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The Hyper-Executive State of Emergency in France

SYLVIA BRUNET

I. Introduction: Chronology of the Management of the Health Crisis

While some people were probably infected with the COVID-19 virus in December or even November 2019, it was not until 24 January 2020 that the first cases were confirmed on French soil. On 13 February 2020, the plan to organise the health system response was activated. Faced with an increase in the number of COVID-19 cases, phase one of the response plan to the coronavirus epidemic was triggered ten days later by the Minister of Health. On 29 February, the first defence council and an exceptional Council of Ministers were held under the authority of the President of the Republic. The health plan also moved from phase one to phase two. Gatherings of more than 5,000 people in an enclosed space were forbidden.¹ This measure proved to be late and insufficient, as more than 2,000 people participating in a religious gathering in Mulhouse in February 2020 would then spread the virus throughout France.

It was, therefore, particularly at the beginning of March that Prime Minister Edouard Philippe and the ministers concerned adopted numerous measures via orders, decrees, circulars and press releases in order to slow down the spread of the virus. Admittedly, on 12 March 2020, the Prime Minister brought together the presidents of the two Houses of Parliament (the National Assembly and the Senate), the presidents of parliamentary groups, party leaders and the presidents of associations of local elected representatives, but it was not a question of involving them in the decision-makings. At most, it was a question of informing them of the decisions that had already been taken at the highest level of the State and that were announced the same evening by President Emmanuel Macron in a televised speech.²

¹ Order of 4.03.2020 and Decree 2020-191 of 4.03.2020.

² Address to the French (12 March 2020) www.elysee.fr/emmanuel-macron/2020/03/12/adresse-aux-francais.

There was, indeed, an urgent need for action. On 14 March 2020, there were 4,500 confirmed cases (a figure that doubled in 72 hours) and 91 deaths in hospitals.³ The Prime Minister announced the passage to phase three of the plan, which meant that it had become an epidemic. However, the first round of the municipal elections on 15 March was maintained, which was incomprehensible to many in the population and led to a participation rate of only 44 per cent (36 per cent in major cities). The maintaining of the elections was even more criticised because the following day, during his second televised speech,⁴ the President reinforced the measures, hammering home several times that 'France is at war'. Non-essential shops and businesses were required to close, the second round of municipal elections (scheduled for 22 March 2020) was postponed⁵ and, if the President did not pronounce the term 'lockdown', he warned that from 17 March and for at least 15 days, all travel would be reduced to a strict minimum. A certificate for derogatory travel needed to be presented to justify the need for travel, failing which the fine would be at least €135.⁶ The Prime Minister's Decree 2020-260 of 16 March 2020, which added to the measures taken by the Minister of Health – in particular his Order of 14 March⁷ – thus introduced a general lockdown of the population from 17 to 31 March 2020.

In an abrupt and unpredictable manner, the legal framework for the management of the crisis then changed. On 18 March 2020, the Prime Minister tabled an emergency bill to deal with the COVID-19 epidemic in the Senate. In addition to organising the postponement of the second round of the municipal elections, that Act of Parliament, on the one hand, introduced a brand new 'state of emergency' system, ie, a new exceptional regime, that could be imposed by a Council of Ministers' decree in the event of a health disaster. On the other hand, it empowered the Government to legislate by 'ordinance' (*ordonnance*), without parliamentary debate, in order to take emergency economic and adaptive measures to combat the COVID-19 epidemic. In addition to that statutory law, there was an Institutional Act (*loi organique* – supplementing the Constitution). Its purpose was surprising as this Act suspended the deadlines for examining an 'application for a priority preliminary ruling on the issue of constitutionality' (*question prioritaire de constitutionnalité* – *QPC*).⁸ The two statutes were adopted and promulgated in record time, the Government having triggered the accelerated procedure.⁹ The new

³ 'Coronavirus: la secrétaire d'Etat Brune Poirson testée positive; un premier cas en prison' *Le Monde* (14 March 2020).

⁴ Address to the French (16 March 2020) www.elysee.fr/emmanuel-macron/2020/03/16/adresse-aux-francais-covid19.

⁵ Decree 2020-267 of 17.03.2020. The second round took place on 28 June 2020. The departmental and regional elections, scheduled for March 2021, were also postponed to June 2021, as recommended in the 'Debré Report', submitted to the Prime Minister on 13 November 2020.

⁶ Decree 2020-264 of 17.03.2020.

⁷ Order on the closure of places that open to the public, the prohibition of gatherings of more than 100 people or the closure of schools and universities.

⁸ See fn 62 concerning the *QPC*'s procedure.

⁹ Statutory law 2020-290 of 23.03.2020 and Institutional Act 2020-365 of 30.03.2020.

legal framework was of immediate application, with Article 4 of the statutory law proclaiming a state of emergency for a period of two months.

It was not really this new regime, but rather the more concrete issues, such as the lockdown, that were of concern to the French people. The latter was extended to 15 April 2020, then 11 May, the date on which a progressive ending of the lockdown¹⁰ began according to sectors of activity (restaurants, schools ...) and regions (green, orange or red colours indicating the level of ending of the lockdown by department). The (first) general lockdown of the population thus lasted 55 days, from 17 March to 11 May 2020, and until 2 June 2020 and even beyond for Mayotte and French Guiana. Even if certain constraints remained in force (obligation to wear a protective mask on public transport, limitation of travel to a radius of 100 kilometres from home, etc.), with the ending of the lockdown, freedom was once again the rule – travelling without a certificate in particular – and police restriction was the exception.

As for the state of emergency that was imposed on 23 March, it remained in force for almost 16 weeks until 10 July 2020.¹¹ Then, statutory law 2020-856 of 9 July 2020 implemented a transitional regime to end the state of emergency,¹² authorising the Government to continue to take exceptional measures until 31 October to deal with the epidemic. However, in view of the resumption of the active circulation of the virus after the summer and the 'second wave' of the epidemic, the state-of-emergency regime was once again activated¹³ for one month, starting on 17 October 2020. It allowed the introduction of a night curfew policy¹⁴ over a large part of the country. It was not, however, enough to stop the epidemic and a new national lockdown was decreed¹⁵ from 30 October and at least until 1 December 2020, a less strict lockdown than the first so as not to paralyse the economy¹⁶ or aggravate social disparities¹⁷ (keeping schools, businesses and public services open, then reopening shops, etc), but which was to last until 15 December, the date on which a night curfew has been re-imposed.¹⁸ As a result, Parliament had to authorise the extending of the state of emergency.¹⁹ The bill was tabled on 21 October and adopted on 7 November 2020, again in record time,

¹⁰ Decree 2020-548 of 11.05.2020.

¹¹ Extended by statutory law 2020-546 of 11.05.2020.

¹² Except in French Guiana and Mayotte, where the state of emergency was extended until the end of October 2020.

¹³ Decree 2020-1257 of 14.10.2020.

¹⁴ Decree 2020-1262 of 16.10.2020.

¹⁵ Decree 2020-1310 of 29.10.2020.

¹⁶ As of 9 April 2020, the emergency plan to support the economy, which was initially €45 billion, was increased to €100 billion.

¹⁷ One million French people have fallen into poverty during the health crisis.

¹⁸ Decrees 2020-1582 of 14.12.2020 (night curfew from 8 PM to 6 AM) and 2021-31 of 15.01.2021 (from 6 PM to 6 AM). The curfew was then lightened and finally ended on 20 June 2021 (Decree 2021-782 of 18.06.2021).

¹⁹ Statutory law 2020-1379 of 14.11.2020.

but not without tensions.²⁰ The statutory law extends the state of emergency by three months until 16 February 2021. The senators wanted to reduce the deadline to 31 January 2021 and impose a Parliamentary vote if the lockdown extended beyond 8 December 2020, but they were unsuccessful. The statutory law of 14 November 2020 also extends the transitional regime for ending the state of emergency until 1 April 2021. The senators had abolished the extending of the post-state of public health emergency regime, but the National Assembly reinstated it. Like in March 2020, a series of authorisations to take economic and social measures by way of ordinance completes the statutory law. The senators had reduced the authorisations requested by the government from 70 to 30, but they were not followed by the deputies.²¹ With the virus continuing to spread rapidly and the vaccination campaign evolving slowly in France, statutory law 2021-160 of 15 February 2021 has again extended the state of emergency until 1 June 2021. Lastly, statutory law 2021-689 of 31 May 2021 implemented a transitional regime to end the state of emergency, authorising the Government once more to continue to take exceptional measures until 30 September 2021. This gives the executive a free hand to govern the country without parliamentary debate for several more months.

II. Management of the Health Crisis within the Executive

While it is true that the executive leads the dance, it is at the cost of an impaired functioning, as decisions are taken by the highest levels of State on the advice of experts, with the Council of Ministers marginalised.

A. The Council of Ministers, an Echo Chamber

i. The Role of Experts

Interestingly, two councils play a fundamental role in the management of the crisis: A scientific council and the Defence Council.

a. A Scientific Council

At the request of the President of the Republic, a 'COVID-19 Scientific Council' was created on 11 March 2020 by the Minister of Health to inform public

²⁰ After the failure of the joint committee, the two Houses did not adopt the same text and the statutory law was, therefore, definitively passed by the National Assembly under Article 45, paragraph 4, of the Constitution.

²¹ Statutory law 2020-1379 of 14.11.2020 authorising the extension of the state of health emergency and establishing various measures for managing the health crisis, www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000042452030/.

decision-making on the management of the health situation linked to the coronavirus. This informal council (comprised above all of medical doctors) was added to existing bodies such as the National Public Health Agency, the High Authority for Health, the High Council for Public Health, the Operational Centre for Regulation and Response to Health and Social Emergencies of the Ministry of Health, and the Academy of Medicine. The new scientific council was also backed by another council of experts – some of whom are on both councils – the ‘Analysis Research and Expertise Committee’, which was created on 24 March 2020 by the Government to advise the public authorities on the follow-up to be given to proposals for innovative scientific, technological and therapeutic approaches.

The scientific council has been criticised because its functioning did not have any legal basis and it lacked legitimacy and transparency. For this reason, the statutory law of 23 March 2020 gave it legislative existence²² and then the statutory law of 14 November 2020 provided that the council’s opinions, formed in application of the two new regimes – the state-of-emergency regime and the regime for ending the state of emergency – were required to be communicated simultaneously to the Prime Minister and the presidents of the National Assembly and the Senate and be published without delay. Since decisions at the highest levels of the State are taken on the basis of those opinions, they are, at the very least, required to be sent to the public institution decision-makers.

b. The Defence Council

The ‘National Security and Defence Council’ is an inter-ministerial body that reports directly to the presidency of the Republic, as provided for in Article 15 of the Constitution, pursuant to which the President, as head of the armed forces, ‘presides over the higher councils and committees of national defence’. The Council was created by decree in 2009,²³ replacing the ‘Internal Security Council’. A priori, its role is not to manage a health crisis, as it is competent in matters of national defence. However, the 2009 decree broadened its name and competences.²⁴

The Council has three configurations:²⁵ a plenary configuration, composed of the President of the Republic, the Prime Minister, the Minister of Defence, the Interior, the Economy, the Budget and Foreign Affairs; a restricted configuration, composed of ministers concerned by the agenda; and specialised configurations in specific areas: the national intelligence council, the nuclear armaments council, the ecological defence council (since 2019) and the health defence council, which brings together the ministers of health, of economy and of labour, the director-general of health and the chairman of the scientific council, as well as the President and the Prime Minister. It is within this National Security and Defence Council,

²² Article L.3131-19 of the Public Health Code (*Code de la santé publique* – CSP). A Decree of 3 April 2020 appointed the chairman and members of the ‘committee of scientists’.

²³ Decree 2009-1657 of 24.12.2009.

²⁴ Art R.1122-1 of the Defence Code (‘Planning responses to major crises’).

²⁵ Art R.1122-2 of the Defence Code.

which has met (in restricted or specialised configurations) more than 60 times since February 2020, that the President of the Republic's decisions are taken to combat the coronavirus pandemic.

This mode of operation is criticised, essentially for two reasons. On the one hand, it departs from the usual decision-making process. Draft bills or regulations are, in principle, discussed collegially in the Council of Ministers, under the Presidency of the Republic (Article 9 of the Constitution), and a report is then drawn up by the government spokesperson, in complete transparency and under the control of Members of Parliament and citizens. However, the Council of Ministers no longer plays its role and has become the echo chamber of the National Security and Defence Council. On the other hand, the latter remains first and foremost a Defence Council. The proof of this is that its participants are bound by defence secrecy: nothing is filtered out and no reports are drawn up. Admittedly, the decisions taken are then formally enacted by the Government (decree, order, circular) or by parliament (statutory law), and defence secrecy can also be lifted at the request of a court, as provided for in the Code of Criminal Procedure, but there is no mechanism for political accountability with regard to the justification of what is decided within the Council. The Defence Council has therefore become the principal crisis management tool of the Head of State, but outside the usual institutions of the political system.

ii. Hyper-presidentialism

a. An Isolated President

Surrounded by experts – the members of the two councils above mentioned – who guide him with their opinions and recommendations, Emmanuel Macron has isolated himself and arbitrates alone,²⁶ outside the Council of Ministers that he presides over and out of touch with his parliamentary majority. He decides on his own and then communicates his decisions to the French people, under the fire of the media.

b. A Powerful President

In substance, he grants himself a competence that he does not have in principle. In the French system, health is within the competence of the Prime Minister and the dedicated minister, not the President. But recourse to the Defence Council allows Emmanuel Macron to circumvent that principle in order to take care of health security himself and thus further strengthen the preponderance of the Head of State – ‘hyper-presidentialisation’ or ‘monarchisation’ – already inherent in the spirit of the Fifth Republic since its inception in 1958. In normal times, and even

²⁶ E Favereau, ‘Pour le Président, des avis à tout-va puis des décisions en solo, *Libération* (13 April 2020).

more so in times of crisis, it is not the Prime Minister but the President who ‘determines and conducts the policy of the Nation’, contrary to what is stated in the wording of Article 20 of the Constitution. The Prime Minister intervenes only in the wake of the President. This is no doubt also why Jean Castex was appointed Prime Minister in July 2020, replacing Edouard Philippe. This high-ranking civil servant has never been a Member of Parliament or a Minister and as merely a locally elected representative and behind-the-scenes coordinator of the strategy for the ending of the lockdown in April 2020, he was totally unknown to the French people. He was, however, required to take on the role of Head of a Government the role of which was to play by ear an unprecedented health crisis.

B. The Proliferation of Government Measures

i. Regulation-making Power and Authorisation to Legislate

The Prime Minister is, at the national level, the principal authority that holds regulatory power (*pouvoir réglementaire*), as ‘the Government shall have at its disposal the civil service’ (Article 20 of the Constitution) and he is the Head of Government (Article 21²⁷). The COVID-19 crisis has increased the regulatory power of the Prime Minister and certain ministers²⁸ through the acknowledgment of a specific regulatory power in the Prime Minister and some ministers and the authorisation by Parliament for the government to pass measures by ordinance that are normally the preserve of statutory law.

a. Autonomous Regulatory Power and Regulatory Power to Implement Statutory Laws

The decrees and orders issued in March 2020 by the executive before the adoption of the statutory law instituting the public health emergency were based on dual legal grounds.

Article L.3131-1 of the Public Health Code (*Code de la santé publique* – CSP –) allows the Minister of Health to adopt emergency health measures in the event of a serious health threat, such as an epidemic, for example.²⁹ At the beginning of the crisis, measures were taken pursuant to orders by the Minister of Health on that basis. As the policing powers required are not general but specific, on 13, 14 and 15 March 2020 we witnessed a series of orders by the Minister of Health, with the Prime Minister simply implementing the orders by way of decree. In other

²⁷ ‘The Prime Minister shall direct the action of the Government. [...] he shall exercise regulatory power [...]’.

²⁸ See eg JM Pontier, ‘La crise sanitaire de 2020 et le droit administratif’ (2020) *AJDA* 1692.

²⁹ See eg D Truchet, ‘Covid 19: point de vue d’un administrativiste sanitaire’, *Blog Jus Politicum* (27 March 2020).

words, important measures were formally enacted by a minister and not by the most important, ie the Prime Minister.

The process was so inconsistent that the Prime Minister finally issued the lockdown decree of 16 March 2020. The ‘theory of exceptional circumstances’, shaped by administrative courts during war,³⁰ which authorises the executive branch to free itself from compliance with the legislation under certain conditions, forms the legal basis of that decree. But the foundation is fragile, which is why the statutory law of 23 March would give the decree a legal basis.

In Articles 2 and 3 of the statutory law of 23 March 2020,³¹ the legislator created a specific ‘state of public health emergency’ (*état d’urgence sanitaire*) regime within the CSP.³² This state of emergency can be declared by decree of the Council of Ministers – on the basis of scientific data and a report by the Health Minister – for all or part of the country in the event of a health disaster that, by its nature and seriousness, endangers the health of the population. In order to guarantee public health, the Prime Minister can then, by decree, take a series of measures that derogate from the law applicable in normal circumstances and that are particularly prejudicial to rights and freedoms (Articles L.3131-12 to 20 of the CSP). This extension of the Prime Minister’s regulatory power was implemented by the new Article L.3131-15.³³ Between 23 March and 10 July 2020, then from 17 October and until 1 June 2021, the Government measures were taken under that state-of-emergency regime.

As stated above, between these two periods and then from June 2021, another, transitional, regime takes over, namely that of the ‘ending’ of the state of emergency. It allows the Prime Minister to take numerous binding measures to combat the spread of the COVID-19 epidemic.

b. Authorisation to Legislate by Ordinance (Ordonnance)

With the statutory laws of 23 March, 17 June and 14 November 2020, the Government is largely empowered to adopt ‘measures by ordinance that are normally the preserve of statutory law’ (Article 34 of the Constitution) in accordance with the procedure in Article 38 of the Constitution.³⁴ By the end of March 2020,

³⁰ *Conseil d’État (CE)*, 28 June 1918, No 63412, *Heyriès*.

³¹ Statutory law amended by statutory law 2020-546 of 11.05.2020.

³² See below.

³³ See below.

³⁴ ‘In order to implement its programme, the Government may ask Parliament for authorisation, for a limited period, to take measures by ordinance that are normally the preserve of statutory law. Ordinances shall be issued in the Council of Ministers, after consultation with the *Conseil d’État*. They shall come into force upon publication, but shall lapse in the event of failure to table before Parliament the bill to ratify them by the date set by the authorisation statutory law. They may only be ratified in explicit terms.

At the end of the period referred to in the first paragraph hereinabove ordinances may be amended solely by a statutory law in the subjects that are the preserve of statutory law.’

37 ordinances had already been adopted by the Council of Ministers in the context of the public health emergency. Those ordinances significantly changed many areas of law and daily life (working hours, part-time work, exceptional aid, public procurement, budgetary law, operation of local authorities, justice, criminal law, civil service, competitive examinations and tests, etc). Parliament is thus deprived of its power to enact statutory laws in a scope constitutionally reserved to it.

ii. The Question of the Effectiveness of the Management of the Crisis

a. Criticism of the Policies of the Executive

The action of the Head of State and his Government is criticised not only by the political opposition but also by numerous others.³⁵ The media have also highlighted various barometers indicating a 'strong mistrust' towards the Government by the French due to its management of the pandemic.³⁶

Three major issues arose during 2020.³⁷ The necessary equipment was not available in sufficient quantities (shortages of protective masks and hydro-alcoholic gel during the 'first wave' of the epidemic, lack of screening tests, respirators, hospital beds, etc), which was not made clear to the French; all available resources were not immediately mobilised (private clinics and laboratories in particular); and official communications were fluctuating, even inconsistent, particularly with regard to the 'test, trace,³⁸ isolate' method³⁹ and the wearing of masks by the general public (of no use and then compulsory). Even France's highest administrative court, the *Conseil d'État*, had to adapt and be pragmatic. For example, with regard to the obligation decreed by mayors or prefects (State representatives in the local authorities) to wear masks, in April 2020, the Court considered that such a decision was not possible in the absence of specific local circumstances.⁴⁰ In September, on the other hand, the Court considered that the wearing of masks could be imposed in public in widely delimited areas.⁴¹

³⁵ See eg the report of the Firefighters' Federation, *Le Monde* (5 July 2020).

³⁶ J Imad, 'Gestion de crise: pourquoi les Français sont-ils plus défiant à l'égard de leur gouvernement que leurs voisins?' *Figaro Vox* (20 April 2020).

³⁷ Others arise in early 2021, in particular concerning the vaccination campaign, with fewer than one million French people vaccinated mid-February 2021: www.covidtracker.fr/vaccintracker/ (updated figures).

³⁸ 'StopCovid' (Decree 2020-650 of 29.05.2020) was a failure. The purpose of the application was to inform its users of the risk of contamination in case of proximity with other users who tested positive for COVID-19. Only 2.6 million people downloaded this application in four months. Another application ('TousAntiCovid') was, therefore, implemented from October 22 (with a legal basis only as from the Decree 2021-157 of 12.02.2021). More than 12 million people have downloaded the new application in February 2021.

³⁹ Method that, on 24 November 2020, becomes (in the televised speech by the President): 'test, alert, protect, care': Address to the French (24 November 2020) www.elysee.fr/emmanuel-macron/2020/11/24/adresse-aux-francais-24-novembre.

⁴⁰ *CE ord* (summary order), 17 April 2020, No 440057.

⁴¹ *CE ord*, 6 September 2020, Nos 443750 and 443751.

The unpreparedness of the French State was compared to the more effective crisis management carried out simultaneously in Germany or Japan. More broadly, the health crisis revealed the inadequacies of our health system, which had been undermined by budgetary reforms over the past 20 years, and France's over-dependence on a globalised economy.

b. Criminal Proceedings

In addition to the dozens of complaints filed against government bodies (ministries, Public Health France, etc) for involuntary homicide and injury, endangering the lives of others and failure to fight against a disaster, nearly 100 complaints were filed against ministers and former ministers⁴² in the Court of Justice of the Republic (*Cour de Justice de la République*), which is responsible for judging the criminal liability of ministers for acts carried out in the exercising of their duties (Part X of the Constitution). The Court will have to determine whether their management of the public health crisis linked to the pandemic includes criminal offences. In particular, the ministers are accused of concealing the shortage of masks and maintaining the first round of the municipal elections. As part of the judicial investigation commenced by the Court, on 15 October 2020 the ministries as well as the homes of former Prime Minister, Edouard Philippe, the current Minister of Health, Olivier Véran, his predecessor in that position, Agnès Buzyn, the former government spokesperson and the Director General of Health were searched by police from the central office for the fight against environmental and public health damage.

These actions, spectacular and the focus of media attention, illustrate a current trend in society, that of the criminalisation of public life. Criminal law is over-solicited, based on the logic that the same law should apply to everyone; ministers are thus treated as 'vulgar common criminals'.⁴³ These criminal charges are, however, not appropriate. On the one hand, according to the principle of the division of powers, justice should not prevent the executive branch from functioning and the 'representatives of the State' should be given specific protection.⁴⁴ On the other hand, the dysfunction of a Government in the management of public affairs must be subject to political accountability. In other words, political accountability and criminal liability should not be confused, which is why the charges against the ministers will most likely be dismissed by the Court.

The mode of governance within the executive is unprecedented and raises many substantive and procedural questions. Democratic life is the other

⁴² However, the President benefits from political and legal immunity (Art 67 of the Constitution).

⁴³ See eg O Beaud, 'Mal gouverner est-il un crime? Réflexions critiques sur les perquisitions effectuées dans le cadre de l'enquête judiciaire relative aux ministres impliqués dans la gestion de l'épidémie du Coronavirus' *Blog de Jus Politicum* (21 October 2020).

⁴⁴ O Beaud, 'La responsabilité administrative de l'État comme modèle de la responsabilité de droit public' in D Chagnollaud (ed), *Responsabilité pénale et vie publique en France et à l'étranger* (LGDJ, 2002) 89.

collateral victim of the methods used to manage the public health crisis, insofar as Parliament, in particular, but also locally elected representatives, are marginalised and downgraded.

III. Putting Democracy in Parentheses in Times of Crisis

Already under normal circumstances, Parliament is weakened, and the decentralised authorities often lack the resources to exercise their powers. This structural tendency in the Fifth Republic is accentuated in this period of public health crisis.

A. The Weakening of Parliament

Article 24 of the Constitution provides that Parliament fulfils two main tasks. On the one hand, it ‘shall pass statutory laws’. On the other hand, it ‘shall control the actions of the Government’ and ‘assess public policies’. These two missions have been undermined, however, because Parliament has been doubly sidelined since the beginning of the epidemic.

i. The Deprivation of the Power to Create Statutory Laws

In the framework of the state-of-emergency regime, in addition to empowering the government to legislate by ordinance, Parliament transfers all prescriptive power to the executive.

a. Existing Bases were Possible but Rejected

Although clearly the legislature had to intervene to enable the executive to act as a matter of urgency, the issue arises, and will no doubt arise for a long time to come, of the need, and even the usefulness, of creating a new emergency regime.⁴⁵ Two existing legislative bases⁴⁶ could have been indeed exploited.

The Members of Parliament could have relied on statutory law 55-385 of 3 April 1955 on the ‘state of emergency’⁴⁷ – even if they had to amend it again – because one of its two conditions, in addition to that of ‘imminent risk resulting

⁴⁵ See eg S Renard, ‘L’état d’urgence sanitaire: droit d’exception et exceptions au droit’ (2020) *RDLF* 13.

⁴⁶ But none constitutional bases: neither Art 16 (presidential exceptional powers in the event of other serious threats), nor Art 36 (state of siege in the event of foreign war or armed insurrection, which implies a transfer of various powers from the civilian to the military authority) of the Constitution were adapted to the 2020 health crises.

⁴⁷ This exceptional regime had been adopted to counter the Algerian insurrection. It was applied in Algeria in 1955 and 1961-62, in France in 1958, in New Caledonia in 1985, in Wallis and Futuna in 1986, in Polynesia in 1987, in 25 departments in 2005 during the civil riots in the suburbs, then

from serious breaches of public order', is the existence of 'events that, by their nature and seriousness, have the characteristics of a public calamity'. And a pandemic is indeed such an event.

The legislator could also have relied on Art. L.3131-1 of the *CSP* cited above – which was only slightly amended by the statutory law of 23 March 2020 – under which it is incumbent on the Minister of Health, 'in the event of a serious health threat requiring emergency measures', to 'prescribe, in the interest of public health, any measure that is proportionate to the risks involved and appropriate to the time and place in order to prevent and limit the consequences of possible threats to the health of the population'. The legislator could have supplemented that Article by specifying, for example, that jurisdiction was now shared with the Prime Minister in the event of a health disaster. Such a reform of the *CSP* would have been a way to remedy the exclusive competence of the Minister of Health in health emergencies and legal consolidate the Prime Minister's lockdown decree of 16 March 2020. However, the Members of Parliament preferred to establish a brand-new legal basis for action.

b. The New Basis for Action

Under pressure of Government and in an emergency situation, the legislator chose to create a new legal basis for major crisis. In other words, the health emergency police – the specific police powers of the Minister of Health – is supposed to be a police dedicated to the prevention of a mere health 'threat'. Furthermore, the state of public health emergency – the specific police powers of the Prime Minister – is supposed to be applied when the threat is no longer a 'threat' and the 'disaster' endangering the health of the population (new Article L.3131-12 of the *CSP*) is proven, thus opening the way to more restrictive measures which are prejudicial to rights and freedoms.⁴⁸ However, there is nothing to prevent the Minister of Health from taking, before or after the state of emergency, measures that are equivalent (lockdown, isolation, quarantine, etc) to those that could be imposed by the Prime Minister in the framework of the state of emergency. More precisely, the

between November 2015 and November 2017 following the terrorist attacks in Paris; the 1955 statutory law was then amended by statutory laws 2015-1501 of 20 November 2015 and 2016-987 of 21 July 2016. Afterwards, a new anti-terrorism legislation was adopted (statutory law 2017-1510 of 30 October 2017), which created a de facto permanent state of emergency. See eg O Beaud and C Guérin-Bargues, *L'état d'urgence. Étude constitutionnelle, historique et critique* (LGDJ, 2016, 2nd edn, 2018). The work shows not only how the state of emergency affects relations between public authorities, with administrative power dominating the legislative and jurisdictional branches, but also how it affects freedoms in ways that, under normal circumstances, would be contrary to law.

⁴⁸This is also the justification put forward by the *Conseil d'État* in the opinion (*avis*) No 399873 of 18 March 2020: 'the existence of a health disaster makes it useful to have a special state-of-emergency regime in order to have an organised and clear framework for intervention in such cases'.

scope of the new Chapter I *bis*, entitled 'state of public health emergency' (Articles L.3131-12 to 20 CSP) is twofold. Article 7 of the statutory law of 23 March 2020 provides that that Chapter is applicable until 1 April 2021 – then until 1 June 2021 since the statutory law 2021-160 of 15 February 2021 – in the current specific context of the COVID-19 crisis, with numerous Government authorisations to adopt adaptation measures by way of ordinance. But the mechanism governing the new specific state of emergency is also and above all now permanently codified in the legislation. The issue therefore arises as to whether it is possible to multiply *ad infinitum* emergency regimes, the aim of which is to transfer all prescriptive power to the executive for the resolution of crises.⁴⁹

ii. Restraints on Political Control Over the Government

a. Insufficiently Reinforced Oversight

Logically, parliamentary oversight should be strengthened during a state of emergency. This is, moreover, what is provided for in Article 4-1 of the statutory law of 3 April 1955 cited above, with an increased obligation for the Government and the administrative authorities to inform the National Assembly and the Senate. In addition, and to emphasise the abnormal and necessarily temporary nature of the state of emergency, which may be declared by a decree of the Council of Ministers, Article 2 provides that after a period of 12 days, a statutory law must authorise its extension.⁵⁰

The health emergency bill of 2020 was presented by the political majority as being inspired by that 1955 statutory law. The text adopted therefore clearly provides for increased parliamentary oversight, with both Houses having to be informed 'without delay of the measures taken by the Government' under the state of emergency and being able to 'request any additional information in the context of the oversight and evaluation of those measures' (new Article L.3131-13 of the CSP). However, that control is less stringent than that provided for in the 1955 statutory law.⁵¹ Article 4 of the new law states that a state of emergency 'is declared throughout the national territory for a period of two months' (a derogatory duration in the current case) from the entry into force of the statutory law. After these two months, Parliament must authorise its extension. And as regards the future, the general 'state of public health emergency' system does not envisage any such intervention by Parliament before the (long) one-month period has elapsed: the

⁴⁹ See eg P Cassia, 'L'état d'urgence sanitaire, remède, placebo ou venin juridique?' *Mediapart* (24 March 2020).

⁵⁰ This is also the case with regard to the extension of another specific exceptional regime, the 'state of siege cited above' (Art 36 of the Constitution).

⁵¹ What is most surprising is that it was the *Conseil d'État* which, in the opinion on the bill, recommended changes unfavourable to political control over the government by Parliament.

new Article L.3131-13 of the *CSP* provides that a state of emergency 'is declared by decree of the Council of Ministers' and that its extension 'beyond one month' must be authorised by legislation, after consultation with the scientific council.⁵² Thus, in the event of a health disaster, Parliament is excluded for a period (one month) that is longer than in the event of terrorism or war (12 days).

b. Parliamentarians' Attempt to Respond

Deputies and senators reacted and immediately seized the tools at their disposal in order to inform themselves and exercise political control over the governmental action. In addition to question sessions with the Government, the most effective tool is that of commissions of enquiry. Since the constitutional reform of 23 July 2008, their existence has been enshrined in Article 51-2 of the Constitution, which provides that 'committees of enquiry may be set up within each House to gather [...] information'. In addition, since a review of the Rules of Procedure of the National Assembly in 2003, the Conference of Presidents may create 'temporary fact-finding missions' on a proposal by the President of the National Assembly. A fact-finding mission was thus set up on 17 March 2020 in the National Assembly on the management and consequences of the COVID-19 epidemic. From 2 June, it was given the prerogatives of a committee of enquiry for six months. The Senate also set up its committee of enquiry on 30 June 2020 to evaluate public policies in the face of major pandemics in the light of the COVID-19 health crisis and its management. The ministers, including the former and new prime ministers, and other public decision-makers and experts have thus been convoked to explain to Members of Parliament their management of the health crisis.

It should, however, be emphasised that these parliamentary initiatives were clearly in competition with an initiative by the President of the Republic who, on 25 June 2020, entrusted a 'fact-finding mission' to a Swiss expert, who, together with other scientists, were instructed to analyse how the French executive had managed the COVID-19 crisis.⁵³ His mission, therefore, exactly overlapped that carried out by the national representative body under the Constitution. By the way, the fact-finding mission of the National Assembly was suddenly dissolved on 27 January 2021, a very criticised decision taken by the political majority, qualified as a 'democratic sinking' or a 'democratic treason' by all opposition parties.⁵⁴ Here again, the formal institutions and procedures are bypassed, in favour of an expertise commissioned by the Head of State.

⁵² However, if the public health emergency ceases to exist, it can be terminated by decree of the Council of Ministers before its expiry.

⁵³ The final report was published in March 2021: www.vie-publique.fr/sites/default/files/rapport/pdf/279851.pdf.

⁵⁴ M Darame, 'Les oppositions protestent contre la dissolution de la mission d'information de l'Assemblée nationale sur le Covid-19' *Le Monde* (28 January 2021).

B. Centralised Management of Local Affairs

i. A Uniform Policy Throughout the National Territory

a. The Centralisation/Decentralisation Dialectic

France is a unitary State, an ‘indivisible Republic’ that ‘shall ensure the equality of all citizens before the law’. But its organisation is ‘decentralised’ (Article 1 of the Constitution). Consequently, the principle of self-government by local authorities (communes, departments, regions) through their elected councils (Article 72 of the Constitution) multiplies the decision-making centres and local specificities.⁵⁵

The health crisis has accentuated an already strong trend over the last 15 years, that of the recentralisation of power, such recentralisation being particularly marked in the field of health.⁵⁶ Thus, the State alone directed the management of the coronavirus crisis without relying on local democracy.

b. Crisis Management and Centralism

The centralised and uniform exceptional law on health emergencies prevents local initiatives or coordinates them with those of the State.⁵⁷ In particular, while a municipality could present itself as a priority area in order to ensure the exercising of the policing powers in the event of an epidemic, mayors are largely excluded.⁵⁸ More broadly, local authorities are not able to use the regulatory power conferred on them by the Constitution (Article 72) to take appropriate local measures. From the very first months of the health crisis, local authorities did take action, often symbolic, at their own level, for example by ordering masks for their inhabitants⁵⁹ or by providing material or financial assistance. Some mayors went further and tightened the lockdown (Paris, Nice, Perpignan) or imposed the wearing of masks in the city centre (Strasbourg) by municipal order – on the basis of the general police powers of the mayor – but still under the authority of prefects – on the basis of the specific police powers of the State in the event of a health crisis – and under the control of the administrative courts.⁶⁰

No commune, department, region or metropolis was, therefore, able to play a significant role in the fight against the pandemic, which caused incomprehension

⁵⁵ In addition, since 2010, decentralisation has been coupled with a policy of inter-communalisation (notably with the creation of metropolises). The result is a complex institutional superimposition, a vector of duplication and heaviness, described as a ‘multi-layered system’ (*millefeuille territorial*).

⁵⁶ Social competences were indeed transferred to the departments in 1982, but a recentralisation took place in 2004. The State became ‘solely responsible for campaigns to prevent and combat major diseases’, for reasons of ‘efficiency’ and in order to guarantee ‘equal access to care’: J-M Pontier, ‘La santé, entre centralisation et décentralisation’ (2019) 4 *RDSS* 669.

⁵⁷ B Faure, ‘Théorie et pratique des compétences des collectivités territoriales face à la crise sanitaire’ (2020) *AJDA* 1727.

⁵⁸ See eg O Renaudie, ‘La police administrative aux temps du coronavirus’ (2020) *AJDA*, 1704.

⁵⁹ Action that was possible after the State had lifted its ban (Decree 2020-285 of 21 March 2020).

⁶⁰ See above (case law on the obligation to wear a mask).

among the population and might have partly explained the high abstention rate during the municipal (2020), departmental and regional (2021) elections.

ii. A Minimalist Differentiation

a. During the Crisis

Although various decisions were made on a territorial basis, they were not taken by elected representatives of local authorities. It was the central State that, on the ending of the first lockdown for example, established zones (green, orange or red) depending on the speed of circulation of the virus in the different areas. And it was the prefects, the State representatives in the departments and regions, who were empowered to adopt 'more restrictive measures' where required by 'local circumstance'. For example, on the basis of Article 2 of the Decree of 16 March 2020 on the first lockdown, on 21 March 2020, the prefect of the *Alpes-Maritimes* decreed a night curfew throughout the department.

b. After the Crisis?

Once the health emergency is over, the role of local authorities and metropolises will undoubtedly be especially important when it comes to implementing locally adapted economic, social, cultural and tourism policies to manage the consequences of the crisis and attempt to mitigate its impacts. But they still need to have the financial resources to do so.

Faced with a weakened democracy at both national and local level, checks and balances to executive power could come from the courts. However, the jurisdictional guarantee of legality and freedoms does not seem to play the full role it should have, and the rule of law is consequently weakened.

IV. Distorting the Rule of Law in the Name of the State of Emergency

Due to the 'specific circumstances' linked to the pandemic, even the constitutional judges (*Conseil constitutionnel*) did not censure (ex ante review) new legislative provisions that were nonetheless contrary to the Constitution. It remains to be seen what their position will be when they rule (ex post review) on the applications for a priority preliminary ruling on the issue of constitutionality (QPC, Article 61-1 of the Constitution⁶¹) on provisions that are potentially prejudicial to rights and freedoms.

⁶¹ The application for a priority preliminary ruling on the issue of constitutionality, introduced under the constitutional reform of 23 July 2008, is 'the right for any person who is involved in legal

A. The Breaching of the Constitution

The Institutional Act of 30 March 2020 was referred prior to enactment (*ex ante*) to the *Conseil constitutionnel* pursuant to Article 46, paragraph 5, and Article 61, paragraph 1, of the Constitution (mandatory referral). In the decision 2020-799 DC of 26 March 2020, the Act is declared to be in conformity with the Constitution, which may come as a surprise.

i. Suspension of the Time Limits for the Examination of a QPC

a. Subject

In terms of substance, the single Article of the Institutional Act, which is not directly linked to the prevention of the spread of COVID-19, suspends until 30 June 2020 the two time limits that are, in principle, required for the examination of a QPC: the first (mandatory) three-month period at the end of which the highest non-constitutional administrative and judicial courts (*Conseil d'État* and *Cour de cassation*) must transmit a QPC to the *Conseil constitutionnel*,⁶² and the second (indicative) three-month period, during which the latter is invited to rule on the issue.⁶³

b. Purpose

The aim is to suspend the time limits for the highest non-constitutional courts at a time when the courts are placed on standby due to the lockdown because, after three months, those courts must automatically (*ipso jure*) transmit the QPC that they have not ruled to the constitutional judges. A failure to suspend the three-month period might, therefore, have led to a possible bottleneck in the *Conseil constitutionnel*, which is why the *Conseil constitutionnel* validated in the 26 March 2020 decision the suspension of the time limits. However, the issue remains as to whether such suspension is not directly contrary to Article 61-1 of the Constitution, which provides that a 'determined time limit', in this case that required by the ordinance of 7 November 1958, must be respected.

Moreover, the interest of suspending the time limit for the examination of the QPCs before the *Conseil constitutionnel* is less understandable, as a failure to comply with the said time limit does not entail any consequences or sanctions.

proceedings before a court to argue that a statutory provision infringes rights and freedoms guaranteed by the Constitution. The *Conseil constitutionnel*, 'to whom the application will have been referred by the *Conseil d'État* or the *Cour de cassation*, will give its ruling and, if need be, repeal the challenged statutory provision', www.conseil-constitutionnel.fr/en/selection-of-qpc-decisions.

⁶² Article 61-1 of the Constitution requires a 'determined time limit' (but without further specification).

⁶³ These two deadlines are referred to in ordinance 58-1067 of 7 November 1958 on *Conseil constitutionnel*.

Lastly and more generally, the issue may arise as to whether such exceptional suspension of the two deadlines was truly necessary and urgent.

ii. *Unconstitutionality of the Procedure*

a. Breach of the Constitution

With regard to the procedure for adopting the Institutional Act, the *Conseil constitutionnel* did not sanction the breach, however manifest, of paragraph 2 of Article 46 of the Constitution. Where the accelerated procedure has been initiated under the conditions provided for in Article 45 paragraph 2, which was the case here, that Article 46 paragraph 2 provides that the bill ‘cannot be submitted for deliberation by the first House to which it is referred before the expiry of a period of fifteen days after its submission.’ That deadline was not, however, respected, as the bill was tabled on 18 March 2020 and voted on by the Senate and the National Assembly in the following three days.

b. Justification

The *Conseil constitutionnel* considered that the ‘specific circumstances in the instant case’ preclude a finding of unconstitutionality. The reasoning (the indirect reference to the theory of exceptional circumstances in administrative law) and the wording (the constitutional judges seem to imply that they are judges of facts, whereas their review of the legal rules is abstract) are very curious and questionable. The constitutional judges confuse their role with that of the administrative courts and in so doing, moreover, allow themselves not to apply the Constitution, which is their legal rule of reference. They implicitly assert (on what basis?) that their decisions have a higher value than that of the Constitution that they are supposed to be the guardian of. Thus, in that incomprehensible decision, the *Conseil constitutionnel* breached the Constitution and created an irreversible breach in the rule of law.

B. Breaches of Rights and Freedoms

The new state of emergency extends the specific policing powers of the Prime Minister, the Minister of Health and the prefects. It defines a regime that is very restrictive in terms of civil liberties, which is justified by the courts. In particular, the *Conseil d’État* validates the fact that the state-of-emergency regime, which is ‘useful’ in the event of a proven health disaster, gives ‘the Prime Minister the possibility of taking the most restrictive measures for freedoms.’⁶⁴

⁶⁴ Opinion No 399873 of 18 March 2020.

i. The Choice of Extended Policing Powers Potentially Prejudicial to Freedoms

Periods of major crisis inevitably lead to restrictions on rights and freedoms and there cannot be any real objection to the principle of inevitable restrictions. The question is how far they can go. With regard to the COVID-19 pandemic, the difficulty is to know how to reconcile the 'objective' set by the *Conseil constitutionnel* (*objectif de valeur constitutionnelle*) of the protection of health with the respect for fundamental freedoms. The measures taken in France by the Minister of Health and the Prime Minister from March 2020 onwards may, however, have sacrificed the substance of the latter.⁶⁵

a. The Concerns of the Senators

Article 2 of the statutory law of 23 March 2020 refers to 'exceptional circumstances' that justify the restriction of rights and freedoms. However, the Senate sought to provide a better framework for the prerogatives granted to the Prime Minister. While the bill merely stated that the declaration of the state of emergency gave him the power to take 'general measures limiting the freedom to come and go, the freedoms to act and meet and allowing him to proceed with the requisition of all necessary goods and services', an exhaustive list of possible regulatory measures was introduced by the senators. That list now appears in Article L.3131-15 of the CSP. Pursuant to that Article, the Prime Minister can, on the basis of a report by the Minister of Health and 'for the sole purpose of guaranteeing public health':

1. restrict or prohibit the movement of persons and vehicles in the places and at the times fixed by decree;
2. prohibit people from leaving their homes, subject to travel that is strictly necessary for family or health needs;
3. order measures that are for the purpose of quarantining [...] persons likely to be affected by the virus;
4. order measures for the placement and maintenance of the affected persons in isolation [...], in their homes or any other suitable accommodation;
5. order the temporary closure of one or more categories of establishments receiving the public as well as meeting places, with the exception of establishments providing essential goods or services;
6. limit or prohibit gatherings in public and meetings of any kind;
7. order the requisition of all goods and services necessary for the fight against the health disaster as well as any person necessary for the functioning of such services or the use of such goods [...];
8. take temporary measures to control the prices of certain products in order to prevent or correct tensions observed for certain products on the market [...];
9. if necessary, take any measure to ensure that patients have access to appropriate medicines to eradicate the health disaster.

⁶⁵ See eg P Wachsmann, 'Les libertés et les mesures prises pour lutter contre la propagation du COVID-19: sanctuariser le noyau dur des libertés' *Le club des juristes* (13 May 2020).

The list validated by the Senate contains considerable powers that are, therefore, limited to these nine points.

b. Government Requirements

Under pressure from the Government the deputies adopted an amendment that adds a very general, imprecise and open tenth point to that list, according to which the Prime Minister can ‘where necessary, decree any other regulatory measure limiting the freedom to act’.⁶⁶ Admittedly, such measures can be taken only ‘for the sole purpose of ending the health disaster’ and must, therefore, comply with the requirements of administrative and constitutional case law, that means be strictly adapted and proportionate. The statutory law thus supplemented gives actually the Head of government policing powers on a scale not seen since the Act on Health Police of 3-9 March 1822, which was enacted to counter the yellow fever epidemic. This is evidenced by the fact that the National Consultative Commission for Human Rights and the Defender of Rights published an opinion on the former⁶⁷ and a letter addressed to Members of Parliament on the latter⁶⁸ expressing their concerns about the impact of the state of emergency on democratic life and freedoms.

In addition, the Government retains significant policing powers when the state of emergency is ‘lifted’, as provided for in the statutory law of 9 July 2020.⁶⁹ This transitional regime, which links the emergency regime and the ordinary-law regime, allows the Prime Minister and prefects to adopt restrictive measures to curb the spread of the coronavirus epidemic: limiting movements (lockdown is therefore possible) and gatherings of people in public and in places open to the public, regulating the opening of establishments receiving the public or requiring travellers using public air transport to or from France to present a negative COVID-19 test.

ii. *Litigations on the State of Emergency and the Protection of Rights and Freedoms*

Faced with this unprecedented factual and legal context, the courts have already had the opportunity to decide certain issues but, above all, they will be creating a body of case law that is sure to be abundant in the months and years to come.

⁶⁶ Moreover, such regulations do not prevent complementary measures adopted by the Minister of Health (Art L.3131-16 CSP) or the prefects. The latter may be empowered to take all general or individual measures appropriate for the implementation of national decisions (Art L.3131-17 CSP) and may even, in the event that the state of emergency only concerns a limited area not exceeding the area of a department, be empowered to initially intervene in order to take the measures listed in points 1 to 9 of Art L.3131-15.

⁶⁷ ‘État d’urgence sanitaire et État de droit’, *JORF* 0108 (3 May 2020) text No 49.

⁶⁸ Letter of 2 May 2020, www.defenseurdesdroits.fr/sites/default/files/atoms/files/courrier_au_parlement_-_3_mai_2020_-_prorogation_de_letat_durgence_sanitaire_0.pdf.

⁶⁹ Statutory law validated by the *Conseil constitutionnel* in the decision 2020-803 DC of 9 July 2020.

a. The Position of the *Conseil Constitutionnel*

The *Conseil constitutionnel*, to which the statutory law of 23 March 2020 was not referred in the context of the ex ante review, can censor it on the occasion of a QPC, as the *Conseil* did with regard to legislative provisions on the ‘state of emergency’ provided for in the 1955 statutory law.⁷⁰ The judges may also be called on to rule on the conformity of various ordinances with the rights and freedoms guaranteed by the Constitution, in particular ordinances that have made significant changes to court procedures, such as the extension of time limits.⁷¹

The 2020 statutory law extending the new state of emergency was, nonetheless, referred to the *Conseil constitutionnel* just after its adoption. In the decision 2020-800 DC of 11 May 2020, the *Conseil* attempts to reconcile the requirements of public health order with a respect for rights and freedoms. With regard, for example, to the use of digital technology for health purposes – the ‘tracing’ of people affected by COVID-19 and their contacts – the judges strongly emphasise the importance of the right to privacy and medical confidentiality.⁷²

b. The Case Law of the Administrative Courts

For the time being, it is principally the administrative courts that arbitrate under urgency in order to determine whether various rights (to privacy, expression, etc) and freedoms (to come and go, meet, demonstrate, worship, act, etc) are sufficiently respected within the framework of the state of emergency. Article L.3131-18 of the CSP specifies that the measures taken in the event of a health emergency may be the subject of summary proceedings (temporary suspension – *référé-suspension* – or safeguarding freedom – *référé-liberté* –) in the administrative courts. Appeals immediately flooded in and the summary proceedings judge at the *Conseil d’État* issued numerous decisions, which can be easily consulted online as the Court has classified them in chronological order on its website.⁷³

In some cases, the *Conseil d’État* has decided in favour of public health order. Thus, at the beginning of the first lockdown, the *Conseil* rejects an application by a union of young doctors for a total lockdown of the population but forces the Government to provide details concerning the certificate for derogatory travel

⁷⁰ Six total or partial censorships out of nine QPCs. See eg decision 2017-684 QPC of 11 January 2018: the *Conseil constitutionnel* notes the lack of a balanced reconciliation between the need to protect public order and the freedom to come and go, as the statutory law, due to its imprecision, has allowed a prefect to establish a ‘protection zone’ around a migrant camp.

⁷¹ eg, two QPCs have been sent to the *Conseil constitutionnel* by the *Cour de cassation* on 3 November 2020 concerning the automatic extension of pre-trial detention provided for in Art 16 of ordinance 2020-303 of 25 March 2020. The *Conseil constitutionnel* considers (decision 2020-878/879 QPC of 29 January 2021) that this Article is contrary to the prohibition on arbitrary detention and individual freedom guaranteed by Art 66 of the Constitution in that it automatically extends the effects of pre-trial detention orders without court intervention.

⁷² See also decision 2020-808 DC of 13 November 2020 on the statutory law of 14 November 2020.

⁷³ ‘Dernières décisions (référés) en lien avec l’épidémie de covid-19’, www.conseil-etat.fr/.

(travel for 'health reasons' and 'short' commutes).⁷⁴ The judges also reject an application from sports professionals who want sports facilities to reopen⁷⁵ and do not suspend the closure of bookshops.⁷⁶ They also reject an application against curfews⁷⁷ and refuse to suspend restrictions on gatherings in places of worship during the second lockdown.⁷⁸ It should also be noted that the *Conseil d'État*, to which was referred the merits of an application for annulment of a provision in decree 2020-293 of 23 March 2020 prescribing the general measures necessary to deal with the epidemic, considered that the lockdown was not in the nature of an individual deprivation of liberty within the meaning of Article 66 of the Constitution. In other words, lockdown is not house arrest.⁷⁹

In other decisions, the *Conseil d'État* ensures that rights and freedoms are protected, the limitation of freedoms being possible only if it respects the principles of strict necessity, an adaptation to the circumstances of time and place, proportionality to the health risks incurred and non-discrimination. For example, the judges protect the right to asylum by requiring the re-registration of asylum applications, especially for vulnerable persons.⁸⁰ They protect the freedom to cycle by asking the Government to clearly specify the possibility of the use of a bike for authorised travel during lockdown.⁸¹ In other notable decisions, they protect the fundamental freedom to demonstrate in public. They suspend the obligation to obtain prior authorisation before organising demonstrations.⁸² They also sanction the general and absolute ban on demonstrations imposed by a decree that prohibited gatherings, meetings or activities involving more than 10 people in public areas: a demonstration could be banned only in the event of a breach of public order, including public health order (absence of 'protective gestures'), or when particular circumstances so required, which was not the instant situation as the circulation of the virus was at the time decreasing.⁸³ Lastly, a summary order should be cited in which the *Conseil d'État* orders the State to immediately cease police surveillance by drone on the grounds that the capturing of images by drone constitutes the processing of personal data and must be accompanied by sufficient guarantees.⁸⁴

⁷⁴ *CE ord*, 22 March 2020, No 439674. See the criticisms by X Dupré de Boulois: 'On nous change notre référé-liberté' (2020) *RDLF* chron. No 12.

⁷⁵ *CE ord*, 16 October 2020, Nos 445102, 445186, 445224, 445225.

⁷⁶ *CE ord*, 13 November 2020, Nos 445883, 445886, 445899.

⁷⁷ *CE ord*, 23 October 2020, No 445430.

⁷⁸ *CE ord*, 7 November 2020, Nos 445827 et al (21 applications). On 18 May 2020 (Nos 440361-440511, 440366 et seq, 440512, 440519), on the other hand, the court protects the freedom of worship by ordering the Government, at the beginning of the (first) ending of the lockdown, to lift the general and absolute ban on assembly in places of worship and enact measures strictly proportionate and appropriate to the health risks.

⁷⁹ *CE*, 22 July 2020, No 440149, *Cassia et al.*

⁸⁰ *CE ord*, 30 April 2020, Nos 440250 and 440253.

⁸¹ *CE ord*, 30 April 2020, No 440179.

⁸² *CE ord*, 6 July 2020, Nos 441257, 441263 and 441384.

⁸³ *CE ord*, 13 June 2020, Nos 440846, 440856 and 441015.

⁸⁴ *CE ord*, 18 May 2020, Nos 440442, 440445.

V. Conclusion

The French management of the health crisis disrupts since March 2020 the usual democratic decision-making processes, in so far as neither the Members of Parliament nor locally elected representatives, but various experts (scientific council, Defence Council, Swiss expert, private consulting firms⁸⁵ ...) without any democratic legitimacy surround President Macron, who decides on his own what measures must be taken by ministers and by the political majority in Parliament. The President of the Republic has further decided to create from 16 January 2021 an additional new tool, the 'Citizens' Collective' – made up of 35 citizens selected at random – in charge of sharing preoccupations and proposals concerning the vaccination campaign against the COVID-19. The question arises as to whether the 233 members of the 'Economic, Social and Environmental Council' (Title XI of the Constitution) designated by various bodies and who have practically set up the 'Collective' couldn't have themselves taken on this role.

Under the pretext of an exception, not only democracy but also the Constitution and the guarantee of rights and freedoms have been undermined. The robustness of a democracy and the rule of law can, in particular, be assessed in exceptional circumstances, which test the coherence of a legal, political, economic, social and sanitary system. From this point of view, it is fairly obvious that France was not prepared to face and manage a health crisis of such magnitude.⁸⁶ In an emergency a hyper-centralised response outside the normal functioning of the institutions has been improvised.

The risks are the normalisation of emergency regimes and the permanency of exceptional measures within the standardised rule of law, so that these regimes and measures remain insidiously in force even without any emergency nor exceptional circumstances. That's why it remains to be seen whether the legislator and the courts will take back control in the coming months so that the ending of exceptional regimes can lead to a return to a more balanced, shared and protective decision-making system. It also remains to be seen whether the lessons drawn from the crisis and its haphazard management will be learnt, both politically and legally.

⁸⁵ eg, the American firm McKinsey is in charge of the French vaccination strategy, *ie* a sovereign function: R Besse Desmoulières 'Vaccination contre le Covid-19: le gouvernement a fait appel à quatre cabinets de conseil', *Le Monde* (7 January 2021).

⁸⁶ The figures prove this: more than 5,7 million confirmed COVID-19 cases, more than 111,000 deaths and not even 24,900 million people full vaccinated as of 7 July 2021, www.santepubliquefrance.fr/dossiers/coronavirus-covid-19/coronavirus-chiffres-cles-et-evolution-de-la-covid-19-en-france-et-dans-le-monde. The measures implemented have led to a stabilisation in the number of new positive cases in March 2021, but a third wave occurred in May, and a fourth one in summer 2021.