Contemporary states of exception and rule of law
General considerations from the French case of state of emergency 2015, November 14th – 2017, November 1st

VÉRONIQUE CHAMPEIL-DESPLATS*

Some background information. The French state of emergency was created by the Act of 1955, April 3rd, in response to the Algerian war for independence. It is an exceptional administrative policing regime involving a derogation of the law and increased administrative police powers for prefects and the Minister of the Interior. Since the Ordinance of 1960, April 17th, the Council of Ministers, under the direction of the President of the Republic, has had the authority to declare a state of emergency, which can be declared when there are "situations involving imminent danger resulting from serious breaches of public order" or "in circumstances which, due to their nature and seriousness, have the character of public disaster" (art. 1).

As a jurisdictional matter, a state of emergency can be enforced in all or part of France as well as in the overseas departments (territories). Regarding the duration of a state of emergency, unless extended, a state of emergency cannot exceed 12 days. The parliament can, however, extend the length of a state of emergency by explicitly determining a definitive duration (art. 2 and 3), and parliament has broad discretion in determining the extension (6, 3 or 2 months). Furthermore, the events that transpired between 2015 November-2017 November demonstrated how fixing the "definitive duration" does not necessarily provide a significant limitation to the length of a state of emergency, since the identification of a definitive duration was shown to be compatible with successive renewals.

On the one hand, the declaration of a state of emergency gives the state automatic powers. The precise nature of these powers has changed with successive Acts, extending the duration of and modifying the state of emergency adopted in November 2015. The state of emergency has also been affected by the fact that some decisions have been determined to be unconstitutional by the Constitutional Council. As a summary

* Professor in public law, Paris-Nanterre University.

of the central elements of the powers provided by the state of emergency, the prefects in their department (municipality) can decide: a) to establish curfews, including prohibiting the movement of persons and vehicles at the places and times fixed by decree in order to prevent and avoid harm to the public order and security; b) to identify and define protection or security areas where inhabitants are regulated; and, c) to prohibit persons from staying in any part of the department (municipality) for whom there are serious grounds to believe that their behavior constitutes a threat to public order and security.

On the other hand, the declaration of a state of emergency makes possible additional powers, the enforcement of which are subordinated to a special decree adopted by the President of the Republic. The Act of April 1955 initially permitted the following: day and night administrative house searches; seizure of weapons; control of the press, including entertainment; postponement or prohibition of the sale of certain goods (e. g. petrol, alcohol, etc.); banning meetings; and, house arrests.

From 2015, November to 2017, July, Acts that extended and altered the terms of the state of emergency, modified some of those powers. New powers were given to the prefect and, more and more, to the Minister of the Interior: the power to dissolve associations or groups involved in the commission of acts causing a serious breach of public order or whose activities would facilitate or incite the commission of such acts; the ability to compel the temporary administrative closure of religious places where hate, violence or terrorism are glorified or provoked; the ability to require identity verification and the inspection of bags or vehicles; and, the ability to extend and, after constitutional review, frame the rules for house arrest. As a symbolic counterpart, the Act of 2015, November 16th has rescinded the control of the press and has prohibited administrative searches for certain professions (lawyers, magistrates and journalists).

Theoretical approaches. The experience of the state of emergency declared in France between November 14th, 2015 and November 1st, 2017, presents many salient and novel questions. From a theoretical point of view, it challenges two important assumptions about the relationship between the law and the state of emergency: on the one hand, the relationship between norm and exception and, on the other hand, the relationship between the concepts of the rule of law and a "regime" or "state" of exception. It causes one to wonder if the French state of emergency is a state of exception, and if it is compatible with the rule of law. If the answer to the former question is yes, what does this imply about the understanding of the rule of law?

If we are to understand the concepts of ordinary legislation, exception, state of exception and rule of law, these questions must be resolved. A satisfactory answer requires that one consider the French state of emergency in the light of these meanings. The challenge is serious and demanding. An alternative approach may be to compare the regime of the state of emergency, as defined by the Act of April 3th, 1955 and its successive modifications, to the preeminent theories of states – or paradigms – of exception mobilized in France since November 2015. This alternative approach would

likely lead to the conclusion that the French state of emergency cannot be understood as a "state" of exception, if a state of emergency is conceived as being opposed to the rule of law. As noted above, the state of emergency implemented in France is a special administrative police regime involving the derogation of the law, that overlaps in various and sophisticated forms with the concept and the quotidian life of the rule of law (I). Consequently, there is an argument to be made that there is no conflict with the rule of law, thus undermining this alternative approach.

The hypothesis put forward here is that the French experience of states of emergency can serve as an example of the political and legal responses that current democratic States, claiming to respect rule of law, bring in response to various security and terrorism challenges. The general lessons to be learned from these two years of a state of emergency are that States committed to the rule of law can integrate the enforcement of exceptional norms or legal sub-regimes without undermining their commitment to the rule of law. A detailed analysis of the implementation of the French state of emergency reveals several interactions between "ordinary" legislation and an "exceptional" regime, the distinction between them becoming increasingly blurred. These interactions highlight the implications such states of emergency, thought to be exceptional and provisional, have for our understanding of the concept of the rule of law. What new conceptions of the rule of law result from the fact that the state of emergency has been integrated in a way that respects the rule of law? (II)

I. Strength and weakness of the classical paradigms of exception for understanding the French experience of states of emergency.

Numerous relationships are revealed when comparing the main contemporary theories of states of exception with the regime of the state of emergency defined by the Act of 1955, April 3rd, and successively modified until July 2017. Notwithstanding this, and in full recognition of the widely accepted understanding of the contentious relationship between the rule of law and states of exception, the French state of emergency should not be understood as a state of exception necessarily opposed the rule of law. If anything, assuming the conceptual and analytical distinction between states of emergency and the rule of law are to remain relevant, the state of emergency enforced between November 2015 and November 2017 appears as a hybrid state, or regime, that is linked in sophisticated ways with the rule of law and its ordinary norms.

So, the analysis of the French state of emergency leads us to refine our understanding of states of exception and their relationships with the rule of law. Constructing this new understanding will not be a matter of re-examining the complete theories of authors already well analyzed, but of highlighting their main theses, thus helping us to understand the French state of emergency, and reciprocally, what this understanding of the French state of emergency calls into question. Looking to such theses for

guidance, one is compelled to assess the regime of the state of emergency with (A) the Schmittian problematic of transcendence and sovereign decisions, (B) Agamben's thesis of suspension of the legal order and, finally, (C) the supposed temporality of states of exception.

A. The French state of emergency in the light of the transcendence and sovereign decision structuring the Schmittian dictatorship

Carl Schmitt's theory of a state of exception[1] is built around a strong ontological opposition between an immanent liberal State, entirely framed by the law, and a state of exception that would be transcendent and in which political decision-making regains its sovereignty and supremacy. This ontological opposition is also present in Schmitt's least brutal version of the state of exception, conducted by a "dictator commissioner", acting temporarily according exceptional – but legal – rules, in order to respond to specific circumstances.

This conception of the state of exception and of the forms of dictatorship associated with it in Schmitt's thought, presents deep conceptual differences with the French state of emergency regime. Assuming the French state of emergency regime can be considered as an exceptional regime, it is not an alternative to the liberal state and is certainly not a negation of it.

The Schmittian theory of the state of exception nevertheless offers keys for understanding the experience of the state of emergency in France, but that understanding is constrained by various limitations. Among them, we can specially consider the notion of sovereign decision that characterizes the Schmittian state of exception.

On the one hand, no decision adopted under the French state of emergency is unbounded or can be made without consensus. As was noted, the President of the Republic declares a state of emergency in the Council of Ministers, but it is Parliament that extends it and the Prefects and the Minister of the Interior who implement it. Moreover, out of respect for the rule of law, all acts relating to the state of emergency are reviewable by judges (Constitutional Council, administrative judges and, trial and appellate judges).[2] On the other hand, due to the political context, the choice by those with the authority to provide judicial review of those acts related to the state of emergency, is most often to confer *de facto* sovereign power to the executive branch and, particularly, to the President of the Republic.

1 Carl Schmitt, *Dictatorship*, Polity Press, November 2013.

2 Council of State, *ord.*, 2005, November 14th, *Rolin*, req. n° 286835; Council of State, 2005, December 9th, *Mme A. et autres*, req. n° 287777; Council of State, 2016, January 2016, 27th; *Ligue des droits de l'Homme,* req. n° 396220; Constitutional Council, n° 2016–536 QPC, 2016, February, 16th.

There are several other relevant points to be made regarding our understanding and expectations of such judicial review. First, the actual exercise of the relevant powers can be discussed considering the exceptional circumstances. In a political regime where presidential prerogative prevails, the decisions of the various competent authorities are often reduced to endorsing the presidential will. The chance that an opinion that conflicts with the president's will, becomes highly improbable, especially when security issues are involved. For instance, in our case, on the night of 2015 November, 13th, faced with the emergency and gravity of the events, the President of the Republic announced the enforcement of a state of emergency ***before*** the meeting of an exceptional Council of Ministers. It is the latter that has the legal authority to decide the matter. Similarly, as a result of the political consensus on the security issue, the Acts extending and amending the state of emergency were adopted by a large majority. Because of the speed of the procedure allowed by the Constitution (arts. 42 and 48) for Acts relating to crisis or emergency situations, parliament has done little more than register and support the presidential will.

Second, the effectiveness of judicial control is not unequivocal. Would the Council of State determine the decision of the President of the Republic to declare a state of emergency or recognize the absence of a decision to put an end to it to be illegal? Would the Constitutional Council declare an Act extending the duration of the state of emergency to be unconstitutional? Judicial review is intended to provide some protection, but, for the time being, it is assumed that abuse must be extreme to justify the judiciary's decision to annul declarations or extensions of a state of emergency. In addition, in spite of the power administrative judges have to serve as a check on each administrative decision implementing the state of emergency, a sovereign decision could well regain its relevance based on secret defense information. This is of particular concern when the case for individual administrative decisions is based on internal intelligence documents ("white notes")[3] and general decisions based on the argument of foiled attacks. In both cases, the information is held and provided by the Ministry of the Interior without the possibility of external detailed verification.

These experiences of the state of emergency lead to the conclusion that, regarding the sensitive decisions of declaration, extension and ending a state of emergency, judges affirm their power but exercise it with a high degree of self-restraint. They therefore leave the sovereign power to the executive and legislative bodies, if not *de jure*, at least *de facto*. They thus tend not only to legally validate the decisions related to the state of emergency, but also to politically legitimize them.

3 État d'urgence – L'empire des notes blanches, *lundimatin#45*, 25 janvier 2016.

B. The state of emergency: suspension, deviation or derogation?

In his book devoted to the state of exception, Girogio Agamben[4] links states of exception with the suspension of the legal order. Agamben's claim regarding the implications of suspension for the legal order was, nevertheless, called into question when considered from the perspective of a theory of political philosophy based on Foucault's analyses on contemporaneous forms of governance[5] as well as from a general theory of law developed in France by Michel Troper.[6] The thesis defended by these authors is that, far from excluding the law, contemporary states of exception are defined by it and filled with binding norms regulating public and private behaviors.

The case of the French state of emergency and its implementation over two years tends to confirm this analysis. It does not operate as a total, nor even a partial, suspension of the legal order; it is not unbounded by normative commitments. On the contrary, it could even be distinguished by an increase in normative activity. According to the *data* provided by the Ministry of the Interior, nearly 10000 general and individual legal administrative decisions have been listed.[7] This number does not include any judicial decisions relating to the Ministry of the Interior itself. Consequently, whatever might be said about the intensity of jurisdictional control, the judges have affirmed their authority to review such legal and administrative decisions. Some judgments even reference the ECHR. Its application has not been suspended. The invocation by French authorities of Article 15 of the Convention allows only some limited derogations, and certain human rights remain beyond derogation.

Considering this, the experience of these two years of implementation of a state of emergency in France could more closely coincide to the concept of "deviation" proposed by Bernard Manin to characterize his paradigm of exception,[8] as well as the concept of "derogation" used by François Saint-Bonnet.[9] The former defines the "paradigm of exception" by three criteria: (1) the authorization to deviate from higher norms, such as those contained in the Constitution; (2) the submission to special conditions to address what the exceptional circumstances require; and, (3) the temporal delimi-

4 Georgio Agamben, *State of Exception*, The University Chicago Press, 2005.

5 Marie Goupy, "L'état d'exception, une catégorie d'analyse utile? une réflexion sur le succès de la notion d'état d'exception à l'ombre de la pensée de Michel Foucault", *RIEJ*, 2017, n° 79, pp. 98–99.

6 Michel Troper, "L'état d'exception n'a rien d'exceptionnel", in *Le droit et la nécessité*, Paris, PUF, 2011 p. 99.

7 http://www2.assemblee-nationale.fr/14/commissions-permanentes/commission-des-lois/controle-parlementaire-de-l-etat-d-urgence/controle-parlementaire-de-l-etat-d-urgence

8 Bernard Manin, "Le paradigme de l'exception. L'État face au nouveau terrorisme", *La Vie des idées*, 15 décembre 2015; "The Emergency Paradigm and the New Terrorism", in Sandrine Baume, Biancamaria Fontana (eds.), *Les Usages de la Séparation des Pouvoirs – The Uses of the Separation of Powers*, Paris, Michel Houdiard, 2008, pp. 135–171.

9 François Saint-Bonnet, *L'état d'exception*, Paris, Presses universitaires de France, 2001.

tation of the deviation.[10] The latter characterizes the state of exception as "the meeting point of three elements: the derogation to the ordinary legislation, the reference to an out of ordinary situation and the design of a superior finality". The derogations may concern norms guaranteeing rights and freedoms as well as norms regulating powers of the public authorities.[11]

To our knowledge, neither author explicitly discussed their concepts of "deviation" or "derogation" with the specific case of the French state of emergency regime as implemented in November 2015. Nevertheless, these concepts can be helpful in analyzing it. If the concepts of "deviation" or "derogation" are indeed understood in a strong sense, as meaning the impossibility to invoke constitutional norms, especially those recognizing rights and freedoms, there is not "deviation" or "derogation" to be found in the French state of emergency. The only explicit derogation allowed is that provided for in Article 15 of the European Convention on Human Rights. But this derogation is strictly defined. It is not meant to apply to certain fundamental rights and freedoms. It is relevant only in the context of the implementation of a state of emergency. The European Court has authority to control some aspects of this implementation, specifically those regarding the protection of fundamental rights, even if it leaves a wide margin of discretion to the Member States.[12]

In the domestic legal context, if the degree of control depends on the type of decision taken and the authority of the judges, none has, in principle, excluded the application of any constitutional norms. Nevertheless, on the one hand, they subject them to a test of proportionality, the outcome of which is most often favorable to the security requirements and to the detriment to constitutional rights or freedoms. On the other hand, regarding the specific case of constitutional review, the constitutional Council is now used to neutralize its decisions of unconstitutionality through the power, permitted by article 62 of the Constitution, of modulating the effects of such decisions over time.[13]

This behavior, as a matter of practical effect, leads to the validation and effectiveness of unconstitutional norms, violating rights and freedoms guaranteed by the Constitution until the moment determined by the Constitutional Council itself. This procedure has been regularly used by the Constitutional Council in the institutional frame-

10 Bernard Manin, *op. cit*.

11 François Saint-Bonnet, *op. cit.*, p. 27.

12 Vincent Souty, *La constitutionnalisation des pouvoirs de crise. Essai de droit comparé*, Pdh Thesis, 2015, Junuary, Sorbonne-Nouvelle 3, pp. 115 et s; Anaïs Lambert, Laeticia Braconnier Moreno, "La marge de manœuvre de la France dans le déclenchement d'un régime dérogatoire aux libertés fondamentales, une dénaturation de l'article 15 de la CEDH?", *La Revue des droits de l'homme* [En ligne], Actualités Droits-Libertés, 22 janvier 2015.

13 See decisions n° 2017–635 QPC, 201, June 9th; n° 2017–624 QPC, 2017, March 16th; n° 2016–600 QPC, 2016, December 2nd; n° 2016–567/568 QPC, 2016, September 23th; n° 2016–536 QPC, 2016, February 19th; n° 2016–535 QPC, 2016, February 19th; n° 2015–527 QPC, 2015, December 22nd.

work intended to control the state of emergency. Consequently, if a gap is emerging between the supreme norms and a state of emergency's legal regime, it is less because of the Act regulating the state of emergency itself than the result of how constitutional review functions under such circumstances.

C. The state of emergency and time: perpetuation and normalization of the exception

Limitation in time is one of the key characteristics most commonly associated with regimes of exception. This limitation is analyzed as the counterpart of the derogation of legal norms and exceptional measures which these regimes allow the state to adopt. In France, the duration of the state of emergency was one of the first and main changes introduced by the Ordinance of 1960, April 17th. While the original version in the Act of 1955 did not specify the duration, leaving it to the discretion of the parliament, the Ordinance of 1960 provides that the state of emergency may not last more than 12 days. As mentioned above, any extension beyond 12 days must be authorized by law (art. 2) which fixes "its definitive duration" (art. 3). However, despite this wording, which could have been read to discourage decisions to extend the exceptional regime, each state of emergency declared has been extended by the parliament.

Moreover, the past two years have shown that neither the legal requirement to determine a "definitive duration" nor the judicial and political repetition that "the state of emergency is not intended to last longer than necessary"[14] have not deterred those with the ability to do so from extending this "definitive" duration. Between 2015 November 14th and 2017 November 1st, no less than 6 Acts have been successively adopted for extending the duration of the state of emergency. The reference to "definitive" duration can therefore no longer be interpreted as strict. It only requires that the parliament provides definitive terms for each extension. But one Act of extension can be followed by another.

These repeated extensions of the duration of the state of emergency, followed by the vote of the Act of 2017, October 30th which strengthened internal security measures and intensified the fight against terrorism (SILT), transposing *mutadis mutandis* several measures of derogation, provided for the incorporation of a state of emergency into ordinary legislation, tending to increase the propensity for regimes of exception to be

14 Minister of Interior, *Débats au Sénat*, 2016, February 9th; *Débats Assemblée Nationale*, 2016, December 13th. See also Council of State, 2005, December 9th, *Mme A. et autres*, req. n° 287777; Council of State, 2016, January 2016, 27th; *Ligue des droits de l'Homme,* req. n° 396220; Constitutional Council, n° 2016–536 QPC, 2016, February, 16th; Jean-Marc Sauvé: "L'état d'urgence ne peut être renouvelé indéfiniment", *Le Monde,* 2016, November 16th.

normalized. As noted, for Walter Benjamin, Michel Foucault[15] and Giorgio Agamben, these regimes are moving from provisional and exceptional measures to an ordinary "technique of government".[16] Thus, from the first Act extending the French state of emergency, this risk of normalization, of survival "of the extraordinary measures" out of concern for the circumstances that gave rise to them, are concerns that have been frequently emphasized. The objectively ascertainable phenomenon caused by the repetition of the exception has initiated a qualitative process, transforming the exceptional regime to a "normal" situation. This movement is in France crowned by the vote of the previously referenced SILT Act.

II. The French state of emergency: a regime of exception within the rule of law

The general lesson that emerges from the two years of a state of emergency experienced by the French is a confirmation of the hypothesis that contemporary States with a commitment to the rule of law believe that they can, without inconsistency, accommodate the enforcement of an exceptional legal regime while still respecting the rule of law. A thorough assessment of the implementation of an actual state of emergency (A) provides examples of several points of contact between the so-called ordinary legislation and an exceptional legal regime. And, (B) such contacts raise questions about the meaning of the rule of law.

A. Porosity between exception and ordinary legislation

Regarding the close relationship that regimes of exception maintain with security measures based on ordinary legislation, the hypothesis of a trivialization of the exception is no longer a slogan defended by human rights activists or by philosophers loving paradoxes. The abstract concern over the trivialization of the state of emergency is made real in the French legal order. In several respects, in addition to the question of the durability of the exception analyzed above, the implementation of the state of emergency since November 2015 has contributed to the blurring of the conceptual and normative boundaries between a regime of exception and ordinary legislation. This ambiguity over where the boundaries lie can be understood from three distinct but related perspectives: procedural, teleological, and material.

15 See Marie Goupy, *op. cit.*, p. 106.
16 Georgio Agamben, *op. cit.,* p. 12.

At the procedural level, the implementation of the state of emergency, its extensions and its amendments have given rise to several intersections. First, the state of emergency regime was amended by four Acts which, at the same time, extended it (Acts of 2015, November, 2016, July, 2016, December and 2017, July). The specific and accelerated procedure provided for in the Constitution (Articles 42 and 48) for voting laws relating to crisis or emergency situations has made it easier to extend the time limits of exceptional legal regimes and to modify the rules defining them. The rules of the game were changed at the same time as the game was being played and extended. Second, the state of emergency Act was also amended by ordinary legislative procedures (Public Security Act 2017, February 28th) in order to limit the conditions for administrative searches by day and night. Third, and finally, the specific and accelerated procedure provided in articles 42 and 48 of the Constitution has not only supported those decisions concerning the state of emergency but also those related to legal provisions external to this exceptional regime. The Act of 2016, July 21st has amended several provisions of the Criminal Code, the Code of Criminal Procedure and the Code of Internal Security in order to strengthen anti-terrorism legislation. The process is essentially an unjustified usurpation of the ordinary legislative process.

With respect to teleological considerations related to the justification for the implementation of the state of emergency, the state of emergency regime was intended to do more than prevent similar attacks to the ones providing its original justification. In addition to being used to support decisions restricting freedoms in order to prevent "imminent peril", it has been used to provide the legal basis for decisions that go beyond its "raison d'être".[17] Among the most controversial cases are the house arrest of environmental activists at COP 21, the issuance of hundreds of individual travel bans, the prohibition on demonstrations by social activists, the demarcation of protection zones in refugee camps in Calais, and the evacuation of a squatter's community in the Paris suburbs.

Finally, the blurring of the boundaries between exceptional legal regimes and ordinary legislation can be observed through the previously discussed integration of measures which were previously conditioned on the enforcement of the state of emergency into ordinary legislation. The legal spirit of the state of emergency was first implemented in several branches of law (public freedoms, administrative police, criminal law and procedure, immigration and asylum legislation, etc.) through the adoption of measures that extended or strengthened the state of emergency.

There are several examples worthy of our attention. First, there was the controversial disregard for usual consultation regarding jihadist websites, which was partially declared unconstitutional by the Constitutional Council. Second there was the vote

17 Olivier Beaud, Cécile Guérin-Bargues, *L'état d'urgence. Etude constitutionnelle, historique et critique*, Paris, LGDJ, 2016, p. 150.

of the SILT Act presented as the condition for leaving the state of emergency regime. As mentioned, the SILT Act incorporates, with euphemistic language, provisions directly inspired by the state of emergency regime; powers for the prefects to determine "perimeters of protection", powers to order the closure of places of worship, powers to pronounce administrative house arrest measures, powers to proceed to visits and seizures, *etc*.

The perpetuation of the state of emergency is therefore no longer the consequence of its repeated formal and temporal extensions. It is a result of its material integration *mutatis mutandis* into ordinary legislation without any limitation of duration, nor requirement of exceptional circumstances conditioning its implementation or extension. In other words, the so-called "ordinary legislation" becomes less and less ordinary and comes to be defined in negative terms of the right of exception. It is a right whose implementation is not conditioned by an exceptional event.

B. Transformation and weakening of the concept of the rule of law

The integration of the state of emergency, as well as other kinds of exceptional legal regimes, within the framework of the rule of law, tends to transform the classical conception of the rule of law, according to which the State is required to respect fundamental rights and freedoms; a conception that has informed the reconstruction of the legal orders of contemporary democracies since the Second World War. As a result of such integration, the concept of the rule of law is less about the requirement that the State respect fundamental rights and freedoms and more about the priorities of and objectives sought in exceptional legal regimes. First, (1.) the State is giving supremacy to security requirements, second, (2.) the State, which is interfering with rights and freedoms it has been required to respect under the classical conception of the rule of law, is promising compensation for such interference, and, third, (3.) in targeting its enemies, the State has built a legal regime around the derogation of legal norms, supposed to be specific to those enemies. In other words, the substantial conception of the rule of law is transforming respectively into formal-security, compensatory and discriminatory conceptions.

1. The formal-security conception of the rule of law

Those within the executive branch of the French government have never failed to affirm their commitment to a substantial conception of the rule of law, requiring respect for fundamental rights and freedoms. Nevertheless, their speeches are full of proposals asserting the priority of security. Consequently, the rule of law is gradually reduced to a formal conception that, in a state of emergency, only requires that the state be

subjected to the law without greater consideration of the substance of legal prescriptions. Moreover, when the content of this conception of the rule of law is considered, it affirms the primacy of security considerations, regardless of the nature of the limits opposed to police powers.[18] Everything therefore happens as if the rule of law were compatible with "two states", a "normal" state in which fundamental rights and freedoms must be perfectly protected and a "state of exception" in which some of them could be temporarily set aside "because the legislation or the Constitution provides for this suspension or limitation".[19]

The completion of this conceptual shift is reached when the state of emergency is no longer presented as only an exceptional regime implemented within the rule of law which then must be articulated with its norms and is instead thought of as much more, as a condition, a "shield" of the rule of law. In this way, assuming this military metaphor, the Minister of the Interior has recalled many times, "The state of emergency is not the opposite of the rule of law; it is when the situation requires it, a shield".[20] Finally, based on a well-known dialectic built around the conceptual relationship between freedom and security, the state of exception tends to come first. The state of exception is imposed "given the situation", as a perfect and inescapable means to protect fundamental rights and freedom and the rule of law.[21]

2. A compensatory conception of the rule of law

Many references to the rule of law during the French experience of the state of emergency tend to support a compensatory conception of the rule of law, according to which violations of rights and freedoms by police and other authorities can be justified by security reasons and the victims of such violations can claim compensation.[22] The rule of law is then reduced to the possibility being compensated in the event of damages.

This approach is often based on an overvaluing of judicial review and legal compensation. However, the mere institution of these procedures does not ensure that the judges satisfactorily address the victims' claims. On the one hand, not all victims whose rights and/or freedoms have been violated during the implementation of the state of emergency are able to pursue a judicial appeal. Victims may ignore the pro-

18 See for instance, Manuel Valls, Prime Minister, "Examen du projet de loi de révision constitutionnelle", 2016, February, 5th.

19 Wanda Mastor, François Saint-Bonnet, "De l'inadaptation de l'état d'urgence face à la menace djihadiste", *Pouvoirs*, 2016, n° 158, p. 53.

20 National Assembly, Speech, 2015, november 20th; National Assembly, Question to the government 2015, december 1st; National Assembly, Speech, 2015, december 2nd, National Assembly, 2016, February 9th …

21 See Wanda Mastor, François Saint-Bonnet, *op. cit*.

22 Manuel Valls, Prime Minister, Speech, National Assembly, 2015, december 23rd.

cedures or choose not to use them, thinking that a trial would be futile. On the other hand, even for those who might choose to pursue a legal remedy, the possibility to appeal does not mean that the trial will be won since in the French administrative legal system a presumption of legality is often made to the benefit of the administration. Finally, in material terms, the compensatory judgments have reduced the concept of the rule of law to an average compensation of $1000 USD for approximately 200 people, more than a year after the violations committed by the authorities.[23]

3. A discriminatory concept of the rule of law

The measures adopted during the state of emergency have tended to target certain groups and individuals.[24] In other words, the enforcement of the state of emergency was largely painless and almost imperceptible for a large part of the population. Yet it was very intrusive and restrictive of rights and freedoms for a small part. It may explain why the protests expressed by activists or by French and European institutions dedicated to the protection of human rights have had very little impact. Anyway, the lesson is that individuals are not equal in front of the new scales of justice in the emerging "suspicious society".[25] Faced with a state of emergency, as with other forms of emergency regimes, it is better not to be a Muslim, an ecologist, an extreme leftist activist, or to be diagnosed with psychiatric troubles.[26] Police practices under the auspices of emergency legislation, and claimed to be a part of the fight against terrorism, might transform the rule of law into a "discriminatory state of police".[27]

Conclusion

To begin, the experience of two years of a state of emergency in France has confirmed the propensity of exceptional legal regimes to be perpetuated and to become commonplace. It also highlights the capacity of contemporary democracies, committed to

23 Voir http://www2.assemblee-nationale.fr/15/commissions-permanentes/commission-des-lois/controle-parlementaire-de-l-État-d-urgence/controle-parlementaire-de-l-État-d-urgence; Paul Cassia, "indemnisation des perquisitions administratives de l'état d'urgence", *Blog Médiapart*, 25 mars 2017.

24 Nils Muiznieks, Council of Europe Commissioner for Human Rights, "Luttons contre le terrorisme dans le respect du droit", *Le Monde,* février 2016; Defensor of rights, *Rapport annuel d'activité*, 2016.

25 Mireille Delmas-Marty, "De l'état d'urgence au despotisme doux", *Libération,* 16 juillet 2017.

26 https://www.francetvinfo.fr/sante/maladie/lamalgame-entre-terrorisme-et-maladie-mentale-na-pas-de-sens_2350947.html.

27 Patrick Weil, "Le projet de loi antiterroriste rappelle le code de l'indigénat", *Le Monde*, 2 septembre 2017.

the rule of law, to incorporate exceptional regimes that derogate from ordinary legislation and restrict fundamental rights and freedoms. These exceptional regimes integrate the ordinary and regular functioning of public authorities. This situation makes it inappropriate to defend a strict opposition between, on the one hand, the norm and the exception and, on the other hand, the rule of law and the state – or regime – of exception. More precisely, if conceptual oppositions are possible and relevant from an analytical point of view, the experience of the implementation of exceptional regimes within states based on the rule of law shows the ability of contemporary governments to make them coexist, rather than to present them as alternative forms of the exercise of power.

With the French state of emergency experience, as with other emergency regimes or exceptional legislation, we are not dealing with general and absolute suspensions of the rule of law and its requirement that rights and freedoms be respected; rather, we are faced with partial limitations and derogations. These limitations are in principle procedural and formally limited to the circumstances for which the exceptional regime has been declared. However, the French experience puts in light the predisposition of emergency regimes to be invoked to govern situations external to the circumstances, the emergency being invoked to justify their implementation. In other words, the implementation of exceptional regimes within the framework of the rule of law is a matter of porosity, blurring the exceptional and the ordinary legislation, at both practical and theoretical level.

The French experience of the state of emergency may be one of the laboratories in which the degree to which contemporary societies committed to the rule of law are able to accept limitations on rights and freedoms justified by security requirements is being tested. It could also be an *in vivo* illustration of the clear-sighted reflections that Michel Foucault proffered regarding exceptionality in liberal states. As Marie Goupy sums it up, this would indeed imply "in no way" a "suspension of law", nor "the brutal assertion of the power of sovereignty". It would rather illustrate "a completely different way of exercising power" which, through exceptional legislation and the use of surveillance technologies, are the expression of a "security pact, *i. e.* the implementation of forms of population management involving the regulation of flows and the control of the particular case". Such a form of government would then shape "a new stage in the development of the liberal State, one in which the 'State' is never more than the name given to a set of techniques of government acting in particular situations by controlling and preventing risks".[28]

28 Marie Goupy, "L'état d'exception, une catégorie d'analyse utile? Une réflexion sur le succès de la notion d'état d'exception à l'ombre de la pensée de Michel Foucault", *op. cit.*, p. 106.