The Legal Scheme of Exceptional Circumstances: Exception Tempered by a Respect for Freedoms

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> *"With the acts of war on November 13, the enemy has taken things to a new level. Democracy is capable of responding. Article 2 of the Declaration of the Rights of Man and of the Citizen affirms that safety and resistance against oppression are fundamental rights. So we must exercise them.*
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> *In accordance with these principles, we will provide the means to once again guarantee the safety of our fellow citizens."* (Francois Hollande, speech to Congress, November 16, 2015)
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> *"In organized societies, above the most respectable individual rights and the most serious collective rights, there is the general interest, the superior right for a nation to secure its existence and defend its independence and safety"* (Helbronner, conclusion under CE, National Railway Union of France and its Colonies, July 18, 1913).

The exceptional situation spoken of by Carl Schmitt ("Ernstfall" or state of crisis, V. E. Tuscherer, Le décisionnisme de Carl Schmitt, théorie et rhétorique de la guerre, Mots, 73-2003, p. 25) is at the limits of common law's legality. Legality does not have the same requirements following periods in which the state and the government are threatened or in danger. At such times, a legality of crisis is substituted for ordinary peacetime legality. The Roman Republic, for example, was subjected to the institution of a dictator, a magistrate appointed for 6 months by a consul, in order to re-establish the Republican order that was in danger, a position which had imperium (absolute power). Much could also be said of the dictatorship of the Convention during the French revolutionary period.

There are therefore schemes of exceptional jurisdiction: case law schemes (§1) and textual schemes (§2).

§1: The Case Law Scheme: The Theory of Exceptional Circumstances, Expression of the Judge's Pragmatism

From the beginning of the twentieth century, the Council of State has accepted an easing of the principle of legality. The recognized notion of exceptional circumstances (A) leads to a legal derogation scheme (B).

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(A) The Notion of Exceptional Circumstances

War logically constitutes the first hypothesis. The two foundational judgments go back to the First World War: CE, June 28, 1918, Heyriès (dismissal of a public servant without prior communication of the file), and CE, February 28, 1919, Dames Dol and Laurent (infringement of the freedom of movement of "courtesans" at the port of Toulon). The judge, however, limited these circumstances to only periods of hostility: May–June 1940 and June–September 1944 (TC, March 27, 1952, Dame de la Murette), the war in Indochina (1947–1954, CE, January 31, 1958, *Chambre syndicale du commerce d'importation* in Indochina, CE, Ass. December 10, 1954, Andréani), the Madagascar conflict (1947), the Algerian war (1954–1962).

But other periods of tension caused by various events also represented exceptional circumstances:

-general railway strike in 1938 (CE, April 18, 1947, Jarrigion);
-acts by the Nazi occupier from June 1940 to June 1944 (CE, Ass., December 13, 1957, Barrot and others);
-the events of May–June 1968, qualified as "special circumstances," but with similar consequences (CE, Ass., July 12, 1969, Saint-Etienne Chamber of Commerce);
-natural catastrophe (CE, May 18, 1983, Félix Rhodes: risks of eruption of the Soufrière volcano in Guadeloupe);
-the tension in New Caledonia in 1985 (CE, November 3, 1989, Galliot).

All cases noted were abnormal situations that prevented the administration from acting within the strict framework of regular legality.

(B) A Legal Derogation Scheme

The judge ensures that the conditions for implementation are present, and that this implementation remains within the limits of the exceptional legality he/she has defined.

It is first necessary that the situation actually be exceptional, then, that a major interest is sufficiently threatened such that it must be protected at all cost, and finally, that the use of ordinary procedures of law are insufficient.

Within a situation qualified as exceptional circumstances, the judge verifies that the powers used for the intended purpose are suitable, which causes him/her to void certain actions while approving others (during the war in Indochina, legal expulsion of some individuals: CE, December 10, 1954, Andréani, but irregularity in maintaining a serviceman once his enlistment had ended: CE, October 23, 1957, Camy).

This situation brings about derogations first for the rules of jurisdiction:

-issuing a decree instead of a law (CE, April 16, 1948, Laugier);
-delegation of powers in violation of the procedure (CE, June 26, 1948, Viguier);
-individuals substituting themselves proprio motu for the administration and acting in its place (theory of the de facto public servant: CE, January 7, 1944, Lecoq: levying taxes; CE, March 5, 1948, Marion: requisition of food stocks).

Then for essential procedural requirements under normal circumstances:

-requisitioning wheat without the ad hoc form in 1940 (CE, November 9, 1945, Agricultural cooperative company "L'Union agricole");
-replacement of the mayor without complying with the Code of Municipalities (CE, May 16, 1941, Courrent);
-non-communication of the file (CE, June 28, 1918, Heyriès);
As well as substantive rules:
-infringement of the freedom of movement (CE, February 28, 1919, Dames Dol and Laurent);
-infringement of individual freedom (CE, March 27, 1952, Dame de la Murette);
-ban on the export of arms (CE, January 14, 1959, French armament company);
Obviously these derogations ceased as soon as the exceptional circumstances ended (CE, May 19, 1944, Idessesse).

At the same time, textual schemes exist, based on constitutional and legislative provisions, the emergency powers of which are less controlled by a judge.

§2 Textual Schemes

(A) Article 16 of the Constitution of October 4, 1958, or the expression of the sovereignty in the state

This is where the clearest illustration of Roman-style "dictatorship" for safeguarding the public comes into play. We know that General de Gaulle personally sought for the introduction of this provision into the Constitution, so that the head of the government would have a tool allowing him to deal with a situation like that of June 1940, which had affected him, when President Lebrun resigned, since he lacked any legal instrument when faced with the political crisis and the war.

Article 16 of the Constitution of October 4, 1958 includes a provision for "*emergency powers*" granted to the President of the Republic, in his quality

as "*guarantor of national independence, territorial integrity and due respect of Treaties*," whose responsibility is to "*ensure due respect of the Constitution" and guarantee "the proper functioning of the public authorities*" (article 5).

It can be put into effect 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 serious and immediate threat and when "*the proper functioning of the constitutional public authorities is interrupted.*"

After consultation with the Prime Minister, the Presidents of the Houses of Parliament, and the Constitutional Council, the President of the Republic takes measures "required by these circumstances," which must be designed "to provide the constitutional public authorities as swiftly as possible, with the means to carry out their duties." He is required to inform the Nation of the implementation of article 16, during which the Parliament may sit as of right and the National Assembly cannot be dissolved.

As part of the extension of proposals developed by the committee concerning the modernization and rebalancing of institutions, directed by Édouard Balladur (*Rapport du comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la Ve République au Président de la République*, "Une Ve République plus démocratique," *La Documentation française* (October 2007)), in 2008, the constituent supplemented article 16 with a subparagraph in order to improve the conditions for monitoring the measures taken by the head of state. The Constitution now specifies that after 30 days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the President of the National Assembly, the President of the Senate, 60 Members of the National Assembly or 60 Senators, so as to decide if the conditions implemented by article 16 "*still apply.*" It must then make its decision known by public announcement as swiftly as possible. It then, as of right, carries out such an examination and makes its decision in the same manner 60 days after the exercise of emergency powers or at any moment thereafter.

Article 16 has been implemented only once, following the "putsch by the generals" in Algeria, by decision of the head of state on April 23, 1961. It remained in force until September 29, 1961. During this 5-month period, 16 decisions were made, covering areas as diverse as the status of servicemen, civil servants or judges, police custody, criminal procedures, the creation of military tribunals, and the banning of certain texts, several of which were related to the area of law defined in article 34 of the Constitution.

The decision to implement article 16 is qualified as an act of Government by the Council of State (March 2, 1962, Rubin de Servens), and therefore not susceptible to judicial remedy; however, the measures taken by the President of the Republic related to the regulatory domain can be challenged before the administrative courts. This means, a contrario, that legislative measures benefit from a degree of judicial immunity (Guy Carassonne).

It is interesting to note that these measures taken under the authority of article 16 remain in effect even though this article is no longer used (CE, Ass., October 23, 1964, d'Oriano). The role of administrative and constitutional judges remains modest, which favors the expression of state power then held entirely by the President of the Republic.

(B) The State of Siege: An Appeal to Military Authorities

The state of siege goes back to the Ancien Regime. Its name comes from the status of strongholds under siege, where the military governor held all the authority. More recently, its legal bases were established by two laws from August 9, 1849 and April 3, 1878 (*The law of April 3, 1878 took up the law of August 9, 1849 while also specifying, in its article 6, the maintaining, aside from articles 4 and 5 of the law of 1849, of* "the dispositions of its other articles not contrary" *to it*), which remained in effect until the adoption of the legislative part of the Defense Code (*Order No. 2004-1374 of December 20, 2004 related to the legislative part of the Defense Code, ratified by law No. 2005-1550 of December 12, 2005 modifying various dispositions related to defense*).

These laws on the state of siege were themselves directly in line with older provisions, such as the law of 10 Fructidor, year V on implementing the state of siege or war for the communes, or article 92 of the Constitution of 22 Frimaire, year VIII (December 13, 1799), which states: *"In case of rebellion by armed forces or of disturbances that threaten the security of the state, the law may suspend, in the places and for the time which it determines, the authority of the constitution.— This suspension can be declared provisionally in the same cases, by an order of the government, the Legislative Body being on vacation, provided that this body is convened within the shortest possible time by an article of the same order."*

It is interesting to note that under the July monarchy, there were decisions by the Court of Cassation of June 29 and 30 and July 7 and 13, 1832 (ruling on the constitutionality of decrees implementing the royal order of June 6, 1832 that decreed a state of siege for various communes and a department) that invalidated provisions of a decree shielding a citizen seeking justice from the natural court to the benefit of the war council (Court of cass., June 29, 1832, Geoffroy, June 30, 1832, Colombat, July 7, 1832, Poiron, July 13, 1832, N.). The judge was already concerned with respecting fundamental principles . . . and this was the ordinary judge!

As under the Fourth Republic (article 7 supplemented by the revision of December 7, 1954, which states that "The state of siege is declared under the conditions provided for by law"), the state of siege contains a constitutional basis in article 36 of the Constitution of October 4, 1958.

Now regulated by articles L. 2121-1 to L. 2121-8 of the Defense Code, a state of siege is declared by a decree in consultation with the ministers, who determine

the field of application, and it can only be implemented in a case of *"imminent peril resulting from a foreign war or armed insurrection" (terminology used in the law of April 3, 1878 and repeated in article L. 2121-1).*

Its extension beyond 12 days must be authorized by Parliament. Its application involves the transfer of prerogatives from the civil authority to the military authority in terms of *maintaining order* and *police*, while the civil authority continues to exercise its other powers (art. L. 2121-2).

In this regard, the implementation of the state of siege involves military jurisdictions for a certain number of exhaustively listed infractions (L. 2121-3) and the possibility of the military authority to:

> *"-conduct household searches by day or night;*
> *-remove any person having been subject to a final conviction for a crime or offense and individuals who do not reside in the place under the state of siege;*
> *-order that weapons and ammunition be surrendered, and proceed to search and remove them;*
> *-prohibit publications and meetings it judges to be a threat to the public order"* (L. 2121-7).

This transfer is not however automatic: on the one hand, military jurisdictions have not been allowed since 1982 in peacetime and, on the other hand, the transfer only takes place if the military authority seeks to prosecute in the jurisdictions of ordinary courts.

This legal scheme, conceived for the most serious cases of peril, has never been applied under the Fourth and Fifth Republics; the most "recent" uses go back to the two last world wars *(during World War I with the decree of August 2, 1914, for the state of siege, and the law of August 5, 1914 related to the state of siege; during World War II with the decree-law of September 1, 1939 in respect of a declaration of a state of siege (89 departments plus the Territory of Belfort and the 3 departments of Algeria)).*

(C) The State of Emergency: The Development of Police Administrative Powers
(see Olivier Beaud and Cécile Guérin-Bargues, "L'état d'urgence de novembre 2015: une mise en perspective historique et critique," Jus Politicum 15 (2016)).

(1) The Regime Provided for by the Law of April 3, 1955

The state of emergency, which results from law No. 55-385 of April 3, 1955, is applicable *"either in a case of imminent peril resulting from serious attacks against the public order, or in the case of events having, due to their nature and seriousness, the character of public calamity."* Declared by decree made in consultation with ministers, it grants civil authorities, in the geographic region to which it applies,

exceptional police powers involving the regulation of the movement and residence of persons, the closure of places open to the public, and the requisitioning of weapons. The decree instituting the state of emergency may provide for a strengthening of police powers with regard to searches and control of information services. After 12 days, the extension of the state of emergency can only be authorized by law.

Since its promulgation, a state of emergency has been declared six times:
-in 1955, in the context of the Algerian war;
-in 1958, following the events of May 13, 1958 in Algiers;
-in 1961, after the putsch by the generals in Algiers, renewed until May 1963 (for all of metropolitan France);
-in 1984, in New Caledonia, following the first riots;
-in 2005, during the urban riots (25 departments, including Ile-de-France);
-in 2015, after the coordinated attacks in Paris (for all of metropolitan France).

The Constitutional Council ruled on the constitutionality of the law of April 3, 1955 on the state of emergency, during the examination of the law on the state of emergency in New Caledonia and dependencies (Decision No. 85-187 DC of January 25, 1985, Law on the state of emergency in New Caledonia and dependencies). This decision states:

> *"4. Considering that, while the Constitution, in article 36, is expressly intended for the state of siege, it has nonetheless not excluded the possibility that the law has provided for a state of emergency scheme in order to reconcile, as has just been stated, the requirements for freedom and safeguarding public order; that therefore, the Constitution of October 4, 1959 did not have the effect of abrogating the law of April 3, 1955 on the state of emergency, which, furthermore, was modified thereunder."*

Furthermore, the Council of State's judge hearing applications for interim relief was, on November 9, 2005, presented with two requests seeking to suspend the execution of the decrees by the President of the Republic of November 8, 2005 implementing Law No. 55-385 of April 3, 1955 and by the Prime Minister of the same day on the implementation of this same law.

On that occasion, underscoring the wide discretionary powers available to the head of state, considering the nature and seriousness of the threats or dangers the law of April 3, 1955 is meant to deal with, and regarding the decision to use the state of emergency scheme and the definition of the territorial scope of application, the Council of State's judge hearing applications for interim relief felt that—given that urban violence since October 27, 2005 was worsening and spreading to a large part of metropolitan France, and that public safety was under attack—the argument that these decrees would grant the state of emergency scheme a scope of application that extended uselessly to all of metropolitan France did not raise any serious doubts concerning the legality of these acts.

The administrative judge also ruled that the text was compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms (*Council of State, Ass., March 24, 2006*, Rolin and Boisvert).

(2) Changes Made by the Law of November 20, 2015: An Extension of Powers and the Pursuit of Guarantees

The declaration of a state of emergency in November 2015 gave police authorities supplementary means of action to fight against terrorist threats, which were immediately used and were intended to be continued. Prefects were thus able to prevent new acts from being committed, by police searches of residences, day or night. They could declare that performance halls, drinking establishments, and meeting places of any kind were temporarily close, as well as prohibit meetings. The minister of the interior could place persons involved in terrorist groups under house arrest.

When the state of emergency was extended beyond the 12 days of the initial decree, which was essential because the threat level remained high, it seemed necessary to adapt and modernize some of the law's provisions, to ensure, on the one hand, that they continued to be effective in the fight against new threats and, on the other hand, that the measures implemented under this legal scheme could be subject to effective jurisdictional monitoring.

Thus, for example, house arrest was adjusted in order to allow escorts to the places of house arrest, a requirement to check in, the possibility of returning passports and identity documents, or the prohibition of being in contact with designated persons.

But these various changes aiming especially to make the prevention of terrorist attacks more effective had to be accompanied by the adaptation and strengthening of the safeguards provided by law.

The law thus now referred explicitly to the common law provisions in the Code of Administrative Justice that allowed for challenging measures based on it. This is the case, for example, for searches ordered by the administrative authority. The modifications proposed also aimed to eliminate certain measures provided for in the context of the period during which the law was initially adopted, but that today no longer have any serious justification, such as control of the press or the media.

More specifically, which provisions does this entail?

Concerning articles 2 and 3 of the law of 1955 requiring that the prolongation of the state of emergency beyond 12 days be authorized by a law, article 1 extends the state of emergency for a period of 3 months, which began on November 26, 2015, the day when the decree of November 14, 2015 was no longer in effect.

Article 2 extends the option available to the minister of the interior and prefects, already provided for by the decree of November 14, 2015, to order searches day or night.

Article 3 enables limiting the use of special measures authorized by the state of emergency to only what is strictly necessary, by allowing the Government to end these measures by decree in consultation with the ministers before the deadline is reached. In this case, it is reported to Parliament.

Article 4 adapts and strengthens the provision of house arrest provided for in article 6 of the law of 1955, in order to make it more effective and functional, by applying a scheme comparable to what is provided for in the Code for Entry and Residence of Foreign Persons representing a threat to the public order, who are placed under house arrest while awaiting deportation. It aims to limit the freedom of movement of persons to whom it is applied and to limit their ability to contact other persons considered as dangerous, in a context in which law enforcement is greatly mobilized.

First, point 1 of article 4 updates the terms in the first subparagraph that designate the place of house arrest, which must be determined by the minister of the interior. Second, it changes the measure's field of application in order to better respond to the targeted goal and reality of the threat by substituting the terms "[of any person] whose activity is considered dangerous for public safety and order," which seems too restrictive, with the terms "[of any person] concerning whom there are serious reasons to believe that his/her behavior constitutes a threat to public safety and order," which enables including persons who have attracted the attention of police or intelligence services by their behavior, acquaintances, words, plans... Finally, to the extent that the places for house arrest are, if necessary, outside the district where the person held normally resides, it provides the minister of the interior with the ability to have the affected person taken to that place by police or gendarme services in order to ensure the measure is carried out.

The sub-paragraphs that follow provide the means for the minister of the interior and law enforcement to verify that the person concerned remains within the confines of the house arrest and to limit his/her freedom of movement. Thus, the law allows the minister to order the person held to remain in the places of residence he/she designates for a certain time period, at a limit of 8 out of 24 hours. The second subparagraph provides for requiring him/her to present him/herself to police or gendarmerie services at set intervals, limited to three times per day, and establishes a requirement to hand in his/her passport or any other identity cards in exchange for a receipt. It also enables the minister of the interior to prohibit the person held from entering into direct or indirect contact with certain named individuals about whom there are serious reasons to believe that their behavior represents a threat to public safety and order.

The third subparagraph provides for the dissolution of associations or de facto groups causing serious harm to the public order, under conditions specific to the state of emergency, given especially the role of logistic support or recruiting these organizations may have.

The fourth subparagraph adapts the appeal procedure that may be exercised against measures taken in applying the law, by broadening the guarantees which have

until now been reserved for challenging house arrest, and by replacing the examination of an appeal by an advisory board with the possibility of using summary suspension and freedom summary procedures, which are more protective of freedoms because they are not advisory or led by a judge. By subjecting all the administrative measures taken on the basis of this law to the administrative judge, this provision places the entire police search procedure under the control of the administrative judge, unless an offense is discovered, which causes control of the operation to move to the judicial realm.

The fifth subparagraph specifies the conditions for administrative searches conducted as part of the law on the state of emergency. It extends the possible search to all places, such that vehicles or public or private spaces that are not residences fall under this provision. It does, however, exclude places where protected professions are conducted. It sets a framework—non-existent today—for this measure of administrative policing, by limiting its use to circumstances in which there are serious reasons to believe that the place is frequented by a person whose behavior represents a threat to public safety and order. The established procedural scheme provides especially for informing the public prosecutor without delay, as well as the writing of a report, which is sent to him without delay by the investigating officer, who is the only one authorized to do so and to proceed with seizures. Finally, it provides access to computer data accessible from the place searched, as well as copying. In addition, the search cannot be done except in the presence of the occupant of the premises or his/her representative or of two witnesses.

Furthermore, it eliminates the possibility of taking measures to control the press and the media in any way, including radio programs, film projections, and theatrical performances.

The sixth subparagraph re-evaluates the applicable criminal penalties for the violation of the law on the state of emergency. Offenses referred to in articles 5 (measures that restrict freedom of movement), 8 (policing of meetings and public places), and 9 (surrender of weapons) are punishable by 6 months' imprisonment and a 7,500 Euro fine. The offense of non-compliance with the geographic limits of house arrest is punishable by 3 years' imprisonment and a 45,000 Euro fine. For house arrest involving such prescriptions, a punishment of one year of imprisonment and a 15,000 Euro fine is applied to offenses of non-compliance in terms of remaining in the residence at night, the requirement to appear periodically at the police station or gendarmerie, the remittance of identification documents, the prohibition of entering into contact with one or several persons, and the placing under mobile electronic surveillance.

Article 5 supplements article L. 811-3 of the Code of Internal Security by a reference to the associations and groups dissolved in the application of article 6-1 of the law of April 3, 1955, created by paragraph 3 of article 4.

Article 6 provides for the application of the law of April 3, 1955, as amended by article 4, throughout the territory of the French Republic.

The major innovation that resulted from the law of November 20, 2015 was the legal scheme of the state of emergency that now provides for modalities for monitoring its implementation by Parliament: *"Art. 4-1.—The National Assembly and the Senate shall be informed without delay of the measures taken by the Government during the state of emergency. They may call for any complementary information as part of the monitoring and evaluation of these measures."*

The Legislative committee of the National Assembly gave its Chairman, still Jean-Jacques Urvoas at the time, as well as Jean-Frédéric Poisson, the permanent mission of monitoring the measures taken with regard to the state of emergency. The Senate created a state of emergency monitoring committee that included special rapporteur Michel Mercier. The two Legislative committees adopted powers attributed to inquiry commissions.

According to article 14 of the law of 1955, if the Government resigns or the National Assembly dissolves, the law extending the state of emergency becomes null and void after a period of 15 clear days. As a result of these provisions the state of emergency also terminates at the end of a parliamentary term. The election or re-election of the President of the Republic automatically results in the submission of the outgoing government's resignation. There is only one exception to this general rule for the dissolution of associations and de facto groups, which is decided by decree in application of article 6-1 and whose effects are prolonged after the state of emergency.

Furthermore, in its decision of December 22, 2015 Cédric D. (decision No. 2015-527 QPC), rendered on account of CE, sect., December 11, 2015, Cédric D., the Constitutional Council ruled that, in a case in which the law prolongs the state of emergency by a new law, "the house arrest measures taken earlier cannot be prolonged without being renewed." The result of this case law is that the house arrest orders made between November 14, 2015 and February 25, 2016, and which the minister sought to keep in effect for the second prorogation period had to be taken up again (70 persons were held under house arrest within this framework).

Similarly, in the decision of February 19, 2016 on article 8 of the law of 1955 (CC, decision No. 2016-536 QPC, League for Human Rights), the Council determined that the measures for the temporary closure and prohibition of meetings could not, in the case of a new legislative prorogation, be prolonged without being renewed.

The law also specifies that the administrative authority, notwithstanding the existence of these criminal sanctions, may automatically implement the measures it would have prescribed as part of the state of emergency.

The decisions made by the administrative authority after the state of emergency came into effect on November 2015 led to many litigations and made it possible to develop consistent case law, with three articles of the law of April 3, 1955 being a matter of constitutionality that was given priority and transferred to the Constitutional Council by the Council of State.

During the first period the state of emergency was applied (November 14, 2015–February 25, 2016), of the 350 orders of house arrest given by the minister of the interior, 303 requests were made to the administrative court. Out of a total of 174 decisions rendered (orders and judgments), only 13 orders were suspended by the judge hearing applications for interim relief and two orders were nullified by the trial judge.

In its decision of December 22, 2015 Cédric D., the Constitutional Council upheld the constitutionality of article 6 of the law of 1955, apart from its provision related to the placement under electronic surveillance, concerning which it did not rule.

The litigation of police searches seems less protective because, even though these measures are the most used by the administrative authority (3,400 police searches between November 14, 2015 and February 25, 2016), they led to a only a small number of litigations (a dozen appeals to request compensation for damage suffered during the searches), especially due to the fact that interim applications were not particularly effective.

The law of November 20 also allowed law enforcement to copy computer data from any medium for later use. Nonetheless, in its decision of February 19, 2016, the Constitutional Council, which upheld the constitutionality of the general legal scheme of police searches, declared unconstitutional the ability to copy these data because the law had not provided *"legal assurances likely to guarantee a balanced reconciliation between the goal of the constitutional value of safeguarding public order and the right to privacy."*

The issue of constitutional stabilization was raised, but fizzled out...

> *". . . we have to go beyond the emergency situation.*
> *I have thought about this issue a lot. I honestly think that we must develop our constitution to allow the government authorities to take action against terrorism that incites war, in accordance with the rule of law.*
> *Our Constitution currently has two specific schemes that are not appropriate for the situation we are in.*
> *. . . We need to have an appropriate tool to provide a framework for taking exceptional measures for a certain period without recourse to the state of siege and without compromising public freedoms"* (Francois Holland, speech to parliament, November 16, 2015).

As part of the presidential speech, a draft constitutional law for the protection of the Nation (No. 3381) was presented to the National Assembly on December 23, 2015, and included two measures, one concerning the very polemical revocation of nationality, the other involving the state of emergency.

Article 1 establishes this state of emergency in the Constitution. The goal is to frame the conditions for using this exceptional scheme, as well as strengthen the means of action available to law enforcement and the legal certainty of the measures taken during this period.

After article 36 of the Constitution, an article 36-1 was inserted, written as follows:“Art. 36-1.—The state of emergency by the Council of Ministers, in all or in part of the territory of the Republic, either in a situation of imminent peril resulting from serious attacks on the public order, or in the case of events that present, due to their nature and seriousness, the character of public calamity.

The law determines the administrative police measures that civil authorities may take to prevent this peril or deal with these events.

Throughout the duration of the state of emergency, the Parliament shall meet without requiring to be convened.

The National Assembly and the Senate shall be informed without delay of the measures taken by the Government during the state of emergency. They may require any supplementary information as part of the monitoring and evaluation of these measures. The regulations of the assemblies provide for the conditions according to which the Parliament shall monitor the implementation of the state of emergency.
The prorogation of the state of emergency beyond twelve days can only be authorized by law. The law shall determine the duration, which shall not exceed four months. This prorogation may be renewed under the same conditions."

Article 1a (new)

At the end of the second phrase of the last subparagraph of article 42 and in the third subparagraph of article 48 of the Constitution, after the word: “emergency,” the following words are inserted: “under articles 36 and 36-1.”

The National Assembly adopted the text without too much difficulty but the Senate was much more circumspect.

The Senate legislative committee expressed its doubts on the legal need for this constitutional amendment which would only be accepted in the name of national unity on the condition that it strengthened guarantees offered to citizens.

After noting that recent decisions by the Constitutional Council on the state of emergency measures demonstrated that inscribing this legal scheme into the constitution was not necessary, it nonetheless considered that inscribing the state of emergency into the Constitution could be of interest in order to set limits on administrative police powers and determine the guarantees for respecting freedoms and judicial and parliamentary control.

It thus adopted nine amendments in order to subject the administrative police measures to the principle of proportionality, specify that the state of emergency cannot override the jurisdiction of the courts, protector of individual freedoms, and allow Parliament to hold a public debate on the state of emergency at any time, including a draft law bringing it to an end.

The Senate passed a text different from the one adopted by the National Assembly, especially concerning the revocation of nationality. This political and constitutional impasse led the head of state to abandon the constitutional review

of the procedure on March 30, 2016: *"I decided to close the constitutional debate, but I will not deviate from the commitments I have made to protect the safety of the country."*

France has remained under the state of emergency scheme ever since. . .