HAL
open science

The Right of access to the courts under the State of emergency in France

Olivier Le Bot

To cite this version:

Olivier Le Bot. The Right of access to the courts under the State of emergency in France. Xth World Congress of the International Association of Constitutional Law, Jun 2018, Seoul, South Korea. hal-02264653

HAL Id: hal-02264653

https://hal.science/hal-02264653

Submitted on 7 Aug 2019

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

The Right of access to the courts under the State of emergency in France[1]

Olivier Le Bot, Professor of public law at Aix-Marseille university

In France, the State of emergency legal regime is regulated by an act of 1955[2].
This statute was passed during the Algerian war, in order to strengthen administrative police powers in crisis situations.
According to article 1, this exceptional regime can be decreed in two situations: in "cases of imminent danger resulting from serious breaches of public order, or in case of events threatening, by their nature and gravity, public disaster".
Its implementation opens a number of exceptional powers to public authorities, especially for the minister of the interior and the prefects (*ie* governors that represent the state government at local level).
For example, those authorities can:

- put individuals under *house arrest* (people are confined to their homes during the night and, during daytime, have to report one, two or three times to the authorities)[3];
- *disband* associations or groups[4];
- prohibit certain public meetings and provisionally close certain meeting places[5];
- pronounce curfews[6];
- authorize the police to inspect vehicles, to carry out identity verifications and to control luggage[7];
- authorize *administrative searches* in houses without judicial oversight[8].

[1] This text has been presented in the 10th World Congress of Constitutional Law (Seoul, 18-22 June 2018, AIDC-IACL). You can find a more developed version of this paper in French on Hal: https://hal.archives-ouvertes.fr/hal-01850943.
[2] Law n° 55-385 of 3 April 1955 related to the State of emergency: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350
[3] Art. 6.
[4] Art. 6-1.
[5] Art. 8.
[6] Art. 5, 1°.
[7] Art. 8-1 (created by a law n° 2016-987 of 21 July 2016, and abrogated by a decision of the Constitutional Council : decision n° 2017-677 QPC of 1st December 2017: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2017-677-qpc/decision-n-2017-677-qpc-du-1er-decembre-2017.150249.html.
[8] Art. 11.

In ordinary times (when the State of emergency is not activated), the last two measures can be ordered only by the judicial authority (either a judge, or a public prosecutor).

The State of emergency has been decreed eight times[9]:

- the first three times in relation to the Algerian war;
- the next three times in French overseas territories;
- once during the 2005 riots in the suburbs of Paris;
- and the last one in 2015 after a series of terrorist attacks in Paris.

The measures taken under the State of emergency regime generate important *effects* for individuals and can create significant *limitations* of fundamental rights. Therefore, the rule of law implies the intervention of a judge to exercise a control. This issue has two dimensions: one the one hand, the right to a constitutional judge and, on the other hand, the right to an ordinary judge.

I. The right to a constitutional judge

The first dimension is related to the right to constitutional review.
This implies the intervention of a judge to review the constitutionality of the law.
Is this control actually exercised? Yes and no.
Yes, formally: any person can challenge the constitutionality of a legislative provision through a priority preliminary ruling on constitutionality. It leads the constitutional court, in an *ex-post* review, to evaluate if the 1955 Act dealing with the State of emergency respects the constitutionally protected rights and freedoms.
Yes again, because most of the challenged provisions of the 1955 Act have been declared unconstitutional. Without self-restraint, the Constitutional Court has reviewed the challenged provisions with the same criteria and the same intensity than in ordinary time. As a result, 8 of the 9 decisions handed down by the constitutional council regarding the law of 1955 have led to the unconstitutionality of some provisions of the act – in most cases due to their vagueness[10].

[9] http://www.senat.fr/rap/l15-177/l15-1776.html#toc50.
[10] Constitutional Council, decisions n° 536 QPC, n° 567/568 QPC, n° 600 QPC, n° 624 QPC, n° 635 QPC, n° 677 QPC and n° 684 QPC.

But those repeals had absolutely *no* effects for the applicants. Why? Because the Constitutional court has systematically decided (as authorized by the Constitution) not to order the *immediate* cancellation of the unconstitutional provisions but to *postpone* this annulment for several months, taking into consideration the principle of legal security and in order to give time for the Parliament to rewrite the law.

II. The right to an ordinary judge

The second question, related to the right of access to court, deals with the control exercised not on legal provisions themselves but on individual measures taken on the ground of these provisions. This question is related to the right to get access to an ordinary court in order to review the applications of the legal provisions.
Is this control effective?
One must distinguish two situations.

Most of the decisions are subject to an effective judicial review. Referred back by the individual concerned by a given public decision, the administrative court can exercise its control in a very short period of time (in 2, 3 or 4 days) to evaluate whether the decision is justified and proportionate. If not, the judge can suspend the disputed decision[11]. For example, 20 % of the measures of house arrest were considered illegal by the administrative court, and therefore suspended[12]. As a result, we can agree with the Constitutional court to consider that the control exercised by the ordinary judge on those measures is effective[13].

However, the control cannot be considered as effective for decisions that produce all of their effects in a very short period of time. It is the case of two types of decisions:

[11] See, for example: Council of State (which is the supreme administrative court), ord., 22 January 2016, Abdelmalek, n° 396116 (https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000031938420) and Council of State, ord. 9 February 2016, Zammouri, n° 396570 (https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000032040170).
[12] Venice Commission, Opinion on the Draft Constitutional Law on "Protection of the Nation" of France adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), CDL-AD(2016)006-e, § 73 : http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)006-e.
[13] Constitutional Council, decision n° 2015-527 QPC of 22 December 2015, § 12 : http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-527-qpc/decision-n-2015-527-qpc-du-22-decembre-2015.146719.html.

- decisions that authorize the police to inspect vehicles, to carry out identity verifications and to control luggage;
- and the decisions that authorize house searches.

The house search is resorted in 2, 3, 5 hours, maybe 6. In any case, the targeted person has not the time to refer the decision back to court and to get a judgement on its legality before the house search is over. When the judge rules on the case, it's too late: if the administrative decision was illegal, the harm is done, and it cannot be rectified. The problem is all the more important because 40 % of the judgements have concluded that the disputed house searches were illegal[14].

The situation is the same with decisions authorizing the police to inspect vehicles, to carry out identity verifications and to check luggage. Those decisions were adopted every day, for a period of 24 hours. This time is too short to challenge its legality before a judge.

What is the position of the Constitutional court on this situation?

The Court did not rule on the provision of the 1955 act related to the power to authorize the police to inspect vehicles, to carry out identity verifications and to check luggage[15].

But it ruled on the article related to the conduct of house searches[16].

And it found that the constitutional right to access to court was *not* violated. Why? For two reasons. First, because "of the particular circumstances which led to the declaration of the State of emergency"[17]. Secondly because a judge can repeal the decision allowing the illegal house search and it can order the administration to compensate the damage suffered as a result of that decision.

We can estimate, as those two measures (annulment and compensation) only occur *after* the complete execution of a possible illegal house search, that they cannot be considered as providing an effective judicial protection.

With this decision of the Constitutional Council, we are far, far away, from the contemporary conception of what an effective judicial protection should be.

---

[14] Report from the National Assembly n° 591 of 28 June 2017, p. 14 : 31 annulations, for 78 judgements handed down. Direct link here: http://www.senat.fr/rap/l16-591/l16-5912.html#toc17.

[15] More precisely, it did not rule on the issue of the right to get access to court, because it declared this power unconstitutional for violating other rights (the freedom of movement and the right to privacy) : Constitutional Council, decision n° 2017-677 QPC of 1st December 2017 (http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2017-677-qpc/decision-n-2017-677-qpc-du-1er-decembre-2017.150249.html).

[16] Constitutional Council, decision n° 2016-536 QPC of 19 February 2016, § 11.

[17] § 11.