



**fidh**

**FRANCE**

INTERNATIONAL FACT-FINDING MISSION REPORT

Counter-terrorism measures  
& human rights

**When the exception  
becomes the norm**

# TABLE OF CONTENTS

INTRODUCTION	4
I. THE STATE OF EMERGENCY UNDER SCRUTINY	6
A. Factual background	6
1. Measures implemented under the state of emergency	7
2. Searches and house arrests: facts and figures	8
3. Parliamentary oversight	10
4. Judicial oversight	11
B. Analysis of consequences and assessment of oversight mechanisms	16
1. The consequences of state of emergency measures	16
2. Questioning the efficacy of state of emergency measures	19
3. What kind of safeguards are in place?	22
II. WHEN THE EXCEPTION BECOMES THE NORM: THE SHARP INCREASE IN COUNTER-TERRORISM LEGISLATION	27
1. The Law of 24 July 2015: intelligence	28
2. Draft reforms to French criminal procedure, another reason for concern	29
CONCLUSION AND RECOMMENDATIONS	33
ANNEX 1 : INSTITUTIONS AND PERSONS INTERVIEWED	40
ANNEX 2 : LETTER FROM THE INTERIOR MINISTER BERNARD CAZENEUVE, IN RESPONSE TO MEETING REQUEST BY THE FIDH DELEGATION	41

# INTRODUCTION

Over the course of this decade, France has been the scene of numerous acts of terrorism.<sup>1</sup> In March 2012, seven people were killed in the space of eight days: a soldier in Toulouse, two soldiers in Montauban, and four people, including three children, in a Jewish school in Toulouse. The perpetrator, Mohamed Merah, died during an assault led by the specialised national police unit, the RAID (*Recherche, Assistance, Intervention, Dissuasion*).

On 7 January 2015, the offices of the newspaper Charlie Hebdo were attacked. Two brothers, Chérif and Saïd Kouachi, entered the building armed with assault weapons and murdered eleven people, including eight members of the editorial staff. Two days later, Chérif and Saïd Kouachi were killed by the GIGN, a specialised unit of the national armed police, the Gendarmerie (*Groupe d'intervention de la Gendarmerie nationale*). On 8 January 2015, an accomplice of the Kouachi brothers, Amedy Coulibaly, killed a policewoman in Montrouge. On 9 January he held shoppers in a kosher supermarket in the Paris suburb of Vincennes hostage, killing four of them. He was killed that same day by French law enforcement agencies.

The last in the series were the events of 13 November 2015 that led to the declaration of a state of emergency: three suicide attacks near the *Stade de France*, where the President of the Republic was attending a football match, followed by shooting sprees in the 10th and 11th districts of Paris where gunmen fired at the terraces of cafés and restaurants and held concert goers hostage at *Le Bataclan*, a concert venue. These events ultimately left 130 people dead and 350 wounded.

The French President declared a state of emergency applicable to the entire country on the night of the 13 November attacks. On 20 November 2015, the French Parliament voted by an overwhelming majority to extend the state of emergency for a period of three months. On 16 February 2016, a second extension was approved. On 20 April, the government announced its intention to ask Parliament to vote on a new law authorising the extension of the state of emergency by an additional two months; the law was adopted by the Senate on 10 May and by the National Assembly on 26 May.

On 16 November 2015, the President convened the Congress (a joint meeting of the National Assembly and Senate) and announced his intention to amend the Constitution, firstly, to include the principle of the state of emergency and, secondly, to authorise the revocation of French nationality for persons who commit acts of terrorism.

After a lengthy debate, principally on revoking French nationality, the President failed to obtain the backing of the majority (a number of pro-government members of Parliament disapproved of the measure) and was forced to withdraw the draft amendments. Although initially intended to be examined in the current report, given that the proposed amendments were withdrawn, they will not be discussed.<sup>2</sup>

1. The causes of these acts of terrorism merit analysis because of their diversity and because of the wide range of interpretations. However, this type of analysis falls outside the remit of the fact-finding mission.

2. French law already provides for the revocation of French nationality, under certain circumstances.

In the weeks following the attacks, the government also presented to Parliament draft legislation seeking to modify French criminal procedure, adapting it to address such exceptional situations.

It is against this background that FIDH, with the agreement and assistance of its member organisation in France, LDH (*League de droits de l'homme* - French Human Rights League), decided to conduct an international fact-finding mission to examine the compatibility of measures taken by France in response to the recent terror attacks with respect to human rights. The mission took place between 14 and 18 March 2016. Three people, each from a country where similar concerns have arisen and still exist, were appointed to lead the mission. The FIDH delegation was composed of Fatimata Mbaye, a Mauritanian lawyer and President of the *Association mauritanienne des droits de l'Homme* (AMDH – Mauritanian Human Rights Association), Mokhtar Trifi, a Tunisian lawyer and Honorary President of the *Ligue tunisienne des droits de l'Homme* (LTDH – Tunisian Human Rights League), Ramzi Kassem, an American lawyer and Associate Professor of Law at the City University of the New York School of Law and Jérémie Kouzmine, a trainee lawyer from the Versailles Bar Association in France.

The current report reflects discussions between the FIDH delegation and various individuals and representatives of institutions and organisations with whom they met (see Annex One for the full list). The report also contains an analysis of the issues with respect to human rights and the rule of law, as well as an examination of counter-terrorism measures adopted or currently under consideration in France.

Those in charge of this mission and FIDH as a whole would like to express their gratitude to all of the individuals and institutions that agreed to meet with the FIDH delegation and respond to their questions. With the notable exception of the Minister of the Interior, whose refusal to meet with those leading the mission was expressed by letter (reproduced in Annex Two), all of the persons contacted agreed to meet with the FIDH delegation.

# I. THE STATE OF EMERGENCY UNDER SCRUTINY

## A. FACTUAL BACKGROUND

The Law of 3 April 1955 on state of emergency, adopted to deal with the situation in Algeria, had been applied on seven occasions before the attacks on 13 November 2015.

It was first applied in the wake of attacks carried out on 1 November 1954 in Algeria. The scope of the state of emergency was limited to Algerian territory and lasted three months. Due to the situation in Algeria, a state of emergency was declared in 1958, for a period of 15 days, and again in 1961 for a period of two years (recourse was also made – from June to September 1961 – to Article 16 of the French Constitution, which confers enhanced emergency powers on the President).

Thereafter, a state of emergency was declared in New Caledonia in 1984 as a result of ethnic and political conflicts, for a duration of six months, from January to June. States of emergency of shorter duration were also declared over the Wallis and Futuna Islands in 1986 and French Polynesia in 1987.

Finally, on 8 November 2005, following riots that broke out in several towns after the death of two teenagers who were trying to avoid police identity checks and an incident where a grenade was thrown at a mosque by law enforcement agencies during clashes with civilians, a state of emergency was declared in 20 French cities and in the entire Ile-de-France region (where Paris is located).

On the very night of the 13 November 2015 attacks, the President declared a national state of emergency. State of emergency is provided for by Law no. 55-385 of 3 April 1955 for an initial duration of 12 days. LDH and FIDH did not oppose the initial 12-day state of emergency. Objections did arise, however, when the state of emergency was extended.<sup>3</sup>

On 16 November, the French President addressed the Congress of the French Parliament in Versailles at a joint meeting with both legislative chambers and announced that draft legislation extending the state of emergency for a period of three months would be submitted.

On 20 November 2015, the French Parliament approved Law no. 2015-1501, prolonging the application of Law no. 55-385 of 3 April 1955 on state of emergency (through to 26 February 2016) and reinforcing the effect of its provisions. The draft was approved by an overwhelming majority: 551 members of Parliament voted in favour, six against, and one abstained. The text adopted allowed for a three-month extension and, more significantly, broadened the scope of measures applicable in a state of emergency.

<sup>3</sup> See, among other reactions: [www.fidh.org/en/europe-central-asia/France/getting-out-of-the-state-of-emergency](http://www.fidh.org/en/europe-central-asia/France/getting-out-of-the-state-of-emergency)

On 16 February 2016, the National Assembly voted a further three-month extension of the state of emergency, through to 26 May 2016. At that point the government was entitled to call for another extension, and its intention to do so was announced in April. However, police searches conducted in the absence of a criminal investigation and which do not require the intervention of a judge (*perquisitions administratives*), would no longer be authorised. Of 577 members of Parliament, only 246 were present on the day of the vote. Once the debate was over, 212 members voted for the state of emergency, 31 against and 3 abstained.

Thus, in May 2016, the state of emergency was extended until the end of July, voted for by a smaller, but still rather large majority.

## 1. Measures implemented under the state of emergency

### **Article 6 of the Law of 20 November 2015: house arrest**

Article 6 of the Law of 20 November 2015 sets out the conditions in which individuals can be placed under house arrest, as well as its application in practice.

As for the conditions, under the Law of 20 November 2015 a person can be placed under house arrest in the context of a declared state of emergency if there are “*serious reasons to believe that their behaviour represents a threat to public safety and order*”. In the 1955 version of the law, a person could be placed under house arrest if “*the activity proves to be dangerous to public safety and order*”. The notion of ‘activity’ is a concrete concept that is easy to understand. Moreover, it is used several times in the French Criminal Code in the definition of offences such as fraud committed against vulnerable persons (Art. 223-15-1 of the Criminal Code). The notion of ‘behaviour’ on the other hand can cover a multiplicity of situations.

Regarding the application of house arrest in practice, an individual may either be confined to a specific area or town, or be “*confined to a place of residence determined by the Minister of the Interior, for a period of time, determined by the Minister, of up to 12 hours per period of 24 hours*”. The original law did not provide for house arrest of this kind, an individual could only be restricted to a specific area or town.

This measure is cumulative with the obligation to report to the police or the Gendarmerie up to three times a day, including on Sundays, public holidays and other days off.

It is also possible to require individuals under house arrest to hand their passport and any other identification documents over to the police or the Gendarmerie.

### **Article 11 of the Law of 20 November 2015: searches and seizures of computer files**

Under the Law of 1955, searches can be conducted and computer files seized, even in a person’s home, both during daytime and at night. The Law of November 2015 maintains this position, although it has been partly called into question after the *Conseil Constitutionnel* was petitioned to examine the constitutionality of the law permitting seizure of computer files, through a specific constitutional mechanism (*question prioritaire de constitutionnalité* – see below).

The Law of November 2015 introduced the possibility of seizing computer files during searches: "Access may be gained, using a computer system or terminal present at the location where the search is carried out, to data stored on such system or terminal or in another computer system or terminal [...] Data accessed under the conditions set out in this Article may be copied onto any device".

### Article 8 of the Law of 20 November 2015: bans on public demonstrations

Article 8 provides for the possibility to prohibit organised public demonstrations "of a nature which may provoke or sustain disorder". Prohibitions applicable across the entire country must be imposed by the Minister of the Interior. When the ban concerns a specific county (*département*), the decision is taken by the Prefect responsible for that county.

The prohibition of organised public demonstrations during a state of emergency has a particular feature which derogates from the general law. It can be applied on the basis of presumption; contrary to what is generally required, the authorities do not need to prove the existence of a certain and specific threat to public order. In addition, the authorities also do not have to demonstrate to link between the potential threat posed by the demonstration and the reasons that led to the state of emergency being established.

What makes this measure unique is the absence of any real test of proportionality that is normally required for such prohibitions, which, unlike well-established jurisprudence of the *Conseil d'État* (Council of State, the highest chamber of the French administrative court system), are of general application.

### Article 6-1 of the Law of 20 November 2015: dissolution of associations and assemblies

Article 6-1 of the law authorises the Council of Ministers to dissolve by decree any associations and *de facto* assemblies that "participate in the commission of acts that can seriously disturb public order or whose activities facilitate or incite commission of such acts".

## 2. Searches and house arrests: facts and figures

The various measures provided for in the law on the state of emergency have been implemented by the Minister of the Interior or his representatives (in the case of house arrest) and by the Prefects (in the case of searches conducted without an investigation or the intervention of a judge, *perquisitions administratives*).

By mid-March 2016, 3,440 such searches had been conducted and 400 house arrests made, 70 of which were renewed in February 2016 when the state of emergency was extended.

### Cases before the administrative courts at first instance

RELEVANT MEASURE	DECISIONS ON THE MERITS		SUMMARY PROCEEDINGS – PETITION FOR RELEASE				SUMMARY PROCEEDINGS – SUSPENSION OF MEASURE			TOTAL
	Overturned	Dismissal	Suspension granted	Other injunction	No charge to answer	Dismissal	Suspension granted	No charge to answer	Dismissal	
Searches ( <i>perquisitions administratives</i> )	-	-	-	-	-	-	-	-	1	
House arrest	1	5	3	3	1	33	1 (partial)	1	5	53
Ban on protest	-	-	-	-	-	2	-	-	-	2
Restrictions on religious freedom	-	-	1	-	-	1	-	-	-	2
Ban on sales	-	-	1	-	-	1	-	-	-	2
Restaurant closure	-	-	1	-	-	-	-	-	1	2
<b>Total</b>	<b>1</b>	<b>5</b>	<b>6</b>	<b>3</b>	<b>1</b>	<b>37</b>	<b>1</b>	<b>1</b>	<b>7</b>	<b>62</b>
	<b>6</b>		<b>47</b>				<b>9</b>			

### Cases before the *Conseil d'État*

RELEVANT MEASURE	DECISIONS ON SECOND APPEAL			DECISIONS ON APPEAL			DIRECT REFERENCE TO THE CONSEIL D'ÉTAT – SUMMARY PROCEEDINGS FOR SUSPENSION			TOTAL
	Decision of administrative court overturned	No charge to answer	Dismissal	Decision of administrative court overturned	No charge to answer	Dismissal	Suspension granted	No charge to answer	Dismissal	
House arrest	6 (overtuned on the merits)	-	-	2 (1 amended, 1 re-established)	3	2	-	-	-	13
Ban on sales	-	-	-	1 (ban re-established)	-	-	-	-	-	1
Restaurant closure	-	-	-	-	-	1 (closure remains suspended)	-	-	-	1
Travel restrictions on sports fans	-	-	-	-	-	-	-	-	3	3
<b>Total</b>	<b>6</b>	<b>0</b>	<b>0</b>	<b>3</b>	<b>3</b>	<b>3</b>	<b>0</b>	<b>0</b>	<b>3</b>	<b>18</b>
	<b>6</b>			<b>9</b>			<b>3</b>			

### Between 14 November 2015 and 13 May 2016

SEARCHES
3,579 searches ( <i>perquisitions administratives</i> ) of which 152 were conducted during the second extension period of the state of emergency
756 weapons found
557 offences recorded
420 arrests leading to 364 detentions
67 sentences issued by the courts, of which 56 contained prison sentences
31 offences recorded likely to be connected to terrorism
6 proceedings opened on the charge of criminal association with a terrorist undertaking

HOUSE ARRESTS
404 persons targeted
27 of them in connection with COP21
268 orders for house arrest still in force at the end of the first extension period of the state of emergency
<b>Since 26 February:</b>
69 house arrest orders renewed
3 new house arrest orders issued, i.e. two more than on 30 March 2016
Of the 72 house arrest orders signed by the Interior Minister, two were suspended following summary proceedings ( <i>by the juge des référés</i> ) and one was annulled; consequently, 69 orders are currently in force

Tables based on data provided to the FIDH mission by the *Conseil d'État* on 7 January 2016.

Searches were mostly conducted at night (50.4%, according to the *Commission des lois*, the National Assembly's Law Commission, who justified this practice by reference to difficulties in intervening in certain neighbourhoods and the risk of rioting).<sup>4</sup> Moreover, all of the criminal investigation officers (part of the French police force) conducting the searches were systematically armed.

A number of people have described acts of violence and humiliation on the part of the investigation officers, as well as racist remarks made during searches (see below).

According to figures from the government, of the 464 offences recorded during the searches, only 25 were connected to terrorism (21 of which were for glorifying terrorism).<sup>5</sup> Only 6 police investigations for terrorist offences have been opened, leading to a single indictment.

### 3. Parliamentary oversight

Article 4-1 of the Law of 1955, revised by the Law of 20 November 2015, stipulates that the National Assembly and the Senate "shall be informed without delay of the measures taken by the government during the state of emergency. They can request any additional information for the purposes of oversight and evaluation of these measures."

Jacques Urvoas, former President of the National Assembly's *Commission des lois* (and currently Minister of Justice) proposed establishing a monitoring system, whereby the *Commission des lois* should "map the exceptional measures authorised in the state of emergency such as house arrest, searches, surrendering weapons, restrictions on movement, disbanding associations, closing establishments or banning Internet sites. The administrative and judicial follow-up to these measures as well as any recourse taken against them will also be recorded. All means of parliamentary oversight will be used to obtain in-depth information on subjects such as: spontaneous checks, travel, questionnaires, hearings, requests for evidence".

This type of parliamentary oversight, however, does not include the ability to impose restrictions or sanctions.

The National Assembly's *Commission des lois* has introduced a special procedure that gives it the same powers as an investigating commission; including hearing individuals under oath.

According to the President of the *Commission des lois*, Dominique Raimbourg, the Commission exercises comprehensive oversight: receiving reports on all the activities carried out under the state of emergency and meeting every Wednesday to assess the situation. Monitoring is carried out by the Commission's President and Vice President

4. Pursuant to the new Article 4-1 incorporated through Law no 2015-1501 of 20 November 2015 on the state of emergency: "the National Assembly and the Senate shall be informed, without delay, of measures taken by the Government during the state of emergency. They can request any additional information for the purposes of overseeing and assessing these measures". In application of this provision, the National Assembly's *Commission des lois* has established a special procedure that gives it the same powers as an investigating commission.

5. The anti-terrorist law, adopted on 4 November 2014, transfers the glorification of terrorism from the Press Act to the French Criminal Code. Legal proceedings triggered in France since this reform was adopted demonstrate the risk posed for fundamental freedoms, which has been denounced by LDH. (See the LDH press release dated 14 January 2015: [www.ldh-france.org/deja-50-poursuites-engagees-au-penal-apologie-du-terrorisme/](http://www.ldh-france.org/deja-50-poursuites-engagees-au-penal-apologie-du-terrorisme/)).

(a member of the opposition). As part of its work, the Commission visits prefectures, requests information from institutions such as CNCDH (*Commission nationale consultative des droits de l'homme* – the National Consultative Commission for Human Rights) on the implementation of the state of emergency, and examines complaint letters.

## 4. Judicial oversight

### *Sidelining court judges*

Implementation of the state of emergency has become notorious for, amongst other issues, the systematic sidelining of ordinary court judges (*juge judiciaire*). By creating *a posteriori* controls that are exclusively in the hands of administrative court judges, ordinary court judges have been dispossessed of the ability to exercise any control over the measures taken, in complete disregard of Article 66 of the French Constitution, which provides: "The Judiciary, guardian of individual liberty, shall ensure this principle is respected in legislation".

The French Constitution is not the only instrument that provides for this guarantee. European and, more broadly, international law require State signatories to conventions on the protection of human rights to respect certain fundamental principles. As an example, the right to an effective remedy is guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).<sup>6</sup> The notion of access to an effective remedy has been broadly interpreted, such that while the ECHR does not require access to ordinary courts, it does guarantee access to a national court with certain characteristics in the case of violations of rights and freedoms guaranteed by the Convention, including the right to recourse before a constitutional court and the possibility to invoke the Convention before the national courts.<sup>7</sup> The European Court of Human Rights (ECtHR) considers a remedy to be 'effective' in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred.<sup>8</sup> More specifically, in cases involving individual liberty and security, ECHR Article 5 mentions the entitlement to have the lawfulness of the detention decided speedily by court, as well as the right to compensation in the event of unlawful detention. To the extent that administrative measures ordering house arrest can be interpreted as a total deprivation of individual liberty, those concerned by such measures should be entitled to benefit from the guarantees described above.

Additionally, international instruments on the protection of human rights provide for exceptional situations such as those that have arisen in France since the November 2015 attacks. ECHR Article 15(1) states:

*"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 this Convention*

6. ECHR, Article 13 states: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". See also Art. 14 of the ICCPR.

7. Committee of Ministers of the Council of Europe, *Guide to good practices in respect of domestic remedies*, 18 September 2013.

8. See the ECtHR judgment in *Kudła v. Poland*, Grand Chamber, 26 October 2000, no. 30210/96, para.158.

*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".*

Article 4(1) of the ICCPR provides for the same kind of derogating measures in similar terms. The link between these two instruments is noteworthy. Both conventions require the existence of a public emergency threatening the life of the nation. More importantly, neither instrument authorises an absolute derogation from States' obligations on the protection of human rights. Derogating measures must be proportionate ("*to the extent strictly required by the exigencies of the situation*"). The limit for such measures set by the ECHR is compliance with international law obligations, while for the ICCPR it is the obligation not to discriminate "*solely on the ground of race, colour, sex, language, religion or social origin*".

With the exception of the possibility to petition the *Conseil Constitutionnel* (Constitutional Council; see below), the fact that the administrative courts have exclusive oversight of measures implemented under the state of emergency gives rise to many problems of principle.

One such problem consists of the composition of the *Conseil d'État* (the highest chamber of the French administrative court system), which calls into question its independence and impartiality.

It is important to recall that France is one of the few countries in the world with a judiciary divided between an ordinary court system and an administrative court system (*l'ordre judiciaire* and *l'ordre administrative*), conferring on the State the ability to effectively choose between them.

Without going into the historical reasons for this division, it is worth noting that the *Conseil d'État* is divided into the Studies section (*section des Etudes*), charged with issuing opinions on proposed government action, and a Litigation section (*section du Contentieux*) that hears cases between public administrations and ordinary citizens and also determines the legality of administrative actions undertaken. During the course of their careers, magistrates in the *Conseil d'État* may move between these two sections. The members of the *Conseil d'État* are appointed, in part, by political powers: 30% of the State Advisors (*Conseillers d'État*) and 25% of the Masters of Requests (*Maîtres des requêtes*) are appointed at the discretion of the executive branch. Politics thus play a significant role in the composition of part (though not the majority) of the *Conseil d'État*. This is not the case with the ordinary courts system (*l'ordre judiciaire*).

As for the Constitutional Council (*Conseil Constitutionnel*), its members are appointed entirely by elected officials (the President of the Republic, the President of the National Assembly and the President of the Senate). Moreover, former Heads of State become *ex officio* members; Valéry Giscard d'Estaing is the only former president currently sitting on the Council.<sup>9</sup>

9. Reforms to the Constitution oblige appointees to be approved by the relevant Senate and National Assembly committees, which can reject their appointment by a three-fifths majority.

### ***The jurisprudence of the administrative courts and of their highest chamber, the Conseil d'État***

It should be underlined that decisions relating to house arrest and searches have been taken by the competent authorities (the Minister of the Interior or his representative for house arrest and Prefects for searches) almost exclusively on the basis of 'white notes' (*notes blanches*). A 'white note' is a document produced by the intelligence services for the Interior Ministry, which itself oversees these services. In concrete terms, a white note<sup>10</sup> – according to the lawyers and persons subject to these kinds of measures who spoke to members of the FIDH fact-finding mission – is a white sheet of paper that contains the person's photograph and personal information from public records and any other information that the intelligence services have been able to glean, such as "radical practice of the Muslim religion", alleged connections with terrorists or with "radicalised" persons, or travel to conflict zones (in Syria or Iraq).

Before the administrative courts, the results of attempted recourse vary widely. In some house arrest cases, the Interior Ministry itself rescinded the relevant orders a few hours before the hearing, thus depriving the applicant of the possibility of having the court seized actually rule on the measures taken.

There have been cases where the judges have determined that the Interior Ministry had not provided sufficient proof in support of orders issued, consequently requiring the Ministry to produce more proof. In some instances, this led to the production of an additional '*note blanche*' or to the rescinding of the order by the Ministry. On other occasions, house arrest orders were suspended by the administrative courts in summary proceedings.

On 19 January 2016, LDH filed a summary petition for suspension (for the protection of fundamental liberties) with the *Conseil d'État*, in which it requested:

- suspension of the implementation, in full or in part, of the state of emergency measures; and, in the alternative:
- an order directing the President of the Republic to put an end without delay to the state of emergency, in full or in part, in application of the provisions of Article 3 of the Law of 20 November 2015; and
- an order directing the President of the Republic to re-examine the factual and legal circumstances that led to the state of emergency being declared.

LDH claimed that "*the continuation of the state of emergency for more than two months after it was initiated is a grave and manifestly unlawful violation of several fundamental liberties given that the imminent danger resulting from the serious breaches of public order that justified the state of emergency have disappeared, and the measures taken under the [state of emergency] regime have manifestly achieved their intended goal*".

On 27 January 2016, the *Conseil d'État* issued an order dismissing the petition, on the grounds: – first, that "*the conformity of these legislative provisions with the Constitution cannot be challenged before an administrative court judge, and that consequently the judge hearing the petition could not hear submissions in which the applicants request an order for com-*

10. The *chargés de mission* were able to consult some 'notes blanches' that were provided either by the lawyers or by the targeted individuals with whom they met.

plete or partial suspension of the state of emergency, which in reality entails suspending the application of the Law of 20 November 2015"; and,

- second, despite the President of the Republic's power to put an end to the state of emergency before the scheduled date, that because of the grave breach of public order and since the measures adopted within the framework of the state of emergency are subject to oversight by the administrative judge, "the President of the Republic has not gravely and manifestly unlawfully violated any fundamental liberties that would justify the judge hearing the petition using the powers held under Article L. 521-2 of the Code de justice administrative (French Administrative Court Code)".

The *Conseil d'État* thus concluded that it did not have jurisdiction to suspend state of emergency measures because that would have been tantamount to suspending a law, and that it would only have ordered the President of the Republic to put an end to the state of emergency if the President had seriously and manifestly unlawfully breached a fundamental liberty, a conclusion that the court did not reach.

With regard to summary petitions for the suspension of house arrest orders, the administrative courts initially concluded that the criterion of emergency, which is very strict for such petitions, was not met. The *Conseil d'État*, however, in its decision of 11 December 2015 (No. 394990), decided that such petitions did satisfy the emergency criterion. Consequently, orders for house arrest could be systematically challenged, but only if the person subject to such an order was informed of the existence of this type of recourse.

Elsewhere, in response to legal challenges initiated by environmental activists to house arrest orders issued against them for the duration of the international UN conference on climate change (COP21) held in Paris, the *Conseil d'État* disregarded the absence of any obvious connection between the reasons for the state of emergency and the placing of the activists under house arrest. The *Conseil d'État* based this conclusion solely on the supposed danger that their activities could have entailed.

### **The position taken by the Conseil Constitutionnel**

During the adoption process for the Law of 20 November 2015, those members of Parliament authorised to request that the *Conseil Constitutionnel* (Constitutional Council) review the constitutionality of the draft bill failed to do so. Consequently, it is only once the law on the state of emergency had already been passed that the *Conseil Constitutionnel* examined the compatibility of the law – or rather, certain of its measures – with the Constitution, through a specific mechanism whereby a priority request is made for a preliminary ruling on constitutionality (*question prioritaire de constitutionnalité – QPC*).<sup>11</sup>

11. The French Constitution confers on the *Conseil Constitutionnel* the power to review the conformity of laws with the Constitution. Article 61 authorises the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, and 60 Members of the National Assembly or 60 Senators to seize the *Conseil Constitutionnel* to examine the compatibility of laws with the Constitution before they are promulgated. This is an a priori review. Article 61-1 of the Constitution provides for a posteriori review of constitutionality in ongoing court proceedings. The *Conseil d'État* or the *Cour de cassation* may ask the *Conseil Constitutionnel* to examine the constitutionality of a law that is relevant in proceedings before either institution. This mechanism is referred to as a priority request (in the form of a question) for a preliminary ruling on constitutionality, known as a *question prioritaire de constitutionnalité – (QPC)*. Whenever the constitutionality of a law is questioned, the *Conseil d'État* or the *Cour de cassation* must refer the issue to the *Conseil Constitutionnel*, provided that the *Conseil Constitutionnel* has not already issued a decision on that law and that the question is either new or of a serious nature.

The *Conseil Constitutionnel* has issued three important rulings: first on the *QPC* of 22 December 2015 on house arrest orders issued under the state of emergency (Decision no. 2015-527); second on the *QPC* of 19 January 2016, submitted by LDH, on searches and seizures effected under the state of emergency, (Decision no. 2016-536); and third on the *QPC* of 19 February 2016, also submitted by LDH, on the policing of assemblies and public places during the state of emergency (Decision no. 2016-535).

Several salient points have come out of the rulings issued by the *Conseil Constitutionnel*.

Firstly, house arrests do not constitute a deprivation of liberty. This reasoning is used to justify the "ousting" of ordinary court judges from the procedure; under Article 66 of the French Constitution,<sup>12</sup> proceedings in the ordinary courts (before a *juge judiciaire*) are only required in the event of deprivation of individual liberty, which has been interpreted by the *Conseil Constitutionnel* to be equivalent to cases of imprisonment rather than simply confinement.

Secondly, the *Conseil Constitutionnel* determined that while all the legislative measures put in place in the context of the state of emergency clearly do violate individuals' fundamental liberties, these violations are proportionate to the need to protect public order and security. Thus, the measures providing for searches were found to appropriately balance rights and freedoms with the protection of public safety.

However, as regards measures authorising the seizure of computer files during searches, the *Conseil Constitutionnel* found these to be incompatible with the Constitution, on the grounds that: "the legislature did not provide for legal guarantees that could ensure an adequate balance between the constitutional objective of protecting public order and the right to privacy".

Lastly, in its rulings, the *Conseil Constitutionnel* seems to take into account the temporary nature of the state of emergency. In effect, according to the line of reasoning adopted, measures taken in the context of the state of emergency do not breach the rights and freedoms guaranteed by the Constitution because violations are only temporary. Nonetheless, the state of emergency has (for the moment) been extended twice, and a third renewal set to last eight months is currently under consideration. 70 house arrest orders were re-issued with the February 2016 extension of the state of emergency. Certain individuals have thus been confined to their homes since December 2015. All of this raises the question of the amount of time that must transpire before the *Conseil Constitutionnel* decides that the state of emergency has acquired a character that is no longer temporary.

12. Article 66 (2) of the Constitution: "The Judiciary, guardian of individual liberty, shall ensure this principle is respected in legislation".

## B. ANALYSIS OF CONSEQUENCES AND ASSESSMENT OF OVERSIGHT MECHANISMS

### 1. The consequences of state of emergency measures

Numerous testimonies collected by the FIDH mission from persons subjected to searches and subsequently placed under house arrest, as well as from their lawyers, described the use of violence during searches with, in some cases, acts of humiliation. Searches were always carried out by armed, often hooded, members of the security forces, despite a memorandum from the Minister of the Interior addressed to all Prefects, which called for respect of people's rights and property.<sup>13</sup> There were exceptions however; some witnesses described searches where violence was not used.

On the other hand, all of the criminal investigation officers involved in the searches were armed. Individuals whose premises were searched stated that the officers did not use their weapons, but that they were clearly used as a means of intimidation.

One individual whose premises were searched told members of the FIDH mission that: *"They came in and put a gun to my head". [...] "The search was carried out by armed, hooded policemen. We opened the door; they put my 13-year old son outside. They put me to one side and searched me. I was treated as though I was nothing".*<sup>14</sup>

According to another witness: *"They handcuffed me. The key broke in the handcuffs. The blood in my hands couldn't circulate anymore. When they finally took the handcuffs off, I had marks on my hands".*<sup>15</sup>

The *Collectif contre l'islamophobie en France* (CCIF - Organisation against Islamophobia in France) stated that: *"[...] some searches were badly conducted; others were carried out respectfully. We have proof of interventions by the law enforcement agencies where affronts to religion were made. One pregnant woman lost her baby because of an intervention; a weapon was pointed at her throughout, as well as at all of the children who were present".*

According to Dominique Raimbourg, President of the National Assembly's *Commission des lois*: *"every search is a necessarily unpleasant intrusion. In general, it involves breaking down a door. The Défenseur des droits (Ombudsman) asked that special attention be given to vulnerable persons. Someone must be assigned to take care of the minors".*

Beyond the use of violence, the sense of humiliation felt by those subjected to searches is striking. This can be seen from one of the interviews conducted by the FIDH mission: *"They [the police] sat down on the sofa and watched television. Some of them laughed. When I prepared food for my son, they asked me if I had made some for them".*<sup>16</sup>

13. Memorandum from the Minister of the Interior dated 25 November 2015, on "Administrative searches under the state of emergency".

14. Reported by Mrs. G and recorded by the members of the FIDH fact-finding mission. All persons interviewed wanted to remain anonymous.

15. Reported by M. B.

16. Reported by Mr. S.

The MP Isabelle Attard stated that while data on the number of searches and house arrests exists, these kinds of acts of police intimidation cannot be quantified and have not been recorded in any way.

All those interviewed also spoke of the serious consequences of house arrest on their personal lives. In some cases, it affected their health, as was the case of one person the FIDH fact-finding mission met with, in the presence of their lawyer, who suffered two strokes during the period in which he was confined to his home but, fearful of the consequences of infringing the order, was afraid to go to hospital for necessary follow-up appointments. This example illustrates in concrete terms the extent to which house arrest was a traumatic experience in certain cases.

For others, there were implications for their professional lives (dismissal, withdrawal of access passes, etc.). One person in their 20's was not able to undertake an internship as she had planned and which had taken time to obtain. Another woman in her 30's is having difficulty finding another job as a result of the traumatic effects of her house arrest:

*"I withdrew into myself during the 3-months of my house arrest. My doctor diagnosed me with post-traumatic stress. I don't go into the same shops anymore. When I leave the house I am sick to my stomach with fear. I only go to places where I think I won't run into anyone. I had a job offer before my house arrest. But I couldn't take up the position. Afterwards, I got a job interview. I agreed to go but then I had a panic attack. I'm afraid of seeing people I know. It's paradoxical because it would do me good to work, but I'm afraid of having to face the world. I live hidden away at home".*<sup>17</sup>

The lack of communication with persons under house arrest on the part of the Ministry of the Interior is notable, as is the lack of clarity when measures are put to an end. The termination date for house arrest orders was not notified in any of the reported cases. Generally, the individuals concerned had to go to the police station to obtain the information themselves. Once there, it became clear that even the police officers did not know what to do at the end of the first extension period. As a result, some people continued to check in with the police for two days because no-one had informed them that they no longer needed to and because the *gendarmes* had told them to do so.

Faced with criticism concerning the very real consequences on the lives of those subjected to searches and/or placed under house arrest, especially when violence was used, the Ministry of Justice replied that these kinds of measures would *"always be experienced that way"* and that, as a result, civil society monitoring is essential.

For French Muslims, whether born in France or having lived there from a very young age, the measures taken under the state of emergency have a direct impact on their sense of belonging within French society.

Interviews conducted by the FIDH fact-finding mission with people who had been subjected to searches and/or house arrest and their lawyers have highlighted the risk of stigmatisation and the destruction of social links that is inherent to such measures, as

17. Reported by Mrs G.

well as their intrinsically discriminatory nature. Among the many cases that illustrate this type of discrimination is that of a family with two sisters, whose cousin had travelled to Syria; only the sister who had converted to Islam was placed under house arrest. In another family, where one of the children had travelled to a conflict zone, only the brother born in Algeria was placed under house arrest, even though the family had informed the authorities of their 18 year old son's departure to Syria. In addition, one of the testimonies collected by the fact-finding mission stated that during a search, half of the questions asked by the police concerned the religious practices of the woman targeted.

While CCIF observed an increase in the number of acts of discrimination based on religion after the January 2015 attacks, especially against women wearing veils, no sudden rise was seen in November and December 2015. One of CCIF's greatest fears is that people are internalising and no longer reporting discriminatory acts. According to CCIF, only 19% of victims of discrimination report it; the figure is 21% for French Muslims, 56% of whom believe that filing a complaint will not change their situation.

CCIF has strongly criticised the Ministry of the Interior for the discriminatory position taken in issuing house arrest orders, targeting the surreptitious methods used by jihadists that in fact simply describe religious practices.

CNCDH, for its part, has denounced the fact that searches and house arrest measures widely targeted Muslims with strong religious convictions who practiced their faith openly, but in a resolutely non-violent way.

The FIDH delegation observed that the individuals subjected to searches and house arrests, under the impression that they were being rejected, expressed a desire to leave France:

*"I'm thinking about leaving France because I live in conditions that generate anxiety here. I have lost confidence in the system of the Republic. I took out a student loan. I did everything I could to integrate. I do not want to be assimilated".*  
*"When I was placed under house arrest, it was like the end of my confidence in the State".*<sup>18</sup>

A desire to obtain apologies from the French authorities was also observed:

*"I know that I will not receive any apology from my country. I am ready to go to the European Court of Human Rights if that's what it takes. Acknowledging a mistake is admitting that one did something wrong. My only goal now is to go through with this so that someone high up actually says to me 'I was wrong'".*<sup>19</sup>

18. Reported by Mr S.

19. Reported by Mrs G.

## 2. Questioning the efficacy of state of emergency measures

Interviews conducted by the FIDH delegation indicate that many of the state of emergency measures, and searches in particular, were used for reasons other than counter-terrorism. Above all, it became evident that legislation already in effect was sufficient and that a new law was superfluous.

### ***Use of state of emergency measures for purposes unrelated to counter-terrorism***

The FIDH mission met with a representative of the branch of the CGT trade union that represents police officers, who explained that most of the searches were carried out by members of the drug squad, especially in the Paris region. This means that searches supervised by the administrative courts and provided for under the state of emergency were used in relation to investigations unrelated to terrorism. According to the *Union syndicale des magistrats (USM* – France's largest national syndicate of judges): *"We were told that the Prefect, to increase the number of searches carried out, asked the Prosecutor which individuals could be the object of them, even if these individuals had no connection with terrorism"*. This practice was denounced as an effort by the authorities to "boost" the number of searches conducted and opportunistically issue search orders for persons linked to ordinary crimes by claiming the existence of a direct link between drug trafficking and terrorism.

Dominique Raimbourg, President of the National Assembly's *Commission des lois*, has explained that:

*"[...] the policy differed from one prefecture to another. In some prefectures, searches under the state of emergency were only conducted when intelligence pointed to terrorism, not just to criminal behaviour. On the whole, safeguards were in place"*.

A proportion of the searches conducted under the state of emergency were thus carried out in the context of anti-drug trafficking, the alleged motive being that the drug trade financed terrorism.

In addition, CCIF believes that state of emergency measures may have enabled large companies to do some "housekeeping", by dismissing employees because they had been the object of a search at work.

In an opinion paper dated 18 February 2016 on the state of emergency,<sup>20</sup> CNCDH calls into question and denounces *"practices amounting to misuse of the state of emergency"*. In this respect, according to CNCDH, while the state of emergency could justify bans on demonstrations, the reasons given for banning them were not connected to the imminent danger that led to the state of emergency being declared. With regard to searches, CNCDH considers that they provide evidence of law enforcement agencies instrumentalising the powers reserved for the administrative police in order to deal with less serious offences.

20. Available at: [www.cncdh.fr/publication/english\\_avis\\_statement\\_of\\_opinion\\_on\\_the\\_state\\_of\\_emergency.pdf](http://www.cncdh.fr/publication/english_avis_statement_of_opinion_on_the_state_of_emergency.pdf)

While the real impact of the state of emergency on the organisation of protests and demonstrations is not easily ascertainable, because most of the available data relates to house arrests and searches, it is clear that the state of emergency has changed the applicable legal framework. Representatives of the CGT trade union who met with the FIDH delegation were very critical of this change. They explained that certain demonstrations were forbidden on the basis that it was impossible to guarantee the security of the public due to a lack of security personnel and that, for others, authorisation was only given the night before, thereby disrupting the organisation and effectively preventing the protest from being held. The framework applicable to the organisation of protests and demonstrations has thus shifted from a system of notification to one of authorisation. This situation increases the risk of violations of the right to demonstrate.

### ***The superfluous character of the Law of 20 November 2015***

According to several people who met with the FIDH fact-finding mission, the legislative scheme already in place was sufficient to meet the stated objectives of the new law. Available resources, on the other hand, were presented to the delegation as being inadequate, in terms of both personnel and equipment.

In fact, all of the state of emergency measures could already have been implemented under the supervision of ordinary courts. According to the branch of the CGT that represents police officers, the state of emergency was an opportunistic measure rather than a concrete counter-terrorism mechanism. When the Law was adopted, the *Syndicat de la magistrature* (SM – one of the national syndicates of judges) recalled the arsenal of anti-terror legislation already in force, however disputable it may be, and stressed that it was not necessary to create more laws. This was especially the case since the SM had already warned about the possibility for abuse arising from the inclusion of nebulous terms such as “behaviour”.

As set out above, under the original Law of 1955, individuals could be placed under house arrest when “*their activity proved to be dangerous to public safety and order*”. The term ‘activity’ is a tangible concept that is easy to comprehend. It is also used several times in the French Criminal Code (*Code Pénal*) in defining offences such as fraudulent abuse of vulnerable persons (Art. 223-15-2 of the Criminal Code)

The Law of 20 November 2015 represents a major departure from this position, requiring only “*serious reasons to believe that behaviour represents a threat to public safety and order*”. It is thus no longer necessary to ascertain the existence of tangible activity; the loosely defined concepts of “serious reasons” and “behaviour” now suffice. As a result, an individual who happens to know a person suspected of terrorist activities can themselves be placed under house arrest.

Nonetheless, according to the *Commission des lois*, without the state of emergency the French authorities would not have had the means necessary to react in the immediate aftermath of the attacks, between 13 and 16 November. In this respect, it should be noted that the declaration by the President of a 12-day state of emergency on 13 November was not contested by LDH, FIDH nor a large number of other civil society organisations.

The USM (*Union syndicale des magistrats*) has confirmed that ordinary court judges (*juge judiciaire*) can react swiftly and already have the necessary means to fight terrorism. Specifically, the *juge des libertés et de la détention* (the ‘liberty and custody judge’, an independent judge that rules, in criminal proceedings, on questions of pre-trial detention and, more generally, protection of individual liberty during the judicial investigation phase) already has the power to issue orders, for example, for searches at night, in cases connected to the fight against terrorism.

### ***Legal challenges to measures taken under the state of emergency reveals their generally negative impact***

According to the majority of people with whom the FIDH delegation met, the impact of measures taken under the state of emergency was generally negative. Although the President of the *Commission des lois* suggested that there had been positive effects with regard to hampering the abilities of those who might provide logistical support to terrorist networks, CNCDH felt that the results were not positive and that introducing these measures required the mobilisation of huge resources and was extremely expensive. According to statistics from the Ministry of the Interior and quoted by CNCDH, the state of emergency has led to 576 legal proceedings being opened (the majority of which concern possession of weapons or glorification of terrorism), with 392 arrests leading to 314 people being detained for questioning, of whom 65 were found guilty and 64 received prison sentences. Only six cases were opened by the specialist national anti-terrorist unit (*pôle antiterroriste*, part of the ordinary courts system), which is extremely low in light of the overall number of house arrests and searches.

In some cases, ordinary court judges (*juge judiciaire*) who were presented with offences that were discovered during searches declared the administrative order authorising the relevant search to be illegal and, consequently, dismissed the entire case. This was the case, for instance, with a decision issued by the Riom Court of Appeal on 28 April 2016 (LDH transmitted this decision, issued after the fact-finding mission, to the FIDH delegation).<sup>21</sup> The Ministry of Justice has acknowledged that it should be expected that the *juge judiciaire* find search orders lacking a concrete basis to be illegal.

When the state of emergency was extended on 16 February 2016, only 70 of the 400 house arrest orders that had been issued since November 2015 were renewed; no explanation was given as to why over two-thirds of the orders were not renewed.

Very few proceedings on the dismantling of terrorist networks have been initiated on the basis of measures resulting from the state of emergency. The measures have mainly been used to initiate proceedings in the ordinary courts for charges such as glorification of terrorism (*apologie de terrorisme*), drug trafficking, and possession of weapons.

According to USM (*Union syndicale des magistrats*), even cases unrelated to terrorism were dropped. Searches conducted under administrative search orders have not led to formal investigations being opened and cases where weapons were seized generally resulted in summary hearings (*comparution immédiate*). The syndicate also regrets the fact that

21. Court of Appeal of Riom, 28 avril 2016, n°16/00153.

formal criminal investigations were not opened to trace the source of illegally trafficked weapons.

However, the Ministry of Justice for its part considers that the general impact of the state of emergency is positive; although the searches conducted did not systematically lead to legal proceedings before the courts, they nonetheless did lead to the discovery of illegally held weapons.

### 3. What kind of safeguards are in place for the state of emergency?

#### *Insufficient parliamentary oversight*

According to Dominique Raimbourg, the main role of the National Assembly's *Commission des lois* is to provide members of Parliament with information that allows them to decide on any potential extension of the state of emergency. This should be done, he stated, based on an analysis of the effectiveness of all the measures taken under the state of emergency. If the overall impact of the measures taken is negative, then the Commission should advise Parliament not to vote in favour of any extension.

However, Isabelle Attard, one of the few members of Parliament to vote against the Law of 20 November 2015 (there were 551 votes in favour of extending the state of emergency, 6 against and one abstention) felt that the oversight conducted by the *Commission des lois* is illusory. She explained that in order to conform with the separation of powers as imposed by the French Constitution of 1958, the legislative branch of government should not interfere in matters falling under the domain of the executive branch, which in this specific case is to apply the laws adopted by Parliament. Consequently, once the Law of 20 November 2015 had been adopted by Parliament, the only area in which members of Parliament could intervene in compliance with the Constitution would be by voting for or against an extension of the state of emergency or amending the existing law.

#### *Minimal judicial oversight*

The FIDH delegation conducted interviews with numerous parties. Several of these and in particular those with CNCDH, the *Syndicat des avocats de France* (SAF – the national syndicate of lawyers), as well as both national syndicates of judges, the *Union syndicale des magistrats* (USM) and the *Syndicat de la magistrature* (SM), reveal that conferring judicial oversight completely to administrative judges (except for the role played by the *Conseil constitutionnel*, see below) creates two problems of principle. Firstly, it is an *a posteriori* control, conducted after orders that may lead to serious violations of individual rights have been enforced. The second problem is linked to the intrinsic nature of the French administrative justice system.

As recalled by *Conseil d'État* representatives with whom the FIDH mission met, the Venice Commission of the Council of Europe – in an opinion published on 14 March 2016 concerning draft reforms to the French Constitution (which the government ended up scrapping on 30 March) – evaluated the control exercised by the administrative judge in the following way:

*"The Venice Commission does not see any reason to doubt that the oversight of emergency measures exercised by the French administrative judge, notably by means of summary measures (référés), is effective."*<sup>22</sup>

However, this position fails to take into account the fact that even though mechanisms for challenging administrative measures exist, the issues are decided on by institutions whose independence and impartiality are subject to considerable reservations. It is not a case of calling into question the quality of the men and women working within these the institutions, but rather of returning to a position consistent with well-established European Court of Human Rights (ECtHR) jurisprudence: it is not only the judiciary itself that should be independent and impartial, but also the image it projects.

On the issue of independence and impartiality, members of both national judges' syndicates (SM and USM) agreed that it was unfortunate and, more importantly, unjustified to sideline ordinary court judges (*juge judiciaire*). Circumvention of the *juge judiciaire*, they said, began with the Law of 24 July 2015 on intelligence and was taken one step further with proposed reforms to the French Code of Criminal Procedure (see below).

According to both the branch of the CGT trade union that represents police officers and one of the judges' syndicates (SM), one of the reasons advanced for sidelining the *juge judiciaire* is the perceived slowness of proceedings and the large number of cases. On this logic, *a priori* control by judges (exercised before orders are issued or implemented) would not be possible in urgent cases, whereas *a posteriori* oversight by administrative judges (once the relevant orders have been implemented) give security forces much greater leeway to react quickly.

Criticisms of the potential slowness of the ordinary courts' ability to react needs to be considered in light of recent statements made by the Minister of Justice, Mr Urvoas. He denounced the lack of available resources within the justice system to such an extent that some courts could no longer pay their bills. The government cannot rely on the resource shortage in the justice system, for which it is entirely responsible, to explain the supposed slowness of terrorism cases (which, incidentally remains to be proven).<sup>23</sup> In any event, under no circumstances could this justify retreating from fundamental rights.

With regard to measures taken under the state of emergency, the Ministry of Justice justifies administrative search orders, which are not subject to *a priori* oversight by a *juge judiciaire*, by the need to gather intelligence in an emergency while also pointing to the fact that it is open to ordinary court judges to issue orders authorising such searches.

Concerns expressed by both ordinary court judges and magistrates (*juges* and *magistrates judiciaires*) conflict with the *Conseil constitutionnel's* decision which found that house arrest as a measure does not constitute a deprivation of individual freedom and, consequently, falls outside the mandatory remit for ordinary court judges (*juge judiciaire*) that is

22. The opinion of 14 March 2016 is available at: [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)006-f](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)006-f).

23. "Le ministère de la justice n'a plus les moyens de payer ses factures" ("the Ministry of Justice no longer has the means to pay its bills"), excerpt of interview with the *Journal du dimanche* dated 2 April 2016.

provided for in Article 66 of the French Constitution. As a result, the judges and magistrates' concerns are not easily heard.

The *Conseil d'État* responded to these criticisms by asserting that administrative court judges have always dealt with restrictions to individual freedom. The protection of individual freedoms is an issue that has been adjudicated by the administrative courts since their creation and arises every day in cases involving, for instance, the deportation of foreign nationals. The creation of the *référé-liberté* mechanism (a petition to the *Conseil d'État* for summary protection of fundamental liberties) in 2000 was an important step in the protection of fundamental rights. It is consequently unimaginable that both court systems (ordinary and administrative courts) would drop their guard with regards to fundamental freedoms. According to the *Conseil d'État*, it would be "abandoning one's own principles".

During the FIDH mission, the *Conseil d'État* heard 112 challenges to state of emergency measures. Thus, only a quarter of the house arrest orders that were issued were challenged. CNCDH provided several explanations for the low level of recourse: lack of awareness on the part of the individuals' subject to such orders of the possibility of challenging them, despite information provided by the *Défenseur des droits* (Ombudsman); or a feeling that it was useless to challenge measures (searches in particular) after they had already been implemented. This type of challenge also gives rise to questions about compensation.

Mr. Alimi, a lawyer registered with the Paris bar, explained that short deadlines as well as the cost of hiring a lawyer acted as a serious obstacle to bringing challenges. Administrative orders must be challenged within two months after they are served and any appeal before the *Conseil d'État*, through a very specific procedure, must be filed within 15 days. While legal representation is not required before an administrative court, the complexity of the subject means that a lawyer will in practice be needed. Mr. Alimi told the delegation that he had been hired by an individual who had previously attempted to bring a challenge on his own, but had his case dismissed for failing to comply with procedural rules.

Of the 112 challenges that were filed, the French authorities unilaterally terminated 19.6% and the administrative courts suspended 14.3%. In sum: one third of the orders issued were either dismissed or suspended.

Of course, these 112 challenges correspond to just one quarter of all the measures taken under the state of emergency that infringe individual rights.

Beyond problems linked to the nature of judicial oversight and the small number of challenges brought, one of the main issues that came up in connection with the oversight exercised by the administrative courts is the acceptance of very weak evidence, such as "white notes" produced by the intelligence services (*notes blanches*).

In 2002, Nicolas Sarkozy (who was Interior Minister at the time) had called for *notes blanches* to be eliminated. In 2007, the then Interior Minister, Michèle Alliot-Marie, confirmed that they were no longer being used.<sup>24</sup>

<sup>24</sup> See the question submitted to the government posted on the National Assembly website (<http://questions.assemblee-nationale.fr/q14/14-92304QE.htm>).

The *notes blanches* are not supported by any evidence, do not state the source of the information and are not signed. That is to say, there is no evidence to support or justify the points noted by the intelligence services. Frequently, the *notes blanches* do not contain any facts; they contain only suspicions of certain behaviour in vague and unclear terms. Moreover, the Administrative Court in Cergy Pontoise has ruled that the contents of the *notes blanches* were insufficient and that the Interior Ministry had to present facts (Cergy Pontoise Administrative Court, 15 January 2016, case no. 1600238).

Representatives of the *Conseil d'État* and the *Commission des lois* who met with the FIDH delegation stated in the first instance that it was understandable that the *notes blanches* are not signed because this ensures the effective work of the intelligence services that issue them. In addition, they considered that administrative judges take them into consideration as one document in the file and do not "take them at face value". Accordingly, the principle that both sides be heard is maintained because the *notes blanches* can be openly debated in hearings. On a few occasions, the *Conseil d'État* has extended hearings to allow time to address information contained in *notes blanches*. These representatives thus considered *notes blanches* to be nothing more than one element of the case file, carrying the same weight as a written statement.

Nevertheless, the President of the *Commission des lois*, Dominique Raimbourg, has admitted that basing state of emergency measures on these *notes blanches* constitutes a restriction of fundamental rights.

Lawyers and the syndicates of judges also took the opposite position: the fact that *notes blanches* are unsigned, anonymous, and do not identify the source of the information they contain makes it impossible to truly apply the principle that both sides be heard. The individuals concerned cannot effectively refute the information in the *notes blanches* without knowing where it comes from. How is one to know that the allegations do not come from a disgruntled neighbour or anyone else the person quarrelled with? Proving that a person did not behave in a certain way is difficult; but when access to the source of information is not allowed, proving a negative of this kind becomes virtually impossible.

Given this context, it is unfortunate that the *Conseil d'État* has accepted to exercise minimal oversight. By assuming that information contained in the *notes blanches* produced by the Interior Ministry is *a priori* well founded, the burden of proof has shifted to those seeking to challenge administrative measures. They must disprove the arguments presented by the Interior Minister, even though these arguments are generally vague and unsupported by any concrete evidence.

The *Syndicat des avocats de France* (SAF - the national syndicate of lawyers) has analysed the way administrative judges deal with *notes blanches*. The SAF considers that judges hesitate when it comes to verifying the information they contain. As the judge examining a case, an administrative judge controls the investigation. They could, for instance, ask for the contents of intercepted telephone conversations or other aspects of the investigation with a view to strengthening the supposed evidence contained in the *notes blanches* (which only include incriminating evidence, without further details of the context in which that information was obtained). However, such efforts could face difficulties if met by the authorities with claims that such details amount to national security secrets (*secret défense*).

Those with whom the FIDH delegation met unanimously agreed that *notes blanches* alone would never have been accepted as evidence by an ordinary court judge (*juge judiciaire*).

Given these observations, the administrative judge should be extremely rigorous when it comes to determining appropriate reparations. Individuals subjected to searches or placed under house arrest without genuine reasons, as shown by the very low level of legal proceedings that have followed these measures, have suffered considerable non-material, as well as material, damage. Access to compensation must be systematic, especially in cases where the Interior Ministry has of its own accord terminated house arrest orders or where material damage was caused by the security forces during searches. The level of compensation awarded should also reflect the conditions in which the searches were conducted, in particular when officers were armed and hooded in the presence of children.

## II. WHEN THE EXCEPTION BECOMES THE NORM: THE SHARP INCREASE IN COUNTER-TERRORISM LEGISLATION

The presentation of the state of emergency in Part I of this report must be placed within the broader context of the counter-terrorism legislation recently adopted, or currently being considered, by the French Parliament.

For the purposes of the fact-finding mission and the exchanges with various institutions and authorities, the FIDH delegation focused on the recent intelligence law, adopted in July 2015, and on draft reforms to the French Code of Criminal Procedure. The government presented both these legislative texts as being additional tools that France needed to fight terrorism more effectively.

For many years, FIDH and LDH have expressed increasing concern with regard to the rise in legislation that increasingly restricts individual rights.<sup>25</sup> The day after the attacks of 9 January 2015, LDH warned about the possible adoption of a new security law, and regretted the lack of: *“substantive responses that explain what happened in our society for such acts to be committed, not to excuse them, and even less to absolve them, but to avoid having them happen again. Above all, we need preventive solutions. All solutions must strengthen the spirit and the letter of our democracy”*. As it turns out, when “security” becomes policy, arbitrariness, extremism, and even terrorist groups gain ground.

In the same way, in the concluding observations of France’s fifth periodic report in July 2015, the United Nations Human Rights Council specifically alerted France about its counter-terrorism measures, calling on France to ensure conformity with the provisions of the International Covenant on Civil and Political Rights, and especially the requirements for necessity and proportionality as set out in article 10 of the Covenant.<sup>26</sup>

### 1. The Law of 24 July 2015: intelligence

The adoption of the Law of 24 July 2015 on intelligence was the first legislative response after the January 2015 attacks. It was placed on the National Assembly’s urgent agenda and presented as a response to the attacks; but the bill was far from having been recently drafted. The events of January 2015 catalysed the debate and, more significantly, legitimised a law that would have certainly have been difficult to get approved. Brought before the members of the National Assembly on 13 April as part of an emergency procedure that provided only for a single round of debates in Parliament, the bill gained almost

25. See FIDH and LDH press releases, available at [www.ldh-france.org/combattre-terrorisme-ce-nest-pas-restreindre-les-libertes/](http://www.ldh-france.org/combattre-terrorisme-ce-nest-pas-restreindre-les-libertes/); [www.fidh.org/en/themes/terrorism-surveillance-and-human-rights/In-the-face-of-terrorism-ensuring-security-for-all-requires-rigorous](http://www.fidh.org/en/themes/terrorism-surveillance-and-human-rights/In-the-face-of-terrorism-ensuring-security-for-all-requires-rigorous); and [www.ldh-france.org/projet-loi-relatif-au-renseignement/](http://www.ldh-france.org/projet-loi-relatif-au-renseignement/).

26. See the final observations CCPR/C/FRA/CO/5 of the UN Human Rights Council.

unanimous support both in the French Parliament and from the public, still under shock from the January attacks.

The stated objective of this law was to strengthen the methods available to the French secret services by legalising particularly intrusive illegal practices that had long been used without any legal framework. This law, which was presented as a way of protecting the population, in reality allows the use of intrusive intelligence collection methods by the French intelligence agencies.

The scope of application of the law is particularly alarming. Although presented as a counter-terrorism tool, it actually covers seven other situations including protecting national independence, territorial integrity and national security, preventing collective violence that could seriously disturb public peace, and preventing the commission of criminal offences and organised crime. This amounts to the generalisation of an exceptional – and highly objectionable – system of derogations that legalise large-scale surveillance.

Another cause for concern is the introduction of specific technology (known as IMSI-catcher devices) to collect the telephone data (SIM card, IMEI number) of all persons in a given location. According to the *Quadrature du Net*, a French advocacy organisation that promotes digital rights, the new intelligence law proves that the government wants to authorise broad access to connection data (such as the location of a computer or mobile telephone, records of connection times, lists of internet sites visited, subjects entered on search engines, etc.).

Clearly, the purpose of this law is the mass collection of information that intelligence agencies must then sort through. It also means that information is collected about innocent bystanders and that considerable resources are drained; resources that could otherwise be put towards human intelligence.

As a result, numerous civil society organisations in France have publicly expressed their concerns that the Law of 24 July 2015 seriously undermines the right to privacy, among other fundamental rights.

The same reasoning used to dispossess the *juge judiciaire* of the possibility of exercising any oversight over infringements of fundamental rights has been applied in the so-called control mechanisms established in the new law. The measures authorised by the law are taken by the administrative authorities, with the endorsement of the executive, and are subject to the very relative control of the *Commission nationale de contrôle des techniques du renseignement* (CNCTR - National Commission for the Control of Intelligence Techniques), which essentially acts in a purely consultative capacity.

The Prime Minister exercises near-complete control over the measures; he authorises surveillance and can, in urgent cases, bypass the procedure requiring an opinion from the CNCTR by notifying it, after the fact, that the relevant surveillance measure has been authorised. Clearly, this Commission exercises very limited oversight. The only available recourse is before the *Conseil d'État*, which can be petitioned by the CNCTR and anyone who believes that they have been a victim of abusive surveillance measures. The decision of the *Conseil d'État* is final and there is no possibility of appeal. An individual who believes

they have been directly targeted by abusive surveillance can seize the CNCTR, which will inform him or her whether the proper controls were conducted (without having to provide any justification or further details) and, if any irregularities are noted, can also appeal to the Prime Minister directly.

In this respect, a *Quadrature du Net* representative described to the FIDH delegation how they had requested information from the CNCTR as to whether or not they were under surveillance. The response, received 24 hours later, merely indicated that "everything has been done legally" without any further details.

## 2. Draft reforms to French criminal procedure, another reason for concern

Following the 13 November 2015 attacks in Paris, the government decided to reform criminal procedure so as to adapt it to these types of exceptional situations. Explaining the reasoning behind the proposed reforms, the government has spoken of:

*"[...] the need to adapt legislative provisions on organised crime and, more specifically, on terrorism in order to strengthen in a long-term way the tools and resources available to the administrative and judicial authorities, beyond the temporary legal framework that is in place under the state of emergency".*

The aim is very clear: to enshrine in the French Code of Criminal Procedure (i.e. in the generally applicable ordinary criminal law) measures that are normally derogations to the law and only applicable in a state of emergency.

The draft reforms consist of three parts: the first aims to step up the fight against organised crime and terrorism, the second is on strengthening procedural guarantees, and the third aims to simplify the applicable procedure. Only the first part will be examined in this report. It should be noted that at the time of writing this report, the draft legislation was being examined by the National Assembly. As a result, the provisions discussed below may be subject to change.

The first part of the reforms on "stepping up the fight against organised crime and terrorism", contains most of the provisions that are problematic in terms of respecting fundamental rights.

There are several salient issues:

Firstly, there is the issue of enhanced powers for prosecutorial authorities during preliminary investigations. The constantly growing powers conferred on the prosecution with regard to preliminary investigations need to be analysed in light of ECtHR jurisprudence that has underlined the fact that, unlike trial judges in ordinary courts, magistrates who are part of the prosecution do not meet the guarantees of judicial independence and impartiality that are required.<sup>27</sup>

27. On this issue see ECtHR judgments: 25 February 1993 *Funke, Crémieux and Mialhe vs. France*, no. 10828/84; 29 March 2010, *Medvedyev vs. France*, no. 3394/03; and 23 November 2010, *Moulin vs. France*, no. 37104/06.

The main provision of the reforms in this respect is to extend the possibility of conducting night searches in places of residence. Such searches would be under the authority of the Prosecutor, would not require prior authorisation from a judge and would not be subject to effective *a posteriori* oversight. In emergency cases, the draft provisions also allow the prosecutorial authorities to use “IMSI-catcher devices” to collect the connection data needed to identify a computer terminal or the user’s subscription number without prior authorisation from the *juge des libertés et de la détention* (liberty and custody judge). If the information collected happens to reveal offences other than those being investigated, it could nevertheless be used as evidence. Guarantees that data collected in this manner will be destroyed are unsatisfactory and need to be explained in greater detail. During an interview with the FIDH delegation, the French digital rights advocacy organisation *Quadrature du Net* expressed concern about the government’s willingness to allow such widespread access to individual connection data. Metadata obtained in this manner is just as useful as reading the contents of emails and text messages. According to *Quadrature du Net*, the government makes the extremely weak argument that mass collection of data while analysing only a few files does not amount to mass surveillance.

The second source of concern is that the draft reforms increase the powers of security forces when conducting identity checks and controls. A series of proposed measures allow the security forces to carry out visual inspections and search bags and luggage, in addition to existing measures for conducting identity checks and vehicle searches. The proposed measures, which can be authorised by the Prefect acting alone if the security forces’ operation is connected with preventing of acts of terrorism, include: a 4-hour period of administrative detention in cases where identity checks give rise to serious reasons for believing that an individual’s behaviour is linked to terrorism (the detention period is used to consult police records, the records of the services that initiated the alert and especially the records of other European countries); the use of mobile cameras by the security forces during their operations; a narrowing of criminal liability for the national police, the *gendarmerie* and customs agents who, aside from legitimate cases of self-defence, use their weapon to stop a person who has just committed murder(s) from causing further harm.

Thirdly, the introduction of administrative controls over individuals who travel abroad to participate in terrorist activities and then return to France is effectively a transposition of a state of emergency measure into ordinary criminal procedure. This would empower the administrative authorities to issue various orders (enforced by the police under the authority of the administrative courts) against individuals suspected of having travelled, or attempting to travel, abroad in order to participate in terrorist activities or to areas where terrorist groups are operating, who consequently would be incited to disturb public safety on their return to France. The Interior Ministry could issue orders imposing: house arrest for a maximum period of one month, reporting to the police or *gendarmerie* up to three times a week; the obligation to declare a domicile, with the login information for all available communication methods; and the obligation to notify any travel outside of geographic zones defined by the administrative authorities, even in cases where an ordinary court judge (*juge judiciaire*) deems this unnecessary.

USM, one of the national syndicates of judges considers the possibility of issuing house arrest orders to be unacceptable and regrets the position of the *Conseil d’État* that confining a person to their home for less than 8 hours per day is a mere “limitation” of their freedom.

According to the office of the Minister of Justice (*Garde des Sceaux*), the purpose of these measures is to exercise control over individuals who have been able to avoid criminal prosecution. The French government estimates that there are 600 French nationals present in conflict zones, of whom 150 are women. According to the government, these women cannot be accused of going to conflict zones to fight and thus escape criminal prosecution; measures such as house arrest are thus necessary to ensure that they do not have any criminal intentions and to verify the reasons that led them to travel to conflict zones.

The draft reforms add another layer to the existing legislative arsenal. In addition to criticisms that can be made of the measures themselves, serious doubts exist as to the utility of adding a further text to the existing volume of legislation, which has been submitted to the French Parliament without any analysis of how existing laws have been applied and whether they are effective. The government is thus aiming to increase surveillance without first examining the root causes underlying the attraction towards committing violent acts.

On 17 March 2016, CNCDH published an opinion paper strongly criticising the draft reforms.<sup>28</sup> According to CNCDH: “*several of the draft law’s provisions, as indicated, incidentally, in its preamble, seek to introduce into the general law certain measures inspired by the exceptional state of emergency regime, thus trivialising them and turning the exception into the norm*”. States should thus refrain from using counter-terrorism as a pretext to justify taking any measure that would “*undermine, or destroy our democracy while claiming to be defending it*”. More specifically, CNCDH casts an extremely critical eye on the strengthening of investigations conducted by the Prosecutor (who reports to the Ministry of Justice), to the detriment of those conducted by investigating magistrates, who are independent. CNCDH is also critical of the considerable increase in the powers of security forces when conducting identity checks as well as the 4-hour administrative detention period, which is very similar to police custody, and which “*since coercion is exercised, regardless of the short duration, is a deprivation of liberty and should meet the requirements of Article 5 of the ECHR*”.

Finally, the proposed reforms provide for cumulative prison sentences and a minimum 30-year period of detention with no possibility of amending the sentence, which effectively creates a system of life imprisonment without parole for terrorist offences. Human rights organisations have strongly criticised these provisions, which violate ECtHR jurisprudence according to which no prison sentence can remove the prisoner’s hope of being released without constituting degrading treatment.<sup>29</sup>

28. See CNCDH opinion paper dated 17 March, available at: <http://www.cncdh.fr/fr/publications/projet-de-loi-sur-la-lutte-contre-le-crime-organise-et-le-terrorisme-la-cncdh-denonce>.

29. See ECtHR judgment of 9 July 2013, *Vinter and others v. The United Kingdom*, no. 66069/09, 130/10 and 3896/10, page 58.

On 5 April 2016, the draft reforms, with various amendments that further restrict fundamental rights (including the addition of new offences to the French Criminal Code for regularly consulting terrorist websites and intentionally staying at the scene of terrorist operations abroad) were approved in the Senate by an overwhelming majority (with 299 votes in favour and only 29 against). The reforms were approved by the National Assembly, with a few amendments, on 19 May 2016. Final adoption of the reforms by the Senate took place on 25 May 2016.

The adoption of these reforms confirms the current tendency for a security-based approach that takes precedence over respect for fundamental rights.

## CONCLUSION AND RECOMMENDATIONS

Acts of terrorism<sup>30</sup> are undoubtedly a formidable challenge. They drag citizens and political leaders into a state of fear. This fear is especially powerful because the perpetrators do not wear uniforms, because there is no state of war – which, paradoxically, would be reassuring – despite the language that is all too often used, and because what is being sought is far beyond disputes over territory or interests. For democratic regimes, the challenge is especially difficult because they must staunchly oppose terrorism while not losing sight of the reasons why a democracy exists. In contrast with the aims of acts of terrorism, the challenge for democracies is not to impress their opponents (who undoubtedly would not be impressed) nor to destroy them, but rather to maintain security and preserve their values.

Other than during the Algerian war, terrorist attacks of this kind have never been perpetrated on French territory. Furthermore, these attacks have occurred after a period of almost 20 years during which the country was spared such violence, except for acts of home-grown terrorism that were far from being as violent.

Murdering Jews because they are Jewish (thus reviving the collective subconscious of a country which partly collaborated with Nazi occupiers), killing journalists and police officers, shooting people sitting at tables on cafe terraces, and executing concert-goers who have been taken hostage, all of which has taken place against a backdrop of socio-economic crisis coupled with anxiety generated by events abroad, could do nothing less than generate paralysing fear amongst the population.

Acts such as these also bring out weaknesses in the police system, which have an abundance of legislative tools at their disposal but may lack the material resources needed to intervene quickly enough. It was neither surprising nor illegitimate for the government to declare a state of emergency for a period of 12 days. Very few people spoke out against this decision.

Except for a five-year period (between 1981 and 1986), France has always used exceptional measures and courts, which derogate from ordinary law and procedures. Two such measures are provided for in the French Constitution: Article 16 allows for the transfer of all powers to the President of the Republic during wartime. The declaration of a state of emergency during the Algerian war was based on this provision. Until 1981, when it was dissolved, France had the exceptional court known as the *Cour de Sécurité de l'Etat* (Court for the Security of the State), something that is extremely rare in a democratic system. The court was exceptional both in terms of its composition as well as the way it functioned within the French judicial system. After a series of attacks in 1986, the ordinary courts were

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30. We do not use the terms "terrorism" or "terrorists" alone because they do not convey the complexity of a very wide array of phenomena and because they are used indiscriminately to describe the enemy, the opposition and resistance fighters as well as perpetrators of acts of terrorism. As this report is on the situation in France, it is also appropriate to point out that the word "terrorism" comes from the period known as *la terreur* (the terror) during the French Revolution, which consisted of violence perpetrated by the State. In addition, the international community has yet to reach a consensus on the definition of "terrorism".

assigned exceptional powers through the creation of a national anti-terrorist prosecution unit as well as positions for anti-terrorist investigating magistrates; a specialised police department; and a chamber of the court to judge major offences without a jury and with very different procedural rules. Since 1986, between 25 and 30 laws have been adopted to reinforce the powers of this comprehensive anti-terrorist unit. These developments have not been without consequences for ordinary criminal offences, to which procedural rules created in counter-terrorism legislation are increasingly being applied. The draft reforms to the French Code of Criminal Procedure examined above are an example of this phenomenon.

The government's adoption of the intelligence law in July 2015 was unanimously denounced by civil society organisations and by CNCDH<sup>31</sup> because its provisions are extremely intrusive, are devoid of any judicial oversight by the *juge judiciaire* and provide agents of the State with a form of impunity.

We have analysed the nature and effects of all the measures implemented under the state of emergency in the context of a country that is profoundly and understandably traumatised, whose legal system already comprises numerous exceptional measures designed to fight terrorism.

## WEAKENING INDIVIDUAL RIGHTS

One of the characteristics of the measures implemented under the state of emergency is the transfer of jurisdiction over restrictions to individual rights to the administrative courts, who can only intervene *a posteriori*, i.e. once the measure leading to the restriction of rights has already been enforced. Therefore, orders authorising house arrests, searches and the dissolution of associations (although demonstrations have always been under the authority of the administrative judge) are no longer overseen, either *a priori* or *a posteriori*, by the ordinary courts.<sup>32</sup>

Given the nature of the administrative courts, the stage at which they intervene and their jurisprudence, the oversight that they exercise is unbalanced and inadequate. Administrative courts give greater credence to administrative authorities and are prepared to accept declarations made by the police as evidence, which reverses the burden of proof to the detriment of the individuals in question. Furthermore, the only legal consequence of any decision invalidating a search order is the awarding of compensation. Agents of the State are consequently guaranteed impunity. Finally, by admitting that the measures can be applied in circumstances totally unrelated to the events that led to the state of emergency being declared, the administrative courts have facilitated the work of public authorities to a considerable extent but have also authorised them to act for reasons other than those officially stated, and have thus broadened the scope of application of the state of emergency.

31. See opinion paper of the CNCDH, retrievable at: <http://www.cncdh.fr/fr/actualite/avis-sur-le-projet-de-loi-relatif-au-renseignement>.

32. An exception is made in cases where criminal charges result from administrative measures. Several cases have thus been dismissed by the ordinary courts before they reach trial on the basis that unfounded or anonymous search orders are illegal.

## DILUTING THE PRINCIPLE OF EQUALITY

Beyond repercussions for individual rights, what seems most striking is the stigmatisation of one part of the population. Nearly all of the measures taken by the Interior Ministry concerned Muslims and were applied in clearly identified geographical areas. It was thus inevitable that feelings of discrimination would emerge, adding to those that were already felt on various levels even before the terrorist attacks in France. What would have been a limited effect had the situation only lasted 12 days could only be amplified as the state of emergency was extended. Feelings of stigmatisation grew even stronger because public authorities did nothing to stop disparaging remarks, even by State representatives. In this respect, the aborted proposal to include rescinding of nationality in the French Constitution was a further reason to mistrust the authorities. At present, it is not possible to predict how these feelings of humiliation will evolve.

## SETBACKS TO THE RULE OF LAW

Without doubt, methods for recourse and challenge do exist, even if access to them is hindered by financial constraints or simply the fear of having to confront the police and the administrative authorities. Both the *Conseil d'État* and the *Conseil Constitutionnel* have been called on to intervene and have issued rulings following public hearings. The freedom of the press has been preserved. In formal terms, the rule of law has been respected.

The application of the rule of law, however, is more than a matter of respecting its form. The French Parliament is the first institution that failed to discharge its supervisory role. While the creation of the *Commission des lois* by the National Assembly has made it possible, although not easy, to collect significant information, institutionally, this body does not carry any real influence on the course of events. The virtually unanimous vote in favour of extending the state of emergency the first time and the overwhelming majority that voted for subsequent extensions demonstrate that the French Parliament – a representative institution with the authority to end the state of emergency – chose not to examine nor concretely debate the matter.

As we have already emphasised, the administrative courts have proven to be very receptive to the government's requests. However, it is the *Conseil Constitutionnel* that is responsible for the fundamental setback to the rule of law. By interpreting the concept of "individual liberty" (control over which is conferred on the ordinary courts under the French Constitution, rather than the administrative courts) as being restricted to cases of imprisonment and excluding all other forms of restrictions to individual liberty, the *Conseil Constitutionnel* has not only ignored the intentions of those responsible for drafting the 1958 Constitution but has also shifted the balance in the rule of law in favour of the government, to the detriment of individual rights.

This evidently raises questions regarding the composition of the *Conseil Constitutionnel*, whose members are directly appointed by the executive and legislative branches of government.

Finally, our observations have led us to conclude that the application of the state of emergency, in terms of the measures implemented under it, confers near total impunity upon agents of the State. It is virtually impossible to prove racist insults or acts of violence when they take place behind-closed-doors in the context of searches conducted by the security forces.

The same applies to the responsibility of the Interior Minister in relation to the issuing of clearly abusive house arrest orders (which the Minister himself can unilaterally rescind during ongoing proceedings). His responsibility can only be triggered before the Court of Justice of the Republic (*Cour de Justice de la République*), in proceedings in which victims cannot participate nor be represented via the *partie civile* mechanism. Five complaints have been filed with the Court of Justice of the Republic, the responses so far have been limited to acknowledgements of receipt. The only person that has been the subject of a complaint filed under the jurisdiction of the ordinary criminal courts is the Interior Ministry's delegate, the Director of Public Liberties (*Directeur des libertés publiques*).<sup>33</sup>

## THE INEFFECTIVENESS OF THE STATE OF EMERGENCY

Beyond the harmful effects of the state of emergency on individual rights as well as on the rule of law, virtually no tangible effects on the fight against terrorism have been observed. The figures provided in the current report show that not a single terrorist network has been dismantled and that most of the legal proceedings that have been opened following searches are not being conducted under anti-terrorist legislation.

While the Interior Ministry asserts that this has nevertheless permitted the authorities to “kick the anthill”, no evidence has been presented in support. More importantly, this does not explain why the number of house arrests dropped from around 400 to 70 after the February 2016 vote extending the state of emergency, a fact which raises serious doubts about the criteria applied by the Interior Ministry when issuing orders.

The FIDH delegation also spoke with several people who agreed that the law enforcement agencies are under considerable pressure that cannot be sustained across time and that this hampers their capacity to fight terrorism.

## THE NEGATIVE EFFECTS OF THE STATE OF EMERGENCY

In the first instance, the FIDH delegation would like to congratulate the French media for its remarkable work, which has allowed for the issues to be debated and has shed light on the many problems generated by the state of emergency. In the same way, a large segment of civil society (both non-governmental organisations and syndicates) has expressed its

33. FIDH and LDH are parties to the complaints that have been filed. On 11 May 2016, the *Commission des requêtes* (Petitions Commission) of the Court of Justice of the Republic dismissed the complaint lodged against Bernard Cazeneuve on the basis that: “even if the reasons given to the plaintiffs to justify measures taken were not supported by any evidence, neither their inaccuracy nor, a fortiori, any knowledge that the Interior Minister would have had of such inaccuracy, nor the subsequent revocation of the contested measure, would constitute sufficient evidence of the inaccuracy”. The case against the Director of Public Liberty is following the normal procedural path.

opposition to extending the state of emergency, thus nourishing a public debate which nearly all political officials refuse to participate in.

Various testimonies provided to the FIDH delegation indicate that the violence inherent in searches, especially when conducted at night, was made even worse because they were accompanied by acts of humiliation, racism, a total disregard for the presence of minors and pointless destruction of property. In several cases, individuals whose homes were searched were not provided with any notification or document justifying the search, making it impossible for them to prove that the search had actually taken place.

House arrests often led to losing a job and/or major health problems or disruptions to family life, not to mention the many cases in which there was a clear intention to do harm (why require someone to report to a place that is several kilometres from their home when a closer option exists?).

On balance, even if the state of emergency was justified during the first 12 days, the French authorities have not yet demonstrated its effectiveness with regard to its original purpose: fighting against acts of terrorism.

The state of emergency has, however, achieved serious violations of individual rights as well as a setback to the rule of law and has increased stigmatisation on the basis of religion or country of origin for a specific section of the population living in France.

The establishment of this exceptional regime as well as its application has brought to light a willingness on the part of public authorities to grant themselves additional powers (through the law on intelligence, the presence of police on public transport and in stations, and the law on reforms to the Code of Criminal Procedure), while restricting avenues for effective remedies and increasing the scope of their control (from organised crimes to minor offences) beyond that officially intended under the state of emergency.

By failing to submit two important issues for debate (whether in Parliament or within society as a whole), the government gives the impression that acts of terrorism have provided an opportunity for strengthening the powers of the State, to the detriment of individual and collective rights and liberties.

The first issue concerns the reasons underlying acts of terrorism. The French Prime Minister, Manuel Valls, felt it important to say that: “to explain is already wanting somewhat to justify”.<sup>34</sup> While it is outside the scope of this report to respond to or even address the enormous debate on the reasons for this type of violence and the motivation for European citizens, whether through birth or naturalisation, to commit such acts at home, in Europe, we do wish to note that refusing to understand or explain issues (which, incidentally, has nothing to do with “justifying”) can only lead to the implementation of measures such as a state of emergency, without due consideration of the effects of such measures on individual freedom and social cohesion.

34. Statement of the Prime Minister at the memorial ceremony for victims of the 9 January 2016 attacks at a kosher supermarket in Paris.

The second issue relates to the fact that the introduction of a series of emergency measures was not accompanied by any discussion of political responsibility or the poor performance of the French security forces, which rank among the best in the world. On the contrary, since the attacks of January and November 2015, these issues have been avoided in the belief that the solution will be provided by the intelligence law, the state of emergency and reforms to the French Code of Criminal Procedure.

Going back to the reforms initiated in 2002 by Nicolas Sarkozy, who was Interior Minister at the time, we can already see this failure to examine the issues in depth. The 2002 reforms completely changed the architecture of the French intelligence services giving precedence to activities other than traditional intelligence and to electronic surveillance. These reforms were not called into question by the governments that followed. It is interesting to see that Parliament (across all political parties) abstained, after the terrorist attacks, from investigating or examining the issue. This casts doubts as to the exact purpose of a state of emergency that has been extended for eight months (the government has called for a further renewal until 25 July 2016). Is the aim to fight against acts of terrorism or is it to make the population accustomed to an exceptional regime, given that some state of emergency measures have been included in reforms to the French Code of Criminal Procedure, and thereby increase the prerogatives of the State?

Bearing this in mind, it is important to remind the French government of the statement made by Jens Stoltenberg, Prime Minister of Norway, the day after 77 people were assassinated in his country:

*"We will respond to terror with more democracy, more openness and more tolerance".*

## **AS A RESULT, FIDH RECOMMENDS THE FOLLOWING**

### **To governmental authorities**

- put an end to the state of emergency without delay;
- stop the possibility of using *notes blanches*;
- establish a mechanism for compensating people who have suffered damage due to measures implemented under the state of emergency;
- guarantee that legal action can be taken in cases where agents of the State have committed acts punishable by law in the context of the state of emergency;
- restore the primacy of judicial oversight over attacks on individual rights to ordinary court judges (*juge judiciaire*);
- modify the way members of the *Conseil Constitutionnel* are appointed in order to guarantee its independence and impartiality;

### **And more generally**

- ensure that any restrictions on the exercise of fundamental rights comply with the principles of proportionality and necessity as required by international human rights law and, in particular, by the provisions of the International Covenant on Civil and Political Rights and the European Convention on the Protection of Human Rights, to both of which France is a signatory;
- open a debate on the state of existing anti-terrorism legislation and on the policies implemented to fight against terrorism, whether concerning intelligence, actions of the police or within the judicial system;
- ensure that statements by public officials and actions undertaken by public authorities are not and cannot be interpreted as discriminatory with respect to one part of the population on the basis of either religion or country of origin.

# ANNEX 1

## INSTITUTIONS AND PERSONS INTERVIEWED

- *Ligue des droits de l'Homme* (LDH – the French Human Rights League)
- *Confédération générale du travail* (CGT – General Labour Confederation), Anne Braun and Céline Verzeletti
- Arié Alimi, legal counsel to individuals subject to police searches and house arrest orders, and one of his clients.
- *Collectif contre l'Islamophobie en France* (CCIF - Collective Against Islamophobia in France), Yasser Louati, Head of International Relations, Marwan Muhammad, Executive Director and Lila Charef, lawyer and Head of the Legal Department.
- *La Quadrature du Net*, Adrienne Charmet
- *Syndicat des Avocats de France* (SAF – the national syndicate of lawyers in France), Florian Borg, lawyer.
- Branch of the CGT trade union that represents police officers, Anthony Caillé
- *Union Syndicale des Magistrats* (USM – the largest national syndicate of judges in France), Virginie Duval, President and Véronique Léger, Secretary General
- *Syndicat de la Magistrature* (SM – a national syndicate of judges in France), Laurence Blisson, Secretary General
- Isabelle Attard, Member of the French Parliament (*députée*)
- Dominique Raimbourg, Chairman of the National Assembly's *Commission des lois* and rapporteur for the *Commission d'enquête sur le contrôle de l'état d'urgence* (Commission of Inquiry charged with overseeing controls in place over the state of emergency)
- *Commission nationale consultative des droits de l'Homme* (CNCNDH – National Consultative Commission on Human Rights), Christine Lazergues and Michel Forst
- *Défenseur des droits* (Ombudsman), Nathalie Bajos, Director of the *Département promotion de l'égalité et accès aux droits* (Department for the Promotion of Equality and Access to Rights)
- Ministry of Justice, Robert Gelli, Director of Criminal Affairs and Pardons, David Touvet, Diplomatic Adviser and Eric Ruelle, Deputy Director of the Office of the Minister of Justice.
- *Conseil d'État*, Bernard Stirn, President and Jean-Eric Schoettl, Deputy Director of the *Section de l'Intérieur* (Interior Section)
- Mr B, Mr S, Ms G. – Individuals who were subjected to searches and house arrest orders

# ANNEX 2

## LETTER FROM THE INTERIOR MINISTER BERNARD CAZENEUVE, IN RESPONSE TO MEETING REQUEST BY THE FIDH DELEGATION

To:  
Mr. Karim Lahidji  
Président of Fédération internationale  
des droits de l'Homme (FIDH)  
17 passage de la Main d'Or  
75011 Paris

14 March 2016

Mr. President,

In a letter dated 2 March, you requested a meeting with me to discuss the implementation of measures taken under the state of emergency and their consequences as part of your international fact-finding mission.

As you know, I feel that it is not only legitimate but also indispensable to account for my actions before representatives of the State; just as I feel that it is useful and, again, necessary to engage in often fruitful dialogue with independent institutions and authorities working on these subjects, as well as with civil society representatives. For this reason, I decided on several occasions during the last few months to explain the counter-terrorism policy implemented by the Government, and in particular by the Interior Ministry, before the members of the National Assembly and the Senate, as well as before the Commission nationale consultative des droits de l'Homme [National Consultative Commission for Human Rights], in which, moreover, FIDH is represented.

Similar exchanges concerning the state of emergency have taken place between my department and the Défenseur des droits [National Ombudsman], the Contrôleuse générale des lieux privés de liberté [General Controller of Detention Facilities] and, more recently, with the Venice Commission put in place by the Parliament of the Council of Europe. I was planning to meet with the Secretary General of Amnesty International tomorrow, but the terrorist attack in Abidjan forced me to postpone the meeting.

Like you, I am convinced that the implementation of exceptional measures in a democratic society requires even more oversight and rigor than in ordinary times. Consequently, I intend to demonstrate during these interventions that the state of emergency is being implemented with full transparency and with respect for the values of the Republic and the principles of the rule of law.

Under normal circumstances, I would have been pleased to respond positively to your request for a meeting. However, before you had even communicated your request for a meeting with me, you considered it opportune to file a complaint against me and the former Directeur des libertés publiques [Director of Public Liberties] in my Ministry, charging us with violations of civil liberties and discrimination, as I understand from the press release on your website.

This being the case, as I am sure you will understand, I do not wish to interfere with the normal course of justice or with the legal action you have taken by accepting a meeting with you. In any case, the conditions needed for goodwill, fruitful dialogue no longer exist, as can also be surmised from the threatening tone of your letters dated 2 and 10 March. Under such circumstances, it would be difficult for me to express myself as freely as I always wish to. The very principle of such a meeting could be inappropriately interpreted.

My department, at the very least the civil servants who are not yet the object of legal action taken by you, are available to respond to questions from your international fact-finding mission.

Lastly, because of your concern for transparency and honesty, I do not doubt for an instant that you will include this letter in the report that will be published once the mission is complete, on behalf of FIDH.

Please accept, Sir, my sincerest regards.

Bernard CAZENEUVE

Place Beauvau – 75800 Paris cedex 08 – Tél 01.49.27.49.27 – Fax: 01.49.27.35.15

*Le Ministre*

Paris, le 14 mars 2016

Monsieur le Président,

Vous avez, par courrier en date du 2 mars, sollicité un entretien dans le cadre de la mission d'enquête internationale sur la mise en œuvre des mesures prises en vertu de l'état d'urgence et leurs conséquences, que vous avez créée, afin d'échanger avec moi sur ces questions.

Comme vous le savez, il m'apparaît non seulement légitime mais encore indispensable de rendre compte de mon action devant la représentation nationale, tout comme il me semble utile et même, là aussi, nécessaire d'engager un dialogue souvent fructueux avec les institutions et autorités indépendantes qui travaillent sur ces sujets ainsi qu'avec les représentants de la société civile. C'est la raison pour laquelle j'ai souhaité à plusieurs reprises, au cours de ces derniers mois, exposer la politique conduite par le Gouvernement, et en particulier par le ministère de l'Intérieur, en matière de lutte antiterroriste, non seulement devant les députés et les sénateurs, mais aussi devant la Commission nationale consultative des droits de l'Homme, au sein de laquelle d'ailleurs la FIDH est représentée.

De même, des échanges nourris relatifs à l'état d'urgence ont lieu entre mes services et le Défenseur des droits, ainsi que la Contrôleuse générale des lieux privatifs de liberté ou, encore récemment, avec la Commission de Venise, saisie par le Parlement du Conseil de l'Europe. Je m'apprêtais d'ailleurs à rencontrer demain le Secrétaire général d'Amnesty International, lorsque l'attaque terroriste commise à Abidjan m'a contraint à reporter ce rendez-vous.

.../...

Monsieur Karim LAHIDJI  
Président de la Fédération internationale  
des droits de l'Homme  
17 passage de la Main d'Or  
75011 Paris

Tout comme vous, je suis convaincu que la mise en œuvre de mesures exceptionnelles dans une société démocratique nécessite davantage encore de contrôle et de rigueur qu'en temps ordinaire. Aussi, j'entends, à l'occasion de ces interventions, faire la démonstration de ce que l'état d'urgence est appliqué en toute transparence, dans le respect des valeurs de la République et des principes de l'Etat de droit.

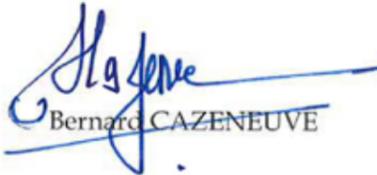
C'est pourquoi, en temps normal, j'aurais bien volontiers accédé à votre demande d'entretien. Vous avez toutefois jugé opportun, avant même de m'adresser votre demande d'entretien, de déposer une plainte contre ma personne et contre celle de l'ancien Directeur des libertés publiques de mon ministère, des chefs d'atteintes aux libertés publiques et de discrimination, si j'en crois le communiqué figurant sur votre site internet.

Vous comprendrez, dès lors, que je ne souhaite pas interférer avec le cours normal de la justice et de la procédure que vous avez engagée en acceptant le principe de ce rendez-vous. En tout état de cause, les conditions d'un dialogue bienveillant et fructueux ne sont plus réunies, comme le caractère comminatoire de vos courriers des 2 et 10 mars le laisse d'ailleurs supposer. Dans un tel contexte, il me serait difficile de m'exprimer aussi librement que je le souhaite toujours. Le principe même d'un tel échange pourrait faire l'objet d'interprétations inappropriées.

Mes services, à tout le moins les fonctionnaires qui n'ont pas encore fait l'objet de procédures de votre part, se tiennent néanmoins à votre disposition pour répondre aux interrogations de votre mission d'enquête internationale.

Enfin, je ne doute pas un seul instant que le souci de transparence et d'honnêteté qui vous anime vous conduira à faire figurer cette lettre dans le rapport qui sera établi, à l'issue de cette mission, au nom de la FIDH.

Je vous prie de croire, Monsieur le Président, en l'assurance de mes sentiments les meilleurs.



Bernard CAZENEUVE

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Its primary beneficiaries are national human rights organisations who are members of the Mouvement, and through them, the victims of human rights violations. FIDH also cooperates with other local partner organisations and actors of change.

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This report has been published with the support of the **Oak Foundation**. FIDH alone is responsible for the contents of the report, which can in no case be considered as reflecting the position of the Oak Foundation.



FIDH is an international  
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from 112 countries.

**fidh**

## ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

### **A broad mandate**

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

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FIDH was established in 1922, and today unites 184 member organisations in 112 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

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