4-8, JULY 2022

CIVIS LETTER N°1

POLITICAL INSTITUTIONS DURING CRISES: FROM RESISTANCE TO RESILIENCE

CIVIS SHORT-TERM MOBILITY COURSE
SOCIETY, CULTURE, HERITAGE

GOVERNING IN TIMES OF CRISES

TABLE

Welcome

P. JENSEL-MONGE
&
A. VIDAL -NAQUET

We are very pleased to present this flipbook, which is the outcome of our CIVIS project titled "Political Institutions during Crises - From Resistance to Resilience." CIVIS is a European Civic University formed by an alliance of 11 leading research higher education institutions across Europe: Aix-Marseille Université, National and Kapodistrian University of Athens, University of Bucharest, Université libre de Bruxelles, Universidad Autónoma de Madrid, Sapienza Università di Roma, Stockholm University, Eberhard Karls Universität Tübingen, University of Glasgow, Paris Lodron University of Salzburg, and University of Lausanne.

Briefly, we would like to provide some information about this project. Faced with an ever-increasing number of crises - health, security but probably in the future climate, economic, migration crises etc. - we initiated the Civis project "Governing in Times of Crises - From Resistance to Resilience." In collaboration with Ekaterini Iliadou (Professor at the University of Athens) and Emmanuel Slautsky (Professor at the Free University of Brussels), we decided to compare our respective national experiences at an institutional level, with the aim of drawing lessons from these crises.

Resistance and resilience are the two main focal points of this project. The first focuses on institutional destabilization due to the crisis and the implementation of emergency measures. The second examines institutional responses, changes, adjustments, and the impact that these crises can have on the state and democracy. During the first Student Week, numerous individuals involved in the crisis (academics, members of civil society, lawyers, doctors, etc.) engaged in discussions on the topic.

This project will be structured around three questions, with each question being the focus of a separate Student Week. The first question is "Governing in Times of Crises" (which has been postponed from 2021 to 2022). The second question is "Oversight in Times of Crises," which took place in Belgium in 2023. The third question is "Learning from the Crises," which aims to draw lessons from the crises in order to anticipate future events and will take place in Greece in 2024.

This project is primarily aimed at the students who have participated in this endeavor. Each year, approximately 30 students from different CIVIS member universities, with diverse backgrounds ranging from bachelor's to doctoral levels, in fields such as public or European law, economics, and media and communication, have taken part. This diversity has been highly stimulating for us. For instance, during the first Student Week, students participated in a *Treasure Hunt* centered around the theme of crisis.

This entire endeavor would not have been possible without our exceptional team, who we deeply appreciate : Audrey Bachert-Peretti, Julien Padovani, Chloë Geynet-Dussauze, Natasa Danielcuc-Colodrovschi, Delphine Georges, Sandra Pagot and all our PhD students, Evan Lagune, Pauline Mallejac, Servane Le Dû, and without our favorite publisher : Charlotte Largeron.

Priscilla Jensel-Monge & Ariane Vidal-Naquet

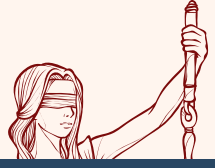
PROGRAM
GOVERNING IN TIMES OF CRISES

TOUT LE PROGRAMME ICI

https://dice.univ-amu.fr/sites/dice.univ-amu.fr/files/article/_programme_governing_in_times_of_crisis.pdf

Première université d'été organisée par l'ILF dans le cadre du programme CIVIS.

Une université européenne, en partenariat avec les Universités d'Athènes et de Bruxelles qui a pour objet de réfléchir à la manière dont les institutions politiques peuvent faire face et s'adapter aux récentes crises qui frappent le monde et l'Europe. Qu'il s'agisse de crises économique, migratoire, terroriste, sanitaire ou environnementale, ces dernières transforment les équilibres institutionnels contemporains et la manière dont sont prises les décisions publiques.
L'université d'été a eu ainsi pour objet de réfléchir à ces problématiques à travers des conférences, des tables rondes et un *treasure hunt*, lesquels se sont déroulés du 4 au 8 juillet 2022 à la Faculté de droit et de science politique d'Aix-en-Provence.



STATE OF EMERGENCY V. ORDINARY STATE? DEALING WITH THE CRISIS

A. VIDAL -NAQUET

The purpose of my introductory remarks is to analyze how States can deal with a crisis of a certain magnitude, whether it is a health crisis - the COVID 19 for instance - but also other types of crises: security, economic, social or even climate crisis …… so many crises that are bound to emerge in the years to come …. That suggests the possible proliferation of crises and, consequently, the multiplication of crisis regimes shaped to deal with them.

More precisely, it is a question of knowing whether, in front of such crises, the State – with a capital S - chooses to remain itself and thus to remain in its "ordinary state" or, whether it chooses to leave this state and to enter a "state of exception" and, then, to become, perhaps, something other than itself.

Indeed, faced with certain crises, the State can judge that the means of action available to it in ordinary times are not adapted to the seriousness / magnitude of the situation. The State can judge that such a crisis requires to implement, to settle down a state of exception, that is to say, a state that derogates from, that excepts from the ordinary state.

It is still necessary to provide a conceptual precision on what is meant by « state of exception ». Shortly, I would define a state of exception as an alternative legal order, provided for by the legal order itself and justified by a particular situation, qualified as exceptional.

More precisely, to take up the legal approach proposed by Professor Magnon (*X. Magnon. Le concept d'état d'exception Une lecture juridique. Revue du droit public et de la science politique en France et à l'étranger, 2021, Numéro spécial : Les États d'exception : un test pour l'État de droit ?, p.11-34*), it is a normative sub-set of the constitutional order in force, characterized by a mode of production of derogatory norms, temporary, and motivated by an exceptional situation.

First observation, the ordinary state provides for a state of exception. That means the state of exception is not autonomous from ordinary law; on the contrary, it is dependent on ordinary law, since it is the ordinary state that provides for the possibility of a state of exception.

In my view, this is a key to distinguish state of exception from a pure state of necessity or from revolution. We can notice here a very strong link between ordinary state and state of exception. It is indeed the ordinary state that makes the state of exception possible.

The fact that ordinary law provides for derogations under exceptional circumstances can be interpreted as the sign of a certain pessimism from States: "pessimistic" or, I would say, "lucid" States decide, in advance, that the rules they lay down will have to be excluded under certain conditions. In contrast, what we may call "optimistic"/naive States believe that they are sufficiently equipped to deal with any situations; the most optimistic of them can even prohibit, for example in their constitution, to establish any state of exception.

For this introductory conference, I suggest I start with two series of general remarks:
- the first series concerns how the ordinary state provides for the state of exception or, more often, several states of exception
- the second set of remarks concerns the end of the state of exception and the return to the ordinary state.

1- HOW ORDINARY LAW PROVIDES FOR STATES OF EXCEPTION?

I would start by underlying that behind the generic term "state of exception", which is not always the term used in positive law, there are often not one but several states of exception.

In France, for example, the state of exception refers to several different regimes, including:
- the full powers of the President of the Republic under article 16 C, which allows for a concentration of power in the hands of the President of the Republic
- the state of siege, which organizes a transfer of civilian power to the military, provided for in article 36 C
- two states of emergency that allow the administrative authorities to derogate from rights and freedoms: a so-called state of security emergency established by a law of April 3, 1955, and a state of health emergency created by the law of March 23, 2020.

Basically, in France, therefore, there is a whole arsenal of states of exception that can be used by public authorities. This raises the question of their possible accumulation (can two or more states of exception be implemented at the same time?) and of their succession in time (can several states of exception fallow each other, as it was done in France, for example, during the Algerian war 1954-1962?).

It can be noted that the normative level of these states of exception is heterogeneous:

- some of them are constitutionalized

We may distinguish between regimes that are « fully » constitutionalized, for example the full powers of the President (Article 16 provides for the conditions of its triggering, the content of the powers and the possibility of control), while others are "weakly" constitutionalized (for example, Article 36 only mentions the state of siege, but its regime is detailed in the ordinary law).

- some regimes, on the other hand, are based only on legislation.

The two states of emergency are provided for by simple laws: the one of 1955 and the one of 2020. However, the constitutionality of these two laws is very doubtful, although admitted by the Constitutional Council. In a 1985 decision, the Constitutional Council considered that the silence of the Constitution did not prevent the legislator from creating new states of exception (décision 85-187 DC du 25 janvier 1985). Despite this decision, I would like to suggest, on the contrary, that the silence of the Constitution prevents the legislator from creating a law that derogates from the ordinary way of production of norms and infringes on the rights and freedoms guaranteed by the Constitution.

It may also be noted that, despite the framework of the state of emergency in ordinary law, there is often a temptation to create a "tailor-made" regime. There are two ways to create such "tailor made" regimes.

The first one is to create an adapted regime from scratch, for example the law of March 23, 2020,on the state of health emergency, that was adopted because of the crisis and, thus, after it. So it will be noticed that, in France, the first confinement of the entire population was imposed by a simple decree of the Prime Minister on 16 March, 2020, adopted in the name of "exceptional circumstances". A few days later, the law on the state of health emergency was adopted. Moreover, and this may be also analyzed as a "tailor-made" sign, this law was conceived as a provisional law. It was supposed to end on the 1st of April, 2021, but this first deadline has been postponed several times and has finally expired on July 31, 2022.

Another temptation is to tailor the law to the needs of the crisis by modifying the existing regime - it is easier of course if it is a legislative one - as it was done, for example, with the 1955 law, which has been modified several times during its application. This possibility of "correcting" the law on states of emergency as the crisis evolves shows, basically, the limit of the ambition of the law to provide for states of emergency.

Now let's move to the second series of remarks, this time on the end of the state of exception.

2- HOW IS IT POSSIBLE TO MOVE FROM THE STATE OF EXCEPTION TO THE ORDINARY STATE?

The question can be approached from a practical point of view, but also from a more theoretical point of view.

From a practical point of view, the question is who decides the end of the state of exception and how. Which authority is competent to decide to go back to normality, to the ordinary state? Is it the authority competent to decide on the state of exception (most often the executive branch of Government) or the authority competent to extend it (most often the legislature), or even the authority competent to control it (the judge)? Despite being very important, this question, is not as enough analyzed in legal literature.

It should be noted that, most of the time, the duration of a state of emergency is not specified by positive law, precisely because this duration must be adapted to the circumstances and therefore to the duration of the crisis.

Now, from a more theoretical point of view, one may wonder whether the transition from a state of exception to an ordinary state is as simple as that. Two questions seem to me particularly important and reveal the "footprints" that the state of exception leaves on the ordinary state.

The first is the emergence of a third type of state, a state between the state of exception and the ordinary one, an intermediate state which is both a little ordinary and a little exceptional and which is presented as a
transitional state of exit from the crisis.

This is typically what happened in France with the implementation, by law, of a first regime called "exit from the state of emergency", in July 2020, which was finally replaced by a new regime of state of emergency in October 2020, then with the implementation of a second regime of "exit", extended twice until the end of July 2022. At present, few weeks ago, a draft law was introduced, which provides for the exit of the "exit" of the state of health emergency: this draft law allows for exceptional measures until 2023, with the exception of the health pass. This creates a buffer zone, a grey zone between the ordinary state on one hand and the state of exception on the other hand, which considerably blurs the situation.

The second question is even more revealing of the "print" that the state of exception leaves on the ordinary state.
It is, in effect, what we can call the normalization of the state of exception: this refers to its integration into the ordinary law. This is what happened with the state of security emergency which was implemented between 2015 and 2017: on the very day of the end of the state of security emergency in 2017, a law was adopted which essentially resumes and perpetuates, under a different name, the measures of the law of April 3, 1955 and thus integrates them in ordinary law (loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme (dite loi « SILT »).

In the same way, in December 2020, the Government proposed a bill on the management of health emergencies, which incorporates the main measures introduced by the law of March 2020 into common law (isolation and quarantine, limitations on freedom of movement, price controls and requisitions). It is, therefore, a project that is strangely similar to the state of health emergency (except for the generalized confinement measures); it has been, for the moment, withdrawn by the Government.

This integration of the state of exception in the common law and thus in the ordinary state shows that the distinction between the state of exception and the ordinary state can be very narrow. It gives meaning to the title of this paper used in the program, which goes from a state, in the sense of a situation, to a state in the legal sense, or how the state – with a small s, meaning the situation - of exception can become a permanent State - with a capital S - of exception. I think that the transition from a "state of exception" to a "State of exception" is particularly worrying, because it transforms the very meaning of State, of constitutionalism and of political liberalism.

Katerina N. ILIADOU

STATE OF EMERGENCY V. ORDINARY STATE? CROSS VIEWS AND EXPERIENCES

During the last decades, the "crisis" narrative is ever present in popular discourse and politics.

We all became familiar with the notions of economic crisis, ecological and climate crisis, migration crisis, terrorist crisis, pandemic crisis etc. Crises owing to different sort of threats that endanger basic goods and fundamental rights, thus affecting the regular conditions of social coexistence and the law, have become a hot topic, not only for political discussion but also for academic research and dialogue.

It is however difficult to define crisis. For example, Article 1 of the Directive 2009/81/EC "on the coordination of procedures for the award of contracts in the fields of defense and security" (L 216/76) states that "crisis' means "any situation (….) in which a harmful event has occurred which clearly exceeds the dimensions of harmful events in everyday life and which substantially endangers or restricts the life and health of people, or has a substantial impact on property values, or requires measures in order to supply the population with necessities".

The wording of that provision demonstrates eloquently that the legal definition of "crisis" is inevitably broad and rather unclear. Moreover, it cannot be predicted which situations will eventually become emergencies; therefore, it is intrinsically impossible to define crisis in a material way. Hence, any definition of the term by default remains functional and shall concentrate on the fundamental features that justify the characterization of certain circumstances as a situation of "crisis".

Common characteristics of crises include:
(a) The outbreak of urgent situations or situations of need that constitute a rupture of normality (or normalcy);
(b) the generation of significant dangers or harm of fundamental rights and basic goods (such as life, health, property etc.); and
(c) the necessity to engage in action aiming to prevent the realization of the aforementioned risks.
It is not necessary for crises to be unpredicted or to be officially declared as such; instead, they are de facto situations that require urgent decision-making and action to avoid harm.
All branches of law include mechanisms designed to confront crises, usually by providing for the possibility to deviate from ordinary applicable rules to prevent the occurrence of detrimental consequences and to protect important goods and values.

For private law, for example, it is commonly accepted that under extraordinary circumstances, deviations from the principle "*pacta sunt servanda*" may be justified; therefore, rules, which may excuse contractual performance or lead to the adaption or even the termination of contractual obligations, may apply. Similarly, procedural, penal, administrative etc. law provisions take into consideration force majeure situations and regulate accordingly.
At the state level, crises are factual situations of emergency, which due to their nature and magnitude may temporarily justify deviations from ordinary structures and procedures of government decision-making.

In addition, the enactment of crisis-specific legislation to impose restrictive measures aiming to mitigate urgent situations may also be deemed necessary. Therefore, from the point of view of constitutional law and theory, the crisis problematic is twofold; it relates to both the form and the substance of public decisions adopted by state authorities for combating the detrimental effects of emergencies:

(a) From the institutional perspective, focus is given on the constitutional provisions that regulate the modalities of decision-making aiming to address crises efficiently and effectively, i.e., the constitutional regime of emergencies.

(b) From the point of view of substantial constitutional rules, i.e., the guarantees of fundamental rights and liberties, the central question that arises relates to the implications of crises on striking the balance between ensuring security and respecting various fundamental rights and liberties. In other words, the central question under this aspect is to define how far-reaching restrictions of fundamental rights may be justified and tolerated under conditions of emergency. The principle of proportionality and the effective application of mechanisms of judicial review in this regard are of key importance.

Both the above-mentioned subject matters are intertwined. Their common feature is the necessity to deal with an emergency related to decisive factors of public interest.

Moreover, in so far as restrictions of fundamental rights and liberties are imposed through mechanisms that deviate from ordinary democratic procedures, suspicion arises regarding the legitimacy of such measures and their conformity with the constitutional framework.

These dimensions of the crisis-problematic gained particular attention during the pandemic period, ongoing since it was declared by the World Health Organization at the end of January 2020. It is evident that the outbreak of the pandemic generated vital physical threats for human life and health, as well as economic and social challenges. Governments around the globe were forced to act urgently and to adopt severe measures that restrict fundamental constitutional rights in an unparalleled way since the end of the Second World War, at least for the liberal tradition in Europe.

Although the measures adopted are mostly similar (mainly measures to implement the so-called "social distancing" and restrictions of free movement), the constitutional context governing the enactment of the related legislation and the application of such measures differ significantly between various countries.

Based on the comparative overview of Member States' institutional responses to the coronavirus crisis prepared by the scientific services of the European Parliament (States of emergency in response to the coronavirus crisis: Situation in certain Member States I-IV, available online on: https://www.europarl.europa.eu/portal/en), we may differentiate between the following:

(a) Some national constitutions include more or less detailed rules on emergencies, i.e. events of external or internal threats that may lead to the declaration of special legal regimes of exception.

Regardless of the observed differentiations of the terminology used in different legal orders (e.g., state of emergency /État d'urgence or state of siege /état de siege/Martial Law and other similar expressions), such regimes commonly provide not only for the restriction of fundamental rights and related guarantees, but also for the suspension of the relevant constitutional provisions. Suspension is a totally different concept compared to "restriction"; suspension means that the protective framework of fundamental rights and liberties is temporary deactivated and therefore legislative and administrative action is no longer subject to judicial scrutiny or if so, in a limited way.

(b) Irrespective of the existence of rules on state of emergency as the above many Constitutions address crises through providing for specific rules that grant the executive branch prerogatives to enact so-called "emergency legislation" thus allowing for a certain temporary alteration of the regular balance of powers between the executive and the legislative branch.

In both cases, discussion is about constitutional procedures and rules that already exist when the emergency presents itself. In this sense, the focus is on the so-called "constitué" and not on the 'constituant' law of necessity (For the differentiation between constitué and constituant law of emergency see Ev. Venizelos, "Pandemic, Fundamental Rights and Democracy - The Greek Example", p. 5, Published in COVID- DEM, April 2020, https://www.democratic-decay.org/research and https://evenizelos.gr/other-languages/375-articles-eng/6235-ev-venizelospandemic-fundamental-rights-and-democracy-the-greek-example.html).

The latter "stems from unprecedented de facto situations extending beyond the existing provisions of the constitutional order". Therefore, the constituent law of necessity is linked to the question of whether necessity may create new primary rules of law beyond those already provided for in the constitution in force, as dictated by the axiom "salus populi suprema lex esto". Such problematic gained attention in the Greek constitutional history mainly during the post-war period when a system outside the existing constitutional order - the so-called "para-constitution" –was de facto established and applied, leading to institutional anomalies and systematic violations of fundamental rights.

The following presentation will focus on the provisions of the Greek Constitution designed to handle situations of need or emergency and the experience gained as regards the application of such provisions in recent times of distress.

The example of Greece is quite interesting: Since the enactment of the Constitution in 1975 after the 7-year military dictatorship, the political system in Greece operated smoothly according to the principles of democracy and the rule of law. In recent times, that normality was twice undermined. Firstly, in 2009 an acute financial and sovereign debt crisis created serious turbulence on the political scene that lasted for more than a decade. During that crisis, emergency legislation became the norm, challenging the so-called "resilience" of the Constitution (Contiades X./Fotiadou Alk., On Resilience of Constitutions. What Makes Constitutions Resistant to External Shocks?, Vienna Journal of International Constitutional Law, Vol. 9, Issue 1, 2015, p. 3-26). Systematic application of the constitutional provisions on emergencies generated skepticism since it could have the dynamic to modify silently and gradually the ordinary institutional balance of state organization.

More recently, due to the pandemic, the same problematic became once more actual, however under different material conditions of emergency.

Aiming to address that problematic, the presentation focuses on the following:

(I) An overview of the constitutional framework as regards the basic organizational principles of the state and the ordinary and emergency legislation setting procedures that apply.

(II) An overview of recent practices applied to deal with the extraordinary circumstances of the financial and of the pandemic crises.

(III) A rough presentation of the crisis related jurisprudence in Greece.

(IV) An outline of the central themes, questions and issues that raise the practices of the state authorities while dealing with emergencies.

I.INSTITUTIONAL BALANCE ACCORDING TO THE GREEK CONSTITUTION

A. Basic organizational principles of the state

According to Article 1 of the Greek Constitution, the form of government in Greece is that of a parliamentary republic. Popular sovereignty is the foundation of all public authority; all powers derive from the People and exist for the People and the Nation. Article 2 proclaims that respect and protection of the value of the human being is a primary obligation of the State and furthermore declares that the country, "*adhering to the generally recognized rules of international law, pursues the strengthening of peace and of justice, and the fostering of friendly relations between peoples and States*".

The structure of the State relies on the fundamental principle of the separation of powers: Article 26 of the Constitution defines the three branches of powers i.e., the executive, the legislative, and the judiciary and assigns respective competencies to specific state institutions. According to the provisions of Article 26, the ordinary institutional balance may be outlined as follows:

(a) Legislative powers are exercised by the Parliament acting together with the President of the Republic. Greece applies a unicameral system of legislature; the Parliament has the power to vote for draft legislation to become a "law", following a stage of elaboration and open discussion. The President of the Republic promulgates and publishes laws voted on by the Parliament.

(b) The executive branch consists of the Government and of the President of the Republic. The Government determines and exercises the general policy of the country, is the basic agent of executive power and stands at the head of the public administration. The President of the Republic is the Head of the State, exercising not only legislative powers as mentioned above, but also executive competencies. All acts of the President of the Republic shall be countersigned by the competent Minister, who, by such signature alone is rendered responsible (Article 32). The executive has the competency to implement the laws passed by the legislator. Nevertheless, under prior legislative delegation granted by the parliament, the executive may also exercise regulatory competencies. By default, acts of the executive are subject to mechanisms of direct or indirect judicial review.

(c) The judiciary resolves judicial disputes among individuals or between individuals and the state. A system of diffuse, concrete and incidental control of constitutionality of parliamentary legislation applies: All courts have the power to review the constitutionality of the content of laws at any time; however, court decisions are only binding for the particular case tackled each time, according to Articles 87 paragraph 2 and 93 paragraph 4 of the Constitution. The observance of procedural requirements of the legislative process may not be challenged before the courts since this issue belongs to the so-called interna corporis of the Parliament. Furthermore, laws cannot be challenged for annulment before the Courts as Greece has no Constitutional Court.

B. Ordinary legislative process

1. Parliamentary legislation

As afore mentioned, the Parliament is assigned with the main legislative powers and may decide on any subject matter, unless specific constitutional provisions stipulate for the competency of other state authorities (presumption of competence). Legislative function shall respect the substantial limits set by the Constitution and mainly the provisions on the protection of fundamental rights and liberties, as well as international law; the latter according to Article 28 of the Constitution has higher normative value compared to parliamentary laws.

Articles 74–80 of the Constitution regulate the legislative process. The legislative initiative lies with the Government and the Parliament. In most cases, the Government, that is the competent minister(s), propose(s) Bills to the Parliament. Members of the Parliament may also submit Law Proposals as provided for in Article 73 of the Constitution.

According to Article 76, the Parliament votes for a Bill or Law Proposal to become a "Law" in three subsequent voting sessions: in principle, per article and in toto. Once the Bill is passed by the Parliament, it is submitted to the President of the Republic for promulgation and publication in the Government Gazette within one month of the vote (Article 42). Normally, laws are enacted in plenary sessions of the Parliament following open debates. Article 72 par. 1 of the Constitution enumerates Bills and Law Proposals, which depending on their content, belong to the exclusive competence of the Plenum, such as those on the protection of individual rights, the electoral law, or Bills and Law Proposals on the authentic interpretation of statutes. The Plenum also debates and votes Laws that according to special provisions of the Constitution require a special majority such as amnesty for political offences and recognition of competences (specified in the Constitution) to international organizations. Finally, the Constitution as well as the standing orders of the Parliament provide for rapid voting procedures in case of urgency (Art. 76 par. 4 and 5 of the Constitution).

2. Regulatory competencies of the executive

Regulatory competencies of the executive require prior legislative delegation by the Parliament as provided for in Article 43 of the Constitution. Legislative delegation shall define in a specific manner the subject matter and the limits of the delegated powers. Article 43 foresees two main forms of legislative delegation. The most significant form is the one granted from the Parliament to the President of the Republic for the issuance of Presidential Decrees following proposal by the competent minister and prior opinion of the Council of the State. The Parliament may also delegate regulatory powers to all sorts of authorities of the executive branch other than the President of the Republic, such as Ministries, local authorities and independent administrative authorities. Such delegation shall be specific and shall be limited to "cases concerning the regulation of more specific matters or matters of local interest or of a technical and detailed nature" (Article 43 par. 2 sub-par. B of the Constitution).

Contrary to what applies to parliamentary legislation, general regulatory acts of the executive may be directly challenged for annulment before the Council of the State, as acceptable in general for all acts of the administration. Furthermore, such general regulatory acts of the executive are also subject to incidental control by the Courts, e.g., in the context of pending petitions for annulment of related individual administrative acts. In both cases, courts have the power to review both the observance of the conditions set out in Article 43 of the Constitution concerning legislative delegations, as well as the content of the acts under scrutiny; therefore, it lies with the courts to determine if the limits of the legislative delegation are exceeded, and the fundamental rights and liberties are respected.

In the hierarchy of the sources of law, general regulatory acts of the executive have a legal value like the one of formal (parliamentary) laws. Hence, they may also amend or repeal provisions of parliamentary laws. The regulatory competencies of the executive complement the regular legislative powers exercised by the Parliament.

Under ordinary conditions, general regulatory acts of the administration are very common in practice, numerous and of great significance for the Greek legal system. The reasons of their importance relate to the highly technical nature of the issues to be regulated; to the necessity to adopt decisions in a timely manner and to the necessity to ensure flexibility and easy adjustment of the legal framework to changing economic and social conditions.

C. The constitutional provisions on emergency

The Greek Constitution contains two sets of rules designed to address emergencies: Art. 48 par. 1 regulates the state of siege, while Art. 44 par. 1 of the Constitution regulates the enactment of emergency legislation. These provisions remained in the shade for a long period since their enactment after the fall of the military dictatorship in the mid-70s; they gained attention in recent times, at first, during the period of the acute financial crisis after 2009 and more recently, during the era of the covid-19 pandemic.

Emergency legislation outside the legal limits of the Constitution is unthinkable for the Greek legal system: It reminds of unconstitutional practices exercised in the past mainly by authoritarian governments and is not compatible with the rigid character of the written Constitution. As it has been observed: (P.Prikramenos, Theoria kai Praxi Dioikitikou Dikaiou 2012, p. 97 et seq., 99), "*the law of necessity does not delegate powers nor does it extend the powers already delegated and cannot alter the limits imposed on the exercise of power (…)*"
(….).

1. State of siege

According to the provisions of Article 48 par.1 of the Constitution, in case of war or mobilization due to external dangers or an imminent threat against national security, as well as in case of an armed coup aiming to overthrow the democratic regime, the Parliament, issuing a resolution upon a proposal of the Cabinet, puts into effect throughout the State, or in parts thereof the law on the state of siege, establishes extraordinary courts and suspends the force of enumerated constitutional provisions on fundamental rights and liberties such as the freedom of association, the freedom of the press or habeas corpus.

As is obvious from the wording of this Article, the circumstances for activating a state of siege are extremely extraordinary; they are of an existential nature for the State or the Constitution. Therefore, the state of siege is understood only as an ultimum refugium (G. Karavokyris…., in: https://verfassungsblog.de/the-coronavirus-crisis-law-in-greece-a-constitutional-matter-of-life-and-death/) designed to apply only in extreme situations as enumerated in said article.

Since the enactment of the Constitution, the provisions of Article 48 were never resorted to. Moreover, in recent times it was observed that the eventuality of conditions justifying a decision to put into effect the state of siege seems to be highly improbable [Sp. Vlachopoulos, in An.-I.Metaxas, The law of necessity, p. 25 et seq. (27)].

2. Emergency legislation ("atypical" state of emergency)

Crises other than those that trigger a state of siege may be addressed through emergency legislation, which is enacted according to the provisions of Article 44 paragraph 1 of the Constitution. More specifically, Article 44 paragraph 1 authorizes the executive "*under extraordinary circumstances of an urgent and unforeseeable need" to issue the so-called "acts of legislative content*".

According to organic criteria, the latter are acts of the administration. Nevertheless, they have the legal value of parliamentary legislation and are considered equivalent to such. Therefore, acts of legislative content may abrogate or amend statutory provisions enacted according to ordinary legislative procedures and are not subject to petitions for annulment before the Council of the State, contrary to what generally applies to administrative acts. Acts of legislative content may include rules on any subject matter – no thematic restrictions apply under the condition however that they do not violate substantial rules of the Constitution and mainly fundamental rights and principles.

According to settled case-law judicial review as to the occurrence of the "extraordinary circumstances of an urgent and unforeseeable need" does not apply: The decision on the occurrence of such circumstances is linked to the assessment of the necessity conditions. Such assessment falls within the sphere of political responsibility of the authorities that according to the Constitution in case of need carry out the legislative work (Council of the State Plen. 3636/1989, 1250/2003, 2567/2015) and is therefore excluded from judicial scrutiny.

Acts of legislative content are immediately enforceable, subject to *ex post* ratification by the Parliament within predefined deadlines (40 days for the submission to the Parliament and 3 months for their ratification by the Parliament). In the case of ratification, acts of legislative content acquire the status of ordinary parliamentary laws. If they are not submitted to Parliament or if they are not ratified by the Parliament timely, they lose their validity for the future (*ex nunc*); however, their prior implementation cannot be contested for this reason.

II. EMERGENCY LEGISLATION IN RECENT PERIODS OF CRISIS

A. During the sovereign debt crisis

It is common knowledge that in order to overcome the sovereign debt crisis that broke out in 2009 Greece requested financial assistance in the form of successive bailouts. During the decade of 2010, the country was submitted to three consecutive economic adjustment programs and for such purpose, signed three Memoranda of Understanding ('MoUs') with its creditors (EC/ECB/IMF -the so-called "Troika" and the ESM) in exchange for loans. All loan agreements were conditional on the implementation of structural reforms and austerity measures. In order to implement such measures, for many reasons such as avoiding political costs, ensuring immediate application of unpopular decisions (e.g. salaries and pension cuts, new taxes and increase of existing tax rates etc.), the Government resorted repeatedly to emergency legislative procedures. The same practice was followed even in cases where the conditions laid down in Article 44 par. 1 of the Constitution were not satisfied. Emergency legislation "*became the norm rather than the exception*" (A. Tsiftsoglou, Greece after the Memoranda: A Constitutional Retrospective, Hellenic Observatory Discussion Papers on Greece and Southeast Europe, paper No. 132, p. 5, available online on: https://econpapers.repec.org/paper/helgreese/), a factual situation difficult to conciliate with the institutional balance foreseen by the Constitution.

During the memoranda era, the number of acts of legislative content increased fivefold mainly after 2015. The provisions of Article 44 paragraph 1 of the Constitution were often circumvented, permitting the executive to bypass the parliamentary procedures of debate which were considered "lengthy". In many cases "emergency" was only a pretext, aiming to facilitate the implementation of unpopular measures, even beyond commitments made under the memoranda. This way, exceptional procedures of law making expanded and became the norm. This situation seriously distorted the Parliament's role within the separation of powers system. Scholars observed the necessity to restore checks and balances to combat *the establishment of a majoritarian parliamentary system that undermines state institutions and the eventually the constitutional order itself in the long run* (id….).

All the above practices remained within the context of the existing provisions of Article 44 par. 1 of the Constitution and without requiring recourse to any extra-constitutional idea of necessity. There were attempts to achieve the revival of the clause salus populi suprema lex esto, which would permit deviations from constitutionally predefined tools to address the financial crisis that jeopardized the economic survival of the state; however, such attempts remained unsuccessful.

The expansion of emergency legislation, often referred to also as "fast-track" legislation was facilitated by the absence of appropriate control mechanisms, since, as mentioned above courts are not considered competent to exercise control on the occurrence of the exceptional circumstances that justify the time-limited transfer of decision-making powers from the legislative to the executive branch.

B. During the pandemic

At the outbreak of the pandemic in 2020 Greece had just started to return to normalcy. The notion of crisis evaded everyday life and politics in an abrupt way, as has happened almost everywhere on the planet, creating the necessity to adopt, without delay, protective measures to ensure human life and health.

Throughout the pandemic and despite the extreme conditions of uncertainty and risk, nobody argued in a systematically founded manner the necessity to utilize the rules of Article 48 para. 1 of the Constitution on the state of siege. In addition, the country continued, always to be bound by the provisions of the ECHR and its acts were subject to review by the ECtHR.

Severe restrictive measures were adopted, as recommended by the international scientific community, and depending on epidemiological data and technical scientific estimates aiming at controlling the pandemic. Fundamental rights and liberties and especially the freedom of movement and all rights the exercise of which involves physical movement and interaction (such as freedom of assembly) have been systematically and severely restricted, with the sole purpose to protect the individual (article 5 (5) of the Constitution) and the social right (article 21 (3) of the Constitution) to health. Apparently, such restrictions of fundamental rights do not equal suspension, since the related decisions were always subject to judicial scrutiny according to the principle of proportionality and access to justice to control public decisions was never compromised.

In parallel, the Parliament remained operational (with restrictions as regards physical presence during acute phases). Suspension of the Parliament was considered not only unnecessary, but also potentially dangerous. The involvement of the Parliament in crisis management constitutes a fundamental guarantee of the rule of law and of the liberal democracy.

From the point of view of modalities, during the period of the pandemic, consecutive Acts of legislative content under Article 44 para. 1 of the Constitution were once again adopted, thus substituting ordinary legislative procedures. Over a 2 years period we can identify 10 Acts of legislative content. All these acts were submitted to the Parliament for ratification and have been ratified in a duly manner. All acts of legislative content issued during the pandemic period included legislative delegations, assigning the executive branch the responsibility to issue general regulatory decisions (mainly ministerial decisions) by which the predefined restrictive measures were applied in specific cases, as required to address the actual situation of the pandemic at any given time. According to the data of the official database on urgent regulatory measures (https://www.secdigital.gov.gr/project/pandektis-katepeigonton-rythmistikon-m/) during the period dating from 25.02.2020 (the date of issuance of the 1st act of legislative content aiming to address the pandemic) to 01.04.2022 about 1800 pieces of pandemic related legislation were issued.

Legal theory questioned the practice to grant legislative delegation by means of acts of legislative content, since Article 43 of the Constitution presupposes a parliamentary law for such purpose. In addition, acts of legislative content are designed to efficiently handle urgent situations – a purpose that is difficult to reconcile with the institution of legislative delegation, which per definitionem requires time. However, this issue was not considered of major importance.
Apart from the above, during the same period hundreds of circulars issued by the administration complemented the legal framework. Circulars do not belong to the sources of law but are solely interpretative texts deemed necessary for ensuring uniform application of existing rules and have no legal binding force. In the official record of the database on the Urgent Regulatory Measures, the list of the circulars issued within the pandemic period alone takes up some 50 pages.
Similar practices have an enormous impact on the institutional balance as a result of shifting the center of decision-making from the legislature to the executive branch. Considering that the constitution and the standing orders of the parliament provide for procedures of urgency permitting to legislate in a prompt manner, the necessity to bypass parliamentary procedures is not always self-evident, even in crisis.

III. JUDICIAL REVIEW OF APPLICABLE RESTRICTIVE MEASURES

The main instrument of counterbalance at all times of crisis remained the review of the constitutionality of the restrictive measures as was applied by the Courts and particularly by the country's Supreme Courts.

Throughout the financial crisis period, all austerity measures have undergone judicial scrutiny for compliance with the constitutional provisions on the protection of fundamental rights and liberties. However, case law was criticized to be "asymmetric" (Tsiftsoglou and Koutnatzis 2017), since it proved quite difficult to identify common ground for evaluating the constitutional problems that arose. Systemic factors, such as the absence of a constitutional court, unlike the majority of other European countries, were considered of crucial importance for explaining the fragmented way that different austerity measures have been assessed by the courts. In general, the so-called (financial) crisis jurisprudence may be categorized in two periods of time: In relation to the first Memorandum, the emphasis was placed on the need for fiscal salvation of the state, which justified unprecedented severe measures mainly in relation to social policy issues and wages. At a later stage, after 2014, the situation changed, as the fear of a financial collapse of the state subsided. In this way, the Council of the State, i.e.,, the supreme administrative court of Greece, ruled that pension cuts imposed by the second memorandum, as well as cuts of the salaries of police and armed forces and university professors, but also the decision to fully privatize the Athens Water Supply Public Company, etc. are not compatible with constitutional guarantees.

The constitutionality of measures adopted during the pandemic has also been challenged, however without success until now. For example, Council of the State Ruling No 1758/2021 confirmed the constitutionality of the ministerial decision applying the obligatory measure of self-tests to pupils and school teachers and staff after the reopening of schools, taking into account the necessity to ensure protection of life and health as required by the constitution, the minor dangers that the application of self-tests entails, the justification of the decision of the State following respective recommendations by the competent scientific committee and considering the epidemiological data and the possibility to periodically review the necessity of the measures imposed. Similarly, Ruling No. 1386/2021 of the Court rejected objections of unconstitutionality regarding the ministerial decision obliging civil servants to apply self-tests in order to be permitted to work with physical presence. Ruling No. 671/2021 confirmed the constitutionality of the application of the measure of temporary deprivation of the free use and enjoyment of property owing to special circumstances according to Art. 18 par. 5 of the constitution, for the sake of the establishment of migrant accommodation structures on border islands during the pandemic. All petitions for temporary remedies regarding restrictive measures in the operation of churches were rejected.

IV. BRIEF ASSESSMENT

Concluding the preceding analysis, one can observe that in both recent periods of crisis, the constitutional provisions on the state of siege were never exercised in Greece. In thise sense, there was no apparent breach in the operation of the state institutions, despite the difficult situations that had to be dealt with. On the other hand, the issues raised by the implementation of extensive restrictions on fundamental rights and of practices of emergency legislation may be summarized as follows:

(a) In terms of the substance of the state's decisions on crisis management, a key problem is the delimitation of the restrictions of fundamental rights and liberties at stake. In this context, the principle of proportionality, i.e., the test of the appropriateness and necessity of measures to achieve the predetermined legitimate goal as well as the appropriate balancing of conflicting interests, is the main consideration. However, proportionality presupposes weighing (balancing) and therefore uncertainty as to the outcome. Under exceptional circumstances and depending on the seriousness of the risks faced, the balancing of the goods in jeopardy seems to change. As the study of the Greek "crisis case law" depicts, in such cases greater and more far-reaching restrictions on certain fundamental rights may be justified by contrast to what is tolerated under normal conditions. For example, the need for immediate access to medical supplies may take precedence over economic freedom, the protection of free competition and equal treatment. However, when the crisis is prolonged over time, the initially justified tolerance is eroded. This has been evident in the case law of the Greek courts from 2014 onwards. Any crisis cannot last forever and, in any case, its impact on the balance of the goods at stake cannot be constant over time. This means that factual circumstances are inevitably considered in the context of the proportionality test. Moreover, certain goods, such as life and health, are clearly given greater weight in the balancing exercise in any given situation, even though in principle all fundamental rights have equal normative value. On the other hand, cuts in pensions and wages and taxes are imposed more easily, for the sake of the country's fiscal salvation, but with the limit of respecting human dignity. These conclusions emerge eloquently from the judicial decisions issued during the financial crisis and consequently during the pandemic. But if this is the case, there is a considerable degree of uncertainty as to the constitutionally acceptable options. The only way to counterbalance this uncertainty is the thorough substantiation of judicial decisions that are publicly pronounced, as stipulated in article 93 par. 3 of the Constitution.

(b) In terms of technical crisis management, the tool of emergency legislation provided for in Article 44 para 1 of the Constitution has been systematically used to deal with situations that deviate significantly from the normal course of events and give rise to unprecedented problems on a large scale. However, "acts of legislative content" have been designed by the constitutional legislature with the purpose of ensuring the continuity of the state and the effectiveness of its action. They are thus, per definitionem an extraordinary tool for managing crisis situations, which is utilized when the normal parliamentary procedure is for some reason insufficient. The purpose is to respond immediately and efficiently to sudden events, as is evident from the wording of the relevant provisions. The Constitution does not explicitly impose any time or other (e.g., numerical) restrictions on the adoption of acts of legislative content, other than the limits for their submission to Parliament and for ex post ratification. This is reasonable, as it cannot be predicted a priori how a crisis may unfold and what characteristics it may have. However, when the institutions of emergency legislation are systematically used over time, as has happened for example in the case of the fiscal crisis in Greece, the question arises whether that practice de facto creates an informal, undeclared "State of Emergency", which even if it does not obviously violate the Constitution, leads to a circumvention of the basic logic of the relevant rules. And circumvention cannot be tolerated by legal order. The Greek system of organizing judicial review of constitutionality by design so far does not allow the exercise of control of a similar practice: The Courts focus on specific acts of the executive, outside the general picture, and firmly recognize the purely political character of the decisions to mobilize the institution of the acts of legislative content, excluding from the object of judicial review the conditions for activating Article 44. The absence of a constitutional court in Greece as an institutional counterweight to ensure the required balance through judicial review is apparent at this point.

(c) Finally, the question arises as to whether the existing instruments of judicial review of the acts of the executive provide possibilities for delimiting practices that do not seem to be in line with the choices of the constitutional legislator, such as the repeated use of acts of legislative content or the granting of legislative delegation to adopt regulatory acts of the administration through such acts. In such circumstances, negative judicial review could be applied in a marginal manner: If it is established that the conditions of Article 44 are manifestly not satisfied, then we are faced with a situation of circumvention and thus a violation of the Constitution to which the Judiciary cannot turn a blind eye. It could be argued that this is not an important issue, as long as acts of legislative content are subsequently ratified by the Parliament and politically the government and the parliamentary majority usually coincide. However, the involvement of Parliament in the fate of an act of legislative content may be quite remote in time, while legal effects have already been produced by a procedure that may ultimately prove to be inconsistent with the Constitution. In any case, the parliamentary process is matched by public debate and, by extension, by the requirements of political accountability, as required by the democratic principle.

To summarize, under all the above versions, it seems that the judiciary, as a basic institution of liberal legitimacy, concentrates attention and hope for guarantying respect of fundamental rights. But respect for the institutions of democracy is primarily a matter for the People, who assign political responsibility, as well as for the representatives of the People acting within the parliament. In this sense, judicial review is of limited importance if the people tolerate the systematic application of emergency practices by the executive. On the other hand, in extreme cases where legitimate limits are exceeded, judicial review is also capable of arousing reactions of the people.

With the looming energy crisis, which is expected to tip the balance for the entire European Union economy next winter, experience acquired through managing successive crises may be useful.

WHAT 'S NEW? WHAT LESSON TO LEARN?

PAR INES CIOLLI

1. DEMOCRACY AND EMERGENCY POWER

It would be better to wonder at the beginning of the discussion if it is correct to speak today about crisis and if this one is responsible for the changes that occurred in Constitutional law. In other words, I have wondered whether the emergency and new order of political powers could be explained through the emergency and crisis.

The most part of the transformations on law and widely on constitutional law and its system of sources come from so far away. If the last crisis was economic one, and the globalization was largely responsible for the crisis of the domestic sources, now the pandemic changes the perspective because this crisis is old and well knew, because in the past pandemic are diffused. But constitutional law was different in the past: the extreme interconnection between the Countries all over the word and especially European ones, changes the perspective. It is clear for example that crisis asks for a great flexibility and promote a soft law.

But what we intend for "crisis"? This word is used in a generic way, and we have forgotten that it derives from the Greek word: «κρινω», that means « change», or «passage between two different situations». In the XX century different moments of crisis occurred: starting with the Big Crash in 1929, and some other periods of crisis market by a deep transformation of Law and State. This process also invested sources of law. Crisis calls into question the principles of constitutionalism, especially the protection of political minorities in the majority systems, parliamentary competences those could be restraints, parliamentary representation could be set aside.

The impact of this tendency is impressive. In this field, we will put in evidence the effect of the emergency on European constitutional law and on the Member State law.

The crisis showed the limits of the contemporary constitutionalism and its way of making laws. Crisis has unveiled the fragility of EU model and of its regulation, but also the weakness of contemporary democracies, which are no longer able to give priority to the will of parliament and its representatives.

In 1973, Habermas had already spoken about crisis and had identified the origin and causes in late capitalism: "Crisis suggests the notion of an objective power depriving a subject of part of its normal sovereignty. If we interpret a process as a crisis, we are tacitly giving 17 it a normative meaning. When the crisis is resolved, the trapped subject is liberated" . Although Habermas said this crisis could be temporary, it is cyclic. Marx conceived crisis as a ridden process of economic growth excluded.

Analysis of Habermas is still useful and acute about interpreting crisis through Marx's theory, but today there are new several factors that modify the framework. The philosopher of Frankfurt school remembered that: "The State regulates the overall economic cycle by means of global planning. On the other hand, it also There is not much time for parliamentary Committees' discussion and for the approval of Parliament. It gradually loses importance and Governments with its Decrees often substitute it42. Decrees-laws are not used because they ensure quick time, because since the parliamentary passage is rather too fast and the timing of the discussion are now very restricted by the same parliamentary rules. The reason is the involvement of executive power and the strict parliamentary majority in the sensitive decision and especially in the reforms. It means that during the crisis Decree-Laws and government sources have undergone a qualitative evolution that has got worse a malfunctioning of parliamentary democracy. This trend has been maintained during the last legislature imposed the conditions for utilizing capital.

Cyclic crisis could be justified both a use of permanent emergency instruments and the economy's ability to intrude in politics and in the law using emergency sources. These ones meet lower limits and lower legal guarantees comparing with ordinary rules.

Even after the attack on the Twin Towers in the United States, when some constitutional guarantees were suspended, is for a limited period and for limited rights.

Evoking the emergency means to adopt a lot of regulatory emergency instruments to use in different fields. It may use exceptional rules ; It may use exceptional rules as suggest Oren Gross or it may be admitted legislative accommodation, that Gross explains how this model works. It may be divided in two distinct models: ordinary legislation and special emergency legislation. In both cases it is an ordinary legislative power that adopt legislation directly or indirectly empowering the executive power, or even the interpretative accommodation. It may involve arbitrary or discretionary authority, the use of unusual sources or ordinary sources but with emergency purposes, it may be admitted a strong activity of judges and Courts intent to interpret the sources in conformity with the crisis. Having a wiggle room to accommodate emergency within the framework of the existing legal system it is part of the role of judges, but during the emergency period the usual flexibility of the rules could be so distorted as to create new rules completely different from those that the legislative power had created and judiciary should not get replace Parliament. Times of crisis often require emergency powers and they represent the greatest and the most danger for constitutional freedoms and principles.

2. THE RECENT USE OF EMERGENCY SOURCES

Crisis evokes a state of emergency. It implies a restriction of some constitutional guarantees and the use of emergency instruments. In times of crisis democracy and popular participation are questioned and often are hampered by fast solutions that should not be wasting time with shared decisions. In others words, although a Constitution could be democratic but not deliberative, but in the most recent cases deliberation is only a technique to approve amendments of Constitution without legitimacy, therefore procedures of revision of Constitution or vote of citizens cannot be discussed enough, or, better, we have only the moment of voting but the phases of arguing and bargaining have cancelled as well as there being a lack of recognizing and settlement of the conflict through discussion and deliberation. This behavior is both the cause and the consequence of a lack of political choices, which "to be legitimate must be the outcome of deliberation about ends among free, equal and rational agents". During the crisis democracy decisions must be shared more than in other periods otherwise the penalty is a progressive loss of political and legal legitimacy of rules. When decisions are not taken by representative powers but by technocracy or financial markets, democracy suffers as well as popular sovereignty. It does not mean to prefer a plebiscitary decision instead a representative democracy but to recognize that the decisions taken only by the Executive power constitute a wound in the sovereignty because making decisions is not the same as having political choices.

This is the case of most recent constitutional reforms that are simply imposed by financial markets. Reactions of Constitutions and their degree of the adaptability to new financial dictates have been different and proportionate to the different forms of the government and of the structures of political system and political parties. In Italy the loss of any resistance to the political system and an absence of long-term political strategies has allowed some very large amendments to the text of the Constitution, as well as an implicit and silent adaptation to the crisis through the instrument of the interpretation accommodation of the Constitution. Overcoming the crisis through a model of interpretative accommodation has been used in Italy especially by Constitutional court and sometimes by political system. During this recent crisis, Constitutional court have defended principles and values from emergency. It has interpreted Constitution in a different way: in the struggle between rights and resources available to enforce them sometimes rights have won sometimes the reasons of the crisis prevailed.

Some scholars argue that the Constitution we are seeing a distortion of the functions of the constitutional bodies, which are called to play a role different from that which the Constitution assigned them. The interpretative accommodation as a method to respond to the pandemic crisis allows the judiciary to take the place of the legislative and political power. In this way the judges take on a discretionary function that does not belong to them and overexpose and delegitimize them.

It is true that Italian Constitution have been respected because the use of emergency source was limited to the decree law and government is the constitutional body that is created for emergency power.

When an ordinary source disciplines the effects of the crisis, we have as result a kind of normalization of the state of emergency and its extension with no time limit. The goal of these measures is to justify the need of faster procedures. They give the impression of looking like the markets that are rapid and ever changing, while the essence of the constitutional law is to impose general and abstract rules, which limit any power, even the economic one, and that requires durability and long-term solutions.

We are witnessing a centralization of political decisions (and power) in the Government and to a lesser involvement of Parliaments: it means less Act of the Parliament and more Decrees-laws. Another consequence of this requirement of faster procedures is a sort of "undifferentiated primary normative power, free for limitations and procedures, and which can assume the form of most suitable, or appropriate to individual decisions" (Decree-laws, Legislative Decrees).

In times of crisis even the role of Parliament has been changed. There is not much time for parliamentary Committees discussion and for the approval of Parliament. It is interesting to remark that Italian Parliament refuse to adopt online meetings in time of pandemic because it would remark the importance of physical commission and the importance of the debate in parliamentary chamber.

But it is also true that Parliament gradually loses importance and Governments with its Decrees often substitute it. Decrees-laws are not used because they ensure quick time, because since the parliamentary passage is rather too fast and the timing of the discussion are now very restricted by the same parliamentary rules. The reason is the involvement of executive power and the strict parliamentary majority in the sensitive decision and especially in the reforms. It means that during the crisis Decree-Laws and government sources have undergone a qualitative evolution that has got worse a malfunctioning of parliamentary democracy. This trend has been maintained during the last legislature.

3. THE DEMOCRACY OF EMERGENCY AND THE PRINCIPAL ROLE OF EXECUTIVE POWER

The centralization of power in the Executive has been constantly talked about in recent decades as a growing and now an inescapable phenomenon. Many scholars have pointed out that this trend is taking place in most contemporary democracies and that the causes of this phenomenon are multiple and can be traced to several, often concomitant factors: the weakness of parliaments, the cyclical recurrence of crises and emergencies, and the emergence and dominance of technology over politics. Each of the hypotheses mentioned has found practical and theoretical confirmation and has been extensively documented; yet an ultimate cause that encompasses them all seems not yet to have been traced. It can be hypothesized that it lies in the very conformation of Executive power, which is elastic, fluid and not easily circumscribed, and thus more apt to take on new powers and activities and transform old functions according to the most current needs. Evidence for this might be the absence of even an unambiguous definition of Executive power. Indeed, the doctrine has not sufficiently measured itself with at least a minimal identification of the scope of competence of the Executive power and the Government.

Locke himself had devoted more attention to the problem, focused mainly on the separation of legislative and executive power, and noted how it eluded precise definition.

The absence of the latter was also due to the lack of conceptualization of the notion de government and this also had consequences for the division of powers between Executive and Legislative power, which was entirely imprecise as far as the former was concerned.

In a picture with such hazy contours, it is also difficult to trace the contours of the transformation of Executive power and to identify the exact moment when it manifested itself as a pouvoir gouvernant, far from the "concept-fossil" that relegated it to a cursory description of a power totally assertive vis-à-vis legislative power. Maurice Hauriou had already criticized that interpretation, tracing in that very activity of executing the will of popular (parliamentary) sovereignty nevertheless an autonomous power, which intervenes in all the functions of the state, and which cannot translate into a mere subordination to the legislative power. Quite the contrary of what Carré de Malberg had affirmed, who had considered the Executive as an ancillary power vis-à-vis the legislative power, which could therefore occupy only a narrow space of autonomy from the latter, given the centrality of the law. Even Michel Troper more recently agreed that the function of government does not resolve itself into a slavish execution of the will of other powers. The fluid structure of such power is instrumental to a multifaceted activity, capable of adapting to different historical moments.

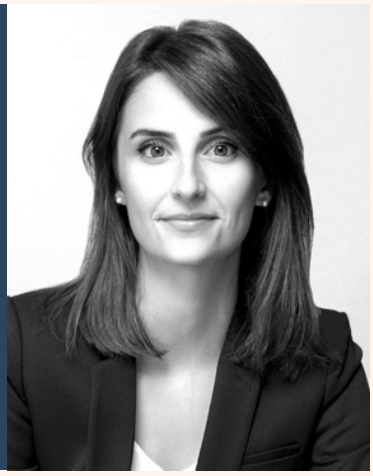
This thesis recently has also been shared by two Anglo-Saxon scholars, Paul Craig and Adam Tomkins, who are credited with attempting to more precisely define such power, which they consider "(the) political power that all those who embark on a career in politics dream of wielding. It is the power to set policy, to act, and to implement the law. In the great theory of the separation of power (...) the preserve of the executive is to do. While the role of the legislative is to speak and that of the judiciary is to judge, government acts». The shift from to do to act is also evidenced by the extension of the functions entrusted to the executive, which can be summarized in four basic points: "(1) setting legislative priorities; (2) implementing policy and legislation; (3) conducting foreign policy and defense, and (4) structuring and allocating the public budget". The two authors, however, are aware of the non-exhaustive nature of the enunciation of the enumeration, which cannot summarize either the countless submerged powers of the executive power or its ability to expand and permeate other functions.

This laconicism, coupled with an obvious polysemy of the term Executive, also responds to the need not to frame it in a strict scheme, given its multifaceted nature, which underlies the expansion of its role; in other words, its pliability is also the key to its success, since it allows for a capacity of adaptation and rapidity of response that other constitutional bodies cannot guarantee.

Since political parties have gradually lost their ability to permeate the form of government and to perform a policy-directing function above the form of government and the dynamics between constitutional bodies, the executive function, capable of evolving more rapidly, has emerged in contemporary constitutional systems with particular emphasis. No longer only in the presence of special conditions such as wars and emergencies, but in normal constitutional activity, which is why we speak of a broad, inclusive, and all-encompassing definition of "government function," corresponding to its degree of expansion. What is certain is that in the pandemic everywhere in the world, fluid and changing executive power has predominated over parliaments.

Legitimising Normative Action of Public Authorities in Times of Crisis: A Comparative Law Study

PAR CHLOË GEYNET-DUSSAUZE



Today, as we have been saying since the beginning of this week, crises are multiplying and affecting almost all areas: in ten years we have gone through economic, terrorist, health, financial, migratory, and environmental crises.

Given the scale and duration of these events, the very use of the term "crisis" can be questioned. Used as a collective singular, its use has become widespread to describe often very different sectoral realities. From the Latin crisis, this term comes from medical vocabulary where it originally covers a double dimension.

According to the first dimension, it describes the paroxysmal moment of an illness which, by definition, is exceptional and occurs during a limited period. However, for most of the events mentioned, these are precisely and conversely marked by a duration that is prolonged, at the risk of becoming permanent states.

According to the second dimension, this term implies a necessary denouement; an exit from the crisis. Politicians are then placed in the situation of a doctor facing his patient: they have to observe the signs, take quick decisions and choose a treatment to prevent the death of political systems. However, despite the increasing number of reflections in favour of healing the system and the problems that have arisen, the way out of the crisis is not apparent.

The use of the term crisis therefore seems questionable to describe phenomena which have often become ordinary and which, in many cases, are long-term. What is certain is that this discourse on crisis is mobilised as soon as there is an upheaval between the old and the new state and that this upheaval makes it necessary to set up specific rules. For the past 20 years, this crisis discourse has been recurrent, to the extent that between November 2015 and November 2021, France lived 44 out of 72 months in a state of emergency regime due to the fight against terrorism and the fight against the pandemic[1].

The triggering of the crisis discourse requires rapid normative action by the public authorities. Because this normative action takes place in an emergency and has sometimes very important consequences on the exercise of public freedoms, it appears necessary for the public authorities to legitimise it.

Indeed, the normative action of public authorities in times of crisis must be legitimised in the eyes of citizens. It is therefore not so much a question here of looking for ways of legitimising the use of discourse on the crisis as of analysing the ways in which the normative action of public authorities is legitimised. In this context, what are the means by which public authorities can legitimise their normative action?

[1] S. Hennette Vauchez, La démocratie en État d'urgence, Seuil, 2023".

In the light of recent crises and an analysis of the French situation and several of its European neighbours, it seems that the current trend allows for two ways of legitimising this normative action.

Firstly, it may appear necessary to have a specific emergency law adopted by Parliament to authorise the Government to take all the necessary normative measures. In other words, there is a search for institutional legitimacy: the national representation must give its agreement. As if the agreement of the people's or the nation's representatives covered, legitimised, all the normative measures adopted.

Secondly, the current crises show that there is an increasing search for extra-institutional legitimacy, which is manifested by the use of expertise. The public authorities rely on experts, who would make their normative action totally legitimate and above all, as we shall see, unquestionable[2].

I.THE QUEST FOR INSTITUTIONAL LEGITIMACY: THE USE OF PARLIAMENTARY MEANS IN THE FACE OF THE URGENCY OF THE CRISIS

The aim here is to highlight a paradox that is frequently found in several countries in times of crisis: in this type of context, the executive chooses to legitimise the use of exceptional and specific rules by asking Parliament, the representative of the Nation, to adopt a law that authorises it to do so (A). Secondly, and paradoxically, the executive tends to bypass the parliament for the concrete management of the crisis and legitimises this bypassing by the argument of urgency, as if the parliament were incapable of moving quickly (B).

A.The adoption of a specific law on crisis management: the agreement of the national representation

Because managing a crisis implies infringing on the exercise of fundamental rights and freedoms, it appears necessary, or even essential, in certain cases and in certain countries, to refer to the national representation. In parliamentary democracies, the executive is therefore often directly authorised by the people's representativesto infringe these rights and freedoms.

In the United States, after the World Trade Center attacks in 2001, the House of Representatives and then the Senate overwhelmingly adopted the USA PATRIOT Act. Although discussions within Congress itself were particularly limited, the adoption of this arsenal of anti-terrorist measures appears to be legitimate, since it contains an authorisation by the people's representatives. The USA PATRIOT Act legitimately gives the American authorities the means to carry out the fight against terrorism on a global scale, and authorises the proliferation of liberticidal normative means.

To take a more recent example, that of the health crisis, most States chose, in the first instance, to adopt exceptional legislation. While some - such as Italy and Spain - declared a state of emergency' or a 'state of alert' already provided for in their legislative arsenal, others considered it more appropriate to establish a new state of exception. In the United Kingdom, for example, while the Westminster Parliament could have had recourse to two existing texts (the Public Health (Control of Disease) Act of 1984 and the Civil Contingencies Act of 2004), it preferred to establish a new legal framework by adopting the Coronavirus Act, which allows the Government to take all the measures necessary to manage the health crisis.

[2] This work was inspired by the following works:
M. Cuono, "Crise de légitimité ou légitimation par les crises? États d'urgence, d'exception et de nécessité", SPC, 2016.
R. Wodak, "Légitimer la gestion de crise pendant la covid-19", Argumentatione et analyse du discours, 2022.
J. Chevallier, "Le rôle des experts dans la prise de décision publique : confiscation de la décision ou instrumentalisation de l'expertise ?", L'abandon du projet d'aéroport Notre-Dame-Des-Landes. Quels enseignements ? 2021, 978-2-7535-8157-9.

In France, while the first measures to combat the pandemic were based on the Public Health Code, the Government quickly wanted to introduce a new state of exception, the "state of health emergency", in order to respond to "crises of exceptional severity and scale". This state of health emergency was voted by Parliament and enshrined in the law of March 23, 2020. The explanatory memorandum to the emergency bill states that the aim is to 'develop the means available to the executive authorities to deal with emergencies'. This gives real prevalence to government decisions. Once endowed with such powers, the executive authorities then increase their use of delegated legislation.

These examples show that parliament is mobilised to legitimise the transition from a normal state to a state of emergency, with all that this implies in terms of infringement of freedoms. The entire normative action then necessarily appears legitimate, insofar as the individuals designated to represent the people themselves empower the executive to take all the necessary actions to fight against the evil at the origin of the crisis. There is therefore a legitimacy ab initio which is intended to apply to all acts adopted during a crisis. This ab initio legitimacy is valid ad aeternam, even though Parliament is relieved of further crisis management.

Indeed, paradoxically, this initial legitimacy seems to cover all measures. Following this step, the Parliament is strongly divested of the normative action in relation to crisis management.

B. Bypassing parliament in the management of the crisis: the argument of speed

Why seek institutional legitimacy and then dispense with it? The answer is always the same: there is an emergency and Parliament is too slow. Urgency and parliament do not mix. Governments seek the prior agreement of Parliament and then act as they wish, under (sometimes very little) parliamentary control. Obviously, in an absolute emergency, parliamentary mechanisms do not necessarily seem adequate. But the question is especially problematic when these exceptional states last and therefore the laws adopted on this occasion remain in force in the national legal order. To take the example of the Patriot Act, this law is in fact only the first wave of the anti-terrorist response triggered by the attacks. The second wave, authorised by this law, is much less well known, more diffuse, made up of a multiplicity of programmes, regulations and funding decisions, all of which are means by which the Bush administration has endeavoured to build and impose an incredible security apparatus on the country.

Moreover, this logic of opposing Parliament and emergency has even been integrated by the parliamentarians themselves and, in France, even by the constitutional judge. Indeed, in March 2020, the organic emergency law addressing the covid-19 epidemic was adopted in violation of Article 46 of the Constitution, which imposed a minimum period of fifteen days between the tabling of the text and the opening of its discussion in the first assembly to which it was referred. Subsequently, the French constitutional judge, the Constitutional Council, refused to sanction the failure to comply with this time-table, stating that, 'given the particular circumstances of the case, there was no reason to consider that this organic law had been adopted in violation of the procedural rules laid down in Article 46 of the Constitution'.

Moreover, beyond a form of legislative resignation by parliamentarians, we must also mention the proliferation of short circuits in parliament, with many decisions being taken by committees appointed and convened at the discretion of the executive in many countries.

While the discourse on crisis is difficult to capture in law, the fact that it is constantly referred to says a lot about the evolution of the mechanisms of government and the principles of legitimisation of political decisions in contemporary times. The crisis has thus become a normal argument for legitimising power, against the backdrop of a social imaginary in which immediacy and instantaneity dominate. In this way, the traditional mechanisms of society, including Parliament, also seem to be in crisis, because they are unable to sustain intense social rhythms, which are at the origin of ever new crises, linked to the impossibility of governing normally economic, political and social realities in constant and rapid evolution.

But what is the consequence? Apart from the acceleration of decisions and the derogations from the guarantees of the rule of law, what disappears in the face of necessity is first of all politics as a mechanism of confrontation and compromise, as a space for deliberation and exchange, but above all as a space where different options are equally legitimate. The choice is simplified by the conviction that there is only one possible answer to public and political problems, or rather only one true answer to what is no longer a problem but a dilemma.
And it is precisely because those in power are looking for the only true answer that they are also increasingly deciding to rely on expert knowledge. This is the second stage of the analysis, relating to the search for extra-institutional legitimacy.

II. EXTRA-INSTITUTIONAL LEGITIMACY: THE GROWING USE OF EXPERTISE

When governments feel that their knowledge of pandemics, the environment or national security is relatively limited, they claim that they need to rely on scientific knowledge to legitimise difficult decisions that have direct consequences for human life and the exercise of public freedoms. However, two difficulties will be raised here: first, difficulties relating to the modalities of choosing experts (A) and, second, difficulties relating to the consequences of using experts, in terms of accountability and democratic legitimacy (B).

A.The unknown modalities of the choice of experts

The need to rely on experts is not new and may appear legitimate. The need for expertise was described by Albert Camus, who said that "The democrat is modest. He admits a certain amount of ignorance (...) from this admission, he recognises that he needs to consult others, to complete what he knows with what they know".

Once again, the recent pandemic demonstrates this trend. In this exceptionally serious context, experts have indeed been called upon to play an essential role.

Confronted with increasingly complex and difficult problems, political decision-makers are led to call on experts more and more, experts who have the necessary knowledge to inform their choices: recourse to expertise has become an obligatory exercise, an unavoidable stage in the construction of public action and in political decision-making, if one wants it to appear legitimate. For experts, it is not only a question of producing useful knowledge for the decision-maker, but also of formulating proposals aimed at orienting the direction of decisions: expertise thus acquires a prescriptive dimension, which raises the question of the power it holds over politics. Although, at first sight, the dividing line between expertise and politics remains clear, with the political decision-makers remaining in control of the fate they reserve for the experts' recommendations, practice shows that the division of roles is less clear in reality.

In France, health has always been one of the privileged areas for recourse to expertise. The composition of the cabinets of the ministers responsible for health issues and the personalities of the ministry's senior administrative officials bear witness to the presence of health experts at the very heart of the State apparatus. The circle of expertise has also always been widened by the existence of specialised structures representing the sector, in particular with the establishment of the High Council for Public Health (HCPH), which is responsible for providing the Minister of Health with decision-making assistance by formulating recommendations.

Developments in covid have led to the setting up of a new expertise system. This High Council was indeed mobilised to provide its expertise in this area: it issued, as a matter of urgency, a series of recommendations on measures for preventing and managing the virus. However, in March 2020, the President of the Republic wanted a scientific council to be set up, made up of doctors but also a sociologist and a mathematician, in order to (and I quote) 'enlighten the public decision in the management of the health situation linked to the coronavirus'. According to the Minister of Health, the aim was to 'innovate in the governance of public decision-making', by helping the government 'to form a conviction', by contributing to the management of the crisis being 'based on scientific evidence'.

I believe that Belgium followed the same logic with the establishment of the GEMS (Group of Experts on the Covid-19 Management Strategy), which was responsible for discussing and issuing recommendations on the closure of certain sectors of activity (cultural sector, discotheques, etc.), self-testing and class breakdown mechanisms. Although this group of experts ceased to exist on April 8th, its members were invited to participate in the Strategic Scientific Committee, which is responsible for advising on the pandemic management strategy. So even when the crisis seems to be receding, experts are kept close by, just in case.

Policy-making is therefore based on the public advice and recommendations of these experts, which seems to give it greater legitimacy. In other words, the normative action of the public authorities appears to be necessarily legitimate, since it has, for the most part, been taken or at least strongly inspired by those who 'know'. Recourse to expertise is presented as a means of overcoming difficulties and deadlock situations, by allowing the controversy and issues to be depoliticised.

The question remains, however, on what criteria are the experts selected? It is very difficult to obtain information on this issue and it seems that it is simply a matter of discretionary power for the members of the executive who consider these scientists to be in a position to give advice in view of their recognition in the scientific community. This raises questions: in France, for example, the independence of the scientific council from the pharmaceutical industry has been challenged in several press articles. This is the paradox: if normative action seems more legitimate because it is based on the opinion of scientists, how is the selection of scientists legitimate?

The difficulty also extends beyond this, notably to the shifting of political responsibility, insofar as the responsibility for defining the contours of a solution appears to be de facto delegated by politicians to experts.

B. The risks associated with the increasing use of expertise

First of all, we must ask ourselves: who is responsible? The quest for the legitimacy of normative action in times of crisis seems to obscure an essential question in the political game: who is ultimately responsible for the decision adopted? On several occasions, the French government has boasted that it has taken up the recommendations of the scientific council, whether it be on containment, the postponement of municipal elections (the President of the Republic has never even considered consulting Parliament on this point), the closure of shops or the reopening of schools. There is a kind of clearing of political actors, essentially the executive. They would only follow the advice of the experts and would therefore not really be responsible for the decisions taken. In times of crisis, even more than in normal times, political choices are approached with a logic of rationality that gives the impression that the decision to be taken is ultimately obvious, that it can only go one way. Political choice gives way to scientific evidence.

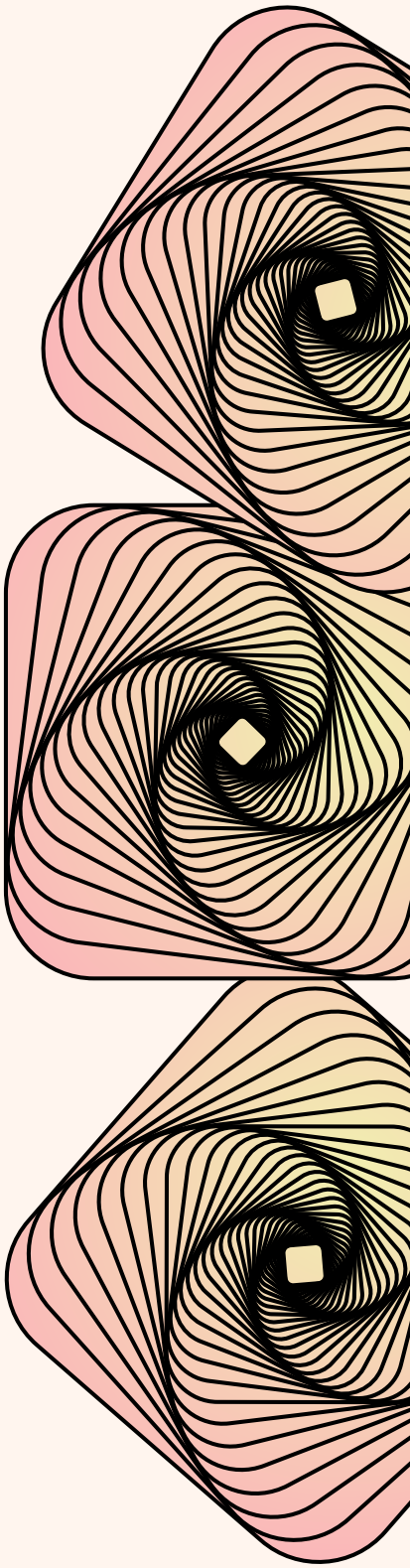
This is why governments sometimes refer to the idea of a dilution of responsibilities or a weakening of the political when they argue for their dependence on experts and specialists in increasingly technical and complex decision-making processes: pleading ignorance and the necessary handover to experts whose competence is required to decide on public health policies, for example, is also a way of (attempting) to avoid possible legal proceedings. It is these strategies - whether they take place in the courts or in strictly political arenas - that the public prosecutor was targeting in the notorious contaminated blood affair: "Who governs?" asks the victim of a social risk. An irresponsible science or a science pretending to be irresponsible? An administration in charge of applying texts that it does not control? Political advisors with an uncertain status, if not non-existent? Politicians who did not know? Who governs if the judge becomes the arbiter of these elusive responsibilities?

Secondly, the other main difficulty lies in the fact that this ever more frequent recourse to experts deprives citizens of the possibility of acting on the decisions that concern them. Feeling less heard by the political elites, less involved in decisions, citizens also feel less invested in political life. The need for expertise is moreover inseparable from a crisis in political representation, as evidenced by the erosion of citizens' confidence in elected politicians: it means that democratic procedures alone are no longer sufficient; the appeal to the skills of specialists has become indispensable to serve as a guarantee for public action, by ensuring its validity and legitimacy. Experts are therefore called upon to exert an ever-stronger hold on the definition of collective choices, at the risk of bending the democratic logic and bringing political systems closer to an epistocracy.

In short in times of crisis, the quest for legitimacy in the normative action of public authorities feeds numerous paradoxes which are perhaps, in the end, only the symptom of a deeper problem, that of a general lack of deliberation in the making of political decisions, not only within the parliamentary arena but also outside it. In the end, the legitimate decision is perhaps not the one that is imposed on everyone - even if it is the result of scholarly reflection - but the one that is discussed by everyone or, at least, by the greatest number, even and maybe especially in times of crisis.

XAVIER MAGNON, ARIANE VIDAL-NAQUET,
THÉO BRILLANTI-DERIEN

JUDICIAL REVIEW OF CRISIS – A COUNTERPOINT READING



The theoretical question and therefore the general question raised by the control of regularity in a state of exception is the following : how can legal regularity be maintained in a situation that derogates from general law, in other words, in a situation that is irregular regarding ordinary law? Respect for regularity thus suffers from the exceptional situation in which it is deployed. This can be seen as a paradox, that of the search for regularity in a system that is itself irregular, in terms that certainly need to be explained.

This general question needs to be treated from three different angles.

First, we will highlight the difficulties occurring in the context of judicially reviewing a state of exception through the general questions raised by such a situation. This theoretical dimension will also have to be tested against the positive law of states of emergency and the control of regularity as practiced by the various competent judges. Thus, in a second stage, it will be a question of investigating how legal provisions, particularly French law, is ruling the way the judicial review of these legal regimes must exist, before systematizing, in a third and final stage, the attitude of judges in such difficult situations. The demonstration will unfold in three stages, from the theoretical dimension (I) to that of positive law (II), to finish with the practice of the judicial review (III). These three stages of the analysis are developing themselves like a symphony played in counterpoint : three points of view, three lines that develop in parallel, each with its own rhythm, its own coherence, but which, read together and superimposed, are not without dissonance.

From a theoretical point of view, the question must be examined from a legal approach to the state of exception, which will be defined as a "normative subdivision of the constitutional order in vigor, with a derogatory mode of production of norms, the norms that may be produced within this framework may intervene without restriction of the area of intervention as long as they fallow the aim that justifies the state of exception, instituted temporarily to respond to a situation that is exceptional in terms of its frequency and dramatic in terms of its intensity, in the name of an imperious superior motive'[1]. This definition first highlights what a state of exception legally is, a normative sub-group that derogates from ordinary law and then the factual and justifying dimensions in which it is deployed (temporary nature, exceptional situation and imperious superior motive).

[1] Xavier Magnon, « Le concept d'état d'exception Une lecture juridique », Revue du droit public et de la science politique en France et à l'étranger, 2021, Numéro spécial : Les États d'exception : un test pour l'État de droit ?, p.11-34.

From a legal point of view, it is necessary to insist on the unfavorable context for the exercise of a satisfactory judicial review within the context of a state of exception, insofar as it is characterized above all by the establishment of a legal order that derogates from ordinary law, developing a system producing legal norms that derogates from ordinary law. To give just one example, in a state of emergency, the protection of constitutional rights is most often no longer determined by the legislature but by the executive branch of government. This derogatory produced law phenomenon potentially concerns all the norms within the legal order, jurisdictional norms included. The state of exception affects all the norms produced by the system, the general and abstract norms (statutory law, other regulations) but also the individual and concrete norms produced to resolve a concrete case by a judge.
From this last point of view, however, it is necessary to specify how the production of jurisdictional norms may be affected by the state of emergency.

This production may be affected both formally and substantially.

Formally, it is possible that certain ways of producing jurisdictional norms are purely and simply closed, if the circumstances lead to purely prohibit certain legal procedures or prevents them from being implemented effectively. For example, the judgement might intervene too late, after the exceptional measures were already fully executed or even after the state of exception finally ceased. It is also conceivable that specific remedies and procedures could be specifically created within the state of exception to ensure a specific form of judicial review which might or not be satisfying regarding the protection of human rights and the sanction of irregular legal norms given the pressure of the circumstances.

Above all, it is in a substantial way that the control seems to be affected, precisely because of the factual and justifying dimensions of the state of exception. It tends to reverse the balance between the extension of powers and the respect of law by those in charge of solving the crisis.

The general question of re-balancing the interests and values because of the state of exception can be summarized as follows: on one side the required respect of the ordinary law and on the other side the increasement of a discretionary power justified by an exceptional situation. In this balance, the respect for lawfulness tends to be sacrificed towards a temporary superiority of the necessity. As seen, the existence of a derogatory regime reflects a renunciation towards the regularity of ordinary law, in particular when the channels of reviewing legal regularity are voluntarily or in practice excluded in the state of exception regime.

The increased discretionary power in the hands of the government and the administration are justified by the emergency and the preoccupying circumstances supporting it implementation. Indeed, it seems that the executive and the administration are more able to act swiftly in a problematic factual situation than the legislatures would be. This dimension implies highlighting two specific elements in the exercise of this power conditioning the potential of its control: decision-making based on technical elements and the strong political dimension of these decisions taken under the state of emergency.

It should first be emphasized that political decision-making is conditioned by the assessment of factual elements (terrorist threat, health threat, etc.) that the judge is not able to fully review and appreciate, even if the possibility to consult experts may enable him to get a clear information. In other words, an important part of the judicial decision, the facts justifying the measures as well as the substantial problem of the case, are beyond the judge's appreciation. In such a context, it may seem pointless, to say the least, to provide for a proportionality review by the judge which, although it may ultimately appear to be just as discretionary in its review as the discretionary power supposed to be reviewed, nonetheless implies an approach of the factual elements. This review is, in some ways, a lure because the judge's capacity to appreciate the facts leading to the state of exception is reduced to thin air after being discretionary determined by the public authorities. The discretionary color of the whole situation is thus completed by the discretionary power of the judge through its appreciation of the proportionality of the measures implemented.

The second point that needs to be emphasized relates to what has been said about the increasement of the public authorities' discretionary power which tends to the primacy of politics and necessity over law. The existence of an exceptional danger and imperious reasons tends to impose any measure that is alleged to be necessary to the detriment of what the law requires. In such a context, the judge's control over such measures may appear to be a sign of a desire to decrease the authority of the authority pronouncing them. Here is the question of the judge's responsibility in the event overturning exceptional measures, as it is likely to be an obstacle to swift and effective action towards the crisis. Such a decision would give no choice to the politician to not act to give an effective response to an exceptional situation, or at least no choice but to act illegally. The psychological burden the judge has to deal with is so overwhelming that it is difficult to see how such an effective or efficient review could be implemented to eventually overturn illegal measures even if they could be justified by the necessity of the circumstances. The judge's position is particularly uncomfortable, as far as an intervention in the political appreciation of the necessity led by emergency is being excluded from the judicial area, remaining an intense political appreciation.

This balance tending to favorize executive appreciation and action can only be compensated by precise legal provisions framing the exercise of the state of exception, covering three different areas: the conditions justifying its implementation, the requirements for decision-making in the context of a state of emergency, and the supervisory powers accorded to the judge in the two preceding situations. The provisions of the legal system are indeed decisive, as the indeterminacy of the rules leads to an increase in the discretionary power of the implementing bodies in a context which, precisely, tends to its extension. The more the exercise of these prerogatives will be framed, the easier it will be for the courts to review their exercise.

This theoretical reflection requires to be completed by a reflection on positive law to illustrate and highlight them.

Part II : Positivist analysis

What does positive law say about the judicial review of state of emergency? This question is significant because it assumes that the legal order takes the emergency and necessity into account It means the paradigm is no longer one of a state of pure necessity, identified as the first age of the state of exception by Pr. François Saint-Bonnet which is unseizable through a legal perspective[2].

[2] F Saint Bonnet, « Rapport introductif : Les trois âges de l'état d'exception », AIJC, p. 91 et s.

For example, in France, the first normative framework goes back to the 1849 law on the state of siege, as St Bonnet also points out; it's the first time that the legislatures intended to domesticate and tame the state of exception.

It seems necessary to focus on the type of norm framing the state of exception, whether they are infra-legislative, legislative, constitutional or even judge made legal norms. The answer to this question provides information on the level assigned to the state of exception. In most countries, there is a whole arsenal of states of exception, some of which fall under the Constitution, others under the law, depending on what they enable, in terms of concentration of power, infringement of human rights and alteration of normative modes of production. The existence of several normative levels also allows the competent authority to choose the one that seems most appropriate to deal with the crisis, which does not prevent from strategies to avoid constraints in the choice of the state of exception's legal basis.

To answer the main question, I was mainly interested in the legal norms, whether international, constitutional, legislative or even sub-legislative, which provide for a judicial review issuing a decision with the force of res judicata.
This excludes judges who are merely consulted in their advisory capacity, such as the Constitutional Council in the case of the implementation of the full powers provided by article 16 of the 1958 Constitution or, more generally, the consulting procedures of constitutional judges we can find in numerous legal orders.

This research leads to one observation: very few legal provisions expressly provide for judicial review of the state of emergency, leading to a necessary interpretation of the constitutional silence.

This observation leads us to another question: how should the silence of legal provisions on the possibility of judicial review be assessed? In our opinion, as long as the state of exception is provided for and framed by the legal order, it can be reviewed by the judge through its usual abilities and without the need for an express habilitation.

1 - The restraint of Constitutions about judicial review

The first serie of remarks deals with what I may call "the weak constitutionnalization of judicial review". The principle itself of an exceptional judicial review is not often framed by constitutional norms, whether it concerns the decision to resort to a state of emergency or the measures it allows to implement. On these two questions, legal norms are not very explicit, and it is therefore a matter of interpreting constitutional silence.

A) Constitutionalizing judicial review

Two different types of constitutional provisions can be emphasized about the possibility of a specific judicial review of the state of exception.

The first type gives habilitates the judge to exercise such a review. In some Constitutions, the text clearly states that the judge, constitutional or ordinary, is competent to review state of emergency, either its implementation or the measures adopted after it, which is the case in Ecuador[3], Kenya[4] or Kosovo[5]. In France, article 16 related to full powers to the President was modified by a constitutional amendment in July 2008. It now provides for that "after thirty days of the exercise of exceptional powers, the President of the National Assembly, the President of the Senate, sixty deputies or sixty senators may refer the matter to the Constitutional Council, in order to examine whether the conditions set out in the first paragraph continue to be met. It shall issue a public opinion as soon as possible. It shall carry out this examination as of right, and shall give its decision under the same conditions at the end of sixty days of the exercise of exceptional powers, and at any time thereafter". Sometimes the text is more implicit and refers to a possible decision by the Constitutional Court, for example in Peru[6] .

On the contrary, some Constitutions may prohibit or limit judicial review. Although we don't have any tangible example, it is possible to imagine that legal provisions purely and simply prohibits any judicial review of the declaration of a state of emergency or the measures taken during its implementation. Also, positive law may not prohibit but limit judicial review, for example in Chile, where the Constitution specifies that the Court may not qualify the factual circumstances of a state of emergency.

Once the principle of judicial review has been accepted, positive law determines how it is going to be exercised. For example, the text may specify which judge is competent, a constitutional judge or an ordinary judge, depending on the nature of the text under review. For example, in South Africa, the constitution underlines than "Any competent court may decide on the validity of-a declaration of a state of emergency ; any extension of a declaration of a state of emergency; or any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency"[7].
The text may provide for mandatory or optional control. The first hypothesis is rare but can be found in France. Article 16 indeed allows a compulsory review after 60 days of exercise of full powers : the constitutional council takes up the case on its own initiative. Between thirty and sixty days of the exercise of exceptional powers, it's only an optional review, as far as the judicial review before the constitutional council may be triggered by several political authorities.

[3] Equador Constitution art 436 « To ensure, by virtue of its office and immediately, monitoring of the constitutionality of the declarations of state of emergency, when this involves the suspension of constitutional rights ».

[4] Kenyan Constitution art. 58 : « The Supreme Court may decide on the validity of-a declaration of a state of emergency;any extension of a declaration of a state of emergency; andany legislation enacted, or other action taken, in consequence of a declaration of a state of emergency ».

[5] Kosovar Constitution art. 113 « The Assembly of Kosovo, the President of the Republic of Kosovo and the Government are authorized to refer the following matters to the Constitutional Court (…) 3. compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency ».

[6]Peruvian Constitution art. 166 « The President of the Republic will notify the National Assembly, the Constitutional Court and the competent international organizations of the state of emergency within forty-eight (48) hours of the signing of the relevant decree. If circumstances warrant, the National Assembly may repeal the decree at any time,

[7] South African Constitution art. 37.

B) Interpreting the silence of Constitutions

In most of cases, Constitutional provisions don't say about judicial review of the implementation of a state of emergency and their silence must be interpreted.

In fact, Judges have a great latitude to interpret the silence of positive law.

First, they can use general maxims of interpretation. For example, they can use the one according to "everything that is not prohibited is permitted", which means that if positive law does not prohibit judicial review, it is authorized. Another example is the maxim according to which "special law derogates from general law" which means that if positive law provides for a special law of exception, it derogates from normal law which provides for judicial review. For instance, this type of reasoning can be found in article 15 ECHR.

The implementation of different methods of interpretation such as historical, systemic or even teleological is also a tool the judges can mobilize to justify their position towards the way the judicial review is being realized. For example, in a systemic interpretation, it can be considered that if the text provides for a system of official consultations, including the one of the constitutional court, it can be interpreted as excluding judicial review since the court is only consulted.
Judges can also use teleological method to interpret the silence of the Constitution. In this way, they can argue that the state of exception aims to concentrate power to ensure maximum efficiency of state action and therefore excludes the possibility of judicial review.

In all cases, whether the judge uses maxims or methods of interpretation, it is important to emphasize the interpretative power they hold to choose the precise method founding their reasoning; the power to disguise a political choice by artificially by hiding it behind a maxim or method. What is meant here is that the silence of the constitutional provisions actually opens up a great deal of freedom to the judge. Theo Brillanti will then explain how, in practice, judges have interpreted the silence of the texts. But this leads to another question : what suggests this silence in positive law and especially in constitutional law ?

2 - The reluctance to accept the principle of judicial review

More precisely, why would one need legal provisions to empower the judge to exercise control over what is, in the end, only a legal regime provided for by the law and therefore potentially subject to judicial review in the same way as other legal acts?

A) Revealing the presupposition

One idea generally shared by the doctrine – and often by the judge itself – is that state of exception concerns the political and not the jurisdictional sphere, even if the meaning of "political" is rather unclear: Political because it refers to the general interest, even more the survival of the entire society. Political because it deals with de facto situations, political because it is concentrated in the hands of political authorities, political because it reveals the sovereign in the sense of Carl Schmitt …. But the key idea is that this 'political' character of the state of exception argues in favor of a political review rather than a judicial one and, therefore, weakens and even more disqualifies any judicial review.

In this way prevails the idea that the 'real' and 'right' review should be a political and not a judicial one, and is therefore the responsibility of the political actors, particularly the National assembly. For example, in France, article 16 provides for that Parliament meets in its own right to supervise the executive and cannot be dissolved during its application. In the same way, during the 2015-2017security state of emergency, November 2015 Act has modified the state of emergency regime and introduced an increased form of parliamentary review : "The National Assembly and the Senate are informed without delay of measures taken by the government during a state of emergency. They may request any additional information within the framework of the review and evaluation of these measures". Later on, in June 2020 following the health state of emergency, a National Independent Mission was created "to evaluate the management of the Covid-19 crisis and anticipate pandemic risks" in order to "assess the relevance, speed and proportionality of [the Government's] response in managing the health, social and economic crisis". A comparable mechanism of "political review" – rather we could say "political supervision" can be found in a certain number of constitutions.

It's as if the state of exception could only be accommodated, by its very nature, by a review of a political nature, which means that it disqualifies the judge to intervene in such a situation.

B) Drawing the conclusion

I think that this can explain why the judge would need an express authorization to control the state of exception: this express authorization would be necessary to counterbalance this reluctance of the judge to exercise a "political" review.

This conclusion seems to me rather embarrassing if we reason in terms of the compatibility of the state of exception with the rule of law. The various states of exception are provided for by law. As soon as they are, they are also subject to a review that makes it possible to verify that they actually respect the conditions required by the legal order. The law lays down a number of conditions to trigger a state of emergency, which the judge can assess. It also lays down numerous procedural rules on which the judge may also make an assessment.

This analyze underlines the evolution of the rule of law notion which presupposes not only that the state is subject to the law but also that a judge is able to ensure the regularity of the state of exception. There is no reason which it should go differently for state of exception.

It howewer seems that practice shows that this conclusion is not easily verified in the judicial review's practice (III).

Part III – Practical analysis

It is necessary to precise that emergency powers regimes are deploying their effects in the legal order through its proclamation and through the adoption enforcement measures that exceed what the ordinary legal prescriptions allows. The judicial review is also deployed through these 2 situations, not involving the same consequences but leading to similar conclusions.

I - Reviewing the proclamation of the state of exception, a possibility limited by a broad political appreciation

Judicial intervention in the implementation of a emergency powers regime lies on 2 hypothesis, wether the review has been provided by the positive law or not. The interest of comparing those 2 types of situations raises the question of determining if there is a difference in the consequences of such a review whether it is provided by law or not.

A) Hypothesis 1 : a constitution-based review

Starting from the French example, only article 16 of the Constitution about the president's exceptional powers explicitly provides an intervention from the Constitutional council both politically and judicially, but the only experience we have at this day concerns its political version. It was to enforce the application of article 16 in 1961 to face a military coup fomented in Algeria by 4 renegade generals. Even if the Constitution compels to submit this decision to the scrutiny of the Constitutional council, it isn't a proper judicial review but more of a consultative opinion given by a judicial institution. The political nature of the review here says a lot about the weak potentiality of a judicial sanction of the regimes's implementation. In the decision n° 61-1 AR16 of 23rd April of 1961, the Council only observed if the facts provided by the President about the open rebellion in Algeria were real and respecting the conditions required by the Constitution about a serious and immediate threat. In other ways, the scrutiny of the facts justifying the application of article 16 seems to be limited to a superficial appreciation of what the political authority told about their seriousness and the necessity they're imposing to the legal system's functioning, without being extended to a full review of their materiality, giving the public authorities a wide political appreciation towards their legal qualification.

Using another example, the Constitution of Ecuador provides explicitly the obligation for the head of state to defer the decree proclaiming the state of exception to the Constitutional court for a prior judicial review. In a decision ruled on July 9th 2019[8], the Court reviewed the reunion of the material criteria justifying the state of exception. In paragraphs 16 to 18 of the decision, the Constitutional court simply enumerates the facts reported by the Home Secretary about social conflict involving minors, subscribing to what the administrative authority was considering as « putting in danger security, integrity and the social harmony » of a precise region, which particularly suits the broad political appreciation The Court also settles for a superficial verification of the existence of such facts, not a critique or an extended analysis of their materiality. The same is revealed in the decision ruled by the Court on march 19th of 2020[9] concerning Covid-19 State of exception. The judge confines the analysis to the proclamation by the World Health Organisation of a pandemic situation and to the affirmation in executive decrees of an existing situation of « national health emergency » (§12). Here again, appreciating the material conditions of the state of exception is limited to what has already been affirmed by public authorities, not being extended to a full review of their characteristics.

B) Hypothesis 2 : reviewing the legal regime's proclamation without constitutional consecration

The proclamation and application of article 16 also initiated an important series of cases before the administrative jurisdiction such as the well know decision Rubin de Servens ruled by the Council of state in 1962[10]. The applicants were sentenced to death by a military tribunal instituted by the President on the ground of article 16, and were contesting the creation of the tribunal but mostly the proclamation of the exceptional powers which are of particular interest here. The administrative judge considered it was an « act of government » which wasn't susceptible of administrative judicial review without any further argument justifying the qualification of such an act, underlining even more the impact of the political appreciation of such a decision and a wide dose of arbitrary power in such a situation.

The solution concerning the state of emergency issued by the 1955 statute law might not be as radical as the one concerning article 16, but the final implications seem to be similar. As its proclamation implies no consequences on the exercise of constitutional powers such as legislative, the Council of state didn't considered it was an act of government. It means that, contrary to article 16, the judge accepted to review the decision, still subscribing to a restrained scrutiny. The main element here is the « Allouache » decision, ruled by the Council of state on December 9th 2005[11] by the procedure of the « référé liberté ».

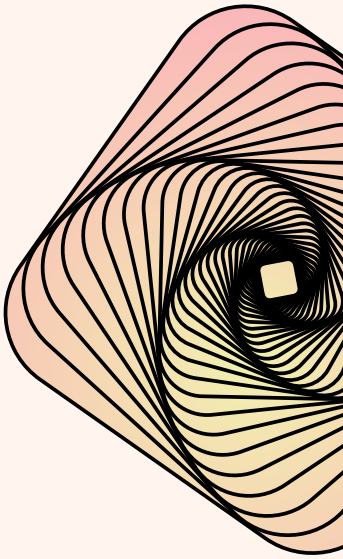
[8] CCE-0003-19-EE-19(0003-19-EE)(1).

[9] Dictamen 1-20-EE/20.

[10] CE, ass., 2 mars 1962, Rubin de Servens et autres, req. n° 55049.

[11] CE, Ord., 9 décembre 2005, Mme Allouache, n° 287777.

The judge was asked to order the President of the Republic to suspend the state of emergency he declared in a context of urban riots. The Council decided that the head of state had, quote on quote, a « broad discretionary power » appreciating « the circumstances that justified the declaration of the state of emergency » which prevented to undermine the proclamation of the regime without any obvious and evident illegality resulting from a biased appreciation of the circumstances justifying its application. A similar approach concerns the review of the decision proroguing the Sanitary state of emergency in the decision n° 2020-808 DC ruled by the Constitutional council on November 13th 2020[12]. As he « does not hold a power of appreciation and decision similar as the Parliament's », the Council reminds it is not his to « call into question the appreciation by the legislator of the existence of an health crisis and its foreseeable persistency »[13] and subsequently judges that the prorogation of the regime's application is not obviously inappropriate due to the circumstances.

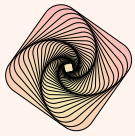


To summarize, the way of reviewing the state of exception's declaration seems to be quite similar between the constitutional and administrative judge, independently of its consecration by the Constitution or even its judicial or political nature. Judges are downgrading the range of the control they are able to provide, consecrating an arbitrary or almost sovereign appreciation in the qualification of the crisis, only depending of a political appreciation. In other words, the judge discards the possibility to criticize the justifications advanced by the political authorities, the simple fact of the authorities presenting them as corresponding to what the law requires being enough for the judge to consider the factual conditions as respected. The judge's role here is clearly marked by an important deference to what the political authorities determine as necessary and maybe not to what is objectively necessary.

[12] Conseil constitutionnel, décision n° 2020-808 DC 13 novembre 2020, Loi autorisant la prorogation de l'état d'urgence sanitaire et portant diverses mesures de gestion de la crise sanitaire.

[13] Ibid. §6.

II) A weakened sanction of the measures enforcing the state of exception



The main focus here will go on the consequences implied by the judicial review of those enforcement measures more than the technical aspect of its implementation such as the proportionality test used by many judges. A quick word on this one nonetheless, human rights restrictions have to be proportionate, necessary and appropriate to the goal they're pursuing to be considered regularly adopted. This method suits exceptional situations as well as normal ones, but the way the different judges seized to resolve state of exception matters apply it says a lot about the constraints they have to face in such situations.

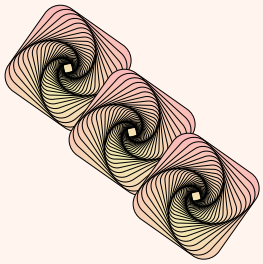
Despite the purpose of using proportionality to consider the adoption of any measure as objectively justified, it remains highly subjective and influenced by the political aspect of the crisis' resolution. The premise here relies on the idea that the judge decreases the potentiality of sanctioning measures that might be too restrictive by restraining its own appreciation of their necessity due to its affirmation by the political authorities justifying their adoption in a very particular factual situation.

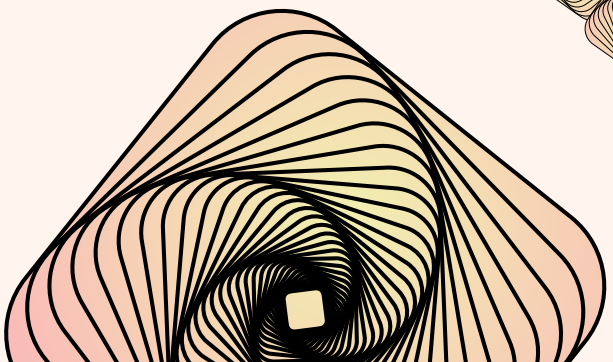
This idea relies on the exercise of a restrained proportionality test both by the administrative jurisdiction or the Constitutional council. The low number of examples in which such measures were sanctioned seems related to the absence of evident disproportion or inappropriate conciliation with superior interests. The judge tends to accept what the authorities establish as absolute necessity to end the crisis to finally downgrade the effectivity of the proportionality test. If this idea only lightens one specific aspect of the exceptional measures' review, it gives us keys to understand why the judge only benefits a restricted margin of appreciation on their regularity.

The Constitutional council as well as the Council of State felt within this perspective during the pandemic. Among many examples, I'll retain two decisions that are quite representative. The decision 2020-803 DC ruled on July 9th 2020 saw the constitutional judge consider the possibility to restrict the freedom of movement provided by the attenuated form of the state of emergency as consistent with the Constitution. Estimating that such measures were pursuing the constitutional objective of health protection, the only way they would have been judicially sanctioned would have been in case of « obvious inappropriation regarding to the exceptional situation » (§13). As the Council considered that, due to what the legislator esteemed to be necessary and appropriate, he had to remind that he « does not hold a power of appreciation and decision similar as the parliament's ».

The administrative judge seemed to act in a similar way with the decision ruled on October 23rd 2020 about the application of the curfew on « référé liberté. » Here, the Council of State didn't take into account any of the scientific arguments and factual considerations brought by the applicant to only consider the curfew was less restrictive than a full lockdown and was thereby constituting a proportional restriction to the rights invoked.

In conclusion, the judge's capacity to sanction the state of exception is correlated to the increased capacity of the public authorities to determine what is necessary to face the crisis, which consequently weakens the judges capacity to appreciate the same criteria and de facto undermines its capacity to sanction their legal consequences. This last idea totally fits with what has been said before about the judge not being an obstacle to a swift and effective action to face emergency. The balance between legal regularity and absolute necessity finally depends on the effectiveness of the Rule of law which manifests itself as a simple choice between necessity and law : doing what needs to be done or doing it how it must be done ?





POLITICAL DECISIONS AND SCIENTIFIC DECISIONS: INTERACTIONS OR INTERFERENCES?

DIDIER TRUCHET

> “Les caractéristiques d’une crise : la soudaineté, la gravité, l’urgence et l’incertitude.

Je n’évoquerai que l’exemple français de la crise sanitaire provoquée par la Covid-19. Au moment où se tient cette table ronde, elle n’est pas terminée et nul ne sait quelles surprises, bonnes ou mauvaise, l’épidémie peut encore nous réserver.

Je siégeais au Conseil supérieur d’hygiène publique de France (remplacé aujourd’hui par le Haut conseil de la santé publique) lors des menaces de SRAS ou de différents virus de la grippe aviaire et j’y ai beaucoup appris sur les réactions du pouvoir politique et administratif confronté au risque d’apparition sur le territoire national d’une pandémie nouvelle. En outre, la crise sanitaire de 2020 constitue un cas d’école pour l’étude du sujet traité dans cette table ronde.

Des crises, la France en a connu beaucoup depuis quinze ans, au point que l'on peut se demander si la crise n'est pas devenue un état permanent : crise climatique depuis au moins vingt ans, crise économique de 2008, crise du terrorisme en 2015 (avec mise en œuvre d'une législation exceptionnelle, l'état d'urgence), crise sociale dite des « gilets jaunes » en 2018, crise internationale et économique avec la guerre en Ukraine depuis février 2022. Mais aucune de ces crises n'a réuni autant que la crise sanitaire, les caractéristiques d'une crise : la soudaineté, la gravité, l'urgence et l'incertitude. Elle a eu aussi cette particularité rare d'être globale à tous les sens du terme : elle a affecté le monde entier et tous les aspects de la vie personnelle et collective.

Afin d'apprécier ce qu'elle a changé, il faut partir des relations entre décisions scientifiques et décisions politique dans les temps paisibles, où l'on peut prendre le temps de réfléchir, de chercher et d'agir. La question est alors de savoir à quel moment et sur quelles bases, le gouvernement et l'administration décident. Plus précisément, il s'agit de déterminer comment et quand leur décision s'est en réalité « cristallisée », a pris son contenu matériel définitif.
A l'occasion d'un rapport remis en janvier 2020 à la Ministre de l'enseignement supérieur et de la recherche[1], j'avais constaté que l'expert était en réalité le décideur.

Certes, il n'est pas le décideur politique ou juridique, mais concrètement, dans l'immense majorité des cas, ce dernier adopte la solution proposée par les experts scientifiques ou médicaux. Il n'en va différemment que pour les sujets dits « sociétaux » (bioéthiques, notamment), ceux qui engagent de considérables politiques publiques (le changement climatique notamment) et ceux à propos desquels les experts sont trop divisés ou manquent trop de données pour rendre un avis véritablement conclusif. Dans ces trois hypothèses, le décideur politique est le véritable décideur, non seulement en la forme, mais aussi au fond.

Le juge administratif ne peut pas être saisi directement de la décision (ou plus exactement, de l'avis) scientifique. Le recours n'est ouvert que contre la décision administrative. Mais en contrôlant les motifs de cette dernière, le juge s'assure qu'elle repose bien sur des considérations scientifiques pertinentes.
En outre, il vérifie de plus en plus soigneusement que la procédure a été régulière : non seulement l'avis doit avoir été recueilli comme les textes le prévoient, mais encore il doit avoir été rendu correctement, sans notamment être entaché de conflits d'intérêts de la part des experts.

[1] « L'expertise publique. Santé, environnement, alimentation ».

Il y a donc une interaction forte entre la décision scientifique et la décision politique, puisque la première fonde généralement la seconde en fait et en droit, même si l'autorité politique ou administrative n'est pas juridiquement tenue de suivre les experts scientifiques. Peut-on parler d'interférences ? Celles-ci sont en réalité rares et ne surviennent que sur des dossiers sensibles, concernant notamment les produits, pratiques ou équipements ayant de forts enjeux pour l'environnement ou la santé des populations : soit l'avis et donc la décision sont contestés par des associations ou des citoyens au nom de considérations scientifiques souvent rangées sous le pavillon du principe de précaution, soit des experts scientifiques expriment publiquement leur opposition à la décision politique.

Selon les cas, ils critiquent le fait que celle-ci a été prise (une autorisation par exemple) ou le fait que la décision qu'ils préconisaient ne l'ait pas été (une interdiction, par exemple). Il est même arrivé qu'une association obtienne du parlement, grâce à son lobbying, une interdiction législative que le gouvernement refusait de prononcer[2].

La Covid-19 a profondément modifié ce système d'interactions et d'interférences. En effet, tous les repères habituels ont fait défaut.

En tout premier lieu, il n'y avait pas de données acquises de la science sur lesquelles le pouvoir politique aurait pu appuyer son action. On ne savait pas où et comment le virus était apparu (on l'ignore toujours !), on ne le connaissait pas, on ignorait comment il évoluerait, comment s'en protéger, comment soigner les malades. Les seules choses certaines étaient sa présence sur tout le territoire national (en métropole et en Outre-Mer) et son extrême gravité pour la population. En France, c'est immédiatement le pouvoir politique qui a pris les choses en main, et tout spécialement le président de la République. Au début de l'épidémie du moins, il a arrêté les principales décisions[3]. C'était non seulement conforme à ce que l'on sait du tempérament du président E. Macron, mais aussi à une double tradition française : celle qui fait qu'en temps de crise, c'est d'abord vers l'État que les citoyens se tournent, de lui qu'ils attendent aide et protection, à lui qu'ils adressent des reproches, et celle qui fait que sous la Ve République, son chef exerce la responsabilité exécutive principale. Cette prééminence présidentielle a bien sûr suscité des critiques souvent acerbes, mais de manière générale, a été acceptée par une opinion publique sidérée par la brutalité de la situation et de surcroît en partie paralysée par les confinements auxquels la population était soumise.

[2] Par exemple, l'interdiction du bisphénol dans les conditionnements alimentaires par la loi n° 2012-1142 du 24 décembre 2012, à l'initiative de l'association Réseau Environnement Santé.

[3] Ayant déclaré le pays « en guerre » contre le virus, il les a même prises, de manière surprenante, en Conseil de défense, normalement réservé aux affaires militaires.

Dans ces conditions, où la décision scientifique pouvait-elle se réfugier ? Dans un conseil scientifique créé pour la circonstance (au début sans base légale) afin de conseiller le président et le gouvernement. Organe léger, réactif, se prononçant très vite, Il a donné de nombreux avis, rendus publics, mais qui ne pouvaient évidemment procurer aucune certitude. Il les exprimait avec prudence, en termes de scenarii possibles, avec des recommandations alternatives offertes au choix du décideur politique. Et il les modifiait souvent, en fonction de l'évolution des données épidémiologiques et des connaissances que les chercheurs acquéraient progressivement. Il est remarquable que si le pouvoir politique s'en est souvent inspiré (en modifiant très souvent les mesures), il n'a pas toujours suivi les préconisations du Conseil scientifique : ce dernier n'a pas été un décideur et n'a pas tenté de l'être. Est-ce pour cette raison que le thème des conflits d'intérêts a disparu du débat public pendant la crise ? Cette disparition reste pour moi très surprenante, alors que dans les temps ordinaires, il suscite des polémiques systématiques. Une autre explication pourrait être que la question des conflits d'intérêts est un « luxe » (si j'ose ce terme excessif) que l'on ne peut s'offrir en temps de crise.

Le pouvoir exécutif a considéré (à raison, à mon avis) que les données scientifiques ne pouvaient pas être son seul guide et qu'il devait les mettre en balance avec d'autres éléments d'appréciation de nature sociale et économique et avec ce que la population était prête à accepter. On pourrait dire qu'en temps normal, les considérations scientifiques interfèrent avec les considérations politiques et que lors de la crise, ce fut le contraire : les considérations politiques ont interféré avec les considérations scientifiques.

Il en a d'autant plus été ainsi que dans les premiers mois de l'épidémie, les circuits habituels d'expertise scientifique n'ont pas pu fonctionner normalement. Les nombreuses agences sanitaires qui l'assurent habituellement ont été éclipsées par le Conseil scientifique. Bien des raisons l'expliquent : au tout début, elles ont dû apprendre difficilement, comme tout le monde, à fonctionner en télétravail, ce à quoi elles n'étaient pas préparées ; leur procédures sont longues et l'urgence ne leur permettait pas de les suivre ; elles s'appuient sur des données scientifiques qui manquaient dans le cas présent. De même, ce que l'on nomme la « démocratie sanitaire » qui repose sur le consultation des associations de patients a disparu du paysage institutionnel. Ce n'est que lorsque l'épidémie a perdu de sa gravité, notamment grâce aux progrès incroyablement rapides de la recherche sur le virus et à la campagne de vaccination que le processus classique d'expertise mené par les agences a recommencé à fonctionner vraiment.

C'est par d'autres voies que des experts scientifiques ont tenté d'interférer, sans grand succès mais avec véhémence, avec les décisions politiques : brandissant leurs titres et leurs compétences, ils se sont répandus en commentaires et injonctions comminatoires et contradictoires sur les réseaux sociaux et les médias d'information continue. Se prenant eux-mêmes au piège d'un exercice qu'ils ne maîtrisaient pas, ils ont offert un spectacle que, personnellement, j'ai trouvé affligeant, mais qui a beaucoup troublé l'opinion publique et affecté l'adhésion de celle-ci aux mesures prises par les pouvoirs publics. Il faut dire que ces derniers se sont souvent exprimés maladroitement et ont même tendu des verges pour se faire battre. Et cela, dès les premiers jours ! Pour excuser l'absence criante de masques de protection, non seulement pour la population mais aussi pour les soignants eux-mêmes, le Premier ministre et le Ministre de la santé ont tenté d'instrumentaliser scientifiquement une déclaration obscure et imprudente de l'OMS sur l'inutilité des masques pour se protéger du virus. Ce souvenir, joint aux difficultés rencontrées par le système hospitalier pour faire face à l'afflux de malades et au dur isolement des personnes âgées dans les institutions qui les accueillent, pèse toujours lourd dans l'appréciation des Français sur la gestion de la crise par leurs dirigeants.

Et le droit dans tout cela ? La France est restée un Etat de droit pendant la crise. Mais c'était un droit spécial, admettant des atteintes inouïes aux libertés fondamentales. Il a très vite reposé sur un état d'urgence sanitaire, créé par une loi du 23 mars 2020. Cela a été utile pour préciser les compétences gouvernementales et donner un cadre législatif adapté aux mesures de prévention et de lutte contre le virus. Mais l'état d'urgence n'était pas indispensable juridiquement : avant son entrée en vigueur, c'est sur le fondement de la vieille théorie jurisprudentielle des circonstances exceptionnelles et des dispositions alors en vigueur du Code de la santé publique (qui résultaient d'une loi de 2007) qu'un décret du 16 mars 2020 a imposé un premier confinement à la population. Dans la première décision importante qu'il a rendue en référé sur les « mesures Covid », le Conseil d'Etat l'a admis[4]. Il est intéressant d'observer qu'il avait été saisi par un syndicat de médecins qui, arguments scientifiques à l'appui, reprochaient au confinement de n'être pas assez strict.

[4] Ordonnance du 22 mars 2020, n° 439674.

Des référés contre les mesures d'urgence sanitaire, le juge administratif en a reçu un millier et malgré les circonstances, a su les traiter dans les très courts délais requis. Jamais le droit des citoyens au recours au juge n'a été menacé[5]. Le Conseil d'État a tenu à motiver ses décisions en se fondant avec un soin particulier sur l'état des connaissances scientifiques mondiales à la date à laquelle il se prononçait[6], ce qui est une autre manière d'interférence, objectivisée par le raisonnement juridique, entre celles-ci et la décision administrative : cette dernière n'est légale qu'autant qu'elle est scientifiquement fondée, dans la mesure du moins où elle peut l'être dans une situation de grande incertitude. On peut aussi y voir une sorte de compensation : lorsque le processus d'expertise a priori ne peut pas fonctionner comme à l'accoutumé en raison de la crise, il revient a posteriori au juge de vérifier que la décision politique n'est pas absurde scientifiquement. En outre, il était important pour les citoyens qu'un juge les assure que les mesures de prévention et de lutte contre la maladie, qui étaient inévitablement des paris sur l'évolution de la situation et sur leur nécessité et leur adaptation, n'étaient pas arbitraires.

En conclusion, je me permets de livrer un sentiment personnel : en dépit de ses hésitations et de ses lacunes sur certains points, le pouvoir politique français a, dans un contexte extrêmement difficile, assez bien réagi à la crise de la Covid-19, non seulement sur le plan sanitaire mais aussi (voire surtout) sur les plans économique et social. Certains pays ont fait mieux que la France, mais beaucoup d'autres ont fait moins bien qu'elle.

[5] Le Conseil constitutionnel a lui aussi statué en temps et heure sur les dispositions législatives dont il était saisi. Mais fidèle au principe selon lequel, il ne dispose pas d'un pouvoir d'appréciation identique à celui du Parlement, il s'est peu appuyé sur des considérations scientifiques.

[6] Voir notamment sa décision du 28 janvier 2021, n° 439864, sur l'utilisation de l'hydroxychloroquine dans le traitement de la Covid-19, qui avait soulevé de vives controverses scientifiques et politiques.

What Role for Independent Agencies in Times of Crises?

AN ANALYSIS THROUGH THE FRENCH EXPERIENCE

Natasa DANELCIUC-COLODROVSCHI

Most States currently have independent administrative authorities or equivalents: Regulatory Agencies or Independent Regulatory Commissions in the United States; QUANGOS (Quasi Autonomous Non-Governmental Organizations) in the United Kingdom; Independent Administrative Authorities and Independent Public Authorities in France. From the historical point of view, the first agencies were created in the United States. For example: Interstate Commerce Commission (1887), Federal Trade Commission (1915), Federal Power Commission (1920), Federal Communication Commission (1934), Securities and Exchange Commission (1934). They had a regulatory function in order to reduce governmental centralization or to fight against monopolistic and unfair practices. In a report from 1937 (Brownlow Report), these agencies were presented as "a fourth branch of government". In the years 1960-1970, many agencies were invested with a regulatory power in social and interest fields: *Environmental Protection Agency*, *Consumer Product Safety Commission*.

The American experience was brought to the United Kingdom, where have been created the QUANGOS (Quasi Autonomous Non-Governmental Organizations): public persons not under the authority of a minister, but which nevertheless contribute to the implementation of government policy. Three major categories of QUANGOS can be pointed up:

- those which perform administrative functions. These functions are quite varied: operational, regulatory by supervising and controlling activities of general interest, cultural and scientific, advising the central administration;
- the QUANGOS perform functions of an industrial and commercial nature: public enterprises, national companies (Bank of England, British Airways Corporation);
- the QUANGOS having judicial functions.

In France, this type of institutions was created by law n° 78-17 of the 6th of January 1978. They were called "Independent Administrative Authority". By law n° 2017-55 of the 20th of January 2017, a significant reform was carried out. First, two categories of authorities were created: Independent Administrative Authorities (IAA)[1] and Independent Public Authorities (IPA)[2]. The difference between the two lies in the fact that Independent Public Authorities have legal personality. That allows them to have their own financial resources and to bring a dispute before a court. The second aspect of the 2017 reform was the reduction in the number of authorities, from 47 to 26 (17 IAA and 9 IPA).

The competences of the Independent Administrative Authorities and the Independent Public Authorities vary from one to the other. In general, four types of skills can be distinguished:

- a power of opinion or recommendation;
- individual decision-making power;
- a power of regulation, consisting in organizing a sector of activity by establishing rules;
- a power of sanction if the rules laid down by these institutions are not respected.
-

Generally, the health crisis has caused a lot of upheaval in the actions and working methods of the IAA and IPA, but also a more assertive conception of their role. All of them have indeed been impacted by the crisis and have focused most of their actions on the defense of fundamental rights and freedoms undermined during the state of health emergency. Some of them have been particularly at the center of this upheaval and have experienced overactivity and increased visibility due to greater solicitation by the public authorities with regard to the measures taken to deal with the pandemic (hearings, requests for opinions and certification). This was particularly the case of the High Authority for Health, which was strongly called upon to deliver its scientific expertise and support the public authorities in their decision-making.

Faced with the "digitalization of society", which has placed personal data at the center of the health crisis (information systems to fight against the spread of the virus, medical research, social networks, videoconferencing, online shopping, teleworking, telemedicine, or tele-education), the National Commission for Informatics and Freedoms has also experienced an intensification of its advisory and control activities, as it highlighted in its 2020 activity report[3].

[1] Examples of Independent Administrative Authorities: Commission for Access to Administrative Documents (Commission d'accès aux documents administratifs); Defender of rights (Défenseur des droits); National Commission for Computing and Freedoms (Commission nationale de l'informatique et des libertés); General Supervisor of Places of Deprivation of Liberty (Contrôleur general des lieux de privation de liberté).

[2] Independent public authorities: Audiovisual and Digital Communication Regulatory Authority (Autorité de regulation de la communication audiovisuelle et numérique); High Authority for Health (Haute autorité de santé).

[3] CNIL, Protéger les données personnelles, Accompagner l'innovation, Préserver les libertés individuelles, Activity report for 2020, May 2021 : https://lext.so/7MFhLT.

The IAA and IPA also had an important role to play due to the worsening of certain attacks on rights and freedoms, requiring an adaptation of their means of action. For example, the number of requests addressed to the Defender of Rights (French Ombudsman) increased of around 10%[4]. The General Superviser of Places of Deprivation of Liberty underlined the difficulties for the institution to carry out effectively its control missions due to the lockdown[5]. However, the different obstacles did not prevent visits to places of deprivation of liberty, the processing of letters or the publication of opinions and recommendations to the Government. Some IAA and IPA have sought to assert themselves by choosing a strong theme linked to fundamental rights. For example, the National Commission for Public Debate which, in view of the digital divides noted during the health crisis, put forward "the principle of inclusion" to "ensure that environmental democracy is also a reality for remote people and to influence political decisions by communicating the arguments of a large majority of citizens"[6].

By observing the activity of the French IAA and IPA during the health crisis, it can be noted that they put themselves in a state of emergency (I) in order to ensure a more effective protection of rights and freedoms during this exceptional period (II).

I – THE PARTICULAR ORGANIZATION OF THE ACTIVITY DURING THE STATE OF HEALTH EMERGENCY

From the adoption of the decree n° 2020-260, the 16th of March 2020, regulating travel in the context of the fight against the spread of the Covid-19, and the declaration of the state of health emergency by law n° 2020-290, the 23rd of March 2020, the Independent Administrative Authorities and the Independent Public Authorities have been reactive in recalling their presence (A) and reinventing their manner of action by setting up new regulation and control tools (B).

A – The institutional adaptation in the context of the health crisis

The objective pursued by all Independent Administrative Authorities and the Independent Public Authorities was to guarantee the continuity of their activity. Two days after the adoption of the decree n° 2020-260, the Defender of Rights informed on its website that the institution was continuing "to fulfill its mission" by ensuring the continuity of the processing of complaints by the central services and the territorial network available by email and telephone. A web page dedicated to the health crisis has also been created.

[4] DDD, Activity report for 2020, March 2021: https://lext.so/2EeC4K.

[5] CGLPL, « Avant-propos », Activity report for 2020, June 2021 : https://www.cglpl.fr/wp-content/uploads/2021/06/CGLPL_Rapport-annuel-2020_web.pdf.

[6] CNDP, Activity report for 2020: https://lext.so/90LFQi.

In its activity report for 2019, the Defender of Rights included an appendix containing the summary of its actions during the health emergency period, thus demonstrating the responsiveness and continuity of the institution's action, despite the halving of the number of files to be processed. This appendix was also an opportunity for the Defender of Rights to emphasize "the strategic importance of public services" and the need for exchanges with the administrations to react to exceptional periods.

Then, on the 20th of March 2020, the Defender of Rights, the General Supervisor of Places of Deprivation of Liberty and the President of the National Advisory Commission on Human Rights published a joint declaration emphasizing the need to protect undamental rights and freedoms during the health crises[7]. Despite a particular context, the General Supervisor of Places of Deprivation of Liberty has succeeded in maintaining the control by increasing the pressure on the supervisory authorities (Ministry of Justice, Ministry of Home Affairs, Ministry of Solidarity and Health) and by ensuring on-site visits to the administrative detention centers to point out the lack of health security for this vulnerable population and the practical impossibility of respecting barrier recommendations.

In its turn, the High Authority of Health adopted, in March 2020, a method for developing rapid responses in the context of Covid-19 pandemic. The purpose of this new document was to give a statement to face urgent situations. Considering the evolving context of knowledge relating to Covid-19, rapid responses had to include a disclaimer specifying that they have been "prepared on the basis of knowledge available at the date of their publication [and] are likely to evolve according to new data". The exercise of the mission of information was very important at that moment because all the people wanted to know more information about Covid-19, the risks for their health and their lives.

B – The deployment of the powers in the context of the health crisis

First of all, some IAA and IPA had a role of pedagogical regulation and evaluation. For example, the health crisis caused by Covid-19 has led the Superior Council of Audiovisual both to allow and promote the dissemination of good information (prevention advice) and to fight against the fake news. Concerning the fake news especially, the law n° 2018-1202 of the 22nd of December 2018 obliges online platform operators to take concrete measures and actions in order to fight against the dissemination of fake news and provides for the monitoring of these measures through the communication of an annual declaration from the operators. As the Superior Council of Audiovisual is responsible for supervising the systems put in place by the platforms and supporting the operators, it informed them by its press release of the 27th of February 2020 of the development of a questionnaire facilitating the preparation of annual declarations. This questionnaire was sent to the platforms[8].

[7] See: https://www.infomie.net/spip.php?article5781.

[8] The questionnaire is available on: https://www.arcom.fr/sites/default/files/2022-05/Questionnaire%20aux%20opérateurs%20de%20plateformes%20en%20ligne%20soumis%20au%20titre%20III%20de%20la%20loi%20du%2022%20décembre%202018%20relative%20à%20la%20lutte%20contre%20la%20manipulation%20de%20l%27.pdf.

The goal was to ensure the presence of a visible and accessible reporting system using transparent processing methods and opening up remedies for the authors of the reported content. It also aimed to control the mechanisms for fighting against accounts that massively spread fake news. All the questionnaires were returned to the Superior Council of Audiovisual. They served for the evaluation of the effectiveness of the measures taken by the platforms. The Superior Council of Audiovisual put also in place hearings from the platforms about the specific systems they adopted during the health crisis. It was specifically the case for Facebook, Twitter, Snapchat, Wikipedia and Google, the major platform used for searching information and communication during the lockdown.

The IAA and IPA also assumed a role of interpellation and support for public authorities. For example, in the opinion n° 20-03 from the 27th of April 2020[9], the Defender of Rights reaffirmed its role for guaranteeing rights and freedoms. It was underlined notably the importance of the adaptation by the public authorities of the mechanisms for checking certificates and verbalization for people who were materially unable to present a derogatory travel certificate. It was therefore recommended that the police favor pedagogy and help these populations in vulnerable situations. In addition, in the all-digital era, it was launching a major reflection on the dematerialization of authorizations, because they were excluding millions of people from access to many public services.

Also, a major attention was paid to the manner the end of the lockdown had to be organized. When the question of the possibility to decide the continuation of the lockdown for a certain number of persons was discussed, the Defender of Rights recalled that such decision should provide for very strict conditions and a limited duration. The solitary lockdown had to be considered as a measure of constraint, like the forced hospitalization. Therefore, it could be decided by respecting upon certain conditions: the spread of the disease had to be dangerous for public health and the lockdown had to represent the *ultima ratio* to prevent the spread of Covid-19. The authorities would have to demonstrate that less severe measures were considered, but these ones were insufficient to protect public health. As always, the measure had to be necessary in the current circumstances and respect the principle of proportionality. If this condition was met, the measure should last only the time strictly necessary to pursue the objective of healing the patient and the end of the period of contamination.

Like the Defender of Rights, the General Supervisor of Places of Deprivation of Liberty intervened on several levels in the context of the health crisis. The methods of interventions and the deployment of the institution's powers during the crisis were listed in the report on "The fundamental rights of persons deprived of their liberty put to the test of the health crisis" from the 2nd of July 2020[10]. In this report have been formulated a certain number of criticisms and recommendations, both for the management of the crisis itself and for the manner political authorities were preparing future steps. Three axes clearly appeared: the case of detained persons in prisons, the case of detained persons in the so called "administrative detention centers" and the case of persons in psychiatric care establishments.

[9] See: https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=19735.

[10] See: https://www.cglpl.fr/wp-content/uploads/2020/07/CGLPL_Rapport-COVID.pdf.

In the case of the detained persons in prisons, two letters were sent to the Minister of Justice, respectively on the 17th of March 2020 and on the 5th of May 2020. In the first, which was sent a day after the announcement of the general lockdown, the Minister's attention has been drawn to a phenomenon far from be recent, but which has taken on a particular magnitude precisely because of the said measures. In fact, the problem of prison overcrowding, at a time when scientific recommendations clearly established the need to implement physical distancing measures, was taking an extremely serious turn. In addition, the suspension of the rights of family visits and meetings with lawyers has worsened the already very precarious conditions of detention.

The second letter, which was sent at the end of the lockdown, completed the first one, by deploying a longer-term vision: the prison population has decreased during lockdown. The General Supervisor of Places of Deprivation of Liberty pleaded for this trend to be continued, in accordance with national and international (and particularly European) law, by using and developing, like our European neighbors, other methods of sanction and by reforming part of criminal proceedings, for example.

For the detained persons in administrative detention centers, two letters were sent to the Minister of Home Affairs. The first one, from the 17th of March 2020, partly reproduced the one addressed to the Minister of Justice, developing the argument of the reduction of international flights, which mechanically implied an almost total impossibility of implementation of removal measures. In this situation the General Supervisor of Places of Deprivation of Liberty called for the closure of the administrative detention centers. A recommendation which was not followed. In a second letter from the 20th of April 2020, was denounced the catastrophic health situation in certain administrative centers that was incompatible with fundamental rights and freedoms. The request for the closure of these centers was reiterated "with firmness", but it remained without response.

In addition, on the 27th of March 2020, the General Supervisor of Places of Deprivation of Liberty sent to the Minister of Solidarity and Health a letter about the particular situation of psychiatric care establishments, drawing his attention both to the problems traditionally encountered by the hospital sector from the start of the crisis (lack of means, lack of supplies, etc.) but also on the particular case of patients treated, who were risking to suffer particularly from the lockdown situation, which was incompatible with the specific care involved in the treatment of these diseases. All these measures were taken in order to insure a more effective protection of the rights and freedoms in the state of health emergency.

II – THE PROTECTION OF RIGHTS AND FREEDOMS IN THE STATE OF HEALTH EMERGENCY

The health crisis has aggravated the vulnerability of certain people, in particular children, people deprived of their freedoms or users of the health system. The IAA and IPA have focused on protecting these people while identifying specific vulnerabilities related to the Covid-19 pandemic (A). They also continued to work for the fight against discrimination and access to rights and public services despite the lockdown measures (B) and paid much attention to the protection of personal data, an important subject in times of pandemic (C).

A – Protection of people in vulnerable situations

During the first lockdown, the Defender of Rights received 127 referrals questioning the rights of children in connection with the health crisis. In a press release from the 20th of March 2020, the institution called for collective responsibility, encouraging the reporting to emergency numbers of any worrying situation concerning a child. The proposal was followed by the creation of the Childhood and Covid-19 platform to support professionals and parents but also to inform children about their rights.

The second question was the return to school. The Defender of Rights focused on the exclusion in certain educational establishments of the children whom parents were exercising a medical profession. The decision to put them in separate groups from other pupils has been criticized. As responsible for combating discrimination and promoting equality, the Defender of Rights declared that there could be no difference in treatment within the education system.

The crisis has also put some single-parent families in difficulty due to the refusal of children to enter supermarkets. The Defender of Rights recalled his mission of "monitoring compliance with the International Convention on the Rights of the Child in France, according to which children have the right to be protected against all forms of violence". In order to fight against discrimination, the Defender of Rights specified that "it was illegal to prohibit the entry of a store to people accompanied by a child or to require that they leave the child at checkouts or in the custody of a security guard". Following this alert, the Secretary of State for Gender Equality and the Fight against Discrimination set up a complaint mechanism on a dedicated email address.

The health crisis due to the spread of Covid-19 and lockdown have led to a deterioration in living conditions and access to rights, particularly for precarious populations, as social inequalities have increased. The Defender of Rights presented recommendations to prevent people from finding themselves in a situation of economic vulnerability, whether this concerned means of communication, food, housing, or work. For example, in the communication from the 7th of April 2020, the Defender of Rights issued recommendations to prevent lockdown from causing isolated citizens in a precarious economic situation and communication difficulties due to lower-cost telephone subscriptions (€2) have become insufficient to cover needs amplified by isolation. He thus recommends that these "telephone subscriptions (…), taken out by the most precarious households, [be] extended to an unlimited duration throughout the period of the lockdown in order to allow them to reach the health services as well as their relatives". The Defender of rights asked the Minister of Economy and Finance to intervene by negotiating with the various telephone operators.

Concerning the protection of sick persons, a major role was played by the High Authority for Health. In general, a large part of the documents the institution produced in the context of the pandemic concerned the care and follow-up of patients with Covid-19. Some documents concerned patients without Covid-19 and healthcare professionals. Chronic diseases have been the subject of the greatest number of publications because of the risks the patients were running. In terms of mental health, the High Authority for Health has adopted rapid responses aimed to ensuring the continuity of care during the lockdown period and the post-lockdown periods. The management and monitoring of pregnancies have also been areas of publication by the High Authority for Health. The latter responded favorably to the extension of the period for recourse to voluntary termination of pregnancy.

B – The fight against discrimination and for access to rights

On the 22nd of June 2020, the Defender of Rights published the report "Discrimination and origins: the urgency to act" which contained more than 80 pages[11]. This report highlighted the problem of the amplification of discrimination and racism during the health crisis. The report was presented in three parts:

- the observation of the amplification of the phenomenon;
- the analysis of the responses provided for by the public authorities, which were deemed insufficient;
- the proposals for actions to raise public awareness and fight effectively against this phenomenon.

The problem of discrimination was also raised by the Superior Council of Audiovisual. In its report published in June 2020, the under-representation of women in the media during the Covid-19 pandemic was noted. Parity has almost been achieved for journalists, but major imbalances have been noted for experts. Only 20% of women spoke about expertise issues. Another area in which strong discrimination was noted was that of the restriction of asylum seekers. The Defender of Rights pointed out the problem of the closure of asylum application registration services in the prefectures. The French Office for Immigration and Integration has stopped the multilingual telephone platform. Asylum seekers have therefore been deprived of the material reception conditions (accommodation, support and daily living allowance) to which they are legally entitled if the application is registered.

In the decision n° 2020-100 of the 28th of April 2020[12], relating to the closure of one-stop shops for asylum seekers in Île-de-France, the Defender of Rights ruled that their closure was a violation of the right to asylum and inhuman or degrading treatment. Such restrictions were disproportionate and undermined the principle of continuity of public service. They "were not based on any text related to the state of health emergency and were not justified by a material impossibility of pursuing the public service". In a decision pronounced on the 30th of April 2020, the Council of State (Conseil d'État) confirmed the position of the Defender of Rights and ordered the reopening of the measures to which asylum seekers are entitled.

[11] See : https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/rap-origine-num-15.06.20.pdf.

[12] See : https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=19733.

C – Protection of personal data

In managing the health crisis linked to Covid-19 pandemic, the French Government has relied on new technologies to try to reduce the transmission of the virus. The National Commission for Computing and Liberties ruled on the guarantees provided for by various automated devices face to the risks they were posing both to the right to privacy and to the protection of personal data. Two processes were specifically analyzed. In the case of thermal camera devices, the National Commission for Computing and Freedoms published a bulletin on the 17th of June 2020[13], warning against the video devices of so-called "intelligent thermal cameras" which were deployed as part of the procedure of the lockdown ending. If the process was seen as legitimate given the context, the National Commission for Computing and Freedoms expressed some reservation because of its massive use by both public and private entities. These cameras, used to prevent any suspicious case by evaluating a person's body temperature, were collecting a large amount of biometric or health data. Because of the absence of specific normative text, the process of such information was, in principle, prohibited. The Commission has concluded that these actions had to respect at least the principles of the General Data Protection Regulation. In the Commission's opinion, the people's consent could not be considered free since any refusal by the individual would be accompanied by a ban on access to certain private or public premises.

The National Commission for Computing and Freedoms also paid particular attention to the "StopCovid" mobile application[14]. The purpose of this application was to alert people who have been in contact with an individual who was tested positive for Covid-19. On the 26th of April 2020, a first opinion on the overall assessment of a mobile application project within the current legal framework was published[15]. The second notice was published on the 25th of May 2020 following the referral to the Ministry of Solidarity and Health on the draft decree implementing the "StopCovid" application[16]. The National Commission for Computing and Freedoms accepted the use of this technology, but it recalled that the process remained subject to the regime of the General Regulations on Data Protection of 1978. Indeed, the preservation of the history of an individual's contacts and elements of his state of health has been assimilated by the institution to the processing of personal data. The implementation of the system therefore had to be justified, necessary and proportionate. The Commission also stated that the maintenance over time of such an application should be conditional on a constant reassessment of its effectiveness through updated studies.

[[13] « La CNIL appelle à la vigilence sur l'utilisation des caméras dites „intelligente" et des caméras thermiques » : https://www.cnil.fr/fr/la-cnil-appelle-la-vigilance-sur-lutilisation-des-cameras-dites-intelligentes-et-des-cameras.

[14] « Application StopCovid : les contrôles de la CNIL » : https://www.vie-publique.fr/en-bref/275466-application-stopcovid-les-controles-de-la-cnil.

[15] See: https://www.cnil.fr/sites/cnil/files/atoms/files/deliberation_du_24_avril_2020_portant_avis_sur_un_projet_dapplication_mobile_stopcovid.pdf.

[16] See: https://www.cnil.fr/sites/cnil/files/atoms/files/deliberation-2020-056-25-mai-2020-avis-projet-decret-application-stopcovid.pdf.

The Ministry of Solidarity and Health followed the recommendations made by the Commission in its opinions. In particular, it was provided for the voluntary nature of the use of the "StopCovid" device, without any consequences or sanctions in case of refusal to use the application. In addition, proportionality has been reinforced by a period of commissioning limited to 6 months from the end of the state of health emergency. On the 4th of June 2020, the President of the National Commission for Computing and Freedoms announced the start of several controls on the mobile applications "Contact Covid", "SI-DEP" and "StopCovid". Following these controls, the decision n° MED-2020-015 of the 15th of July 2020 was made public[17]. The conclusions in this decision were quite severe. The evaluated applications were notably declared non-compliant with the General Data Protection Regulation. Similarly, a violation of the Data Protection Act was found in the collection of information carried out by Google via its "ReCaptcha" system which was not mentioned to the users and for which their consent was not requested. The President of the Commission gave to the Ministry of Solidarity and Health a period of one month to bring the application into compliance with regulatory and legislative standards before the opening of a sanction procedure.

This quick analysis shows that the French IAA and IPA have done a very important job in terms of information, awareness, and even sanctions. They managed to adapt their activity to the new circumstances, while continuing their previous work. They have thus demonstrated a great capacity for adaptation and have asserted themselves in their role as counter-powers. Thanks to their work, they participated in better informing Parliament and therefore enrich the parliamentary debate which is necessary in a democracy. From this point of view, they also plaid an important role in guaranteeing the balance of powers during the period of the state of emergency, when the executive power is much stronger, situation which inevitably leads to a degradation of democracy. All the reports made by European and international institutions noted such a degradation during the Covid crisis. The situation could have been worse in the absence of the work carried out by these authorities.

[17] Available on: https://www.legifrance.gouv.fr/cnil/id/CNILTEXT000042125452/.

THE AUTHORITARIAN COVID EMERGENCY RESPONSE: THE NECESSITY TO MANAGE CRISES THROUGH DEMOCRATIC MEANS

PAR AMÉLIE CASTELLANET
Les citoyens en alerte

Beyond the Covid crisis, another problem, left in the dark by the media and politicians and little acknowledged by the population, occurred and is still happening. The foundations on which our societies rely are at stake: there is a crisis in our democracy. While Covid was everywhere and was cited by politicians to justify very restrictive measures, conversely, the discussion about what happened utterly disappeared, as if these two years had never existed. It seems to us that these debates are nevertheless essential because societies are built on their past, and we learn from it. In fact, it impacts our future, and some profound modifications of l'État de droit (state of law) are still ongoing today. The health emergency management of the last three years has accelerated phenomena that had already begun. If we are conscious that the problems we will point out in this paper are not restricted to the Covid response, we will, however, limit our arguments to this period and topic based on the French case, which can be a starting point for a broader debate.

I) SCIENCE: A POLITICAL EXPLOITATION

Since the very beginning of the crisis, President Emmanuel Macron expressed his faith in science.

The first problem is that the President and Government had officially dismissed their political responsibility by assigning an excessive place to a scientific panel called "Conseil scientifique COVID-19". The latter Conseil scientifique was put in place by the President on his own criteria. Most of the panel members initially were epidemiologists, which seems problematic as their decisions have much broader impacts on domains of education, psychology, and the economy, among others. In fact, the role of politicians is to weigh the pros and cons of their decisions on various domains of society. Relying solely on this newly created institution was a new form of governing, as if the President was suspicious of existing administrative organisations he could have relied on to support the Health Ministry, such as the Haute Autorité de Santé. By choosing their own experts, every possibility of debate in the scientific environment was eliminated. But science is based on discussion and contradiction, which would otherwise lead to the stifling of all scientific progress. It often occurs that minority opinions are not considered seriously until evidence accumulates and causes a shift in scientific thought, as was, for example, the case of the continents drift debate.

The French institutional system, already very centralized and Jacobin in general, has been pushed to its climax in the management of this crisis, considered as "a war" against an enemy: a coronavirus. In the name of speed and efficiency, decisions were secret in order to avoid the enemy's discovery of the strategy adopted (hence the Defence Council), centralized and orders descended hierarchically. At least, that is the vision that Emmanuel Macron imposed. But this is to neglect all the lessons of modern military strategy, which demonstrate that, on the contrary, in a situation of uncertainty, it is necessary to give as much autonomy as possible to the combat units on the ground. While the HQ gives the overall strategic instructions, mainly the goals to be achieved, on the tactical level, the actions are readjusted to the local situation. Applied to Covid, this would have meant supporting regional actors to adapt to the directives, whether they are local public authorities, the medical profession and health institutions, or civil society and citizens themselves. This would have had the benefit of experimenting with various responses and, therefore, gradually adapting the recommendations according to the experience gained. Exactly the opposite has been done. It was particularly visible in the act of preventing doctors from choosing the care to be given to the sick, in a very worrying regression of medical ethics and contradiction with the Hippocratic oath.

Moreover, elected majors could have collaborated more efficiently with the citizens and dealt easier with local preoccupations. Conversely, illogical and incomprehensible measures were taken, such as for instance, the norm of a 1km restriction of movement during lockdowns or prohibiting access to public gardens and forests, which made no sense in regions with wide natural spaces.

The quasi-absence of counter-powers has further strengthened the excessive power already assigned to the executive. The Assemblée nationale (National Assembly), consisting of a presidential majority, complied with the Government's decisions. Most of the laws were passed under "accelerated procedure": sometimes, the Parliament had to pass bills within two weeks, which neither provided the time for the necessary debates nor the reaction of civil society. The President of the Republic announced the laws even before they were voted by the Parliament, which highlighted the fact that the latter had no power to overrule them.

The establishment of a legal state of health emergency provided the Government with vast competencies. In a democracy, such a legal regime should be exceptional and limited as much as possible in time and scope. While one could understand its use at the start of the crisis in a climate of general panic, its indefinite extensions, and for increasingly long periods, were alarming. The restrictions on freedoms resulting from this regime were numerous and severe.

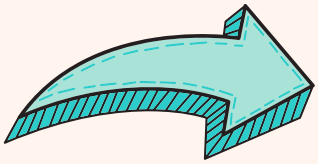
When a new and complex phenomenon appears, as was the case with Covid infection, especially at its onset, it seems natural that diverse scientific opinions and hypotheses are formulated. Nominating a "scientific" panel to prescribe "what is the truth" and what becomes "mainstream" had the inverse effect: it blocked the debate and gave the impression that there is no uncertainty.

Secondly, under this cover of a "scientific" state, the decisions remained strongly political and clearly contradictory to the scientific spirit. The absurdities of this way of governing were repeatedly revealed. The politicians contradicted themselves by using opposing scientific arguments depending on the decision they took. For example, mask-wearing was declared to be useless when there were none available and became compulsory indoors and outdoors when plenty of stock had been imported. Moreover, Emmanuel Macron took measures before the recommendations of the scientific panel were published. The report of the Conseil Scientifique came only afterwards to back up his decisions and seemed, therefore, nonobjective, less say, scientific. Another incongruity occurred when the Minister of Solidarity and Health of that time, Olivier Véran, justified his political decisions based on the scientific literature he picked. He forbade the medicine of Hydroxychloroquine based on an article in The Lancet, which included many errors, and which was withdrawn a few days after his prohibition. Yet, he did not lift the interdiction itself.

This policy can be related to Auguste Comte's positivist philosophy in which science is used as a tool to govern society and has historically led to political abuses, especially in the USSR at the time of Stalin. Those who criticized the measures and their rationality, were classified as being against science, as there was officially only one accepted truth. Some scientists and politicians used this positivist stance to silence any objection against lockdowns or doubts about the vaccination against Covid.

II) NO COUNTERPOWER AND WAR LIKE STATE FUNCTIONING

The political accountability of the Government towards the citizens was further withdrawn by the strategy of Emmanuel Macron to resort to the Conseil de Défense (Defence Council) meetings, which has been legally possible since 2009. However, its application is legally foreseen for extreme crises like war and terrorism. Health emergency was not provided for in the law. Nonetheless, it did not hinder Emmanuel Macron from using it during Covid. The President of the Republic chairs this Conseil de Défense, and the proceedings of these meetings are secret-défense (top secrecy) for at least 50 years. The Parliament cannot then control or even question their decisions. No responsibility is assumed since we do not know who spoke for or against such a measure. Only the actions taken by the Prime Minister can be checked by Government and courts. This system considerably accentuated the authoritarian nature of decision-making.



III) ABSENCE OF DEBATE POSSIBLE AND PROPAGANDA

An enlightening debate was not only missing in the decision-making but also in civil society. Instead, critical voices were silenced.

The crisis management did not include civil society's consultation. Instead, citizens' thoughts had to be focused on Covid transmissions. The gestures, actions and movements were prescribed, like children stripped of all responsibility. Restrictive punishments were put in place, mainly in the form of heavy fines, which were particular burdens for the popular classes. During lockdowns, neighbours even reported to the police those who did not respect it. Citizens were put in vigilance against themselves and were meant to control each other. The highly authoritarian "passe sanitaire" (digital health pass) was particularly drastic in this respect. Meanwhile, it also provided the Government with information about the population to an extent it could not have accessed without the compliance of civil society. This encouragement of self-control has its roots in policies established to respond to terrorist attacks in the 2000s. It distracts society from controlling State policies.

The mainstream media played an essential role in this problematic crisis management. First, it is because of the pressure to follow other countries' policies – China's lockdowns and then Italy – that so many states surrendered to copy such undemocratic models of responses. By playing on the population's fear, they urged governments to act.

Moreover, at the beginning of the crisis, a lot of propaganda was made about the benefits of lockdown while omitting the fact that many people were also suffering (mental health, education, family violence etc.). A very anxiety-provoking message was delivered daily with the rising number of deaths. TV and radio invited healthcare professionals to speak as long as they expressed the official discourse. So, paradoxically, the remaining doctors and nurses had to disappear. When it happened on BFM that healthcare professionals maintained that their hospital was not full of Covid patients, as opposed to the governmental assertion, the TV operator censored the show. Media also contributed to silencing opposite voices: articles on "conspiracy" or "defamation" of specialists were made. In consequence, many doctors who thought differently lost their jobs. It needs to be noted that the pressure did not diminish with the end of the crisis, as many health carers and university academicians or teachers continue to be suspended for critical opinions on crisis management or non-compliance with the rules, such as prescription of forbidden medicine when trying to cure Covid.

Social media played instead the counterpart of media and opened the space to a plurality of voices. Still, as the messages you get are oriented and calculated through algorithms, you only get more convinced about your position instead of seeing different opinions and getting a broader view of the problems and solutions. Moreover, platforms such as YouTube and Facebook practised strong censorship of nonmainstream ideas.

IV) CIVIL COUNTER-POWERS

One of the most crucial counter-power existing, the political demonstration, was impacted during the Covid crisis. This occurred at a very socially critical moment (Gilets Jaune protests and social movements end of 2019 and beginning of 2020). Demonstrations were first forbidden, but the Conseil d'État lifted this restriction in June 2020; nevertheless, social movements have struggled to recover. In this period, many laws further curtailed the society's power (e.g., Loi pour une Sécurité Globale, Loi Avia). Moreover, the police took the opportunity to experiment with and extend illegal means of control. Those were only partially legalised afterwards. For instance, drones were used to ensure that lockdown was well respected. While unlawfully at that time, they have been authorised since then and are currently employed in social protests, such as those against the pension reform.

Although they were less heard, jurists had a decisive influence on the critical view of freedom restrictions. Lawyers probably understood better the impact of the emergency state regime, the total power going along with freedom restriction, and what this would mean for democracy in the long-term. Exemplary is the case of lawyer and writer François Sureau, who published an essay Sans la liberté very critical of the terrorism emergency state. He explained furthermore that if you restrict the freedoms of a part of a society, you limit the freedoms of all because it will be used in broader terms, as it has been with militants like ecologists.

Professor Paul Cassia also clearly stated his concerns about the harmful effects on the state of law of the Covid crisis management. Nonetheless, most intellectuals have supported this crisis management or, at least, did not pronounce themselves. In the beginning, nearly no oppositional voice was heard. The digital health pass establishment, which was very extreme regarding freedom restriction and lacked scientific justification, aroused more widespread social and political opposition. Some had courageous stances, like the philosopher and Professor Barbara Stiegler in her publication De la démocratie en temps de pandémie or philosopher Mathieu Slama who both pointed out the dangers of undemocratic crisis management several times.

We believe the crisis could have been managed and monitored more democratically. After the first moment of shock, no reason existed to hinder our institutions' normal functioning. Pursuing an exceptional regime in the name of emergency for two years was even less necessary and justified. It would have been wiser to grant more power to local institutions (hospitals, doctors...) and to help them financially and logistically.

Moreover, different local and democratic decision instances and discussion groups could have been put in place quickly. Conversely, this way of operating has considerably weakened the Parliament in the long term. Despite losing an absolute presidential majority since the summer of 2022, the Assemblée nationale is repetitively bypassed by the executive power.

PHOTO BOOK

UN GRAND MERCI À P MALLÉJAC, E. LAGUNE,
A. BACHERT-PERETTI, C.-E. NIKOLAIDIS-LEFRANÇOIS

TREASURE HUNT

PROPOSÉ PAR L'AEILF

L'**AEILF** a pour objet la cohésion entre enseignants, étudiants et anciens étudiants de l'Institut Louis Favoreu , l'organisation de manifestations scientifiques et culturelles s'adressant tant aux étudiants qu'aux professionnels du droit et la promotion et la publication d'activités de recherches des étudiants des Masters 2 de l'Institut Louis Favoreu.

UN JEU À ÉNIGMES INÉDIT

L'objectif premier du projet a été d'offrir aux étudiants une réflexion ludique et innovante autour du thème « Governing in times of crises ».

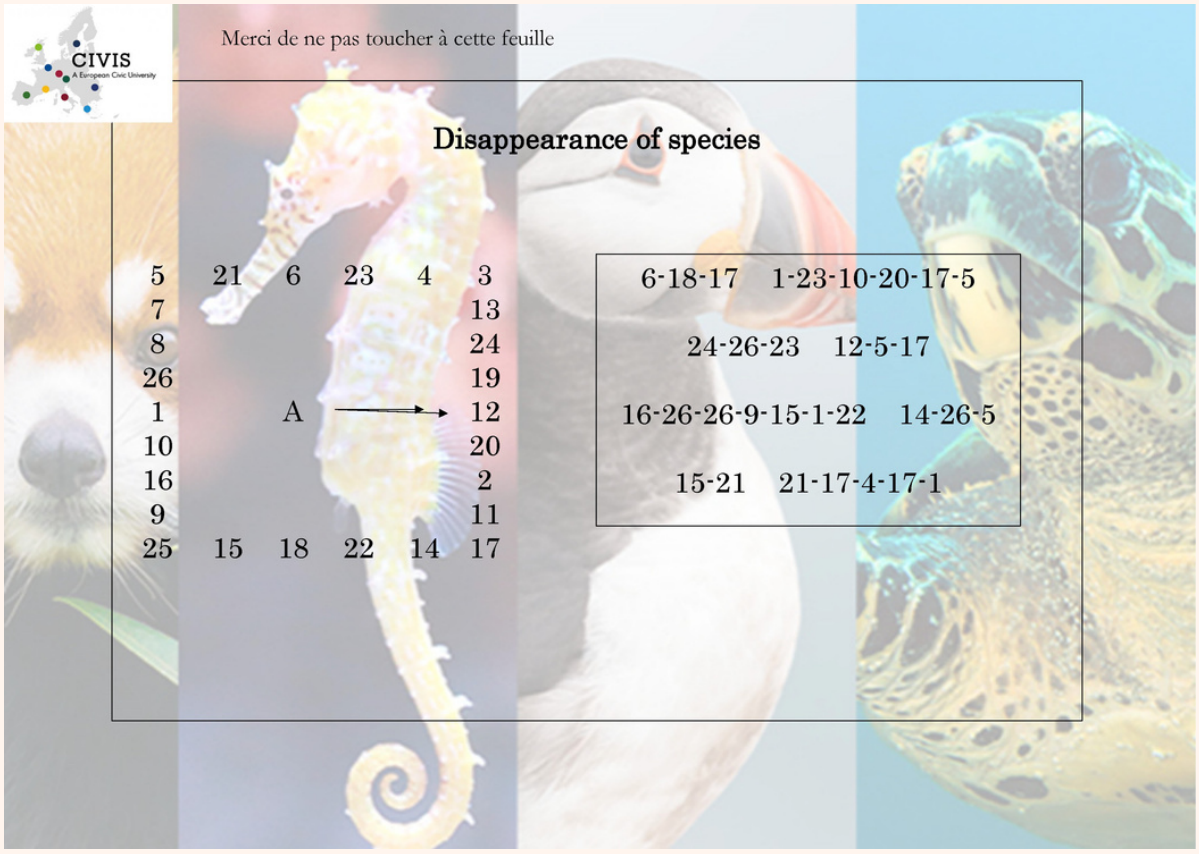
Pensée comme des moments de « respiration » au sein de la semaine, cette activité a invité les étudiants à appréhender autrement la recherche et la science du droit.

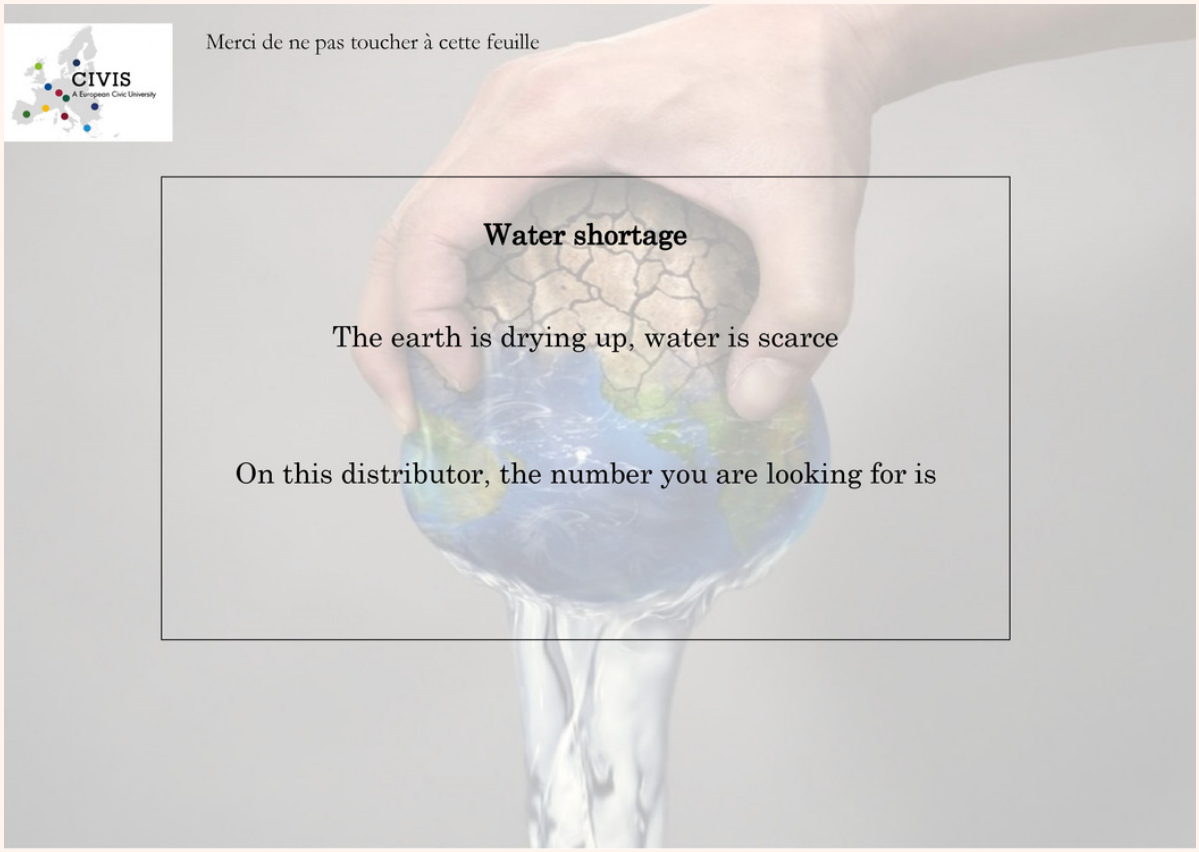
LES RÈGLES DU JEU

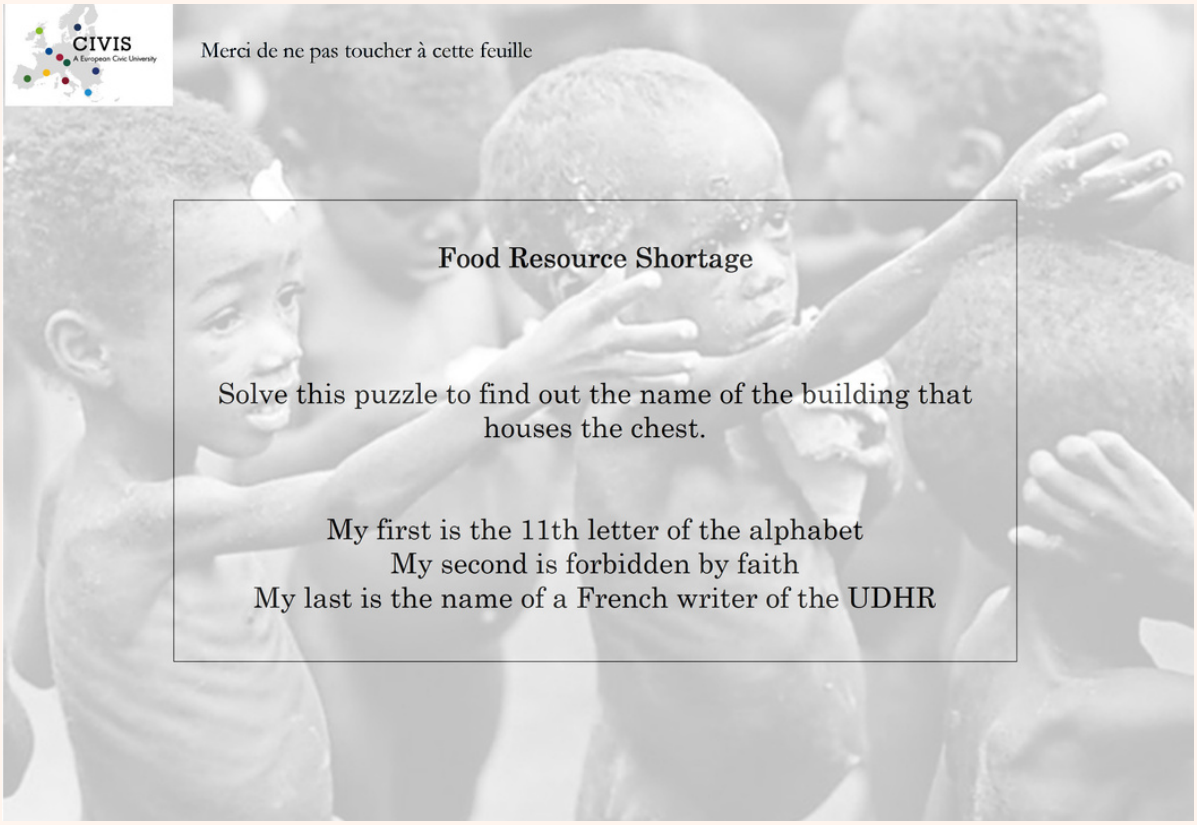
Les **six énigmes** portaient sur le thème de la crise climatique.

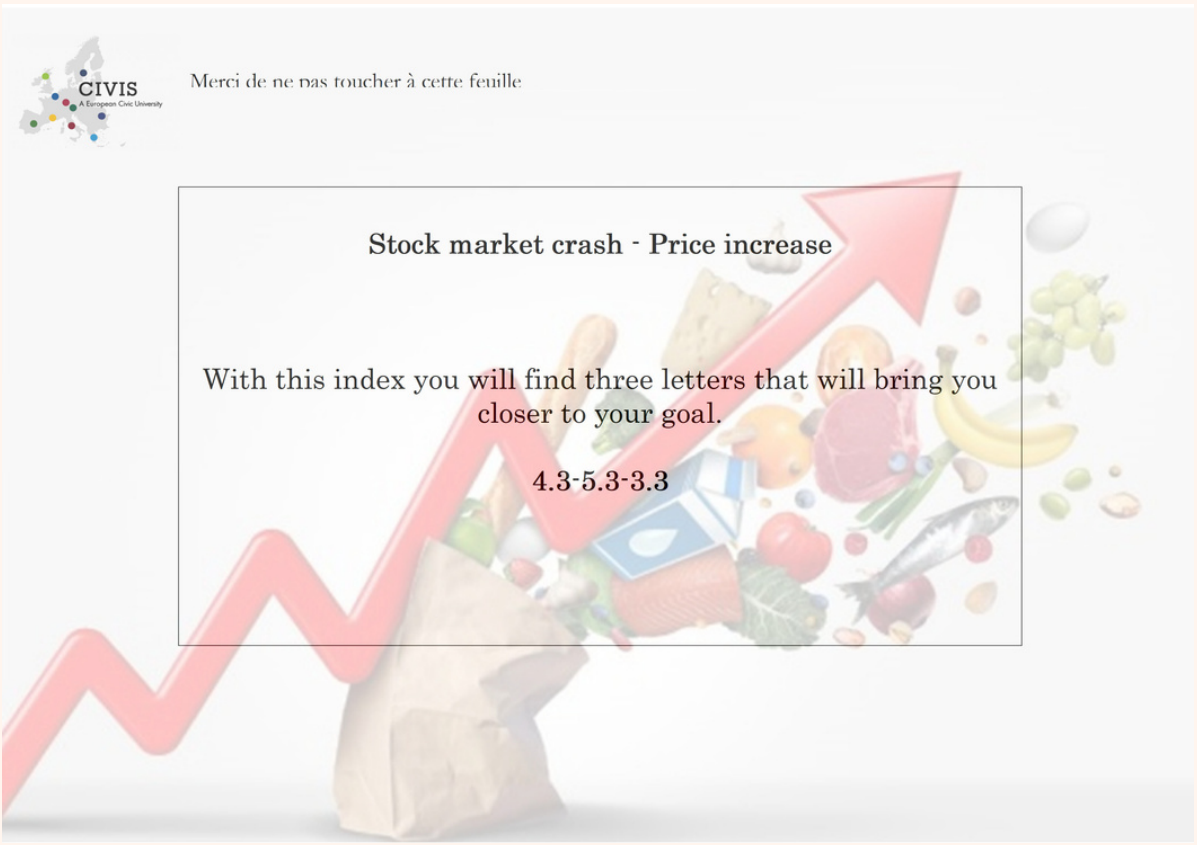
Un livret avait été distribué à chaque équipe participante pour les mener à chacun des lieux où se situait une carte énigme.
Chaque carte énigme résolue offrait un indice permettant à une équipe de découvrir un coffre caché dans la Faculté ainsi que le code du cadenas fermant le coffre.
Une fois le coffre ouvert, l'équipe gagnante s'est partagée le butin composé de 7 livres en anglais portant sur des sujets politico-juridiques.


Merci de ne pas toucher à cette feuille
Forest fires
Quickly! The forest fires are spreading, 1000 hectares are already decimated.
The number you search corresponds to the title number containing the term "forêt" (forest).


Merci de ne pas toucher à cette feuille
Disappearance of species
5 21 6 23 4 3
7 13
8 24
26 19
1 A 12
10 20
16 2
9 11
25 15 18 22 14 17
6-18-17 1-23-10-20-17-5
24-26-23 12-5-17
16-26-26-9-15-1-22 14-26-5
15-21 21-17-4-17-1


CIVIS
A European Civic University
Merci de ne pas toucher à cette feuille
Water shortage
The earth is drying up, water is scarce
On this distributor, the number you are looking for is


CIVIS
A European Civic University
Merci de ne pas toucher à cette feuille
Food Resource Shortage
Solve this puzzle to find out the name of the building that houses the chest.
My first is the 11th letter of the alphabet
My second is forbidden by faith
My last is the name of a French writer of the UDHR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Merci de ne pas toucher à cette feuille
Stock market crash - Price increase
With this index you will find three letters that will bring you closer to your goal.
4.3-5.3-3.3


CIVIS
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Merci de ne pas toucher à cette feuille
War for access to resources
To find the door behind which the chest is hidden, you must find three words using the letters below :
CIFFPHEDTOSDEUTN

CIVIS LETTER N° 1

ONT PARTICIPÉ À CE NUMÉRO
T. BRILLANTI-DERIEN
A. CASTELLANET
I. CIOLLI
N. DANELCIUC-COLODROVSCHI
K. ILIADOU
C. GEYNET-DUSSAUZE
X. MAGNON
P. JENSEL-MONGE
D. TRUCHET
A. VIDAL-NAQUET

RÉDACTION ET MISE EN PAGE
C. LARGERON

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ADDRESS:

CIVIS LETTER Charlotte LARGERON - Publications ILF - GERJC
(AMU CNRS UMR 7318 DICE)
FACULTÉ DE DROIT ET DE SCIENCE POLITIQUE
Aix-Marseille Université - 3 Av. R. Schuman - 13628 Aix-en-Provence