July 2016.

- On the merits:

. Regarding the right to respect for private life and the right to effective legal recourse:

6. The Constitution does not exclude the possibility for the legislature to lay out a regime for states of emergency. In this framework, it is its responsibility to ensure harmonisation between, on the one hand, safeguarding against attacks on public safety, and on the other hand, respecting the rights and freedoms granted to all those who live on French soil. Among these rights and freedoms is the right to respect for private life, specifically the sanctity of the home, protected under Article 2 of the 1789 Declaration of the Rights of Man and the Citizen.

7. According to Article 16 of the 1789 Declaration: «A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all?. It follows from this provision that there shall be no substantial infringement on the rights of individuals seeking effective recourse before a court of law.

8. Pursuant to the first sub-paragraph of paragraph I of Article 11 of the Law of 3 April 1955, upon a Decree declaring a state of emergency or the law expressly extending it, the administrative authority may, under certain conditions, order searches in any location, including a home, day or night, "when there exists serious reasons to think that this location is frequented by a person whose behaviour constitutes a threat to security and public safety". The contested provisions authorise, during such searches, the seizure of data contained on any computer system or terminal equipment found at the locations or in another computer system or terminal equipment, provided that this data is accessible from or available to the initial system. This seizure is undertaken either by copying this data, or by seizing the medium that contains it. The contested provisions determine the conditions for examining and storing this data by an administrative authority, under the control of the administrative judge.

- Regarding the seizure and examination of computer data:

9. Firstly, the measures set out in the contested provisions may only be undertaken if a state of emergency has been declared and only in locations covered by this state of emergency. This state of emergency may be declared, pursuant to Article 1 of the Law of 3 April 1955, "in the case of imminent peril resulting from a serious attack on public safety" or "in the case of events that, by their nature or gravity, present a public disaster".

10. Secondly, copying computer data may only be undertaken if the search reveals the existence of elements related to threats to security and public safety brought on by the behaviour of the person about whom this search is performed.

11. Thirdly, seizing computer data shall be carried out in the presence of a police officer. It can only be undertaken if a report is drawn up including the motives for it and a copy of it shall be supplied to the Public Prosecutor as well as the occupant of the location, to his or her representative or to two witnesses.

12. Lastly, the examination of the seized data requires prior authorisation of the urgent applications judge of the competent administration, who is asked to rule on this by the administrative authority once the search is performed. This authorisation only relates to elements that present any threat to security and public safety brought on by the behaviour of

the person about whom this search is performed. While awaiting the judge's decision, the data shall be placed under the responsibility of the official having initiated the search and no one may have access to it.

13. Additionally, the contested provisions define the motives that justify the seizure of computer data, determine the terms of its implementation and impose prior authorisation, by a judge, of the examination of the collected data, which cannot be performed upon data not linked to the threat. By laying out these different legal guarantees, regarding the seizure and examination of computer data, the legislature has ensured a harmonisation that is not necessarily out of balance between the right to respect for private life and the constitutional objective of safeguarding against attacks on public safety. Nor has it disregarded the right to effective legal recourse.

- Regarding the storage of seized computer data:

14. If the judge rejects the request to authorise the examination of computer data, the copied data shall, subject to appeal to an urgent applications judge of the Conseil d'État, be destroyed without delay. If the judge authorises its examination, the data shall be kept under the responsibility of the official having initiated the search during the time that is strictly required for its examination.

15. In any case, at the end of a three-month period from the date of the search or the date when the urgent applications judge authorised the examination of the data, the copied data, with the exception of data that is related to the threat that led to its seizure, shall be destroyed. This deadline may be extended, for the same time frame, only by the competent urgent applications judge in the case where there are difficulties examining the seized data. If examination of the seized data leads to findings of an infraction, the data shall be held according to the applicable regulations regarding criminal procedure.

16. However, if the copied data regarding a threat does not lead to findings of an infraction, the legislature has not set out a deadline, once a state of emergency has ended, upon which this data shall be destroyed. Consequently, the legislature has not, regarding the storage of this computer data, laid out proper legal guarantees to ensure balanced harmonisation between the right to respect for private life and the constitutional objective of safeguarding against attacks on public safety. Therefore, the words: "With the exception of those elements that are related to any threat to security and public safety brought on by the behaviour of the person in question," in the last sentence of the eighth sub-paragraph of paragraph I of Article 11 of the Law of 3 April 1955, should be declared unconstitutional.

. With regard to the right to property:

17. Property is included under the human rights established by Articles 2 and 17 of the 1789 Declaration. Pursuant to Article 17: "Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified"; In the absence of depriving the right to property under this Article, Article 2 of the 1789 Declaration states nevertheless that infringement of this right must be justified by general interest and proportional to the objective sought.

18. Firstly, when there is an administrative search within the framework of a state of

emergency, the seizure of computer systems or terminal equipment is indicated in the legal guarantees mentioned in paragraphs 9 to 12 and 14 of this decision.

19. Secondly, the contested provisions only authorise the seizure of such systems and terminals when a copy of the data that they contain cannot be obtained or finished during the time of the search. This impossibility must be justified by the administrative authority when it requests authorisation from a judge to examine the data found on these media. Furthermore, there must be a report drawn up with an inventory of the seized equipment.

20. Lastly, the seized systems and equipment shall be returned to their owner, depending on the case, once a copy of the data contained has been made, within a maximum time frame of fifteen days from the date of their seizure or the date when the urgent applications judge authorised the examination of the data. This deadline may be extended, for the same time frame, only by the competent urgent applications judge in the case where there are difficulties gaining access to the data stored in the seized media.

21. The copying of computer data in the same location as the search involves particular limitations, specifically related to the length of the operation and technical difficulties in accessing the data. Consequently, given the legal guarantees mentioned hereinabove, by allowing the seizure of computer equipment without prior authorisation of a judge during an administrative search within the framework of a state of emergency, the legislature has ensured a harmonisation that is not necessarily out of balance between property rights and the constitutional objective of safeguarding against attacks on public safety.

22. It follows from all of the foregoing that, apart from the words: "With the exception of those elements that are related to any threat to security and public safety brought on by the behaviour of the person in question," the fifth through the tenth sub-paragraphs of paragraph I of Article 11 of the Law of 3 April 1955, which are not tarnished by incompetence and have no disregard towards any right or liberty that the Constitution guarantees, should be declared constitutional.

- On the Effects of the Ruling of Unconstitutionality:

23. According to the second sub-paragraph of Article 62 of the Constitution: «A provision declared unconstitutional on the basis of Article 61-1 is revoked as from the publication of the decision of the Constitutional Council or at a later date stipulated in the decision. The Constitutional Council determines the conditions and the limits according to which the effects produced by the provision shall be liable to be challenged". In principle, the declaration of unconstitutionality should benefit the individual who brought up this priority matter, and the provision declared unconstitutional may not be applied in proceedings pending on the date of publication of the decision of the Constitutional Council. However, the provisions of Article 62 of the Constitution reserve for the latter the power both to set the date of repeal and to postpone its effects as well as to reconsider the effects that the provision may produce before this declaration takes effect.

24. The immediate repeal of the words: "With the exception of those elements that are related to any threat to security and public safety brought on by the behaviour of the person in question," in the last sentence of the eighth sub-paragraph of paragraph I of Article 11 of the Law of 3 April 1955, would lead to manifestly excessive consequences. In order to allow the legislature to rectify this unconstitutionality, the date of this repeal should be deferred to 1

March 2017.

THE CONSTITUTIONAL COUNCIL RULES:

Article 1- It is unnecessary to give judgement on the fourth sub-paragraph of paragraph I of article II of Law number 55-385 of 3 April 1955 relating to states of emergency, in its report from Law number 2016-987 of 21 July 2016, extending the enforcement of Law number 55-385 of 3 April 1955 relating to states of emergency and regarding reinforcement measures in the fight against terrorism.

Article 2.- The words: "With the exception of those elements that are related to any threat to security and public safety brought on by the behaviour of the person in question," in the last sentence of the eighth sub-paragraph of paragraph I of Article 11 of the Law of 3 April 1955, relating to states of emergency, in its report from Law number 2016-987 of 21 July 2016, extending the enforcement of Law number 55-385 of 3 April 1955 relating to states of emergency and regarding reinforcement measures in the fight against terrorism are unconstitutional.

Article 3.- The declaration of unconstitutionality of Article 2 shall take effect under the conditions set out in paragraph 24 of this decision.

Article 4.- The rest of the provisions of the fifth through the tenth sub-paragraphs of paragraph I of Article 11 of the Law no. 55-385 of 3 April 1955 relating to states of emergency, in its report from Law number 2016-987 of 21 July 2016, extending the enforcement of Law number 55-385 of 3 April 1955 relating to states of emergency and regarding reinforcement measures in the fight against terrorism are constitutional.

Article 5.- This decision shall be published in the Journal officiel of the French Republic and notified in the conditions provided for in Section 23-11 of the Ordinance of 7 November 1958 referred to hereinabove.