

# From One State of Emergency to Another – Emergency Powers in France

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2 years and less than 5 months after the end of the two-year state of emergency triggered on the wake of the 2015 terrorist attacks in Paris, a brand new “state of health emergency” was activated in France on the 23<sup>rd</sup> March to cope with a new attack led, this time, by a small and invisible enemy, Covid-19. The so-called “state of health emergency” currently constitutes the legal framework and basis of the measures in force to cope with the epidemic, including nationwide lockdown. What is this new regime? Is it a threat to individual freedoms? What are its limits and guarantees? Was it legally necessary?

The latter question is all the more relevant that the French legal playbook is far from being short of emergency powers regimes (1). It makes it all the more surprising that the French Government, at first, decided that it could act without triggering any of the textual regimes available (2) before making a complete U-turn and deciding that it needed a brand new emergency regime, dubbed “state of health emergency” (3).

## 1. Emergency Powers in France: A Quick Overview

### 1.1. The State of Siege

The state of siege was originally based on two Acts of 1849 and 1878. It has been introduced in the French Constitution in 1958, at Article 36:

“The state of siege is decreed in the Council of Ministers. Its extension beyond twelve days can only be authorized by Parliament.”

The 1849 and 1878 Acts have been repealed and replaced by a 2004 Ordinance (delegated legislation) which codified the state of siege in the Code of Defence. The triggering of the state of siege is subject to the existence of "imminent danger resulting from a foreign war or an armed insurrection." The state of siege is an emergency regime of a military nature: as soon as the state of siege is decreed, the powers with which the civilian authority is invested for the maintenance of order and police are transferred to the military authority. It has not been used in France since the second World War.

### 1.2. Article 16 of the French Constitution

According to Article 16 of the French Constitution, where

“the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted”,

the President of the Republic “shall take measures required by these circumstances”, including measures on matters which are ordinarily reserved to the Parliament. There is no substantial limitation apart from the requirement that they “shall be designed to provide the constitutional public authorities as swiftly as possible, with the means to carry out their duties”, which is extremely vague.

### **1.3. The State of Emergency**

The State of Emergency Act has been adopted by the French Parliament on the 3<sup>rd</sup> April 1955. It has been activated several times during the Algerian war (1955, 1958, 1961), secessionist movements in New Caledonia (1984), riots in the suburbs of Paris (2005) and, finally, following the terrorist attacks in Paris (2015) until the 1<sup>st</sup> November 2017. Activating the state of emergency implies the existence of an “imminent danger resulting from serious breaches of public order or events which, because of their nature or severity, constitute public calamities”. The state of emergency is declared by decree in the Council of Ministers (i.e. signed by the President of the Republic). It cannot be extended beyond twelve days without the authorization of the Parliament.

As for the prerogatives that the Administration has under the State of Emergency, listing all of them would exceed the size limit of the present text. Let us just say a few things. First, the Government does not necessarily activate all of them, and not necessarily on the whole of French territory. Second, the prerogatives allowed under the State of Emergency are extremely far-reaching and constitute a potential threat to liberties.

### **1.4. The Exceptional Circumstances Doctrine**

The exceptional circumstances doctrine is not a textual but a jurisprudential regime. It appeared, under the name of “war powers doctrine”, in two rulings related to the circumstances of World War I ([Council of State, 28 June 1918, \*Heyriès\*](#) and [Council of State, 28 February 1919, \*Dol et Laurent\*](#)). According to this doctrine, in the presence of exceptional circumstances (for example war, insurrection or natural disaster), a decision or action of the administration which would normally be considered illegal can be considered legal if a) the administration has been unable, due to exceptional circumstances, to act in accordance with the law b) it acted in consideration of an essential public interest and c) the breach of the principle of legality is proportionate to the other interests at stake. Administrative courts assess these conditions on a case-by-case basis.

## **2. The First Measures Against the Epidemic: A Combination of Health Emergency Police and Exceptional Circumstances Doctrine**

The first measures both restrictive for the general public and related to the Covid-19 crisis were adopted by the Health Minister on the basis of [Article L3131-1 of the Public Health Code](#) (“Code de la Santé Publique”, hereafter CSP). On the basis of this power, usually referred to as “health emergency police”, the Health Minister adopted the [Ministerial Decree of 14<sup>th</sup> March 2020](#), which prohibited public access to a certain number of establishments open to the public (shopping centres, restaurants, cinemas, theatres, museums, etc.), banned any gathering, meeting or activity bringing together more than 100 people in a closed or open environment and prohibited the access of users to childcare establishments and educational and higher education establishments.

As soon as the 16<sup>th</sup> March, the nationwide lockdown was decided, and put into effect on the next day at noon. Since then, it is prohibited for every person to move outside their home, except for one of the listed reasons. People wishing to benefit from one of these exceptions must provide a “self-permission” document certifying that the trip in question falls within the scope of one of these exceptions. This lockdown was decided by [Governmental Decree 2020-260](#), signed by the Prime Minister, the Health Minister and the Minister of Home Affairs. The legal basis of this Decree was, again, Article L3131-1 CSP, which was not legally orthodox since, as we have seen, this provision vests powers in the Health Minister and not the Prime Minister. This deviation from the text, together with the obvious far-reaching effects of a nationwide lockdown, probably explains why the Decree also mentioned the exceptional circumstances doctrine (“Given the exceptional circumstances arising from the covid-19 epidemic”) in its recitals. However, this mention was itself somehow unorthodox since it is for the judge, and no one else, to decide whether such circumstances exist and justify the decision. New exceptions were added by the [Governmental Decree 2020-279 of 19th March](#).

It appears therefore that governmental authorities have found all the legal bases they needed to adopt all the measures they deemed required by the circumstances. Yet, the Government felt the necessity to create a new emergency regime: the state of health emergency.

## **3. The Enactment of a New Emergency Regime: The State of Health Emergency**

### **3.1. Overview**

The [Emergency Response to the Covid-19 Epidemic Act \(2020-290\)](#), adopted under the accelerated legislative procedure on the 23<sup>rd</sup> March 2020, contains various

measures designed to cope with the epidemic. However, I would like to focus here on articles 1 to 8 of the Act. These provisions create a new emergency regime, called “state of health emergency.” This regime is codified in the Public Health Code (CSP) at Art. L. 3131-14 to Art. L. 3131-12.

According to the new Art. L3131-12 CSP, “the state of health emergency can be declared (...) in the event of a health disaster endangering, by its nature and gravity, the health of the population.” The new regime does not replace the health emergency police of Art. L3131-1 (see above) but complements it.

According to Art. L3131-15, in the territorial districts where the state of health emergency is declared, the Prime Minister can, by regulatory decree taken on the report of the Minister in charge of health, for the sole purpose of guaranteeing public health:

1. Restrict or prohibit the movement of people and vehicles;
2. Prohibit people from leaving their homes, subject to travel strictly essential for family or health needs;
3. Order measures having as their object the quarantine of persons likely to be affected;
4. Order measures for placing and keeping in isolation the affected persons;
5. Order the temporary closure of one or more categories of establishments open to the public as well as meeting places, with the exception of establishments providing essential goods or services;
6. Limit or prohibit gatherings on public pathways as well as meetings of any kind;
7. Order the requisition of all goods and services necessary for the fight against the health catastrophe as well as of any person necessary for the functioning of these services or for the use of these goods;
8. Take temporary measures to control the prices of certain products;
9. Take all measures to make available to patients appropriate medicines;
10. As necessary, take by decree any other regulatory measure limiting the freedom of undertaking, for the sole purpose of ending the health disaster.

On the same day, [Governmental Decree 2020-293](#) was adopted on the basis of this provision. For the most part, it rolls over, with even further restrictions, the content of the two previous lockdown Decrees (2020-260 and 2020-279 – see above).

## **3.2. Procedure and Parliamentary Oversight**

As the name of the regime suggests, the state of health emergency mimics the “normal” state of emergency, especially from the procedural point of view. For example, according to Art. L3131-13, “the state of health emergency is declared by decree in the Council of Ministers” (i.e. presidential Decree), just like the “normal” state of emergency.

However, Art. 4 of the Act states that

“by way of derogation from the provisions of article L. 3131-13 of the public health code, a state of health emergency is declared for a period of two months from the entry into force of this Act”.

Thus, in the present circumstances, the state of health emergency has been declared by the Act itself and not a presidential decree.

Also, just like the “normal” state of emergency, the state of health emergency foresees the involvement of the Parliament. For example, according to Art. L3131-13 para 1,

“the National Assembly and the Senate are informed without delay of the measures taken by the Government under the state of health emergency” and they “may request any additional information in the context of the control and evaluation of these measures.”

However, and for no clear or convincing reason, this involvement of the Parliament is, in certain respects, more limited than under the “normal” state of emergency. For example, according to Art. L3131-13 para 3, the extension of the state of health emergency must be authorised by the Parliament beyond one month – as opposed to twelve days for the “normal” state of emergency. Other difference: whereas article 4 of the State of Emergency Act 1955 provides that the Act of Parliament extending the state of emergency lapses at the end of a period of fifteen days following the date of resignation of the Government or dissolution of the National Assembly, there is no such caducity for the state of health emergency. Therefore, if a newly elected Assembly wants to stop the state of health emergency, it has to adopt an Act for this purpose.

The state of health emergency, like the state of emergency, stops at the date foreseen by the Parliament in the Act of extension. However, according to Art. L3131-14 para 2,

“the state of health emergency may be terminated by decree in the Council of Ministers before the expiration of the period fixed by the Act extending it.”

### **3.3. Judicial Review**

Since the decree declaring the “normal” state of emergency is subject to judicial review ([Council of State, 24 March 2006, Rolin and Boisvert](#)), it is likely that the decree declaring the “state of health emergency” is too, at least until it is extended by an Act of Parliament. However, in the present circumstances, the state of health emergency has been declared by the Act itself (Art. 4), therefore barring without necessity any judicial challenge of the declaration itself, except possibly through constitutional review. By analogy again with the state of emergency ([Council of State, 9 December 2005, Allouache](#)), both the termination of the state of health emergency by decree and the refusal by the Government to terminate the state of health emergency before the term determined by the Parliament are probably also subject to judicial review. However, available precedents concerning the state of

emergency (See *Allouache*) suggest a minimum judicial review, limited to “manifest” violation of the law in maintaining it into force (and probably also, conversely, in terminating it).

Measures adopted under the state of emergency are themselves subject to judicial review. How thorough this judicial review may be remains to be seen, but one may have certain causes for concern.

If we assume that the intensity of the judicial review on measures adopted under the state of health emergency will be the same as the one on “normal” state of emergency measures, it is necessary to keep in mind that the latter has raised multiple [criticisms](#). Furthermore, in the current circumstances, the Council of State has not so far proven a fierce guardian of individual freedoms.

First, on the [22<sup>nd</sup> March 2020](#), upon an application from a doctors union for interim measures, it ordered the Government to consider *aggravating* the existing lockdown measures and in particular “review the maintenance of the exemption for “short trips, near the home” taking into account major public health stakes of the confinement order.”

Second, [consulted on the Act when it was only a bill](#), the Council of State made several suggestions to *aggravate* the state of health emergency by comparison with the “normal” state of emergency. It is for example the Council of State which suggested (para 17 of its opinion) to depart from the 12-day deadline for involving the Parliament in favour of a 1-month deadline and to suppress the caducity of the Act extending the state of health emergency if the Government resigns or if the national Assembly is dissolved. It even went as far (para 18 of its opinion) as suggesting the suppression of the provision imposing on the Government the transmission to the Parliament of information relating to the implementation of the state of health emergency – a suggestion which was fortunately not followed by the Government.

In these circumstances, one may be forgiven not to completely trust administrative courts in general, and the Council of State in particular, to be thorough defenders of public liberties.

