

# **From the Bataclan to Nice<sup>1</sup>**

## **A Critique of France's State of Emergency Regime**

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## Abstract

This policy brief analyses the state of emergency regime that was declared by the French Government immediately after the November 2015 attacks and ties it to France's legislative response to terrorism more generally. It is observed that, at various levels, serious human rights concerns arise that are detrimental to the fight against terrorism. In conclusion, concrete policy recommendations are offered to address these concerns.

## Keywords

counter-terrorism – human rights – state of emergency – legislative fever – France

## Introduction

In recent years, France has been struck by several terrorist attacks. In reaction, it has adopted numerous counter-terrorism laws and policies. In November of 2015, immediately after the Paris attacks, even a state of emergency regime was declared by the French Government. This regime has been prolonged since then. This policy brief analyses the state of emergency regime and ties it to France's legislative response to terrorism more generally. It is observed that, at various levels, serious human rights concerns arise that are detrimental to the fight against terrorism. In conclusion, concrete policy recommendations are offered to address these concerns.

## The State-of-emergency Regime

A state of emergency was declared by the French Government in the hours following the attacks of 13 November, 2015. Since then, this state of emergency has been prolonged four times for a total period of fourteen months. On 15 July, 2016, in reaction to the attack in Nice, and a few hours after French President Hollande had actually explained that the state of emergency would not be extended after 26 July of 2016, since “[w]e can't extend the state of emergency indefinitely, it would make no sense. That would mean we're no longer a republic with the rule of law applied in all circumstances”,<sup>2</sup> it was announced that the regime would be further prolonged after all.<sup>3</sup>

Under the state of emergency regime, administrative authorities such as the Minister of Interior and the Prefect of each Department are endowed with very broad powers. They can order individuals to be placed under house arrest, order warrantless searches at any time (day or night), prohibit meetings, dismantle associations, pass curfews, and order the temporary closure of public venues.<sup>4</sup> The exceptional regime expressly intends to partly derogate from human rights obligations on the ground of public emergency, as is made clear by the declarations France made under Article 15 of the European Convention on Human Rights (ECHR).

France's response has been heavily criticised by many organisations which consider that the state of emergency raises significant concerns for human rights and the rule of law.<sup>5</sup> Remarkably, five UN Special Rapporteurs stated that the measures “impose excessive and disproportionate restrictions on fundamental

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2 See L. Marlowe, “Bastille Day Attack: 80 People Dead after Truck Drives through Crowd in Nice”, in *The Irish Times*, 14 July 2016.

3 See A. Withnall, “Nice Attack: Hollande Extends France's State of Emergency after Bastille Day Massacre”, in *The Independent*, 15 July 2016.

4 Articles 5, 6, 6-1, 8 and 11 of Law no 55-385 of 3 April 1955, as amended.

5 Human Rights Watch, “France: Abuses under State of Emergency”, Amnesty International, 3 February 2016; “France: Upturned lives: The Disproportionate Impact of France's State of Emergency”, 4 February 2016; CNCDH, “Statement of Opinion on the State of Emergency”, 18 February 2016.

freedoms”.<sup>6</sup> In particular, the language of the provisions is very vague and thereby potentially very far-reaching, thus leaving room for abuse. Indeed, the procedure of house arrest, for instance, is applicable to anyone suspected of posing a threat to public order and security, while warrantless searches can be conducted at any place suspected to be frequented by an individual who poses a threat.<sup>7</sup>

Furthermore, in practice, administrative powers have been used in an excessive and in some cases abusive manner. In line with the intrinsic vagueness of the law, administrative measures have been decided, “on the basis of vague grounds and with very little evidence”.<sup>8</sup> House arrests have often been ordered based on imprecise and sometimes inaccurate intelligence notes,<sup>9</sup> thus raising the concern that they can be decided on an arbitrary basis.<sup>10</sup>

The extensive use of warrantless searches has also raised concerns. It was reported that, “of the 3,289 administrative searches recorded as at 3 February 2016, only 28 offences linked to terrorism were recorded, with 5 of these resulting in a referral to the antiterrorism Prosecutor in Paris, the remaining 23 concern the offence of justifying, or incitation to, acts of terrorism”.<sup>11</sup>

Moreover, the proportionality of these searches has been questioned: on numerous occasions, house searches resulted in the use of excessive physical and psychological violence by police forces and in unnecessary material damage. Examples include damaging places of worship during searches, conducting aggressive house searches in the presence of young children, and using abusive or discriminatory language.<sup>12</sup>

Finally, many organisations find it problematic that state-of-emergency powers are being used, “on the basis of reasons which lack any connection with the imminent danger that had led to the declaration of the state of emergency”.<sup>13</sup> It was widely reported that ecological activists were put under house arrest during the 2015 UN Climate Change Conference (cop21), which took place a few weeks after the attacks.<sup>14</sup> Amnesty International qualified these measures as the, “clearest example of the abusive application of the emergency measures”,<sup>15</sup> while the Office of the UN High Commissioner for Human Rights (OHCHR) was concerned as to their necessity and proportionality.<sup>16</sup> Despite these criticisms, special powers were again used for unrelated purposes in May of 2016 when a number of people were prevented by administrative orders from attending demonstrations

6 OHCHR, “UN Rights Experts Urge France to Protect Fundamental Freedoms while Countering Terrorism”, 19 January 2016.

7 Respectively, Articles 6 and 11 of Law no 55-385 of 3 April 1955, as amended.

8 Amnesty International, “France: Upturned lives: The Disproportionate Impact of France’s State of Emergency”, 4 February 2016, at p. 14.

9 P. Alonso, “Notes Blanches : Les Corbeaux de la Place Beauvau”, in Libération, 15 February 2016.

10 In this respect, a number of individuals have successfully challenged, before administrative judges, the measure of house arrest to which they were subject. The Council of State suspended several orders, usually finding that there were insufficient grounds to consider the claimant a threat to public order and security. See, e.g., Conseil d’État, Juges des référés, 22/01/2016, N° 396116; Conseil d’État, Juge des référés, 09/02/2016, N° 396570; Conseil d’État, Juge des référés, 23/02/2016, N° 396872; Conseil d’État, Juge des référés, 15/04/2016, N° 398377.

11 CNCDH, “Statement of Opinion on the State of Emergency”, 18 February 2016, at paragraph 16.

12 Amnesty International, “France: Upturned lives: The Disproportionate Impact of France’s State of Emergency”, 4 February 2016, at p. 12; Défenseur des droits, “Avis 16-03 : Suivi de l’état d’urgence”, 25 January 2016, at pp. 6-7; CNCDH, “Statement of Opinion on the State of Emergency”, 18 February 2016, at paragraph 9.

13 CNCDH, “Statement of Opinion on the State of Emergency”, 18 February 2016, at paragraph 26.

14 A Neslen, “Paris Climate Activists Put Under House Arrest Using Emergency Laws”, in The Guardian, 27 November 2015.

15 Amnesty International, “France: Upturned lives: The Disproportionate Impact of France’s State of Emergency”, 4 February 2016, at p. 18.

16 OHCHR, “UN rights Experts Urge France to Protect Fundamental Freedoms while Countering Terrorism”, 19 January 2016.

against a labour law reform.<sup>17</sup>

It can be argued that France's problematic state-of-emergency regime is not an isolated issue and that it should be seen as part of an increasingly tougher legislative stance on terrorism. Typically, terrorist incidents have led France to draft new, stricter laws. In the years preceding the November 2015 attacks, France adopted three terrorism-related laws and numerous decrees.<sup>18</sup> After these attacks, France launched a number of arguably dubious legislative initiatives. For instance, the Government had plans to introduce legislation allowing for the preventive administrative detention of individuals suspected of being radicalised. These plans were dropped after the Council of State unsurprisingly considered them to be incompatible with human rights.<sup>19</sup> In the same vein, the abandoned constitutional reform project—which made it possible to revoke the citizenship of French-born convicted terrorists holding dual nationality<sup>20</sup>—is a typical example of a symbolic measure with questionable effect on the prevention of terrorism. Finally, one more new counter-terrorism law was adopted on 3 June, 2016.<sup>21</sup> The law is a patchwork of measures that notably reinforce the powers of the police regarding surveillance, searches and seizures, and that provide for administrative controls of suspected returning foreign fighters.

France's political response to terrorist attacks could be qualified as “legislative fever”.<sup>22</sup> In a crisis situation, there is a risk that legislative policies are made impulsively based on emotion rather than being supported by a long-term vision. Laws are adopted without, “a period of real debate to clarify in the long-term the public policies to come, and to respond to the concern of publicly and calmly approaching a subject whose seriousness demands that it must not be treated under the influence of emotions”.<sup>23</sup> Moreover, the political discourse gives limited consideration to human rights, which are overshadowed by security matters.

In view of these concerns, this paper offers a few concrete policy recommendations for the way forward.

### 3 Policy Recommendations

This policy brief has shown that France's legislative policy in response to terrorist attacks raises serious human rights concerns. It is important to understand that this situation is detrimental to the fight against terrorism. In the words of UN Security Council Resolution 2178:

[U]nderscoring that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism mea-

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17 “Loi Travail : Plusieurs Opposants Interdits de Manifester”, in *Le Monde*, 16 May 2016.

18 Loi n° 2012-1432 du 21 décembre 2012 relative à la sécurité et à la lutte contre le terrorisme; Loi n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme; Loi n° 2015-912 du 24 juillet 2015 relative au renseignement.

19 Conseil d'État, « Avis sur la constitutionnalité et la compatibilité avec les engagements internationaux de la France de certaines mesures de prévention du risque de terrorisme » 17 December 2015, N° 390867.

20 Projet de loi constitutionnelle de protection de la Nation (version of 23 March, 2016). Revocation of citizenship is already possible for dual nationals who acquired French nationality through naturalisation (Article 25 of the Civil Code).

21 Loi n° 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale.

22 See V. Chalkiadaki, “The French “War on Terror” in the Post-Charlie Hebdo Era”, in *The European Criminal Law Associations' Forum*, 2015 (EuCrim), pp. 26–32.

23 CNCDH, “Statement of Opinion on the Constitutional Bill for the Protection of the Nation”, 18 February 2016, paragraph 3.

asures, and are an essential part of a successful counter-terrorism effort and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and noting that failure to comply with these and other international obligations, including under the Charter of the United Nations, is one of the factors contributing to increased radicalization and fosters a sense of impunity.

Therefore, first and foremost, provisions in conflict with human rights must be removed as soon as possible, and violations must be remedied. The authors also wish to stress the importance of a long-term vision that is focused on prevention rather than on repression. However, at the same time, it is understood that policy makers are under pressure to act quickly, both by their superiors and by the general public, which seems to be in support of a tougher stance.<sup>24</sup> The following recommendations take this into account and could be implemented immediately:

**Policy makers should involve, as soon as possible, relevant civil society organisations in the design of new measures.** Organisations such as the CNCDH, Amnesty International, and Human Rights Watch, as well as local organisations, know better than anyone how measures will be implemented and perceived *in practice*. Therefore, if these organisations indicate that certain measures will entail that more people are discriminated against—which, in turn, may lead to a greater pool of recruits for extremist organisations—such warnings should be taken into account. To avoid the problem altogether, these organisations should be involved at an early stage in the design process rather than afterwards, when the damage has already been done and the work of policy makers has already been impaired by a wave of criticism that could have been averted.

Policy makers, before they design new measures, should first determine whether existing measures are not already sufficient to address certain threats. In the past few years, France has adopted several tough counter-terrorism laws; but these laws did not prevent the November 2015 attacks in Paris. Indeed, 100% safety can never be guaranteed. Taking this reality into account, it is preferable to evaluate what has worked thus far and to invest in those measures before adopting new ones that overcomplicate the system and may further erode the rule of law. It should be noted, however, that this is not only a problem in France. In many EU Member States, “[t]here is a clear need for an effective (and centralised) monitoring and evaluation framework to analyse impact and effectiveness of existing and future policies and practices”.<sup>25</sup>

Policy makers should provide law-enforcement authorities with the methods and resources—i.e., with the funding, manpower, (technical) know-how and possibility to cooperate with other states—to be specific in their targeting, so as to ensure that policies are effective yet do not broadly restrict the rights of the general public. The presence of more police officers, made possible by the emergency regime, might have ensured that the perpetrator of the Nice attack was neutralised before causing even more carnage. However, this arguably shows the need for more and better-resourced police officers rather than for yet another extension of a regime that this brief has shown to be problematic in many respects. Here again, current and new methods should be carefully assessed to increase their efficiency while at the same time ensuring that their use does not excessively affect fundamental freedoms.

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24 J. Fourquet, “79% des Français favorables à une prolongation de l’état d’urgence”, in *Atlantico*, 30 January 2016.

25 See B. van Ginkel and E. Entenmann (eds.), “The Foreign Fighters Phenomenon in the European Union. Profiles, Threats & Policies”, ICCT Research Paper, April 2016, p. 6.

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