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## **Derogations To the European Convention on Human Rights in Times of Emergency**

**A Compatibility Assessment of French Anti-Terrorist Legislations with the European Court of  
Human Rights' Requirements (2015-2017)**

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## *Abstract*

Through the successive occurrence of terrorist attacks and the COVID-19 pandemic, European democracies resorted massively to emergency powers in the past years. A state of emergency is a security-centred regime that allows governments to put the protection of human rights on hold temporarily. At the European level, certain provisions of the ECHR could impede this response. Thus, a system of derogation is provided for in Article 15, allowing states to withdraw from their obligations temporarily, in a limited and supervised manner.

In the aftermath of the Paris terrorist attacks, the French government derogated from the ECHR to implement their state of emergency. From the 20th of November 2015 to the 1st of November 2017, the state emergency was extended six times. This study will focus on the highly contested house arrest and administrative house searches during this emergency regime. Through the recollection of the ECtHR's legal framework on the conditions of derogation in times of emergency, this research aims to assess the compatibility of such measures with the object and purpose of derogations to human rights. By comparing the French anti-terrorist legislative arsenal with the criteria of the European Court, the arbitrary nature of the French regime will be emphasised. This research demonstrates that a state can be compliant with the ECHR, while at the same time being incompatible with its essence. This research's background reflects on the effectiveness of the ECtHR's supervision in times of emergency.

Key Words: Derogation, State of Emergency, ECHR, Anti-terrorism Legislation, France

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## *List of Acronym*

BRI - Brigade de Recherche et Intervention Police [Police investigation and intervention brigade]

CoAT - United Nations Committee Against Torture

CIDOB - Barcelona Centre for International Affairs

CNCDH - National Consultative Commission on Human Rights

COP21 - 21st Conference of the Parties

DGSI - Directorate General of Internal Security [Directorat Général Sécurité Intérieure]

DRPP - Intelligence Directorate of the Paris Police Prefecture [Directorat Renseignements de la Préfecture de Police de Paris]

ECHR - European Convention on Human Rights

ECtHR - European Court of Human Rights

FRA - European Union Agency on Fundamental Rights

ICCPR - International Covenant on Civil and Political Rights

QPC - Priority Question of Constitutionality [Question Prioritaire de Constitutionnalité]

## Section 1- Introduction

On the 17th of May 2022, the European Court of Human Rights (hereinafter "the ECtHR", "the Court" or "the judges of Strasbourg") held the 2022 Judicial seminar focusing on new challenges arising from the pandemic.<sup>2</sup> The first concerns stemming from this seminar revolves around emergency measures implemented by states under this regime of exceptionality. For instance, many governments across the globe instrumentalised the pandemic to amass more power and lean towards a more authoritative form of governance. For instance, the President of the Philippines Rodrigo Duterte authorised the army to shoot civilians not respecting the lockdown.<sup>3</sup> On a more European scale, the Hungarian government passed an amendment allowing President Viktor Orbán to rule by decree without parliamentary oversight.<sup>4</sup> According to the ECtHR, COVID-19's states of emergency involved unprecedented restrictions on human rights worldwide.<sup>5</sup>

As early as March 2022, Emmanuel Macron, the French President at the time and recently re-elected declared a "War on the Virus".<sup>6</sup> Echoing the "War on Terrorism", both of these unexpected and large-scale threats call for special measures. According to CIDOB - the Barcelona Centre for International Affairs - research on terrorism management offers valuable knowledge to grasp the post-pandemic challenges and future risks related to states of emergency regimes.<sup>7</sup> In this line of thought, the Venice Commission issued a report in June 2020 related to human rights, the rule of law and democracy within states of emergency.<sup>8</sup>

According to the Venice Commission, a state of emergency is defined as followed:

*"A state of emergency is a - temporary - situation in which exceptional powers are granted to the executive and exceptional rules apply in response to and with a view to overcoming an extraordinary situation posing a fundamental threat to a country."<sup>9</sup>*

From this definition, both pandemics and terrorist attacks might justify implementing a state of emergency regime.

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<sup>2</sup> European Court of Human Rights. (2022, May 17). "Human rights protection in the time of the pandemic: new challenges and new perspectives". Judicial Seminar 2022. 2.

<sup>3</sup> CIDOB. (2020, April). "COVID-19 and terrorism: when the exception locks down the rule". *CIDOB Opinion 622*.

<sup>4</sup> CIDOB, *Supra note 2*.

<sup>5</sup> ECtHR, *Supra Note 1, 2*.

<sup>6</sup> The Financial Times. (2020, March 16). "We are at war against the virus, says Macron". [online] Link: <https://www.ft.com/content/d6c96612-67c0-11ea-800d-da70eff6e4d3>.

<sup>7</sup> CIDOB, *Supra note 2*.

<sup>8</sup> Venice Commission, (2020, June 19) "Respect for democracy human rights and the rule of law during states of emergency: Reflections". *Report of the 123rd plenary session of the Venice Commission*.

<sup>9</sup> Venice Commission, *Supra note 7*, para 5.

Moreover, the Venice Commission elaborates further on this exceptional regime's spirit of implementation:

*"A necessary precondition for declaring a state of emergency should therefore be that the powers provided by normal legislation do not suffice for overcoming the emergency. The ultimate goal of any state of emergency should be for the State to overcome the emergency and return to a situation of normalcy."<sup>10</sup>*

As this definition highlights, a state of emergency is a reinforcement of security prerogatives at the expense of human rights. It aims to tackle a threat quickly and return to normal protection of human rights as soon as possible. This temporary requirement was broadly denounced in the French state of emergency context from 2015 to 2017.

On the 13th of November 2015, a wave of coordinated terrorist attacks hit the French capital, killing more than a hundred citizens. On the same night, French President François Hollande announced the implementation of the first national state of emergency since 1955. The state of emergency in 1955 was implemented related to the Algerian war. Even though France has been the victim of multiple terrorist attacks since 1955, no state of emergency was put in place to tackle them.<sup>11</sup> However, the coordinated attacks of November 2015 were unprecedented in a peaceful context on the French territory. Indeed, the multiple attacks were carried out by different groups of suicide bombers within minutes of each other in the Parisian capital. The *Stade de France*, packed for the France-Germany match, was the first target of the evening. Faced with the impossibility of entering the stadium, the three suicide bombers blew themselves up outside, causing one death and a multitude of injuries. A few minutes later, in the 10th and 11th districts, another team of suicide bombers started shooting at civilians, targeting bar and restaurant terraces. Thirty-nine people were killed. And finally, a third team infiltrated the Bataclan concert hall, shooting at random spectators and killing eighty-nine people. The police investigation and intervention brigade (hereinafter BRI)<sup>12</sup> and Raid<sup>13</sup> intervened at the end of the evening to free the hostages and take down the terrorists.<sup>14</sup>

That same evening, French President François Hollande declared a state of emergency on the entire territory. The state of emergency was declared for twelve days after which a law of extension had to

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<sup>10</sup> Venice Commission, *Supra note 7*, para 5.

<sup>11</sup> Public Sénat. (2021, September 1). "Attentats du 13 novembre : quand l'état d'urgence s'installa en France". [online] link: <https://www.publicsenat.fr/article/politique/attentats-du-13-novembre-quand-l-etat-d-urgence-s-install-a-en-france-190255>.

<sup>12</sup> *Brigade de Recherche et Intervention Police*, or BRI, translates into "police investigation and intervention brigade".

<sup>13</sup> The Raid is an elite unit of the French National Police, the acronym stands for Research, Assistance, Intervention and Dissuasion.

<sup>14</sup> See timeline on: FranceInfos, Section "13-November" [online] link: <https://www.francetvinfo.fr/faits-divers/terrorisme/attaques-du-13-novembre-a-paris/>.

be adopted. Hence, on the 20th of November 2015, the government extended the Act of 1955 related to the State of Emergency and modified certain provisions to adapt the text to the terrorist threat. This Act was followed by six extensions until the end of this emergency regime on the 1st of November 2017. To comply with European and International obligations, France derogated to the European Convention on Human Rights (hereinafter "ECHR" or "the Convention")<sup>15</sup> and the International Covenant on Civil and Political Rights (hereinafter ICCPR) on the 24th of November 2015.

Derogations enable High Contracting Party to withdraw temporarily from their obligations in a limited and supervised manner. Hence, knowing the potential consequences of a state of emergency on human rights, this procedure is controlled by article 15 of the ECHR. Moreover, the judges of Strasbourg established different criteria regulating the legality of derogations by parties to avoid abuses under the emergency regime.

Thus, considering the highly controversial state of emergency in France from 2015 to 2017, one can wonder how the Court assessed the legality of this derogation. Unfortunately, no assessment has been made by the Court on the compliance of the French anti-terrorist legislative arsenal to the derogation procedure of article 15 ECHR. At a national level, the Constitutional Council was only seized by individual requests throughout the state of emergency. However, no general assessment of the regime's legality under the French Constitution was undergone.

As the compliance test results in a binary assessment that can only be practised by the Court, this research aims to delve into the compatibility assessment. Indeed, a compatibility test with the spirit of the law will assess if the French legislative framework fulfils requirements established by the ECtHR to prevent gross human rights abuses under a derogation in the context of an emergency regime. Thus:

*RQ<sup>16</sup>: Are French anti-terrorists administrative measures, taken under the state of emergency from 2015 to 2017, in compatibility with the derogation requirements of article 15 ECHR?*

As administrative measures are numerous, the present research will focus on two of the most controversial, namely house searches and house arrests. Thus, by delving into the French legislative framework within the state of emergency, this research will analyse the compatibility of the French anti-terrorist measures with the legal framework of the ECHR. The aim is to assess if the French

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<sup>15</sup> For the derogation to the ECHR, read the full text in *Appendix 2*.

<sup>16</sup> RQ stems from Research Question.

legislative arsenal from 2015 to 2017 is compatible – or incompatible – with the protection aimed by Strasbourg's judges, established through guidelines and case law.

## **Section 2 - Methodology**

The compatibility assessment targets the spirit of laws. For instance, concerning the ECHR, compatibility focuses on Strasbourg's judges' interpretation of provisions. Compliance refers to the texts as they are in their literal form. Thus, legislation can comply with the ECHR without being compatible with the judge's interpretation. This research aims to assess the compatibility of the French anti-terrorist legislation of 2015-2017.

To conduct this research, grasping the contextual applicability of norms within the timeframe is paramount. Indeed, 2015 to 2017 marks one of the longest states of emergency in France. To tackle the terrorist threat, the French government had to officially derogate from multiple international and regional conventions. This research will focus on the ECHR, and its derogation procedure regulated by article 15 ECHR. Therefore, the present section aims to outline the methodology that will be implemented to conduct this research. Firstly, the significance of researching the compatibility of anti-terrorism legislation will be established through the traditional debate on Security's articulation with Human Rights (2.1). Secondly, the compatibility assessment will be presented as a legal method and applied to the French case (2.2).

### **2.1- Derogation to the ECHR in time of Emergencies: Rekindling the Security-Human Rights Debate**

As Dominic McGoldrick (professor of International Human Rights Law) wrote:

"The response of a state to a public emergency is an acid test of its commitment to the effective implementation of human rights".<sup>17</sup>

Indeed, states of emergency are emerging as one of the greatest challenges for human rights. First introduced in the 19th century in Western Europe, the state of emergency is a regime of exception conferring immediate legitimacy on a government to respond to a threat.<sup>18</sup> Individual freedoms and

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<sup>17</sup> McGoldrick, D. (2004). The Interface Between Public Emergency Powers and International Law. *International Journal of Constitutional Law* 2 (2), 388.

<sup>18</sup> Sheeran, S. P. (2012). Reconceptualizing states of emergency under international human rights law: theory, legal doctrine, and politics. *Michigan Journal of International Law*, 34, 491.

human rights are relegated to a secondary position. Indeed, collective security takes precedence and legitimises infringements of human rights for the greater good.

The pandemic has reignited the debate on the relationship between states of emergency and human rights. Indeed, the scope of measures restricting human rights in Europe has rarely been so extensive in peacetime.<sup>19</sup> A report issued by the European Union agency on Fundamental rights (hereinafter "FRA") concluded that the worst violations occurred on the already most vulnerable.<sup>20</sup> Thus, states must respect human rights standards, even in times of emergency, to achieve the greater goal of sustainable development.

The emergency regime is a risk to human rights. Hence, International and Regional human rights treaties include a specific procedure to protect human rights within a state of emergency. This procedure is called derogation. Derogation procedures are generally provided directly by the treaty. For instance, derogation procedures are enshrined in article 4 of the ICCPR and article 15 of the ECHR. Derogations must be distinguished from limitations. Indeed, limitations are built in specific articles. For instance, within article 8 ECHR para 2, for the right to respect for private and family life, one can read:

"There shall be no interference by a public authority with the exercise of this right *except* such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."<sup>21</sup>

Thus, article 8 ECHR provides direct guidelines on which reasons shall justify a limitation to the right to respect for private and family life. Hence, limitations arise as a first step before derogations. In other words, derogating is not necessary if a "simple" limitation is sufficient to address the threat. Hence, derogations are regulated by principles of necessity and proportionality, assessing if an emergency is serious enough to justify the temporary withdrawal of a High Contracting Party from its obligations.

Derogations allow contracting parties to opt-out of their obligations under certain articles of the Convention. Thus, only specific articles can be targeted. Unlike limitation clauses, once the waiver is made in respect of a specific article, the contracting party is no longer bound by that article.

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<sup>19</sup> European Union Agency for Fundamental Rights (FRA). (2021, June 10). The coronavirus pandemic and fundamental rights: A year in review. *FRA Fundamental Rights Report 2021 Annual report*. 1.

<sup>20</sup> FRA, *Supra note 18*, 35.

<sup>21</sup> European Convention on Human Rights (ECHR). Article 8 para 2. (Emphasis added)

Derogations are described by Emilie Hafner-Burton (Professor in Political Science and International Law) et al. as:

"a rational response to [the] uncertainty, enabling governments to buy time and legal breathing space from voters, courts, and interest groups to combat crises by temporarily restricting civil and political liberties."<sup>22</sup>

The derogation mechanism is indeed fundamental to the protection of human rights. Firstly, it allows a maximum number of states to ratify a treaty by allowing states to maintain certain sovereignty over their management of crises. Secondly, by categorising rights as derogable and non-derogable, treaties permanently protect the category of non-derogable rights, such as the right to life, the prohibition of torture, and the prohibition of escalation. And finally, taking the non-derogable right to life, states have a positive obligation to protect it constantly.<sup>23</sup> Thus, derogations in times of security-related emergencies allow states to have an unimpeded ability to fulfil this positive obligation. The idea is to enable restricting fundamental rights for the collective interest.<sup>24</sup>

However, as one can imagine, derogations are a sensitive tool that must be supervised for the greater good. Indeed, derogations are mostly justified under a state of emergency. To grasp the ambivalence of this exceptional regime, authoritarian regimes usually declare a state of emergency as their first measure once they hold power. For instance, during the Arab Spring, one of the first measures taken in Tunisia, Egypt and Libya was to declare a state of emergency to implement a more authoritative regime.<sup>25</sup> In Europe, Hungary has also been under the spotlight with measures taken by President Viktor Orbán under the state of emergency. Indeed, some governments use the state of emergency to pass authoritative measures in the common law. For instance, in 2020, the Hungarian government passed a bill preserving the possibility for the President, to rule by decree, with minimal parliamentary and judicial control.<sup>26</sup>

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<sup>22</sup> Hafner-Burton E.M. and al. (2011). Emergency and Escape: Explaining Derogations from Human Rights Treaties. in: *65 International Organization*. n°673, 680.

<sup>23</sup> Lebret. A. (2020, May). COVID-19 pandemic and derogation to human rights. *Journal of Law and the Biosciences*. Volume 7, Issue 1, 3.

<sup>24</sup> Lebret. A. *Supra Note 22*, 4.

<sup>25</sup> Zwitter, A. (2013). Arab Spring – State of Emergency and Constitutional Reform.

<sup>26</sup> Gall. L. (2020, May 29). Ending Hungary's State of Emergency Won't End Authoritarianism. *Human Rights Watch Dispatches*. [online] Link: <https://www.hrw.org/news/2020/05/29/ending-hungarys-state-emergency-wont-end-authoritarianism>.

Thus, derogations within a time of emergency arise as a necessary tool, albeit involving serious human rights implications. The articulation of human rights and security is an ongoing discussion.<sup>27</sup> This debate has been magnified in Western states progressively from external terrorist threats to the more recent pandemic<sup>28</sup>. This research will be focusing on the management of terrorist threats under the lens of the Security-Human Rights nexus.

Indeed, although less current, the terrorist attacks of 9/11 marked the beginning of a new era. It was claimed that this new era marked the beginning of a security-based approach rather than a rights-based one. Hence, the pandemic occurred in a context that was already very favourable to emergency regimes and security measures. Thus, the initiating aspect of terrorism in the Security-Human Rights debate makes it the favoured case study of this research, rather than the pandemic.

The culture of exceptionalism manifests itself more especially in countries where human rights and constitutionality dedication are strong.<sup>29</sup> Indeed, a strong right-base regime makes it difficult to tackle serious security threats. Thus, through the culture of exceptionalism, derogations and state of emergencies are being introduced. These mechanisms are falling right in the debate on Security and Human Rights as they stand at their intersection. State of emergencies and derogations are the compromise between maintaining collective security and protecting human rights. Hence, they will be the focus of this research.

In the European framework, derogations are controlled by article 15 ECHR, as mentioned above. States of emergency measures should be taken by ECHR's High Contracting Party following the derogating requirements displayed in this article 15 ECHR. Only a few states ever used the derogation procedure before the pandemic: the UK, Turkey and France. France will be a particularly relevant example for the current research. Indeed, the derogation was taken in November 2015 by the French government to tackle the terrorist threat post-Paris attacks.

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<sup>27</sup> See for instance: Frid-Nielsen, S. S. (2018). Human rights or security? Positions on asylum in European Parliament speeches. *European Union Politics*, 19(2), 344-362; Goold, B. J., & Lazarus, L. (Eds.). (2019). Security and human rights. *Bloomsbury Publishing*; Stanford, B., Foster, S., & Berdud, C. E. (Eds.). (2021). *Global Pandemic, Security and Human Rights: Comparative Explorations of COVID-19 and the Law*. Routledge.

<sup>28</sup> See for pandemic-related articles : Greene, A. (2020). Derogating from the European convention on human rights in response to the coronavirus pandemic: If not now, when? *Forthcoming, European Human Rights Law Review*; Lebret, A. (2020). COVID-19 pandemic and derogation to human rights. *Journal of Law and the Biosciences*, 7(1); Spadaro, A. (2020). COVID-19: Testing the limits of human rights. *European Journal of Risk Regulation*, 11(2), 317-325.

<sup>29</sup> Goold, B. J., & Lazarus, L. (Eds.). (2019). Security and human rights. *Bloomsbury Publishing*. 17

The state of emergency and derogation lasted for almost two years. Within this period, multiple NGOs – including Amnesty International,<sup>30</sup> Human Rights Watch<sup>31</sup> and the National Consultative Commission on Human Rights (CNCDH)<sup>32</sup> – denounced the disastrous conditions of the French state of emergency. The main concerns are regarding the non-proportionality of the administrative measures and the unjustified duration of the state of emergency.

## **2.2 - France versus the Strasbourg's Judge: Assessment of Compatibility to the ECHR as a Methodology.**

To grasp the meaning of compatibility, this section will first address the semantic difference between compatibility and compliance. According to the Cambridge dictionary of law, compliance refers to the obedience of a particular rule, law or agreement. Compliance with an agreement is embodied by the *pacta sunt servanda* in International Law. This allows the provisions of treaties to be binding. However, states must, by ratification, accept the provisions and obligations of the treaty. Based on this notion of compliance, the research will unfold in three parts to address the above-mentioned question.

Compatibility is defined by its negative in the Vienna Convention on Law and treaties. Indeed, states are required to refrain from taking actions that are incompatible with the object and purpose of a treaty.<sup>33</sup> Thus, where *compliance* controls the just respect of treaty provisions, *compatibility* addresses the purpose of treaties. This purpose shines through the provisions, but also through the judges' interpretation of the provisions. Hence, a state can comply with a treaty's prerogatives, while taking incompatible actions regarding its purpose and object. Compatibility is paramount in the examination of the state of emergency measures. Indeed, this method will enable to emphasise the full interpretation of protection aimed by the ECtHR.

The first step is to collect information on the French anti-terrorist legislation within the state of emergency from 2015 to 2017 (**Section 3**). Regarding compatibility with the ECHR, the first focus will look back to the ratification of the treaty by France. Indeed, France emitted a reservation to the derogation procedure of article 15 ECHR as soon as 1974. Thus, delving into this reservation will

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<sup>30</sup> See Amnesty International. (2016, February 4) Des vies bouleversées: L'impact disproportionné de l'état d'urgence en France. [Lives turned upside down: The disproportionate impact of the state of emergency in France]. *Amnesty International Publications*.

<sup>31</sup> See Human Rights Watch. (2016, February 3) Abus commis dans le cadre de l'état d'urgence. [Abuses committed in the context of the state of emergency]. *HRW News*.

<sup>32</sup> See CNCDH (2016, February 18) Les dérives de l'état d'urgence ou le recul injustifiable de l'Etat de droit. [The excesses of the state of emergency or the unjustifiable retreat of the rule of law]. *CNCDH Press Release*.

<sup>33</sup> Vienna Convention. (1969) Article 19 and Article 41.

highlight compatibility requirements that are specific to the French State (3.1). Once French derogations requirements to the ECHR are established, this research will delve into the six State of Emergency Acts<sup>34</sup> passed by the government from the 20th of November 2015 to the 1st of November 2017. The methodology applied within this section is to compare the different acts with each other, but also with the original State of emergency Act of 1955.<sup>35</sup> The duration, the substance and the form of these Acts will be presented. They will enable a compatibility assessment with ECHR's requirements in Section 5 (3.2). Finally, for the readability of this research, only two major administrative measures will be extensively delved into: administrative house arrests and administrative house searches. The six Acts have direct impacts on the implementation of each of these measures throughout the state of emergency. Therefore, their legislative framework under the successive State of Emergency Acts will be presented. Provisions controlling the implementation of these two measures within the State of Emergency Acts will be assessed based on their compatibility with the ECHR's requirements (3.3).

Methodologically, the second step is to construct a legal framework to apply to the case study. Thus, **Section 4** will focus on delving into the application of Article 15 ECHR through the ECtHR's Guidelines.<sup>36</sup> Within the Court's case law and the Convention itself, six conditions for a legal derogation are outlined. The semantic criterion will be discussed first. Indeed, not all states of emergency justify a derogation under the ECHR. Article 15 mentions a "public emergency threatening the life of the nation"<sup>37</sup> in its first paragraph. Considering the rather vague nature of this formula (compared to the other criteria), the first part of section 4 will be entirely dedicated to the understanding of this semantic by the Court, through articles, case law and doctrine (4.1). Once the semantics are clarified for the research's readability, the five other criteria will be legally presented. Each of them is going to be illustrated with case-law and doctrinal statements to establish clear legal conditions of derogations according to the ECtHR (4.2). Finally, states generally notify in their derogations which article's scope will be reduced. Article 5 ECHR is often in the front line as it protects the right to liberty and security. As administrative measures are the tools to restrict liberty within a state of emergency, article 5 ECHR arises as highly relevant. Thus, the case law of the Court concerning arbitrary detention taken under derogation to article 5 ECHR will be presented. Indeed, no hard strong requirements will be deployed here, this last part only aims to highlight the position of the Court against arbitrary detention within the implementation of state of emergency measures taken under the umbrella

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<sup>34</sup> The six Acts are Acts of the 20th of November 2015, 19th of February 2016, 20th of May 2016, 21st of July 2016, 19th of December 2016 and 11th of July 2017.

<sup>35</sup> The Act of 1955 is not in force anymore but each new State of Emergency Act has to be an extension of it, adapting each disposition to the special needs of the situations. From 2015 to 2017, every new prolongation of the State of Emergency was passed as an extension of the Act of 1955.

<sup>36</sup> European Convention on Human Rights (ECHR). Guidelines to Article 15.

<sup>37</sup> European Convention on Human Rights (ECHR). Article 15 para 1.

of derogation (4.3). The notion of arbitrariness will be applied to the French legislative framework within the discussion.

Finally, the last step of this methodological framework (**Section 5**) will be to compare the French legislative framework depicted in Section 3, to the ECHR's legal framework presented in Section 4. The first discussion point will revolve around the reservation placed by France to article 15 ECHR and what it implicates for compatibility's assessment and human rights protection more generally. The second discussion will take the criteria established by the Court one by one and illustrate them with direct examples from the French legislative framework. Within this assessment, particular attention is going to be given to the necessity and proportionality test of house arrests and house searches. Indeed, criteria of necessity and proportionality established by the court will be looked upon to assess the measures' compatibility with ECHR standards. Finally, the duration of the State of Emergency throughout the six Acts will be passing the compatibility test through the criteria of necessity and proportionality.

Thus, through this three-step test – **1) French Legislative Framework, 2) ECHR's Legal Framework and 3) Compatibility Assessment of 1) to 2)** – this research aims to assess the level of compatibility of French anti-terrorist administrative measures taken under the state of emergency (2015-2017) to the derogation requirements of article 15 ECHR. This research question will not be answered by the binary outcome characterised by yes or no answers. Indeed, it will address the compatibility as a scale rated on different levels. This might be one of the first shortcomings of the current research. Indeed, as the Court has not ruled on the matter, this legal analysis will remain somewhat subjective and open to interpretation. The level of compatibility will be assessed based on the six established criteria and will only concern two administrative measures within a much broader arsenal.

Thus, the limitations of this research stem from a lack of ruling from the ECtHR concerning France. Moreover, national rulings concerning the state of emergency are limited in number as well. However, one of the limitations is also the emotional position in which the French government was while ruling. This compatibility assessment consists in applying European legal requirements to the sensitive and emotional 2015's attacks. Thus, the research tries to keep in mind that the measures implemented were motivated by a need to act promptly, and an important public pressure in making justice. Therefore, this research aims to assess if French anti-terrorist legislation, taken under the derogation to the ECHR, is compatible with requirements established by the ECtHR under Article 15 ECHR.

### **Section 3- The French Anti-Terrorists Legislation Within the State of Emergency: Legal Form, Implementation in Practice and Resulting Consequences**

On 13 November 2015, France became the theatre of a series of terrorist attacks that killed over a hundred and thirty people. The atrocity of these acts left in its wake a psychological climate of fear, anguish and grief. To react promptly and forcefully, a state of emergency was declared and a derogation to the ECHR was filed. The derogation emitted by France encompasses the following rights and freedom: the right to liberty and security, the right to privacy or respect of private life, freedom of expression, freedom of movement and freedom of assembly and association. Thus, to understand how the French state of emergency unfolds, it is essential to find out about the existing legal bases beforehand. Indeed, because of its reservation to Article 15 ECHR, France has made its national constitution the core of its State of Emergency policies (3.1). While this legal framework has never been challenged, it provides the basis for the adoption of measures whose conventionality remains to be determined. Thus, after understanding this background, the research will focus on the Act of 20 November 2015 extending the state of emergency. As this act is the first of many, the examination of its duration will be tied to the intrinsic measures introduced by this act (3.2). Finally, two main measures emerge as focal points of the French counter-terrorism strategy: administrative house searches and house arrest. Once their legal framework has been established in successive extension laws, their practical impact will be addressed (3.3).

#### **3.1 - The Reservation to Article 15 ECHR in Favour of the French Constitution: Guardianship of French National Sovereignty in Matters of Emergency.**

In its relationship with regional bodies, France already manifests a strong attachment to its national sovereignty. Therefore, in its approach to exceptional regimes, this attitude is only exacerbated. Indeed, French monist tradition led the country to refuse the superiority of European laws over its national ones.<sup>38</sup> While the situation has changed, a legacy remains in French attitudes and decisions. As early as 1974, France decided to emit a reservation to the ECHR's derogation system (see *Appendix I*). Thus, in this reservation, France sought to condition the derogatory system of Article 15 ECHR to its own Constitution.

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<sup>38</sup> Sweet, A., & Keller, H. (2008). Assessing the Impact of the ECHR on National Legal Systems. *Yale Law Journal*. 683

It is fundamental to highlight that the French Constitution (hereafter "the Constitution") only implicitly enshrines the state of emergency in that it determines the principles governing the legislator's action in the context of this exceptional regime. Thus, the actual regulation of the state of emergency is regulated by the Act of the 3rd of April 1955.<sup>39</sup> Accordingly to the 1955's Act, the French President can declare the State of Emergency. Once the state of emergency is declared, Article 16 of the Constitution related to exceptional regimes is triggered. Although the unconstitutionality of the state of emergency sparked new debates, the Constitutional Council has remained silent. Thus, this silence is endorsing this mechanism.

Constitutionally, the extra-ordinary and temporary state of emergency is regulated by Article 16. However, exceptional powers stemming from this regime are not enshrined in the constitution but require an Act. In 2015, the government of Emmanuel Valls prorogued the Act of 1955<sup>40</sup> on the state of emergency. Hence, Article 16 of the Constitution granting full legislative and executive powers to the president was simultaneously triggered. In this continuum, the Act of 1955 was extended by the new Act of November 2015 to define the new implementation framework of the regime.

According to former president François Hollande, the state of emergency was declared to "preserve [the] nation from terrorist acts". Under the lens of the 1955 Act, in its first article, a state of emergency can be declared in two situations:

"Either in the event of imminent danger resulting from serious attacks on public order, or in the event of events which, by their nature and gravity, have the character of a public calamity".

Moreover, once the state of emergency is triggered under the Act of 1955, regulations of article 16 of the Constitution can apply. Under article 16, the granting of full powers can only be triggered "when the institutions of the Republic, the independence of the Nation, the integrity of its territory or the execution of its international commitments are threatened".

Considering the conditionality of the state of emergency under the Act 1955, one can conclude that a wave of terrorist attacks killing more than 130 civilians and psychologically terrorising others falls under the scope of an "imminent danger resulting in serious attacks on public order." Thus, article 16 of the French Constitution applies. Article 16 of the Constitution appears to echo the ECHR conditioning its derogations to war or a threat to the life of the nation. However, the Act of 1955 has a

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<sup>39</sup> The act of the 3rd of April 1955 was taken in the context of the Algerian War to fight pro-independence movements. This law applies no longer, however, it is possible to pass extension Acts of this original one of 1955. Each new extension act encloses new measures according to the needs of the imminent emergency.

<sup>40</sup> These extension laws are called "prorogation of the Act of 1955". Thus, the word "prorogued" will be used in the following research to address Acts and Laws extending the Act of 1955 implementing the State of Emergency.

broader interpretation of emergencies. Indeed, under the Constitution and the ECHR, state of emergency and derogation requirements are narrower. For instance, the 1955 Act, implementing the application of Article 16 Constitution, conditions its triggering on a simple "threat to public order". The Constitution and ECHR refer to a "threat to the life of the nation". If terrorist attacks and their impacts are sufficient to trigger the 1955's Act, it might not necessarily meet the requirements under the Constitution and the ECHR.

By emitting a reservation, France upholds the right to declare a state of emergency outside of a war context or a threat to the life of its nation. Thus, three concerns stem from the French reservation (1) the circumvention of the Convention's criteria for characterising a state of emergency, (2) its substantive legality regarding its general scope, and (3) the granting of unbridled presidential powers in an emergency context.

The first concern (1) stems from the definition of requirements that should be met to declare a state of emergency. Their national legislation offering a broader and more permissive definition, France decided to make it prevail. It implies that the Court of Strasbourg does not have the authority to assess if a state of emergency is justified in France.<sup>41</sup> The French government has, therefore, sole competence in this matter.

Secondly, considering the legality of the Convention (2), article 57 of the ECHR states that "reservations of a general nature are not allowed".<sup>42</sup> As the Court has not seized this matter, it should be recalled that Article 15 allows temporary release from obligations to remedy an emergency. Thus, not to examine the reservations to Article 15 para 1 is to grant open access to what it was designed for. In other words, it facilitates derogations from fundamental rights and freedoms by the French government.

Thirdly, and finally, considering the mention of presidential power within the second part of the reservation (3), the latter states that:

"For the interpretation and application of Article 16 of the Constitution of the Republic, the terms "to the extent strictly required by the situation" do not limit the power of the President of the Republic to take the measures required by the circumstances."

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<sup>41</sup> Pellet. A., (1974). La ratification par la France de la Convention européenne des droits de l'homme, *Revue du droit public et de la science politique en France et à l'étranger*, v.90, n5, p. 1359.

<sup>42</sup> European Convention on Human Rights (ECHR). Article 57.

Thus, this last part of the provision places the French President at the centre of the decision-making process. Indeed, a shift is operated from the measures "required by the situation", to any measures the President consider as "required by the circumstances". This reference gives the judge a limited scope to determine the necessity of such actions, as they are no longer conditional on the situation alone, but on what the President considers necessary.

These three considerations all support the view that this reservation is intended to undermine the substance of European supervision.<sup>43</sup> Thus, the specificities of the French reservation are noteworthy: redefining the conditions for derogations to its Constitution, upholding a national control of these measures by limiting the powers of Strasbourg and finally limiting its judicial control by granting the President the necessity-assessments of measures required by the situation. The French Constitution is then the core regulation of any measures taken under the State of Emergency.

### **3.2- From 2015 to 2017: Presentation of the Six Extensions of the State of Emergency Act in France**

From the 14th of November 2015 to the 1st of November 2017, the state of emergency has been prorogued six times.<sup>44</sup> The derogation to the ECHR was proclaimed on the 23rd of November 2015 (See *Appendix 2*). This derogation is imprecise and vague as it does not mention which articles of the Convention will be targeted by the derogation. Not mentioning the specific articles leaves the French government with a total discretionary authority regarding emergency measures taken under the derogation within the state of emergency. Moreover, as derogation must be supervised by the Court, not mentioning the articles targeted by the derogation paralyzes the Court's supervision.

A state of emergency is a temporary measure as it limits checks and balances.<sup>45</sup> For this reason, the original 1955 Act did not provide any extension possibilities (*see Table 1*). Although custom has made it possible to extend the 1955 law to extend the state of emergency, the original intention of non-extension is noteworthy. Indeed, extending such a regime of exception for nearly two years draws this research to consider the evolution of its implementation.

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<sup>43</sup> Ergéc. R. (1987). Les droits de l'homme à l'épreuve des circonstances exceptionnelles : Étude sur l'article 15 de la Convention européenne des droits de l'homme. *Editions de l'Université de Bruxelles*. 375

<sup>44</sup> Acts of the 20th of November 2015, 19th of February 2016, 20th of May 2016, 21st of July 2016, 19th of December 2016 and 11th of July 2017.

<sup>45</sup> Champeil Desplats V. "L'état d'urgence devant le Conseil constitutionnel, ou quand l'État de droit s'accommode de normes inconstitutionnelles" in Halpérin J.-L. and Others. (2017). *L'état d'urgence: de l'exception à la banalisation*. Presses universitaires de Paris Nanterre.

The state of emergency transfers strong powers to administrative authorities. Among these powers, many measures restricting freedoms and rights are also ceded. In the French democratic system, the parliament - legislative power - embodies the counter-power of the government. Thus, the state of emergency must be substantiated before the parliamentary body.

However, no justification in front of the Parliament has been made on the 14th of November 2015. Moreover, no contestations of the legislative counter-power have been registered.<sup>46</sup> This procedural error leads to question the actual role of the French Parliament within the state of emergency. Therefore, the legislative body has been supporting the government in all of its actions and even increased its scope. For instance, in July 2016, the government proposed to extend the state of emergency for another three months, to which the parliament agreed to propose six months rather than three.<sup>47</sup> Thus, as witnessed in *Table 1*, the state of emergency regime follows an exponential curve of aggravation.

**Table.1: Evolution of the French State of Emergency Regime <sup>48</sup> (See description p.23)**

	Act of 1955*	Gov. Project	Act 20 Nov. 2015	Act 21 Jul. 2016	Act 19 Dec. 2016	Act 11 Jul. 2017**
<b>Duration</b>	<i>Fixed by law and not renewable.</i>	<i>3 months</i>	<i>3 months</i>	<i>6 months</i>	<i>7 months</i>	<i>4 months</i>
<b>House Arrest (HA)</b>	<i>Yes</i>	<i>Yes (Softer conditions)</i>	<i>Yes</i>	<i>Yes</i>	<i>Yes (Creation of the long HA regime)</i>	<i>Yes, Unmodified</i>
<b>HA + penalties</b>	<i>No</i>	<i>8h/ day</i>	<i>12h/day</i>	<i>Yes, Unmodified</i>	<i>Yes, Unmodified</i>	<i>Yes, Unmodified</i>
<b>HA + Electronic Bracelet</b>	<i>No</i>	<i>No</i>	<i>Yes</i>	<i>Yes, Unmodified</i>	<i>Yes, Unmodified</i>	<i>Yes, Unmodified</i>
<b>HA + contact interdiction</b>	<i>No</i>	<i>Yes, solely during HA</i>	<i>Yes, including after HA regime stops</i>	<i>Yes, Unmodified</i>	<i>Yes, Unmodified</i>	<i>Yes, Unmodified</i>

<sup>46</sup> Hennette-Vauchez. S. (2019). "La Fabrique législative de l'état d'urgence: lorsque le pouvoir n'arrête pas le pouvoir". *Cultures & Conflits*. n°113. 17-41.

<sup>47</sup> Hennette-Vauchez. S., *Supra Note 45*.

<sup>48</sup> Hennette Vauchez. S., *Supra Note 45*. (adapted from French)

\* This Act no longer applies, however, as the original legislation this Act offers an interesting comparative standpoint.

\*\* The law of 11 July 2017 is the last of the state of emergency and will be replaced by the SILT law on 30 October 2017. This law enshrines state of emergency measures within French common law.

■: Grey boxes represent the final form adopted for a measure until the end of the state of emergency in November 2017.

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While some of these Acts are simple extensions, others are substantive revisions. Indeed, the Act of the 20th of November 2015 is deeply modifying the so-far-unchanged Act of 1955. Moreover, and certainly even more concerning, is the Act of the 21st of July 2016. This prorogation is different, as the revisions relate directly to common law provisions. The common law codes affected by this law are the following: Penal Code, the Code of Criminal Procedure, the Code of Internal Security and the Penitentiary Law of 24 November 2009.<sup>49</sup> This shift raises concerns considering that in January 2016, the Council of the National Assembly announced that benefits of the state of emergency had come to an end.<sup>50</sup> Indeed, this regime draws its effectiveness from the surprise effect. In the case of administrative searches, for example, this surprise effect is at its maximum in the days following the attacks. However, it has a limited impact two years later. Noting the Nice attacks, explaining the new prorogation in July 2016, reasons for common law alterations remain unanswered.<sup>51</sup>

Thus, the duration of this state of emergency raises concerns on several points. On the one hand, the parliamentary inaction in its counter-power duty, and on the other hand the very essence of the revisions altering common law by extraordinary means. Unjustified and ineffective over such a period and modifying common law, these aspects can only raise doubts about the true motivation and conventionality of the measures taken under this regime.

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<sup>49</sup> Hennette-Vaucher. S. (2018). "La France sous état d'urgence (14 novembre 2015-1er novembre 2017)". *Revue trimestrielle des droits de l'homme*. 353.

<sup>50</sup> National Assembly Committee, the statement issued on 13 January 2016.

<sup>51</sup> Guérin-Bargues. C. (2018). "The French Case or the Hidden Dangers of a Long-Term State of Emergency. The rule of crisis: terrorism, emergency legislation and the rule of law". Springer, 4.

### **3.3 - The State of Emergency Legislation Practice versus Theory: Focus on House Arrests and Administrative House Searches**

If the Act of 2015 does not take back all the disposition from 1955, it aims to adapt the old text to the current terrorist threat.<sup>52</sup> These adjustments to the context are made in three main areas: house arrests (3.3.1) and administrative house searches (3.3.2).<sup>53</sup> Together, they illustrate a general strategical focus: preventive over reactive. Indeed, the preventive focus replaces the traditionally reactive legal system of the state of emergency. Hence, new measures differ from the original Act of 1955 by taking a very permissive approach – especially to data protection.

#### ***3.3.1 - House Arrests: Sweeping a Wide Net at the Expense of the Human Aspect***

In theory, the purpose of house arrests is not to punish an individual for his or her criminal actions but to minimise the risk of criminal actions occurring. Some spill-over is, therefore, inevitable. Thus, the approach of this research is not to condemn these excesses but rather their extent. Indeed, it should be recalled that individuals placed under house arrest under a preventive regime must be considered innocent until proven guilty. Aware that innocent individuals are caught in the middle of these large-scale preventive sweeps, it is essential to reconsider the implementation of such measures.

Concerning house arrest, a significant change has been made within the Act of November 2015, perhaps the most publicised one.<sup>54</sup> Therefore, house arrest conditions extend to any "persons who have drawn the attention of the police or intelligence services by their behaviour, or their associations, comments or plans". While the 1995 Act conditioned them to any "persons whose activity proves to be dangerous", the new Act embodies a more permissive approach.

The law shifts from a threatening activity to threatening behaviour.<sup>55</sup> In other words, this broader definition aims to leave a wide margin of appreciation to decision-makers. House arrests oblige an individual to remain at their home<sup>56</sup>, up to a maximum limit of 12 hours per day. Additionally, a physical check-in at the nearest police station up to three times a day is also required.<sup>57</sup> These

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<sup>52</sup> Jacopin. S. (2015, December 18). Presentation des dispositions de la loi du 20 novembre 2015. *RFV, Thyma*. [online] Retrieve here: <https://www.thyma.fr/presentation-des-dispositions-de-la-loi-du-20-novembre-2015/>

<sup>53</sup> Jacopin. S., *Supra note 51*.

<sup>54</sup> Jacopin. S. *Supra Note 51*.

<sup>55</sup> Salas, D. (2016). La banalisation dangereuse de l'état d'urgence. *Études*, 34.

<sup>56</sup> Or another location decided by the Minister of the Interior.

<sup>57</sup> Article 6 of the Act of 1955, revised by the Act of the 20th of November 2015.

modalities are fixed by the Minister of the Interior who can also decide to pair the house arrest with an electronic bracelet. The duration of house arrests is regulated by Articles 142-5 and onwards of the French Penal Code. Hence, house arrests can be carried out for 6 months, renewable several times, up to a period of 2 years. This significant restriction of liberty is not supervised by any judicial body. Only the Minister of the Interior, or the Prefect, can define its duration and implementation measures.<sup>58</sup>

House arrest and their non-existent judicial supervision arise as a serious breach of the freedom of movement. In addition to the disruptive nature of this preventive penalty, the extent of their use has been significant. For instance, 381 house arrests are registered as of the 7th of January 2016, for only 4 court proceedings.<sup>59</sup> Additionally, the breach of the freedom of movement impinged on the freedom to work and have access to a job. Indeed, checking in at the police station up to three times a day has resulted in many people losing their job due to a lack of availability.

Now that the legal framework of house arrests is given, this research will delve into its practical implementation and results. The brief story of 19-year-old Emrah reported in the newspaper *Libération*, in May 2016, sheds light on the consequences of this broad preventive strategy. Emrah was placed under house arrest at his parents' home more than 800km from where he lived with his partner. He was accused of "having been in contact with people intending to go to Syria"<sup>60</sup> when he was 16, three years earlier. Expelled from the technical high school he was pursuing, forbidden to access the Pôle Emploi<sup>61</sup> to find a job or access unemployment benefits, Emrah and his pregnant wife have reached a dead end. France has withdrawn his asylum permit leading Emrah to the only possibility of going back to his native Albania without his family.

If Emrah's story is linked to a terrorist allegation, the excesses of house arrest extend to climate activists of the COP21 in Paris.<sup>62</sup> Indeed, although this issue appears outside of this research's scope, these preventive measures were taken under the anti-terrorist legislation using the exceptional measures of the state of emergency. The French State Council has been seized on the matter and has ruled that for the maintenance of "public order", house arrest *can be motivated by ricochet - knock-on effect* - is

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<sup>58</sup> Salas. D., *Supra note 54*, 35.

<sup>59</sup> Salas. D., *Supra Note 54*, 36.

<sup>60</sup> Alonso. P. (2016, May 27) "Etat d'Urgence: Ma vie d'assigné à résidence". *Libérations*. [online]. Link: [https://www.liberation.fr/france/2016/05/27/ma-vie-d-assigne-a-residence\\_1455658/](https://www.liberation.fr/france/2016/05/27/ma-vie-d-assigne-a-residence_1455658/)

<sup>61</sup> Pôle Emploi is the public administrative body responsible for employment in France.

<sup>62</sup> Rolin. F. (2015, December 15). "Quand la menace terroriste justifie l'assignation à résidence d'activistes engagés contre la COP 21". *Dalloz Revue*. [Online] Link: <https://actu.dalloz-etudiant.fr/le-billet/article/quand-la-menace-terroriste-justifie-lassignation-a-residence-dactivistes-engages-contre-la/h/8bc9a47fac5efcbad1182686bd36c36c.html>

possible.<sup>63</sup> Through this lecture of the legislative text, the State Council empowers the police to act with exceptional means to tackle objectives that are alien to the original motive of the state of emergency.

House arrests are a valuable tool to incarcerate massively. Indeed, they require almost no financial and human resources. They are designed to force a suspect to self-incarcerate. As explained by Ahmed:

"I was cut off from the world because it was: home, police station, police station, home, and that's all. (...) I'm trying to claim my rights because, you know, they still trashed my house, they deprived me of my rights, and I will tell you the worst prison, it is the brain one. And I'm still in a prison."<sup>64</sup>

This statement demonstrates the psychological violence of an extensive preventive approach. The implementation of these house arrests - as well as the searches - have been shown to have profoundly disrupted the victims' relationships with their homes. Some of them also denounced in the interviews conducted by Flora Hergon the feeling of having been raped and humiliated, without any reason being given to them.<sup>65</sup>

Thus, as noted by Amnesty International, the problem with house arrest is not so much its preventive nature but rather its arbitrary one. Indeed, most of these measures have been ordered: "on the basis of vague grounds and with very little evidence".<sup>66</sup> In support of these arbitrary accusations, many victims have been able to win their case in front of the State Council considering the grounds insufficient to justify such measures.<sup>67</sup>

### ***3.3.2 - Administrative House Searches, Forceful Implementation and Delayed Control: The Institutional Abandonment of Its Citizens***

Administrative searches are specific to the anti-terrorist regime introduced in 2015. Indeed, they were not provided for in the 1955 version. From suspicious actions to behaviours, here lies the preventive shift operated since 2015 in anti-terrorist legislation. Administrative house searches are regulated by article 4 of the 2015 State of Emergency Act. This article provides that these house searches are allowed on "any person (...) in respect of whom there are serious reasons to believe that his or her

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<sup>63</sup> See CE, ord., 11 déc. 2015, n° 395009, 394990, 394992, 394993, 394989, 394991, 395002.

<sup>64</sup> Ahmed was placed under house arrest for three months based on an homonym mistake by the police forces. This interview can be found in: Hergon. F. (2021). "The State of Emergency at Home House Arrests, House Searches, and Intimacies in France". *Conflict and Society*. 49.

<sup>65</sup> Hergon. F., *Supra note 63*, p.51.

<sup>66</sup> Amnesty International. (2016, February 4). "France: Upturned lives: The Disproportionate Impact of France's State of Emergency", 14.

<sup>67</sup> See, CE, Juge des référés, 22/01/2016, n° 396116; CE, Juge des référés, 09/02/2016, n° 396570; CE, Juge des référés, 23/02/2016, n° 396872; CE, Juge des référés, 15/04/2016, n° 398377.

behaviour constitutes a threat to public security and order".<sup>68</sup> Thus, these administrative searches become judicial as soon as there is an indication that an offence has been committed. Searches are authorised at any time of the day or night and in any place, including vehicles and non-household areas.<sup>69</sup> This power extends to all digital data contained in phones and computers found on the premises, which the previous law did not provide for.

The constitutionality of this measure was brought before the French Constitutional Council (hereinafter "Constitutional Council") in the form of a QPC.<sup>70</sup> The latter ruled in a decision on the 19th of February 2016 that searches including computer data did not meet the guarantee of the right to privacy.<sup>71</sup> Indeed, nothing obliged the police to delete digital information even after suspicions about that person dissipated. In the subsequent extension of the state of emergency, the government tried to provide a remedy by limiting to three months the hold of digital information.

Since 2015, referrals to the Constitutional Council to evaluate the state of emergency-related measures have increased exponentially. The analysis of referrals shows that these suspicious behaviours are mainly based on frequenting a certain place or contact with a person who is suspected.<sup>72</sup> Hence, the multiplicity of referrals stems from a general feeling of an unfair coercive preventive approach. Indeed, from November 2015 to April 2016, 3427 house searches were carried out. Judicial proceedings "related to terrorism" resulting from these searches culminated in 25.<sup>73</sup> Thus, according to these figures, 99.3% of the searches conducted during this period were inconclusive in the terrorist context. Thus, some of them had a separate objective although using the state of emergency framework. Findings suggest an instrumentalization of the terrorist threat to legitimise administrative measures.

It is fundamental to note that intelligence services have initiated less than half of the house searches.<sup>74</sup> In addition, the CNCDH notes that searches were carried out at night, without taking into account the presence of vulnerable people in the home, paired with inappropriate police behaviour, numerous instances of material damage and the failure to systematically hand over the search order and receipt.<sup>75</sup>

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<sup>68</sup> Article 4 of the Act on the State of Emergency n° 2015-1501 of the 20th of November 2015.

<sup>69</sup> With the exception of places holding a parliamentary mandate

<sup>70</sup> QPC, or *Question Prioritaire de Constitutionnalité*, is a mechanism for reviewing the constitutionality of laws *a posteriori*. Any party to a lawsuit can raise a question of conformity with the Constitution.

<sup>71</sup> Constitutional Council, Decision n° 2016-536 QPC of the 19 of February 2016.

<sup>72</sup> Hergon. F. (2021, Automne). "Contrôle de l'intimité et normes de genre : la qualification d'un comportement suspect et sa contestation dans le cadre de perquisitions et d'assignations à résidence pendant l'état d'urgence". *Genre, sexualité & société*. n°26.

<sup>73</sup> FIDH. (2016, June) Counter-terrorism and Human Rights: When the exception becomes the norm, *FIDH Fact-finding mission report*, n°676a, p.8

<sup>74</sup> National Assembly. (2016) "Rapport", 39.

<sup>75</sup> CNCDH. (2016) *Supra note 31*.

In this context of abuse, there are many cases of terrorised children, abusive handcuffs, racist insults and vandalization. These abuses are echoed in Flora Hergon's findings of the occurrence of post-traumatic syndrome (PTS) among victims of searches.<sup>76</sup>

To understand the extent and arbitrariness of searches' implementation, the journalist Matthieu Suc investigated the DGSI,<sup>77</sup> DRPP<sup>78</sup> and territorial intelligence. The report reveals a policy of quotas. Some interviewees report directives for "mass administrative searches", from which intelligence chiefs ordered quantified requests.<sup>79</sup> These comments lift the veil on the extent and arbitrary nature of these searches. While it is possible to understand the haste of the security agencies due to the gravity of the situation, it is difficult to justify such actions.

In the face of these abuses, victims can only appeal to the judge *a posteriori*. Citizens' expectations do not seem to be respected according to these provisions.<sup>80</sup> This delayed control is problematic. However, according to the ECHR, this competence falls within the national margin of appreciation. Thus, although infringing the right of respect to one's property and the right to privacy, administrative searches pass the compatibility test. Moreover, regarding the constitutionality control of such measures, the Constitutional Council was seized of a QPC in September 2016. The final report states that:

"By failing to subject the use of searches to any conditions and to provide any guarantee concerning their implementation", the legislator failed in ensuring "a balance between the constitutional goal of safeguarding public order and the individual's right to privacy."<sup>81</sup>

If the Court limited the scope of its own judgment in this ruling, its assessment still tends to be a disproportionate attack on fundamental rights and freedoms. In addition to this information, the timid attitude of the Constitutional Council proves once again an excessively favourable environment for the all-powerful executive. Thus, although the constitutionality and conventionality of these administrative measures are difficult to challenge, their unsatisfactory nature raises concerns.

Thus, once the broad framework of the state of emergency has been established, the administrative measures rise as central to the ECHR's compatibility interrogation.

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<sup>76</sup> Hergon. F., *Supra note 63*.

<sup>77</sup> DGSI is the Directorate General of Internal Security.

<sup>78</sup> DRPP is the Intelligence Directorate of the Paris Police Prefecture.

<sup>79</sup> Marchal. R. (2018, April 12) "État d'urgence : "Aucune perquisition administrative n'a permis directement de déjouer un attentat" (François Molins)". *AEF Info*. n° 583947.

<sup>80</sup> Philippe, X. (2017). "Les réponses juridiques aux attentats terroristes du 13 novembre 2015 à Paris: de la déclaration de l'état d'urgence à la révision constitutionnelle abandonnée". *Annuaire international de justice constitutionnelle*, 32(2016), 49.

<sup>81</sup> Decision no. 2016-567/568 QPC dated 23 September 2016, Recital 8. In: Guérin-Bargues. *Supra Note 50*,13.

## Section 4 - ECHR's Legal Framework of Derogation to Tackle Emergencies: Human Rights as a Hindrance to Security?

While no emergency would appear to be a moral reason to breach human rights, practice makes this dynamic more challenging. Thus, it is not infrequent to find derogation clauses in international and regional conventions.<sup>82</sup> Derogation is a mechanism that allows one party to a contract to temporarily withdraw from its obligation towards a certain article. Within the ECHR not all articles can be derogated from, and some simply do not need to as they enclose their limitations.

In the European framework, article 15 ECHR addresses the derogation procedure. This article sets out requirements for a High Contracting Party to derogate from its obligations in a time of emergency. Although it is an important clause to avoid undermining the sovereignty of parties, it is nevertheless a significant threat to the protection of human rights. This delicate balance between sovereignty and protection of rights is ultimately embodied in the decision to include an opt-out clause. A choice that the African Convention did not prefer, for instance.<sup>83</sup>

In the ECHR, article 15 is unfolding in three paragraphs: (1) the conditions and requirements to derogate, (2) the list of the most fundamental rights not encompassed by this derogation and (3) the notification procedure to derogate.<sup>84</sup> Therefore, the first step would be to focus on the appreciation of the conditions that must be met for a state to derogate legally.

Delving into the Article 15 para 1 will enable the identification of legal conditions, while Strasbourg Court's case-law will offer an appreciative eye on the subjective conditions **(4.1)**. Once the conditions are met, the requirements of the measures come into play. The necessity and proportionality test of measures taken under derogation in times of emergencies will therefore be presented **(4.2)**. Finally,

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<sup>82</sup> See Article 27 of the Inter-American Convention and Article 4 of the ICCPR.

<sup>83</sup> See Tolera et al., (2014) "Absence of Derogation Clause under the African Charter and the Position of the African Commission", *Bahir Dar Univ. Journal of Law* 4(2), 237.

<sup>84</sup> See Article 15 of the ECHR:

*"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*

*2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (para 1) and 7 shall be made under this provision.*

*3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."*

after grasping the derogation under the article 15 system, this research will illustrate its mechanism with Article 5 ECHR<sup>85</sup>. In other words, what are the derogation's impacts on the effectiveness of this article? Indeed, in the context of counter-terrorism policies, Article 5 ECHR is in the firing line. Therefore, the examination of Strasbourg's case law on the right to liberty's derogation will bring light to that dynamic (4.3).

#### **4.1 - Permission to Derogate: the meaning of "other public emergency threatening the life of a nation"**

Article 15 para 1 foresees that:

"[I]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."<sup>86</sup>

In the first instance, the list of contextual situations that can lead to a derogation is exhaustive: a war or an emergency threatening the life of the nation. If the first context is more easily defined<sup>87</sup>, the characterisation of "other public emergency" is more obscure. According to the Strasbourg Court's appreciation in *Lawless v. Ireland*, a public emergency is "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."<sup>88</sup>

Defining an emergency, as a supra-national organ, is delicate. Thus, the Court decided to adopt a margin of discretion doctrine concerning this condition. Adopting a margin of appreciation allows the judge to let states determine the most appropriate measures that shall apply to them in terms of rights protection.<sup>89</sup> Essentially, it is a waiver of obligations regarding rights and freedoms, with the final aim of rapidly reinstating an order in which these rights are better protected. However, in practice, the security argument used to unlock powerful "temporary" powers appears more as a sword than a shield.

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<sup>85</sup> European Convention on Human Rights. (ECHR). Article 5 - Right to liberty and security.

<sup>86</sup> See European Convention on Human Rights (ECHR), Article 15§1.

<sup>87</sup> See Cataldi, G. in: Mariniello, T. (2019). Prolonged emergency and derogation of human rights: Why the European Court should raise its immunity system. *German Law Journal*, 20(1), 49.

<sup>88</sup> *Lawless v. Ireland* (No. 3), App. No. 332/57, para. 28 (July 1, 1961). Link: <http://hudoc.echr.coe.int/>.

<sup>89</sup> Gross, O. and, Ni Aolain, F. (2001). "From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights". *23 Human Rights. Q.*, 625.

Indeed, these measures might make it increasingly harder to re-built effective protection for human rights once the state of emergency has been lifted.<sup>90</sup>

Therefore, to control this margin of appreciation, the Court developed extensive case law to establish more precise legal conditions of public emergency. A public emergency must be current or imminent (1); concerning the whole nation (2)<sup>91</sup>; threatening the organised life of the community (3); is exceptional to the extent that normal measures are inadequate (4).<sup>92</sup> This framework narrows the scope of emergency characterisation. The imminence criterion is the most prone to interpretation. Particularly when the Court has never issued any case law on a time limit to the derogation.<sup>93</sup> Indeed, in some cases, notably, to tackle a persistent terrorist threat, as in Northern Ireland or concerning Al Qaeda, the Court found no objection to these emergency derogations spanning several years.<sup>94</sup>

Generally, Strasbourg's judges consider national judges to be in a better position to decide on the continuity of a threat to their respective nations.<sup>95</sup> Thus, it is rare for the Court to go against a declaration of public emergency. However, because the equilibrium between protection and violations is so delicate, the Court must be vigilant. Hence, states are benefiting from European supervision at their discretion.<sup>96</sup> This feature highlights the Court's role as one of supervision rather than a simple observer of national courts. Thus, if the characterisation of an emergency is let with a wide margin of appreciation, Strasbourg's supervision is more stringent in its measures' control of necessity and proportionality.

#### **4.2- Balancing threat and response: Guideline on Measures' Requirements Taken Under Article 15 ECHR**

The Court has established six conditions to derogate for a High Contracting Party. **First**, it must not target one of the non-derogable rights.<sup>97</sup> **Secondly**, the derogation procedure must be following all

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<sup>90</sup> See International Commission of Jurists, *Assessing Damage, Urging Action*. (2008, December). "Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights", 25.

<sup>91</sup> See *Ireland v. the United Kingdom*, 1978, § 205, and in *Aksoy v. Turkey*, 1996, § 70

<sup>92</sup> See Council of Europe. (1969). *The Greek Case: Report to the Sub-Commission*. 1(I). 70. Link: [https://www.echr.coe.int/Documents/Denmark\\_v\\_Greece\\_L.pdf](https://www.echr.coe.int/Documents/Denmark_v_Greece_L.pdf); *Denmark, Norway, Sweden and the Netherlands v. Greece* (the "Greek case"), Commission report, 1969, § 153.

<sup>93</sup> See *Ireland v. the United Kingdom*, 1978; *Brannigan and McBride v. the United Kingdom*, 1993; *Marshall v. the United Kingdom* (dec.), 2001; *A. and Others v. the United Kingdom* [GC], 2009, § 178.

<sup>94</sup> Council of Europe (1969), *Supra note 91*.

<sup>95</sup> See *Ireland v UK*, 1978, §207

<sup>96</sup> *Brannigan and McBride*, *Supra Note 92*, para 43; *Mehmet Hasan Altan v. Turkey*, 2018, § 91; *Şahin Alpay v. Turkey*, 2018, § 75.

<sup>97</sup> ECHR, Article 15 para 2. *e.g.* Right to Life.

requirements and supervision needed. **Thirdly**, the aim of any derogation must be based on a public emergency threatening the life of the nation. **Fourth**, measures taken under the derogation must be necessary and proportionate regarding the threat in question. **Fifth**, the derogation follows the principle of non-discrimination.<sup>98</sup> Finally, **sixth**, the derogation must comply and be consistent with other obligations.

These criteria are paramount to balance the protection of human rights with the derogation mechanism.<sup>99</sup> Thus, considering that the first section delved into the third criterion (characterising a public emergency), this section will touch upon the rest of the requirements. In other words, each requirement mentioned above is going to be delved into in a non-chronological order in the following section. This aims to follow the figurative order given in Article 15 ECHR and the Court's case law.

#### ***4.2.1 - Necessity and Proportionality Criteria of Derogation's Measures (Criterion 4)***

The Strasbourg court allows for a broad national appreciation of which situation is a public emergency, however, it is not the case in the assessment of proportionality for exceptional measures. Indeed, according to the ECtHR, their expertise:

"Is required to examine the measures that have been adopted in derogation of the Convention rights in question and [...] weigh them against the nature of the threat to the nation posed by the emergency."<sup>100</sup>

As proportionality is essential, and yet subjective, judges outlined some conditions. Thus, the Court refined the condition to "measures strictly required by the exigencies of the situation".<sup>101</sup> According to the following cases - *Brannigan and McBride v. UK*; *A. and Others v. UK*<sup>102</sup> - circumstances and duration of the emergency are assessed in relation to the nature of the rights affected by the derogation. Balancing these criteria on merits allows the consideration of a measure as "required by the situation" or not. Therefore, ECtHR's case law led to consider different factors of appreciation as mentioned in the Guide to Article 15 ECHR.<sup>103</sup> For instance, through the case *Brannigan and McBride v. UK*, the court agreed on the following criterion: 1) genuine response to an emergency, 2) limited in scope and

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<sup>98</sup> A derogation to any article of the ECHR cannot target a specific ethnic/religious group and must apply to all citizens (e.g. UK Derogation)

<sup>99</sup> Noting that the non-discrimination criterion will be superficially addressed considering the extent of the literature on the topic.

<sup>100</sup> *A. and others*, App. No. 3455/05 at para. 185.

<sup>101</sup> *See Ireland v. the United Kingdom*, 1978, para 207; *Lawless v Ireland* (n°3), para 29

<sup>102</sup> *Brannigan and McBride*, *Supra note 92*, para 43; *A. and Others v. the United Kingdom* [GC], 2009, § 173

<sup>103</sup> European Court of Human Rights (ECHR). Guide to Article 15 - Derogation in time of Emergency. 30 Avril 2021, 8.

the reasons advanced in support of it, 3) measures subject to safeguards and 4) judicial control of the measures was practicable.<sup>104</sup>

Originally, the margin of appreciation granted by Strasbourg for declaring a public emergency was similar to the one granted to assess measures' proportionality. However, since *Aksoy v. Turkey* and *A and others v. UK*<sup>105</sup> a shift in position occurred. Indeed, the Court restores its scrutiny capacity and tends towards a more thorough and less permissive assessment of measures' proportionality by states.<sup>106</sup> Thus, proportionality and necessity control appears to be the key focus of Strasbourg's supervision of its High Contracting Parties.

#### ***4.2.2 - Compliance and Consistency with Other Obligations and Non-Derogable Rights (Criteria 6 and 1)***

These two criteria are being merged within this section as they are interlinked. Indeed, a party's other obligations include lists of non-derogable rights. Therefore, the Court appears to be more cautious regarding the criterion of consistency with other obligations. Indeed, assessing a state's compliance with other international obligations is often an assessment of compliance with international treaties (i.e. ICCPR). The control of compliance to international treaties can difficultly be practised by a European judge. This delicate situation's outcome is that the Court has never effectively condemned a state for failing to comply with international obligations. Indeed, as the three following judgments testify - *Lawless v. Ireland*; *Brannigan and McBride v. the United Kingdom*; *Marshall v. the United Kingdom*<sup>107</sup> - the Court argues either that no inconsistencies can be found, or that this apprehension is beyond its scope of competencies.

Compliance with international obligations complements Article 15 para 2 in the list of rights from which a state party may not derogate in a situation of emergency or armed conflict. Indeed, the

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<sup>104</sup> See criteria in *Brannigan and McBride*, in citation order: para 51; para 66; para 61-65; para 59. For a full list of factors assessed by the ECtHR, please refer to the Guide to Article 15, 8-9.

<sup>105</sup> See *A. and others v UK*, App. No. 3455/05, [GC], ECHR 2009; *Aksoy v Turkey*, App. 18 December 1996, Reports of Judgments and Decisions 1996-VI. See also more recently, *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018 ; *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018 .

<sup>106</sup> Fenwick, H., & Fenwick, D. (2018). The case for a more ready resort to derogations from the ECHR in the current "war on terror". *European Human Rights Law Review*, (4), 313.

<sup>107</sup> See *Lawless v. Ireland*, 1961, para 40; *Brannigan and McBride v. the United Kingdom*, 1993, para 67-73 (for no inconsistencies to be found); and *Marshall v. the United Kingdom*, (dec.) 2001. (For the appreciation of "official proclamation" of derogation to Art 4 ICCPR as beyond the scope of the Court's appreciation).

"compliance with international obligation" implies that non-derogable rights under international treaties are non-derogable under article 15 ECHR as well. According to the latter article 15 para 2:

“[N]o derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (para 1) and 7 shall be made under this provision.”<sup>108</sup>

Thus, the right to life (Art.2), the prohibition of torture (Art.3), the prohibition of slavery and forced labour (Art.4) and the Latin legal principle of *nulla poene sine lege*<sup>109</sup> (Art.7) are being protected from the derogative procedure.

In addition to these rights inherent to the Convention, three additional protocols - Protocol 6, Protocol 7 and Protocol 13- each contain a clause prohibiting derogation from the rights they enshrine.<sup>110</sup> Thus, protocols 6 and 13 forbid any derogation to the abolition of the death penalty, and protocol 7 forbids derogating to the *ne bis in idem*<sup>111</sup> principle. The latter Latin formula is universally implemented in State's domestic law and ensures that no one can be judged twice on the same actions. Thus, this list of non-derogable rights allows a minimum of human rights protection to be maintained in public emergencies (or armed conflicts) while broadening states' scope of actions and their capability to take all necessary measures to tackle threats. However, this necessary mechanism remains ominous.

#### ***4.3.3- Procedure and Supervision Requirements for Derogating (Criterion 2)***

To ensure the proper functioning of this mechanism, the notification procedure needs to be tightly controlled. Article 15 para 3 provides the following guidance:

"Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."<sup>112</sup>

While this article gives a large outline of the derogation notification and its withdrawal, the Court's case law covered specificities. Firstly, the Court highlighted the main objective of derogation's notification as becoming public. Indeed, the ECHR is based on a collective enforcement system.<sup>113</sup> In other words, the notification to the Secretary-General must be transmitted by him to the other States Parties as soon as possible.<sup>114</sup>

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<sup>108</sup> European Convention on Human Rights. (ECHR) Article 15 para 2.

<sup>109</sup> The literal translation of the Latin principle in English is "no punishment without law".

<sup>110</sup> Article 3 of Protocol No. 6, Article 4 para 3 of Protocol No. 7, and Article 2 of Protocol No. 13.

<sup>111</sup> The literal translation of the Latin principle in English is "not twice for the same".

<sup>112</sup> European Convention on Human Rights. (ECHR) Article 15 para 3.

<sup>113</sup> European Court of Human Rights (ECHR). Guide to Article 15 - Derogation in time of Emergency. 30 Avril 2021, 11.

<sup>114</sup> See *Greece v. the United Kingdom*, no. 176/56, Commission report of 26 September 1958, para 158.

The Court extends this reading to the negative in the case of *Cyprus v. Turkey*, considering that the absence of an official and public notification leads to the non-application of Article 15 to the defendant.<sup>115</sup> This case led the Court to specify the notification's form. Thus, secondly, the notification is expressively required in a writing letter, paired with legal texts' copies and an explanation of every emergency measure taken under them with their purposes.<sup>116</sup> Further information on this part of the procedure will be highlighted in the *Greek Case*. Indeed, the Court outlined that the failure to provide copies of all relevant measures has the same outcome as non-compliance with public notification, which is the non-application of Article 15.<sup>117</sup>

Furthermore, the question of delay of notification is also examined in this same case. The Court found that the four-month delay of notification for certain measures was too long.<sup>118</sup> The same outcome was pinned out for the three-month delay in the case of *Greece v. UK*.<sup>119</sup> However, in *Lawless v. Ireland*<sup>120</sup>, the Court validated a twelve-days delay of notification. This procedure and delay are calculated to give the other High Contracting Party enough time and resources to appreciate the nature and extent of the derogation, with sufficient information at their disposal. Thus, thirdly, even if no other contracting party is objecting to the derogation's notification, the Court reserved itself a *motu proprio* examination possibility.<sup>121</sup> In other terms, the Court can decide at its sole discretion to assess the compliance of the defendant's notification with the requirements of article 15. Finally, the Court as identified, in *Brannigan and McBride v. UK*, the existence of a permanent review system implied by article 15 para 3.<sup>122</sup> Thus, for the duration of the derogation, the Court carries out a review of the measures taken in the emergency context and their compliance with legal requirements.

#### **4.3.4 - The Principle of Non-Discrimination within Derogations (Criterion 5)**

According to Article 14 ECHR, derogations must be implemented:

"Without discrimination on any ground such as sex, race, colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth or other status."<sup>123</sup>

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<sup>115</sup> *Cyprus v. Turkey*, Commission report of 4 October 1983, para 66-68.

<sup>116</sup> *Lawless v. Ireland* (no. 3), para 47

<sup>117</sup> *The Greek Case*, Commission report, para 81(1)-(2).

<sup>118</sup> *The Greek Case*, *Supra Note 116*, para 81(3)

<sup>119</sup> *See: Greece v. the United Kingdom*, no. 176/56, para 158.

<sup>120</sup> *See: Lawless v. Ireland* (no. 3), para 47.

<sup>121</sup> *Aksoy v. Turkey*, para 85-86

<sup>122</sup> *Brannigan and McBride v. UK*, para 54.

<sup>123</sup> European Convention on Human Rights (ECHR). Article 14.

This principle was re-affirmed in *A. and Others v. the United Kingdom*<sup>124</sup> in the context of counter-terrorism measures taken by the UK to fight Al Qaeda. In this case, the judge found a violation of Article 5 of the ECHR, finding that the measures were disproportionate in that they discriminated between nationals and foreigners.

Thus, to comply with the principle of equal treatment and non-discrimination, a law, even one adopted under a legal derogation procedure, may not be discriminatory. In other words, a security measure must not target a specific group or part of the population. If a group is targeted, the measure becomes disproportionate, and therefore, does not comply with the principle of non-discrimination.

As illustrated in this section, the case law has brought a range of new specificities to Article 15. This trend proves the will - and the predicament - of the ECHR. Indeed, the review of Article 15 applications seems to be a case-by-case basis, whereby the Court tries to assess the substantive conditions as accurately as possible. As each notification of derogation specifies articles that the defending country might infringe, derogations to Article 5 (Right to liberty and security) will be of particular interest in this research.

### **4.3 - Reducing Article 5 ECHR's scope of application in the name of security: Preventive necessity or guise to cast a wide net?**

As outlined in *A and Others v. UK*, the character of "imminent" threat, developed in the interpretation of article 15 para 1,<sup>125</sup> does not imply that a state must wait for a disaster to happen before acting.<sup>126</sup> This appreciation of imminence paves the way for preventive, rather than merely remedial, actions. However, in terms of the right to liberty and security, how do these preventive actions materialise?

According to Article 5 ECHR:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."<sup>127</sup>

In the context of a terrorist-grounded security threat, the identification, arrest and detention of suspects are paramount. For instance, in *Brannigan and McBride v. the United Kingdom*<sup>128</sup>, the UK decided to

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<sup>124</sup> *A. and Others v. the United Kingdom* [GC], 2009.

<sup>125</sup> *See Ireland v. the United Kingdom*, 1978, § 205 for the appreciation of the imminence of a threat to the nation by the Court.

<sup>126</sup> *A. and Others v. the United Kingdom* [GC], 2009, para 177

<sup>127</sup> European Convention on Human Rights. (ECHR) Article 5 para 1.

<sup>128</sup> *Brannigan and McBride v. UK*, para 54.

derogate from Article 5 ECHR to tackle the IRA-related terrorism threats. This mechanism makes it possible to apprehend terrorist suspects, by detaining them without charges for a few days, to comply with the necessity of the situation. Moreover, this case law highlighted a major issue in the reviewing methods of Strasbourg. According to Fionnuala Ní Aoláin<sup>129</sup>, the shortcoming of this mechanism is that Strasbourg has no independent monitoring mechanism to carry out fact-finding missions.<sup>130</sup> Thus, the Court is not in position to assess if a measure falls under the necessity of an emergency or not.

For this reason, the Court is very broad in its assessment of this necessity, as demonstrated by the case of *Brannigan and McBride v UK*. Indeed, in 1993, the assessment of the necessity of this derogation was based on the facts of two cases - *Lawless v. Ireland*<sup>131</sup> and *Ireland v. the UK*<sup>132</sup> - occurring 32 and 15 years earlier, respectively. Given the information mentioned above, Strasbourg appears to be in a difficult position to determine if an emergency regime is necessary.<sup>133</sup> However, it is essential to note that this permissiveness has consequences for direct actions being taken under these legal covers.

Indeed, in the Guideline to Article 5 ECHR, the Court highlights that this article intends to prevent any arbitrary deprivation of liberty to occur.<sup>134</sup> Derogation to article 5 - or reducing the scope of its application - is risky. As the Court underlined in *Kurt v. Turkey*, article 5 encompasses “both the protection of physical liberty of the individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.”<sup>135</sup> However, derogations to this article are often the first ones to rise in an emergency context, as they appear to be a grounding basis to unravel security responses to a threat.<sup>136</sup> Thus, the Strasbourg court has a scrutinising duty over the legality of these infringements to Article 5. Therefore, the Court has to evaluate on a case-by-case basis, the necessity and proportionality of a liberty restriction issued by a State in the name of security.

Restrictions of liberty in an emergency context are carried out through administrative measures. The use of these administrative procedures allows the authorities to bypass the judiciary to take these

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<sup>129</sup> Prominent Irish Lawyer, appointed Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in 2017.

<sup>130</sup> Ní Aoláin, F. (1996). The Emergence of Diversity: Differences in Human Rights Jurisprudence *Fordham International Law Journal*, 19, 101

<sup>131</sup> *Lawless v. Ireland* (n°3), para 28.

<sup>132</sup> *Ireland v. the United Kingdom*, application no. 5310/71 (1978) ECtHR, para 207

<sup>133</sup> Smith, R. (2011). The Margin of Appreciation and Human Rights Protection in the 'War on Terror': Have the Rules Changed before the European Court of Human Rights? *Essex Human Rights Review*, 8(1), 128.

<sup>134</sup> ECHR (2021) Guideline to the Article 5 ECHR. 8

<sup>135</sup> *Kurt v. Turkey*, App. No. 24276/94, para. 123 (May 25, 1998)

<sup>136</sup> Mariniello, T. (2019). Prolonged emergency and derogation of human rights: Why the European Court should raise its immunity system. *German Law Journal*, 20(1), 65.

preventive detention measures. This lack of balance threatens the Rule of Law and must remain an exceptional measure to address an imminent emergency.<sup>137</sup> Thus, article 5 para 3 foresees that:

“Everyone arrested or detained in accordance with the provisions of (...) this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power.”<sup>138</sup>

This disposition and appreciation of the "promptly" notion fall under a case-by-case appreciation. Indeed, within the UK, two cases gave different outcomes. For instance, first in *McKay v. UK*<sup>139</sup>, the judge considered that four days would be the maximum delay in an ordinary situation. However, under a legal derogation taken under article 15 ECHR, the Court allowed seven days.<sup>140</sup> If these delays establish a common ground, the margin of appreciation depends on what is necessary to meet the exigencies of the situation varies. This case-by-case consideration is paramount concerning the stakes.

As the Court pointed out in *Aksoy v. Turkey*, the issue at stake in this time limit is vulnerability to torture, and for this reason, the time frame should be as short as possible following the exigencies of each situation.<sup>141</sup> Thus, the monitoring of compliance with Article 5, in times of emergency and derogation, attempts to limit the use of arbitrary detentions to a necessary minimum.

In France, house arrests became an important counter-terrorist preventive tool in the aftermath of the 2015's events. These administrative measures were introduced in the SILT law on the 30th of October 2017.<sup>142</sup> Under the procedural name of MICAS<sup>143</sup> administrative authorities can now place a person suspected of disturbing public order under house arrest. While the French Constitutional Council is defending the position that MICAS and house arrests in times of emergency do not meet the same conditions, these measures are sensibly similar. According to Nicolas Klausser (professor of French Public Law):

"Both allow the administrative authority to place under house arrest - and thus deprive of liberty - persons against whom it does not have sufficient elements to judicially assess their situation."<sup>144</sup>

In the light of the ECHR, the deprivation of liberty is forbidden by article 5 ECHR. This article does not enclose any limitations, therefore, to deprive someone of their liberty, a high contracting party

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<sup>137</sup> Mariniello T., *Supra Note 135*, 60.

<sup>138</sup> European Convention of Human Rights. (ECHR) Article 5 para 3.

<sup>139</sup> *McKay v. UK*, App. No. 543/03, paras. 33, 40 (Oct. 3, 2006)

<sup>140</sup> *Brannigan and McBride*, App. No. 14553/89, 14554/89, at para. 52-54.

<sup>141</sup> *Aksoy v. Turkey*, App. No. 21987/93 at para. 84.

<sup>142</sup> Law n° 2017-1510 of the 30th of October 2017 "Renforçant la sécurité intérieure et la lutte contre le terrorisme" [Strengthening internal security and the fight against terrorism].

<sup>143</sup> MICAS is an acronym of "Mesures individuelles de contrôle administratif et de surveillance" [Individual Administrative Control and Surveillance Measures].

<sup>144</sup> Klausser, N. (2018) "Conformité à la Constitution des mesures individuelles de contrôle administratif et de surveillance", *La Revue des droits de l'homme*, consulted 30th of March 2022 [online]. Link: <https://journals.openedition.org/revdh/3786#citation>

needs to derogate from article 5 ECHR. Deprivation is assessed regarding its duration, effects and implementation. Regarding house arrests, twelve hours of self-incarceration might not be a liberty deprivation. Indeed, under article 2 Protocol 4, restrictions of liberty are permitted if necessary and proportional, with no need to derogate.

Thus, if the restriction of liberty seems to be taken under Article 2 Protocol 4, no derogation is needed. However, if in the light of the duration, effects, and implementation, a deprivation of liberty can be concluded, then a derogation to article 5 ECHR is mandatory.

## **Section 5 - Analysis of the French Anti-Terrorist Legislation's Compatibility with the European Court of Human Rights Standards**

In the previous sections, two frameworks have been developed. On the first hand, the French anti-terrorist legislation was explained and illustrated, and on the other hand, the legal framework of Article 15 ECHR was established. Now, to answer the research question regarding the compatibility of the French framework to the ECHR's one, this section aims to apply legal criteria to the legislative arsenal on three different matters. The first point of this analysis concerns the derogation emitted by France to the ECHR. Indeed, the idea is to understand how the French reservation impacts the application of the derogation criteria established by the Court (5.1). The second point of analysis is to compare the compatibility of the measures of the French anti-terrorist legislative framework with each of the 6 criteria established by the Court (5.2). Finally, the last point of this analysis will focus on the duration of the state of emergency. This more global and comprehensive approach to French compatibility with the ECHR will be carried out under a test of proportionality and necessity (5.3).

### **5.1 - The French Reservation to Article 15 ECHR: Compatibility Assessment with the European Court's Vision.**

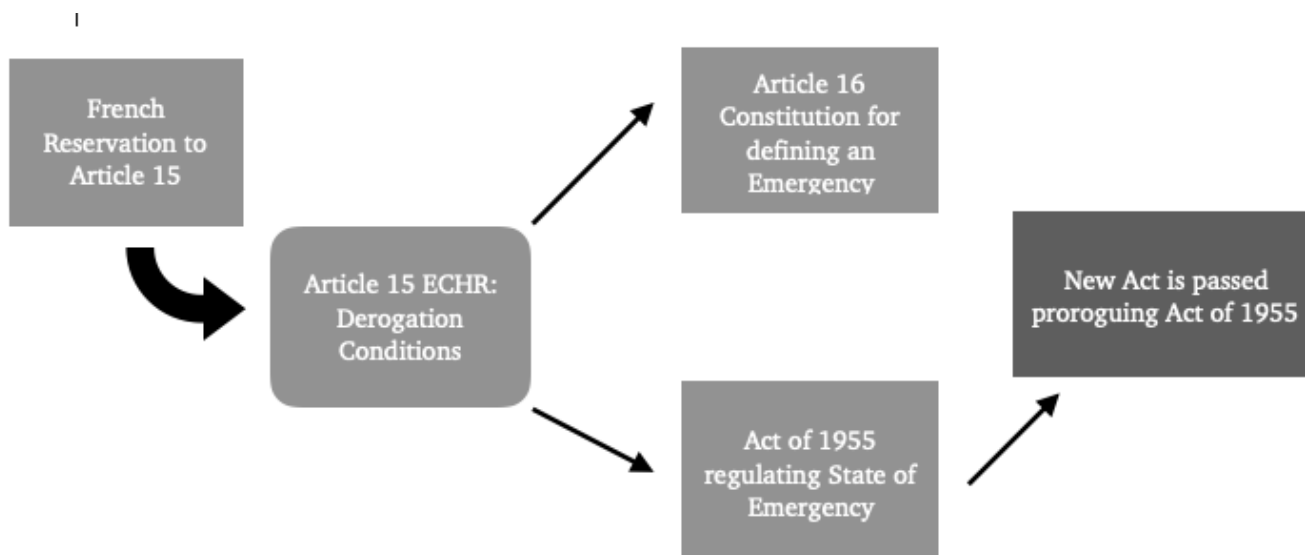
One of the first issues raised in parallel with the compatibility of state of emergency measures in France is its reservation to Article 15 para 1 ECHR. It should first be remembered that the Court must stand against arbitrary state behaviour regarding human rights. This duty became apparent in the post-World War II period. In the case of *Belilos v/Switzerland* of 29 April 1988, the Court held the reservation invalid. Through this action, the Court is asserting its competency in assessing reservations' validity.<sup>145</sup>

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<sup>145</sup> See Toullier, M. (2017). The European Court of Human Rights' control over states' derogation in time of emergency: example of effectiveness of the lessons learned from WW2. *International Comparative Jurisprudence*, 3(1), 10.

Concerning the French reservation to article 15 ECHR, no assessment by the Court has been undertaken. However, the impact of the reservation is emptying the European judge from its substance (see *Table 2* below).

**Table 2: Impact of the French reservation on Article 15 ECHR.**



The French reservation gives priority to the constitution in its article 16 to establish the conditions of derogation. Furthermore, it conditions the establishment of the state of emergency to the 1955's Act. Thus, through this reservation, France conditions its exemption from ECHR's obligations to its own domestic legislation. As previously established, the 1955's Act requires an extension Act to cover a new emergency. This law must accommodate the needs of the new emergency. Thus, the President can invoke a state of emergency and define the measures he considers necessary. In other words, the derogation from ECHR rights and freedoms is conditional on the new law passed by the President of the French Republic to handle each new emergency. As *Table 2* highlights, there is no direct link between article 15 ECHR and the new law proroguing the Act of 1955 State of Emergency.

However, as this is an important point to highlight, the lack of assessment by the Court does not enable any conclusions on its unconventionality. This legal gymnastic is focusing merely on the conditions to derogate. Indeed, the shift operated enabled the bypass of the "threat to the nation" condition, by using the "threat to public order" criterion of the 1955's Act.

Thus, the analysis of the French reservation raises concerns about compatibility with the spirit of the ECtHR regarding Article 15 ECHR. Indeed, a fundamental element in the legality of a derogation is "the threat to the life of the nation" (criterion 3). Through the French reservation, the substance of this criterion is shattered. Thus, the legal requirement to derogate in France is a "threat to public order". By enabling the semantic substitution of requirements, the compatibility of French exceptionalism to the spirit of Strasbourg raises serious concern.<sup>146</sup> However, the reservation goes against the purpose of Article 15 ECHR, and therefore, appears incompatible with the spirit of the Convention.

## **5.2 - French Emergency Measures: House Arrests and House Searches under the Court's Six Requirements Magnifying Glass**

The French derogation of 2015 has been exemplified as vague.<sup>147</sup> Indeed, one can read in the last paragraph of the French derogation (see *Appendix 2*), that emergency decrees "may involve a derogation from the obligations under the Convention". Not only the use of a derogation is made vague, but it refrains from mentioning which articles are concerned by this derogation. This is posing a considerable dilemma for the current research. Indeed, house arrest measures might not be taken under a derogation from article 5 ECHR. For instance, it might be taken under a limitation of Article 2 of Protocol 4 regulating the liberty of movement. Similarly, house searches might have been implemented under a simple limitation to article 8 ECHR and not a derogation to that article. Under the ICCPR, the Party must be specific regarding articles it aims to derogate. Thus, on the 23rd of November 2015, France emitted a derogation to the ICCPR regarding articles 9, 12 and 17 ICCPR.<sup>148</sup> These articles protect respectively, the right to liberty and security, the liberty of movement, and the right to privacy and family life. Thus, considering that this derogation and the ECHR's one have been taken the same day, the following discussion presumes that the French government derogated from Articles 5 and 8 ECHR, addressing respectively the right to liberty and security, and the right to privacy and family life.

Therefore, considering the conditions established by the Court to derogate, French measures under their derogation will be assessed as follow: **1)** it must not target one of the non-derogable rights; **2)** the

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<sup>146</sup>Compliance means that legally, rules that should be applied are being followed by a State. However, the compatibility illustrates the Judge's vision and refers to the spirit of the law. Thus, as the reservation was never contested, the French derogation complies with the ECHR

<sup>147</sup> Mariniello T. and Wallace, S. (2020). Derogations from the european convention on human rights: The case for reform. *Human Rights Law Review*, 20(4), 784.

<sup>148</sup> See France, notification under article 4 (3) of the Covenant, C.N.703.2015.TREATIES-IV.4 (depository notification), transmitted to the Secretary-General on 23 November 2015.

derogation procedure must be following all requirements and supervision needed; **3)** the aim of any derogation must be based on a public emergency threatening the life of the nation; **4)** measures taken under the derogation have to be necessary and proportionate regarding the threat in question; **5)** the derogation follows the principle of non-discrimination; **6)** the derogation must comply and be in consistency with other obligations. Thus, the French legislative framework will be analysed through the different requirements/criterion.

### ***5.2.1 - Criterion 1: Compatibility of French Measures with article 15 para 2 Regarding Non-Derogable Rights***

As established in the legal framework, non-derogable rights encompass the right to life (art. 2 ECHR), the prohibition of torture (art. 3 ECHR), the prohibition of slavery and forced labour (art. 4 ECHR), the principle of no punishment without the law (Art.7), the interdiction to reverse the abolition of the death penalty (Protocol 6 and 13) and the *ne bis in idem* (Protocol 7).

Regarding this list, French anti-terrorist legislation does not seem to be in breach of non-derogable rights. The only ambiguity could be made with the prohibition of torture. Indeed, as established in *Askoy v. Turkey*, measures taken under the derogation to Article 5 ECHR should be taken strictly to avoid position placing an individual in vulnerability to torture.

Within the two focus measures of this research, violent treatments have been deplored by Amnesty International and Human Rights Watch. If no conclusion of physical torture can be proven, the use of physical and verbal violence by the police is. In June 2016, the UN Committee against torture (herein after CoAT) stated in their periodical review that they were concerned by "reports of excessive use of force by the police during some search operations, which has in some cases led to psychological sequelae for the persons in question."<sup>149</sup>

Thus, as no cases have been formed, and the CoAT only raised concerns, this research cannot conclude in the violation of the non-derogable prohibition of torture by the French state. However, this concern was worth mentioning as it directly addresses house searches and the violent character of their implementation. As a vulnerability to torture lies in the implementation of administrative measures, this will be better addressed in consideration of necessity and proportionality criteria.

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<sup>149</sup> UN Committee against Torture. (2016, June 10). Concluding observations on the seventh periodic report of France. *General Distribution*, para 13.

### 5.2.2 - Criterion 2: Procedure and Requirements Compliance by the French Government under the light of article 15 para 3

Procedure and requirements to derogate are outlined in article 15 para 3 of the ECHR. As outlined in the prior legal framework, its main aspects are its form, the delay of the announcement and its publicity.<sup>150</sup>

France submitted a written letter to the Secretariat of the Council of Europe on the 24th of November 2015.<sup>151</sup> This was eleven days after the attacks and the letter announces a terrorist threat of a lasting nature. As established in *Lawless v. Ireland*<sup>152</sup>, the Court validated a delay of twelve-day notice, therefore, the French eleven days complies with the time requirements fixed by the ECtHR.

Concerning the form, the written notification letter has been publicised on the CoE website and was, therefore, available for all. The additional documents enclosed gather all decrees and the extension Act, including the original Act of 1955 on the state of emergency. Moreover, France has been justifying every new extension of the state of emergency to the ECtHR.<sup>153</sup> Considering that the derogation procedure only requires the High Contracting Party to notify the end date of the derogation, such recurrent justification was not necessary. However, recalling the reviewing role of the Court within the derogation period, such justification might have made this task easier.

Concerning the derogation's form, its vagueness raises concerns. The last paragraph of the derogation states that (see *Appendix 2*) emergency decrees "may involve a derogation from the obligations under the Convention". The resort or not to a derogatory regime is unclear. Moreover, no articles targeted by these potential derogations are mentioned. This omission is largely problematic. Indeed, it constitutes

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<sup>150</sup> Ergec. R. (1987). Les droits de l'homme à l'épreuve des circonstances exceptionnelles : Étude sur l'article 15 de la Convention européenne des droits de l'homme. *Editions de l'Université de Bruxelles*. 307

<sup>151</sup> See *Appendix 2* for full text. Declaration recorded in a letter from the Permanent Representative of France to the Council of Europe, dated 24 November 2015, available at <https://www.coe.int/fr/web/conventions/> > searches: searches on reservations and declarations > concerning a given State > State: France; Available subjects: Human Rights (Conventions and Protocols only); Complete chronology from 14/11/2015 to 01/12/2017 (accessed on 06.05.22)

<sup>152</sup> *Lawless v. Ireland* (no. 3), para 47

<sup>153</sup> See Statement contained in a Note Verbale from the Permanent Representation of France, dated 25 February 2016; Statement contained in a letter from the Permanent Representative of France to the Council of Europe, dated 25 May 2016; Statement contained in a letter from the Permanent Representative of France to the Council of Europe, dated 22 July 2016; Statement contained in a letter from the Permanent Representative of France to the Council of Europe, dated 21 December 2016; Statement contained in a letter from the Permanent Representative of France to the Council of Europe, dated 12 July 2017, available at <https://www.coe.int/en/web/conventions/> > searches: searches on reservations and declarations > concerning a given State > State: France; Available subjects: Human Rights (Conventions and Protocols only); Complete chronology from 14/11/2015 to 01/12/2017 (accessed on 06.05.22).

an impediment to effective supervision by the Strasbourg judge. Thus, the French government holds full discretionary powers to impose human rights-restricting measures.

The problem for the Court's supervision and research is the impossibility of knowing whether a measure is taken in derogation of a certain article. For example, house arrest violates Articles 5 and 8 ECHR, and searches violate Article 8 ECHR. Article 5 ECHR cannot be limited. Thus, it requires a derogation to have its obligations lifted. However, Article 4 of Protocol 2 concerning freedom of movement can be limited. Thus, it is difficult to know whether house arrest is a mere derogation from freedom of movement (Art 2 Protocol 4) or a derogation from Article 5 ECHR.

Thus, the border between one and the other is hard to define. The Constitutional Council has been seized of a QPC<sup>154</sup> concerning house arrest. Within this decision, the Constitutional Council, to which the protection of Human Rights is delegated in Emergency times, ruled that ministers and the Council of State are the most legitimate to ensure the protection of rights and freedom in emergency measures. Thus, the Constitutional Council fixed at 12 hours per day the limitation between restriction of liberties to privation of liberties. Deprivation of liberty refers to the use of Article 5, whereas restriction of liberty refers to Article 2 of Protocol 4. Thus, in the sense of French justice, there was no derogation from Article 5. However, it will be argued below that these measures are neither proportionate nor necessary under the limitations of Article 2 of Protocol 4, nor under the derogation regime of Article 5 ECHR.

Thus, to conclude on the procedural and formal criteria, the French government appears to be a rather well-cooperating actor. It is still important to note that the successive derogation extensions could have not been challenged by the Court in any case, as the derogation is granted until the state notifies it ends. In other terms, these letters to the Secretariat of the CoE were a simple share of information that did not enclose a real assessment by the Court. Thus, one can say that the French government has complied with requirements, but it remains quite unclear. Indeed, establishing which articles France has derogated is difficult. Thus, this discussion will be articulated around the presupposition of French derogation to articles 5 and 8 to the ECHR, while keeping in mind that they are not mentioned directly.

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<sup>154</sup> See Constitutional Council. (2016, September). No. 2016-567/568 QPC, *M. Georges F. et al.*, para 8.

### 5.2.3 - Criterion 3: Characterisation of Terrorist Attacks as a Threat to the Life of a Nation

As the French reservation notes in its first paragraph, the problematic part of Article 15 ECHR for France is the "threat to the life of a nation". However, article 16 of the French Constitution seems to go in the same direction by mentioning a threat to the integrity of the republican institutions or the national territory. Thus, one can question the aim of the reservation when the two provisions share the same legal spirit. Concerning the state of emergency, the reservation links the application of article 16 Constitution to the implementation of measures regulated by the 1955 Act. By allowing this normative semantic displacement, the state of emergency is thus conditioned to an "imminent danger resulting in serious attacks on public order."<sup>155</sup>

As established before, the latter definition enclosed in the Act of 1955 is broader. Therefore, the French President has a wider margin of appreciation concerning the declaration of a state of emergency and derogating from the ECHR than other member states. Once this is established, ground facts from the 2015's context must be assessed. Under the light of the ECtHR criteria, a threat to the life of the nation is: current or imminent (1), concerning the whole nation (2), threatening the organised life of the community (3), and is exceptional to the extent that normal measures are inadequate (4).

Considering the first criterion, the presence of a multitude of simultaneous attacks across Paris required a rapid and highly organised response. These attacks took place only 10 months after the Charlie Hebdo attacks. Thus, minds and emotions had not come down from this terrible incident. On 14 November 2015, Daesh claimed responsibility for the attacks on Twitter, stating that "this attack is only the beginning of the storm and a warning."<sup>156</sup> Even though the authenticity of the text has not been assessed, plus considering that one of the perpetrators managed to flee and the operations' mastermind was not apprehended,<sup>157</sup> the possibilities of further attacks being imminent were high.

Considering the second criterion, one can argue that the Parisian centre was, at the time, the epicentre of possible risks. The Daesh twitter post referred to Paris as "the capital of abominations and perversion, the bearer of the banner of the cross in Europe".<sup>158</sup> However, as the "Nice attacks" will prove, the real target is an entire way of life. Thus, if Paris was a suitable first target, the rest of the territory is as much at risk.

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<sup>155</sup> See the State of Emergency Act of 1955.

<sup>156</sup> See Deshayes. B. (2015, November 17) Daesh : une revendication glaçante après les attentats. L'internaute. [online] Herein: <https://www.linternaute.com/actualite/societe/1259217-daesh-une-revendication-glacante-apres-les-attentats/>

<sup>157</sup> HSAC (2016, June). The Attacks on Paris: Lessons Learned. White Paper. 11.

<sup>158</sup> Deshayes. B. *Supra Note 155*.

Regarding the third criterion, the post mentions the attack at the State de France "attended by the French idiot François Hollande".<sup>159</sup> By the mention of the president, and the fact that the location was carefully chosen, a desire to target the French institutions is discerned. Indeed, what better message than to challenge the head of the French presidential regime. Additionally, François Hollande referred to the whole "French Republic" as a target in his speech on 13 November 2015. Thus, the threat to the organised life of the nation can be established.

Finally, the last requirement concerns the measures. Considering the previous elements and the imminent possibility of a threat, more extensive and rapid administrative measures were indeed necessary. It was with this in mind that the searches and house arrests were deployed. The aim was to apprehend any person linked to the organisation and/or perpetration of these attacks. In addition, it was also important to prevent further attacks. The common law does not allow such speed for such a wide-ranging action. Thus, this criterion is also fulfilled.

To conclude, Thus, the threat to the life and integrity of the Nation appears to be concrete, whether in the legal framework of Article 15 ECHR, Article 16 of the Constitution, or a fortiori the 1955 Act. Although it was important to recall France's reservation mechanism, it did not play a role in this specific study case as even the narrower definition of the ECHR is fulfilled.

#### ***5.2.4 - Criterion 4: Proportionality and Necessity of the Derogation***

Proportionality and necessity tests are central to the compatibility test of the French derogation with the spirit of Strasbourg. However, under the circumstances of an unclear derogation, this test is made particularly difficult. House arrests impact the right to liberty and security, freedom of movement and the right to privacy and family life. House searches impact merely the right to privacy and family life. Thus, this section pre-supposes that house searches and house arrests involve derogations from Articles 5 ECHR and 8 ECHR and not limitations from Article 2 Protocol 4 and Article 8 ECHR.

To address the proportionality of a derogation, measures must be assessed under the nature of the threat. Hence, the ECtHR established the following criteria to assess necessity and proportionality: 1) genuine response to an emergency, 2) limited in scope and the reasons advanced in support of it, 3) measures subject to safeguards and 4) judicial control of the measures was practicable.<sup>160</sup> These criteria

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<sup>159</sup> Deshayes. B. *Supra Note 155*.

<sup>160</sup> *Branningan and McBride v. UK*, *Supra Note 92*.

will be used to assess the proportionality of the French derogation through two administrative measures: house arrests and administrative house searches. Thus, requirements will be compared to the two administrative measures of house arrests and searches. The compatibility assessment will be based on whether the measures are proportional to the nature of the threat or not.

*a) House Arrests: Necessity and Proportionality Test*

On the first hand, five rapporteurs of the UN considered the implementation of house arrests to be non-proportional. On the second hand, the Constitutional Council considered these measures necessary and proportional to their decision on the 22d of December 2015. In between these two standpoints, the following discussion aims to discuss relevant points addressing the necessity and proportionality of house arrest measures.

The first criterion established by the Court is the one of genuine response to an emergency (1). As established prior, the 2015's attacks were threatening the life of the nation. Thus, actions had to be taken quickly. House arrest measures arise as a great tool for rapid, large scale and effective apprehension of suspects. However, the genuine character of that response shifted in December 2015 while Paris was hosting the COP21. Indeed, dozens of climate activists have been put under house arrest for the period of the Convention to avoid their participation in protests. The grounds given were their potential to threaten public security and order. In the face of this deviation, the Council of State supports the measures by justifying that such demonstrations would be an obstacle to the fight against terrorism. In 2016, on the same grounds of preserving security and public order, new measures were taken to ban demonstrators from mobilising against the new labour law. Considering that this law was passed under the 49-3 regime, giving the government the possibility to force the passage of a law, without a vote, the ban on demonstrating imposed on certain citizens, under the guise of a terrorist threat, appears to be disproportionate.

The second criterion imposes measures to have a limited scope and reasons advanced to support them(2). As established before, house arrest conditionality shifted from "threatening activity" to "threatening behaviour". This shift embodies the will of the French government to adopt a rather flexible and convenient definition. Thus, any "persons who have drawn the attention of the police or intelligence services by their behaviour" can be convicted of serious restrictions on their fundamental rights and freedom. This definition enables to justify any arrests. Indeed, the mere definition was altered to leave free hands to the police to react unfettered. Considering the reasons advanced, the

definition is conditioning the implementation of these measures to the suspicions of the police and intelligence service. Therefore, house arrests are neither limited in scope - as they rely on suspicious behaviour detected by the police-, nor must be supported by valid reasons - as simple suspicions of the police justify the implementation of such measures.

The third criterion conditions the measures to safeguard (3). Within the house arrest regime, only the Minister of Interior and the Prefect can fix the duration and implementation. This rapid process aims again to take rapid decisions to protect the security of public order. Decisions made by these actors are not subjected to any systematic control by any other organ. Additionally, within article 6 of the State of Emergency Act of 2015, no mention of proof is being made in the procedural part. Indeed, house arrests do not require proof-based justifications from the police on these suspicions. Suspicious as a motive for searching leave the door open to discriminatory behaviour from the police. As it was reported, Muslims were targeted and suspected from the simple fact of their religious belonging.<sup>161</sup> If one can understand the need for a prompt post-attacks reaction, such liberty restrictions without judicial authorisation are difficult to justify. Thus, we can conclude that house arrests, as a measure, are not subjected to any safeguard.

Finally, concerning the practicability of judicial control concerning house arrests (4), no judicial body is involved in this process. Considering the prior point, and the fact that no proofs are needed to implement this measure, possibilities of appeal to a judicial body rise as fundamental. Fortunately, the system provides *référé-libertés*<sup>162</sup> possibilities. This system makes it possible to request an urgent end to an administrative measure that infringes rights and freedom. Appeal to a judge is therefore possible, however, only *a posteriori*. If no judge is seized, there is no mandatory and systematic control of house arrest modalities.

In conclusion, the house arrests appear to be motivated by a reactive-coercion strategy by the government. This sincere response to such an attack on the Republic seems justified, however, in terms of the criteria, none are sufficiently fulfilled. In this light, even if this thesis pre-assumed a derogation to articles 5 ECHR and 8 ECHR, house arrests taken under limitations clauses would not be considered proportional. The important number of house arrests has not been mentioned here, but it illustrates the result of an arbitrary wide-cast net taken in an emotional urgency. Arbitrariness is the main state

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<sup>161</sup> Transnational Institute TNI. (2020, November 5) When a Temporary State of Emergency becomes Permanent France as a Case Study. *Report War and Pacification*. [online] link: <https://www.tni.org/en/stateofemergency>.

<sup>162</sup> Individuals estimating that their rights and freedom are being violated by an administrative measure can make an emergency appeal in front of the liberty judge.

behaviour fought by Strasbourg. Hence, house arrest measures arise as incompatible with the spirit of the ECHR and do not meet the proportionality requirements. To fulfil the latter requirement, the behavioural motive must be changed towards actions, and the declaration of these measures needs reactive and organised judicial control. Without such protection, house arrests embody an arbitrary tool rendering human rights protection under its implementation difficult.

***b) Administrative House Searches: Proportionality and Necessity Test***

Administrative house searches within the state of emergency were introduced in the Act of November 2015 for the first time. Thus, their legal framework was elaborated in the light of the emergency specific to the 2015 terrorist attacks.

Considering the first criterion of genuine response to an emergency (1), house searches rise as a valid measure. Indeed, given the situation, the priority following the attacks was to find the remaining perpetrator, but also to track down any information on this terrorist organisation to identify its mastermind. Hence, house searches are allowed on "any person (...) in respect of whom there are serious reasons to believe that his or her behaviour constitutes a threat to public security and order". The conditionality, like house arrests, is put on behaviour rather than actions. However, in the context of searches, such measures appear genuinely necessary. Thus, even-though violence occurred during these searches, the response in its form (not implementation) arises as necessary considering the context.

The second criterion established by the Court provides that measures should be limited in scope and supported by valid reasons (2). Hence again, the conditionality of behaviour-based apprehension in the house arrests context was not proportional, as the consequences were deeply restrictive. However, concerning house searches, the behaviour-based motive arises as necessary. Nevertheless, house searches are not conditioned to any supporting reasons or proof. As established in section 3, frequenting a certain place or being in contact with a suspected person is enough "evidence" for raising police suspicions concerning one's behaviour. Thus, frequenting a person whose behaviour has been considered suspicious makes one a new suspect. This knock-on effect of behaviour-based targeting explains the massive number of 3,427 searches. A core issue is that suspicions about someone's behaviour are only determined by the police. Moreover, no supporting documents are required. Indeed, as seen in Section 3, a policy of "mass administrative searches" was imposed. Intelligence services would have provided un-signed and dated documents for the police to fill themselves when needed.

Thus, the police were filling their supporting reasons documents, on searches they undertake themselves. Therefore, this second criteria reveals non-proportional measures concerning house searches under both, un-satisfactory limitation in scope and insufficient support by reasons.

In the light of the third criterion, measures should be safeguarded (3). Within article 11 of the State of Emergency Act, house searches are mentioned as being the "sole responsibility of the administrative police". In September 2016, the Constitutional Council stated that:

"By failing to subject the use of searches to any conditions and to provide any guarantee in relation to their implementation, [the legislator failed in ensuring] a balance between the constitutional goal of safeguarding public order and the individual's right to privacy."

This decision forced the legislator to modify the procedure of house searches however, 10 months had already passed. As a safeguard, the police must file a report to motivate each search. However, as established prior with the "blank notes" scandal, the concern of intelligence services is a sufficient motivation. Blank notes contain "extracts from police or intelligence reports about the behaviour of an individual without specifying their sources and which are produced by the administration in support of its claims".<sup>163</sup> By giving these empty notes and giving the police the opportunity to fix dates, times and motives, all safeguard falls apart. Moreover, it weakens the administrative judge's control over these searches. Even though taken to react quickly and optimise the chances of finding proof, the procedure of house searches fails to meet the criteria of being safeguarded.

Finally, the last criterion imposes a practicable judicial control over the measures (4). Just as with house arrests, the only judicial control is a posteriori and is the responsibility of the administrative judge. Proofs gathered during the search are supposed to be kept with the police service until the judge grants their use. The administrative judge has 48 hours to decide on the legality of the search and the possibility for the police to use what they seized. If the search ends up illegal, financial compensation will be allocated to the victim.

One of the first problems of that judicial control is its delayed nature. Indeed, search and psychological damages - as established prior - are already done when the control occurs. A second problem is that proofs are being held in the police service that searched the house. They are no guarantee that the police will refrain from investigating them in those 48 hours. Besides, a third problem is also stemming from blank notes. Indeed, as blank notes are motivated by the mention "threat to public order", the

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<sup>163</sup> Dupré de Boulois. X. (2017). Grands arrêts du droit des libertés fondamentales. *Paris, Dalloz*. 498.

judge is left with limited material to judge their legality.<sup>164</sup> It is paramount to note that such administrative searches are a violation of the right to private life. They are being justified within the state of emergency, however, as such, they should be paired with meticulous judicial control. Thus, in the light of this research, judicial control of house searches is practicable, however, it raises three serious concerns that do not meet the requirements.

In conclusion, administrative house searches are in breach of fundamental rights and freedom, such as the right to private life. However, such a measure is necessary regarding the context. Then, the mere existence of house searches is not challenged, but its control and implementation raise some concerns. Indeed, through the behavioural-based suspicions and the non-restrictive motivation to practice such searches, the limitation in scope and support reasons fail to be ensured. Just as in the judicial control and safeguard assessment, all powers seem to join in the police's hands. An a posteriori judicial control arises as ineffective when motives are not developed, and searches already occurred. Thus, house searches raise as non-proportional under the light of the Court's criteria.

This analysis of measures has been conducted to establish the proportionality of the derogation. It was pre-assumed that France derogated from articles 5 ECHR and 8 ECHR. Under the light of this analysis, the use of limitations clauses under Article 2 Protocol 4 and Article 8 ECHR does not rise as proportional enough either. Thus, this section of the analysis can address the fact that under the legal requirements for a state to derogate, French measures did not meet the necessity and proportionality criteria.

#### ***5.2.5 - Criterion 5: The principle of Non-Discrimination focus on House Searches***

Considering the principle of equal treatment and non-discrimination, a security measure, even adopted under a derogation procedure, must not target a specific group or part of the population.<sup>165</sup> The discrimination of French anti-terrorist measures has drawn a lot of attention. Moreover, the precedent attacks of *Charlie Hebdo*<sup>166</sup> let a difficult social Climate that is still deeply affecting society today. Within this assessment, the non-discrimination principle will only be touched upon as it is a largely

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<sup>164</sup> Kadelbach, S., & Roth-Isigkeit, D. (2017). The Right to Invoke Rights as a Limit to Sovereignty–Security Interests, State of Emergency and Review of un Sanctions by Domestic Courts under the European Convention of Human Rights. *Nordic Journal of International Law*, 86(3), 275-301.

<sup>165</sup> See *A and Other v. UK*, *Supra* note 125.

<sup>166</sup> The terrorist attacks at the satirical journal *Charlie Hebdo* occurred on the 7th of January 2015. The motive given by the perpetrator was related to a cartoon issued by the journal representing the Prophet Allah. Thus, anti-muslim feelings have been raised since these attacks and broad anti-muslim discrimination occurred.

documented topic.<sup>167</sup> Thus, concerning the form, none of the measures has been singling out one specific group or part of the population. Indeed, concerning house arrests and house searches, their regulating articles mention "individuals". Hence, the theoretical aspect of the French state of emergency complies with the principle of equal treatment and non-discrimination.

Concerning the implementation of these measures, NGOs<sup>168</sup> have been denouncing gross discrimination practices from police forces. The state of emergency in France was targeting individuals suspected of religious radicalisation. This is coherent with the terrorist attacks causing the threat to public order. As a result, the Muslim community in France was broadly affected, even though no official texts target them especially. NGOs report massive and violent raids on Muslims during house searches. Many individuals interviewed report gross racist comments made by police officers during searches. Moreover, some searches were conducted even-though individuals had no link to terrorism on the simple base of their faith.

To conclude, the legal framework in its form complies and is compatible with the non-discrimination principle. Victims of discrimination and racism within the implementation of administrative measures can appeal to the administrative judge who assesses the legality of the search or arrest on a case-by-case basis. Thus, as no formal proof of such abuse can be proven, this research will consider that the non-discrimination requirement is fulfilled.

#### ***5.2.6 - Criterion 6: Consistency of the Anti-terrorist Legislation Measures with other International Obligations***

Requirements of consistency with international obligations affects the list of non-derogable rights. To comply with international obligations, France derogated to the ICCPR on the 24th of November 2015.<sup>169</sup> Within this derogation, the French government enclosed all necessary documents and procedural requirements to make it legal. Additionally, this derogation specifies the articles subjected to this notification, namely articles 9, 12 and 17.

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<sup>167</sup> See Everett, S. S. (2018). Interfaith dialogue and faith-based social activism in a state of emergency: Laïcité and the crisis of religion in France. *International Journal of Politics, Culture, and Society*, 31(4), 437-454; Jobard, F., & Slaouti, O. (2020). Police, justice, Etat: discriminations raciales.

<sup>168</sup> See on their websites many articles and communications from LDH, Amnesty International, Human Rights Watch.

<sup>169</sup> French derogation to the ICCPR. (2015, November 24). [online] Herein: <https://treaties.un.org/doc/publication/cn/2015/cn.703.2015-eng.pdf>.

In the light of the ICCPR, Article 9 ICCPR concerns the right to liberty and security. In other words, it is the international scale equivalent to article 5 ECHR to which France might have already derogated to under the ECHR. Thus, consistency with article 9 ICCPR can already be established. Then, article 12 ICCPR ensures the liberty of movement and the right to choose residence. Provisions of this article are directly linked to house arrest measures. Paragraph 3 of article 12 ICCPR allows restrictions to this article taken on the ground of security and protection of the public order. Thus, as the necessity of such protection was already established, no contradiction with article 12 ICCPR is manifesting. Finally, article 17 ICCPR ensures that no arbitrary interference with privacy, family and home is perpetrated. Derogation to this article ensures that house searches are not going against international obligations. Considering that none of these articles are non-derogable the derogation procedure is viable. Moreover, the form and procedure of this derogation enclosed motives and supporting documents, rendering the derogation valid.

To conclude, even though the ECtHR is quite shy in assessing compliance with international obligations, no elements can make the regularity of the French derogation to the ICCPR questionable. Thus, the consistency criterion is fulfilled.

### **5.3 - Necessity and Proportionality Assessment of the State of Emergency's Duration in France**

The duration of the state of emergency offers a more global overview of the derogation's proportionality. According to the ECtHR, the duration of the emergency can be assessed concerning the nature of the rights affected by the derogation.<sup>170</sup> As Appendix 2 highlights, no mention of the articles to which the French derogation applies is mentioned. However, within this research, we can consider that article 5 ECHR on the rights to liberty and security, Article 8 ECHR on the right to respect for private and family life, article 10 ECHR on freedom of expression and Article 11 ECHR on the freedom of assembly and association. Thus balancing the important nature of these rights with the duration of the state of emergency will enable the assessment of whether or not the six extension Acts were "required by the situation".<sup>171</sup> Criteria of proportionality and necessity established by the Court will thus be applied to the duration of the state of emergency: 1) genuine response to an

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<sup>170</sup> *Brannigan and McBride v. UK; A. and Others v. UK.*

<sup>171</sup> *Brannigan and McBride v. UK; A. and Others v. UK*

emergency, 2) limited in scope and the reasons advanced in support of it, 3) measures subject to safeguards and 4) judicial control of the measures was practicable.

	Act 20 Nov. 2015	Act 26 Feb. 2016	Act 20 May 2016	Act 21 Jul. 2016	Act 19 Dec. 2016	Act 11 Jul. 2017
<b>Duration</b>	<i>3 months</i>	<i>3 months</i>	<i>2 months</i>	<i>6 months</i>	<i>7 months</i>	<i>4 months</i>

**Table 3: Duration of the State of Emergency: Six Acts of Extensions**

Firstly, the first state of emergency was implemented for 12 days. After that, six extension Acts occurred. Considering the scope of the attacks, a state of emergency was indeed needed. However, states of emergency are implemented for a limited period, playing on a surprise effect. As one can witness in **Table 3**, not only did the state of emergency was maintained for almost two years, but every new extension appears to fix a longer duration than the precedent. After the first months of this regime, on the 19th of January 2016, the UN Special Rapporteur considered disproportionate the measures taken under the State of emergency and asked to not extend the regime after February 2016.<sup>172</sup> This request failed as a new extension occurred on the 26th of February 2016. Considering the following extensions, the Act of the 21st of July 2016 arise as a genuine rapid reaction to the “Nice attacks” perpetrated on the 14th of July 2016. Nevertheless, this 6-months Act was followed by the longest extension put in place during the state of emergency: the 19th of December 2016. It was reported that the length of the latter Act was aimed at securing the French presidential elections held in May 2017.<sup>173</sup> Thus, out of the six extensions, only three<sup>174</sup> rise as a genuine response to the emergency.

Secondly, considering the limitation in scope and supporting reasons, the duration's proportionality is assessed regarding measures implemented. As we already assessed, measures of house arrests and house searches were not meeting the proportionality requirements of the Court. Additionally, considering all extensions Acts, some were modifying the substance of common law provisions. For instance, the Act of the 21st of July 2016 affected the Penal Code, the Code of Criminal Procedure, the Code of Internal Security and the Penitentiary Law of 24 November 2009. Thus, the long duration

<sup>172</sup> Office of the High Commissioner for Human Rights. (2016, January 19). "UN Rights Experts Urge France to Protect Fundamental Freedoms while Countering Terrorism". [online] link: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?LangID=E&NewsID=16966>.

<sup>173</sup> Dampang, D.Y.C. (2019, January) The Legality of State of Emergency Status Imposed by France following Terrorist Attack. *Padjadjaran Journal of International Law*. Volume 3, Number 1. 135.

<sup>174</sup> Namely the Act of the 20th of November 2015, the Act of the 26th of February 2016 and the Act of the 21st of July 2016 (following the Nice attack).

of the state of emergency enabled broad modifications within common law. Moreover, these serious modifications have not been justified regarding the nature of the terrorist threat.

Thirdly, the duration must be subjected to safeguards. As it was established in Section 3, the Parliament holds the watchdog functions concerning Acts of extensions. However, by not requiring justifications for the first extension Acts, the Parliament failed to safeguard the first three months of the exceptional regime. Moreover, the legislative body has been extending the scope of the government's proposition concerning the state of emergency's duration. For instance, in July 2016, the government proposed a new three-months extension to the Parliament. By proposing to pair the government's proposition with an additional three months (a total of six months), the Parliament failed in its safeguarding missions. Thus, the adoption of the new extension Act is legally subject to safeguard as the government must justify its necessity to the Parliament. However, in practice, the Parliament failed to embody its function of counter-power during a state of emergency.

Fourthly, and finally, the judicial control of measures must be practicable. During a state of emergency, the administrative judge is competent in France. Hence, the State Council and administrative judges have the authority to assess the proportionality and legality of measures taken under the state of emergency. However, judges do not rule on the legislative extension of the State of emergency. Therefore, concerning the extension acts, the constitutional judge can be seized through a QPC. However, the judge cannot assess the existence of a threat justifying the implementation of the state of emergency regime *in concreto*. Indeed, the sole existence of an extension Act mentioning the implementation of the state of emergency on the ground of an imminent and serious threat is characterising a sufficient motive. Thus, if an extension Act is passed, the judge must consider the nature of this emergency extension to be justified.<sup>175</sup>

To conclude the duration of the state of emergency in France stems from a genuine answer to terrorist threats. However, within this answer, and just as witnessed in the previous section (5.2), what begins as a genuine response can become a comfortable environment to undertake non-emergency-related decisions. Through the ignored recommendations of the UN and different NGOs (HRM and AI), one can consider that France turned a blind eye to a situation that began as a genuine answer and became too convenient to put to terms. However, no serious conclusion can be drawn from these multiple not-

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<sup>175</sup> See in the official page of the Constitutional Council: de Montgolfier, J-F. (2017, January) L'urgence et le Conseil Constitutionnel [Emergency and the constitutional Council]. Cahiers du Conseil Constitutionnel n°54. [online] link: <https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/l-urgence-et-le-conseil-constitutionnel>

that-necessary extensions. On the counterpart, modifying common law is a different extreme. A state of emergency enables governments to react quickly to a threat that provisions from the common law would be insufficient to address. Thus, using the state of emergency to modify common law appears far from its primary function. Indeed, the idea of exceptionality attached to the regime shall not, in any case, be a goal for the executive power, that shall understand that when needed, this regime is a powerful tool, however, in long-term use, it has all characteristics of an authoritative regime. This factor raises a concern about the Parliament's inaction. The democratic voice showed no real interest in the management of the state of emergency. For instance, ignoring a procedural gap in the declaration of emergency from the start, the Parliament ended up cautiously paring its opinion with the government it is supposed to control. Finally, considering the judicial control of the extension of the state of emergency, this analysis confirms that the government is the only actor habilitated to frame a threat as an emergency for the public order. This echoes the reservation developed in (5.1). Indeed, under both, the reservation to the ECHR and the Emergency extension Acts, the government is exempted from any judicial control on the framing of a threat justifying the extension of an emergency regime. Thus, with an uninterested parliament and an inoperative judge, the government is pleased to frame anything as a threat, and by that justify an extensive state of emergency regime.

## **Section 6 - Conclusion**

According to Bernard Cazeneuve, "The state of emergency can never be a permanent situation." Throughout this research, the dangers of such a regime have been illustrated by both theoretical and practical examples. However, in the current context of International Law, a state of emergency and a derogation of human rights are fundamental for the well-function of the system. Thus, the articulation of security and human rights forces a case-by-case study that should be thoroughly practised by all as a democratic safeguard. In the French case study, the focus of this research was to provide an answer to the following: *Are French anti-terrorist administrative measures, taken under the state of emergency from 2015 to 2017, compatible with the derogation requirements of the Article 15 ECHR?*

While examining the French derogation to the ECHR, the first issue materialises around its vagueness. Indeed, no articles are directly targeted by derogation. This gap makes it extremely difficult for the ECtHR to supervise French actions in the right manner. By highlighting the French derogation to the ICCPR, this research presumed that articles 5 and 8 ECHR were targeted by the French derogation. Nonetheless, the notification of derogation to the Secretariat can be blamed for its vagueness.

However, the Court does not seem to manifest any interest in restricting derogation by forcing states to mention the articles targeted.

According to this analysis, and by examining each criterion, France has been thoroughly respecting the procedure established by article 15 ECHR. Indeed, no non-derogable rights have been infringed in the French legislative framework. The only concern arises from the vulnerability to torture, however, as pre-trial detention makes this risk more exponential than house arrests, one can consider that the vulnerability risk was, therefore, low. In the same line, no discriminatory legislation has been recorded. The practice might have been different, however, considering the sensitivity of the topic related to suspicions of Muslims, the substance would benefit from a case-by-case assessment by the national judge. Additionally, France appeared as a well-cooperative actor towards the ECtHR and international levels (ICCPR) by justifying each new extension and providing supporting documents. Through its consistency with these requirements, the French derogation appears in compliance with International and European obligations.

However, two concerns arise from the above analysis. The first concern addresses the necessity and proportionality assessment of the two administrative measures of house arrests and house searches. The second concern arises from the requirement of a "public emergency threatening the life of a nation" and links the French reservation with the proportionality of the state of emergency's duration.

House arrests have an extended impact on individual rights. For instance, the freedom of movement, the right to privacy and family life, and the right to work are being challenged by this measure. Regarding the nature of these rights, the scope of application of house arrests must be regulated. This analysis concludes that house arrests, by being implemented as an arbitrary wide-cast net, failed to meet the requirements of a limitation in scope. Indeed, the semantic requirements were too vague and regarding the rights infringed, judicial control should have been a pre-emptive condition.

House searches impact the right to privacy and family life. The extent of rights involved is more limited, however, they are more prone to violent implementation. Again, the scope fails to meet the limited requirements as the requirements are displayed in a vague semantic. Thus, if legal compliance could be achieved, the compatibility with the spirit of Strasbourg could not when scandals like blank notes or mass administrative searches emerge.

Generally, both measures do not benefit from satisfactory judicial control and are not limited in scope. This conclusion goes against the spirit of the ECtHR as all requirements for derogation aim to limit arbitrary infringement of rights. Thus, as the compliance to the ECHR can only be assessed by Strasbourg, a discussion on the compatibility of French legislation with its spirit arise as necessary.

This compatibility extends to the reservation to article 15 ECHR and the duration of the state of emergency. Indeed, from a supra-national level (ECtHR) to the national level (Constitutional Court), not a single judicial control is conducted on the framing of an emergency justifying the trigger of a state of emergency by the French government. The shortcoming tied with the duration of the state of emergency's control and the gap tied to the reservation both concern the semantic requirements of a "threat to the life of a nation". From the reservation analysis, it seems that only the President, through his or her knowledge of the Constitution, can decide what can be framed as a threat. However, as soon as legislation is passed, no judicial control on the framing of a situation as a threat by the President can be performed. Therefore, no judicial control is performed on the presidential justification to implement a state of emergency.

Thus, if the compliance of French anti-terrorist legislation from 2015 to 2017 shall be assessed by the Court, this legislative framework arises as incompatible with the ECtHR's spirit and understanding of article 15 ECHR. The main concerns for its compatibility are the proportionality test, and this reservation emptying the Strasbourg Court from its control substance. Thus, the present analysis unravels the fragility of the Court's supervision in terms of derogation in times of emergency. From the vagueness of its notification to the difficult proportionality control, the necessary supervision of the Court to derogate appears as one of the main shortcomings of the derogation mechanism. The Court's supervision is a vital one for the implementation and protection of human rights in Europe. Noting that since 2015, with the pandemic, France lived in total more than four years under a state of emergency. As European democracies face new challenges, the protection of human rights is to protect individuals through the thorough supervision of states.

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## *Appendix 1*

### **Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005)**

Reservation contained in the instrument of ratification, deposited on 3 May 1974 - Or. Fr.<sup>176</sup>

The Government of the Republic, in accordance with Article 64 of the Convention [Article 57 since the entry into force of the Protocol No 11], makes a reservation in respect of paragraph 1 of Article 15, to the effect, firstly, that the circumstances specified in Article 16 of the Constitution regarding the implementation of that Article, in Section 1 of the Act of 3 April 1878 and in the Act of 9 August 1849 regarding proclamation of a state of siege, and in Section 1 of Act No. 55-385 of 3 April 1955 regarding proclamation of a state of emergency, and in which it is permissible to apply the provisions of those texts, must be understood as complying with the purpose of Article 15 of the Convention and that, secondly, for the interpretation and application of Article 16 of the Constitution of the Republic, the terms to the extent strictly required by the exigencies of the situation shall not restrict the power of the President of the Republic to take the measures required by the circumstances.

Period covered: 03/05/1974

Articles concerned: 15

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<sup>176</sup> Herein [online]: <https://www.coe.int/en/web/conventions/concerning-a-given-state-or-the-european-union-?module=declarations-by-state&codeMatiere=44%2C3&territoires=14&codeNature=2&codePays=FRA&numSte=&enVigueur=true&ddateDebut=05-05-1949&ddateStatus=05-30-2022>

## *Appendix 2*

### **Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005):**

**Declaration contained in a letter from the Permanent Representative of France to the Council of Europe, dated 24 November 2015, registered at the Secretariat General on 24 November 2015 - Or.**

The Permanent Representation of France informs the Secretary General of the Council of Europe of the following:

On 13 November 2015, large-scale terrorist attacks took place in the Paris region.

The terrorist threat in France is of a lasting nature, given the indications of the intelligence services and the international context.

The French government decided, by Decree No. 2015-1475 of 14 November 2015, to apply Law No. 55-385 of 3 April 1955 on the state of emergency.

Decrees no. 2015-1475, no. 2015-1476 and no. 2015-1478 of 14 November 2015 and no. 2015-1493 and no. 2015-1494 of 18 November 2015 defined several measures that could be taken by the administrative authority.

The extension of the state of emergency for three months, starting on 26 November 2015, was authorised by Act No. 2015-1501 of 20 November 2015. This law also modifies some of the measures provided for by the law of 3 April 1955 in order to adapt its content to the current context.

The texts of the above-mentioned decrees and laws are attached to this letter.

Such measures have been deemed necessary to prevent the perpetration of new terrorist attacks.

Some of them, provided for by the decrees of 14 November 2015 and 18 November 2015 and by the law of 20 November 2015, are likely to involve a derogation from the obligations resulting from the Convention for the Protection of Human Rights and Fundamental Freedoms. I therefore ask you to consider that this letter constitutes information under Article 15 of the Convention.