

RÉPUBLIQUE FRANÇAISE

**THE DEFENDER
OF RIGHTS**



Paris, 25 January 2016

Opinion of the Defender of Rights No. 16-03

The Defender of Rights,

Pursuant to Article 71-1 of the Constitution of 4 October 1958;

Pursuant to Organic Law No. 2011-333 of 29 March 2011 concerning the Defender of Rights;

Pursuant to its opinion No. 15-17 of 23 June 2015;

Having been heard on 20 January 2016 by the Senate Committee on Legislation on the matter of monitoring the state of emergency, issues the attached opinion.

The Defender of Rights

Jacques TOUBON

On the evening of the attacks of 13 November 2015, a state of emergency was immediately declared on the grounds of Law No. 55-385 of 3 April 1955 *regarding the proclamation of a state of emergency and improving the effectiveness of its provisions* for a period of 12 days. The state of emergency was then extended to three months as of 26 November by means of Law No. 2015-1501 dated 20 November 2015, extending the application of the Law of 3 April 1955 and improving the effectiveness of its provisions.

Furthermore, the Law of 20 November 2015 introduces parliamentary control over measures put in place in this respect. Indeed, in accordance with the new Article 4-1 of the amended Law of 1955, *"the National Assembly and the Senate are immediately informed of the measures taken by the government during the state of emergency. They may require further information for the purposes of monitoring and assessing these measures"*.

Within this exceptional context of the restriction of freedoms and in the framework of its mission to defend individual rights and freedoms, the Defender of Rights has decided to receive all complaints regarding the problems associated with the implementation of the measures taken in accordance with legislation regarding the state of emergency, notably by means of its 400 territorial representatives currently in operation and who have received clear and precise instructions with regard to the gathering of usable testimonies.

The Defender of Rights has started to undertake an independent and entirely impartial case-by-case examination of complaints falling within its field of expertise, and ensuring that "those holding security-related positions within the Republic observe the code of ethics" in particular, as well as with regard to fighting discrimination, public service failures and protecting children' rights. It has also created a dedicated legal information area on the institution's website.

At the same time, the Defender of Rights informs the National Assembly and the Senate on a weekly basis of the information gathered in this way with a view to supporting and enlightening the parliament in its task of monitoring and assessing the measures taken by the government in the framework of the state of emergency.

According to the latest information from the Ministries of the Interior and Justice, the state of emergency is believed to have resulted in the following:

- **3,099 home searches, carried out both during the day and at night** (58.7% of which took place over the course of the first two weeks of the state of emergency and half of which took place at night), 492 weapons discovered and 453 violations reported, 309 individuals remanded in custody and 2 remedies.
- **542 instances of legal proceedings** being initiated. These relate primarily to violations of the legislation on weapons (199 cases) and the legislation on narcotics (181 cases). Other investigations launched relate to other types of violation (counterfeiting, receiving stolen goods, etc.).

- **382 house arrests** (with the obligation of reporting to the police station), 57 interim rulings for possible infringements of liberties and 46 instances of illegality proceedings. The number of new house arrests has decreased significantly since 25 November.
- **4 temporary closures of entertainment venues, bars and meeting places.**

The Minister of Justice has revealed that some 300 cases are still at the investigation stage and **only 2 are believed to have been referred to the anti-terrorist unit of the Paris Public Prosecutor's Office.**

In light of the objective that the state of emergency is designed to achieve, namely to "*prevent imminent danger resulting from serious breaches of public order*", and more specifically to **prevent acts of terrorism**¹, and the results achieved to date, the parliamentary control commission should consider the operational effectiveness of the state of emergency and ask itself whether the objective in mind could not ultimately have been achieved within the common law system that is more in keeping with the rule of law and fundamental freedoms, with the potential use of the new means for monitoring information services, which have recently been modernised and reinforced by the law of 24 July 2015 regarding information, where necessary.

The Defender of Rights committed to this approach with caution and reserve since it is still in its infancy as an institution and furthermore finds itself faced with the, in many ways unprecedented, legal context of the state of emergency. It is important, here, to make some initial observations, without prejudice to any positions that the Defender of Rights might consequently take regarding the continuation of the state of emergency and any future texts, relating to security.

1. Quantitative assessment of the complaints received

The Defender of Rights consequently received a total of **42 complaints** between 26 November and 15 January 2016, **including the following:**

- 29 referrals relating to measures taken expressly in the framework of the state of emergency: 18 searches and 11 house arrests (including 2 that resulted in dismissal and the withdrawal of authorisations and approvals from an airport security coordinator).

¹ Statement of reasons behind the bill extending the application of Law No. 55-385 of 3 April 1955 regarding the proclamation of a state of emergency and improving the effectiveness of its provisions.

- 13 referrals relating to situations indirectly linked to the state of emergency: **4 denials of access to public places** (including exclusion from a cinema, denial of access to a secondary school to a mother wearing a veil and even denial of access to a police station for wearing a veil), **2 questionings** (one resulting in the individual being remanded in custody), 1 complaint regarding **two dismissals for wearing a beard**, **1 disciplinary suspension** with a report by an employer owing to the nickname displayed on the employee's locker (Kalkal being the name of a terrorist), **1 suspension of a professional license**, **1 refusal to issue a passport**, **1 airport check**, **1 vehicle check** breaching the passengers' right to privacy and **1 case of prohibition on leaving the country**.

Complaints regarding the state of emergency

From 26 November to 15 January 2016

Police search

House arrest

Denial of access to public places

Questioning

Dismissal for wearing a beard

Disciplinary suspension, etc.

Suspension of professional license

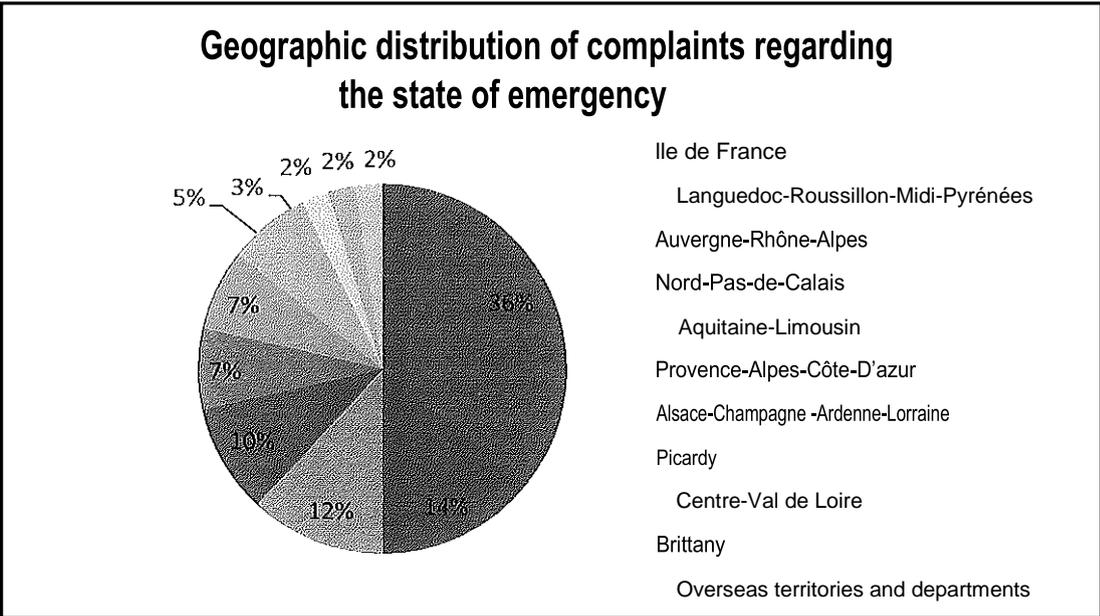
Refusal to issue passport

Airport check

Vehicle search

Prohibition on leaving the country

The majority of the complaints received came from the Ile-de-France region (15) and more specifically the Seine-Saint-Denis and Val-de-Marne departments. Referrals have also been made from the Languedoc-Roussillon-Midi-Pyrénées (6), Auvergne-Rhône-Alpes (5), Nord-Pas-de-Calais (4), Aquitaine-Limousin (3), Provence-Alpes-Côte-D'azur (3), Alsace-Champagne-Ardenne-Lorraine (2), Picardy (1), Centre-Val de Loire (1) and Brittany (1) regions and the overseas territories and departments (1 complaint made in Guyana).



Whilst some complaints have resulted in a favourable outcome (compensation or adjustments to summons conditions), most are still in the process of being investigated or awaiting either a response from the authority in question or for the complainant to provide more information.

2. Qualitative assessment: lessons learnt from the investigation of complaints

With regard to searches:

The majority of referrals relating to the conducting of searches refer to operations performed at night, a mass police presence, material damage to the home (destruction of entry doors, ransacking of premises, destruction of personal items, etc.), the use of handcuffs, physical violence and verbal abuse (and discriminatory remarks relating to the practice of the Muslim religion in particular) and the presence of children at the time that the operation takes place.

It is important to underline that a large number of complaints are made in the form of simple testimonies with no specific demands for action, with complainants believing that they have been the subject of a search or placed under house arrest for no legitimate reason.

The presence of children during searches:

Four of the referrals received refer to the conducting of searches, in the middle of the night and in the presence of sometimes very young children, without any precautionary measures appearing to have been taken. Complainants condemn the fact that their children have been awoken in their beds and had weapons pointed at them and that they have been left traumatised as a result. The circular of 25 November 2015, issued by the Minister of the Interior, for its part, firmly reminds those police and law enforcement officers who carry out searches of their duty to set a good example and the fact that they must be careful to respect the dignity and safety of those placed under their responsibility.

It is vital that operations that might be traumatising for young children be avoided in order not to mentally disturb these children in the long term or cause them to have a negative perception of any members of the police force or of gendarme officers, which could encourage an aggressive attitude towards such professionals in the future.

The Defender of Rights would like to reiterate the recommendations made in a decision dated 26 March 2012², recommending that information regarding the number and ages of any children that might be present during a search should be gathered prior to the operation being executed and that, where possible, the search squad should include a social worker or psychologist, or a member of the police force or gendarme officer from the family protection unit. At the very least, one person from within the search squad should be entrusted with the specific task of protecting any minor(s) involved.

During an operation, police and law enforcement officers should "not use handcuffs to restrain parents in front of the child" and take the latter "aside", such as onto the landing of the apartment, for example, so that "they do not witness the operation" taking place. In the event that the members of the security forces are wearing masks, it is recommended that they remove these when speaking to a child.

Furthermore, the Defender of Rights, in a decision dated 13 November 2012³, recommends that the basic and on-going training of law enforcement units, and of special and masked units such as the RAID, the GIPN and the GIGN in particular, place particular emphasis not only on moving children to a separate room but on the need to ensure that children are supervised and spoken to by unmasked officers. In the event that it is not possible to fulfil all of these conditions, the mask must nevertheless be removed when speaking to young children who are not likely to identify the security forces.

" Decision No. 2012-61 (MDE/MDS) dated 26 March 2012 relating to recommendations regarding the use of police and law enforcement officers when the latter are required to perform operations in a home in which there are children present:

http://www.defenseurdesdroits.fr/decisions/ddd/DDD_DEC_MDE-MDS-2012-61.pdf.

" Decision No. 2010-39 (MDS/MDE) dated 13 November 2012 relating to caring for children when questioning individuals at the homes of two families.

Furthermore, it is worth pointing out that the ECHR, in a ruling dated 15 October 2013⁴, condemned Bulgaria for violating Article 3 of the Convention in the case of a search conducted at a suspect's home in the presence of young children. The Court cited an excessive use of force, among other things, "although the claimants were not physically injured". It notably sanctioned the authorities concerned, claiming that "*the possible presence of the complainant's wife and minor children was not taken into consideration at any stage in planning and carrying out the police operation*" and "*her two daughters were psychologically vulnerable because they were so young (five and seven years of age)*" (...).

This ruling also raises the issue of the reasons behind the decision to execute operations in the middle of the night (is the surprise effect always necessary?): "*[the fact that it was] in the early morning and involved special officers wearing masks, who were seen by [the wife] and her two daughters, served to heighten the feelings of fear and anxiety experienced by these three applicants, to the extent that the treatment to which they were subjected exceeded the threshold of severity required for Article 3 of the Convention to apply*".⁵

Whilst taking into account the context and therefore any potential adaptations that may be deemed necessary, the Defender of Rights would recommend that the issue of the presence of children be given special consideration.

Electronic data entries during searches:

The Law of 24 November 2015 extending the state of emergency and modernising the Law of 1995 introduces the possibility of authorities accessing, "*by means of an electronic system or terminal device located on the premises on which the search is taking place, data stored within said system or device or within another electronic system or terminal device, provided that such data is accessible from the original system or available to the original system*". Data, whether stored or accessible, can be copied but not entered (Article 11 of the amended Law of 1955).

Furthermore, the circular issued by the Ministry of the Interior dated 25 November 2015 regarding the conditions inherent to the conducting of administrative searches states that "*administrative searches prohibit any form of data entry but do allow for computers and telephones to be used and for the corresponding information to be copied in any format. Items of data can only be entered as a result of legal proceedings being initiated and must be entered exclusively by the attending DC.*"

⁴ECHR judgement, Gutsanovi v. Bulgaria dated 15 Oct. 2013, No. 34529/10.

⁵ECHR, 15 Oct. 2013, No. 34529/10, Gutsanovi v. Bulgaria <http://hudoc.echr.coe.int/fre?i=001-127426>

The gathering of personal data through electronic data entries executed during administrative searches must be supported by guarantees regarding the use of said data, particularly for purposes other than fighting breaches of State security.

The report and the reasons behind it:

With regard to processing these complaints, the Defender of Rights would ask that complainants produce search reports. An examination of the reasons reveals two types of argument that are put forward:

- either the person that is subjected to the search is themselves implicated for being an activist in the Jihadist movement (*founded suspicion of terrorism*),
- or the person that is subjected to the measure has either directly or indirectly, and to an unspecified degree, found themselves in contact with an activist in the Jihadist movement. The conditional tense is then used where there is an indication that the residence or the vehicles of the targeted individuals might be used by Jihadist activists (*alleged suspicions of terrorism*).

Furthermore, complainants state that, at the end of the search, the corresponding report is read to them but that they never receive a copy of said report. Wishing to at least be able to request a reimbursement of the costs incurred as a result of damage caused to the entry doors to their homes, they believe that they should be able to produce a document testifying to a broken door for the purposes of applying for compensation or even initiating litigious administrative proceedings.

The Defender of Rights believes that a report outlining any damage caused should be submitted to the individual(s) subjected to the search. In the event of a mistaken address or the incorrect identification of an entry door to a building, such a report should be submitted to the occupant of the premises.

Compensation for damages

These observations have led us to consider the issue of compensation for damages caused by such measures. The circular of 25 November 2015 regarding the conditions inherent to the conducting of administrative searches states that *"the State can only be held liable in the event that there is evidence of gross negligence. Subject to the interpretation of the trial judge, the fact that law enforcement officers might consider it necessary to knock a door down or to cause material damage should not in itself constitute gross negligence since the needs associated with fighting terrorism and preventing breaches of public order in the framework of the state of emergency justify such actions."*

Such measures are, of course, becoming increasingly contested (unjustified searches, house arrests based on suspicion alone, curfews with no connections to terrorism, mistaken addresses, etc.). Beyond any material damage caused, the humiliation felt by the families concerned, the ensuing trauma (particularly where children are concerned) and sometimes changes in relationships with neighbours and work colleagues must also be borne in mind.

The Defender of Rights would recommend that a procedure for seeking compensation for unjustified damage caused in the framework of a state of emergency be put in place and believes that a standard form with an address and a phone number should be introduced to facilitate applications for compensation⁶.

➤ **With regard to house arrests:**

The majority of these complaints concern the terms governing the house arrest (and the need to alleviate the measure as a result of illness, a disability or the individual in question having dependent children).

The parents of an 18-year-old secondary school pupil who was placed under house arrest with the obligation of reporting three times a day, fearing that the system would result in their son having to skip lessons and risk being excluded from school for absenteeism, for example, referred their case to the Defender of Rights. The Defender of Rights ruled that the pupil should be allowed to continue his education without disruption, particularly since attending lessons appears to have a stabilising effect on young people on the road to radicalisation. Simultaneous intervention on the parts of the boy's parents and the Defender of Rights resulted in arrangements being made for the boy to fulfil his reporting obligations without this interfering with his education.

Furthermore, a complainant called upon the Defender of Rights to support his request to be allowed to complete his period of house arrest at his parents' house, which was located in a town far away from the location to which he was required to report. He stated that he found himself in a precarious situation in that he was unemployed and in the process of having his lease terminated. The case was referred to the Minister of the Interior.

Generally speaking, there is a need to allow for the restraints associated with cases of house arrest to be adapted to take into account the day-to-day lives of the individuals concerned, provided that such adaptations do not retract from the effects of the measure.

⁶ Proposal by Jean-Frédéric Poisson at the meeting of the Commission on Constitutional Laws, Legislation and General Administration of the Republic of 16 December 2015.

➤ **With regard to 'collateral damage':**

- **Measures taken in the framework of the state of emergency can have professional consequences for the individual in question.**

Indeed, a number of **cases of dismissal** have been referred to the Defender of Rights:

An individual has been the subject of a dismissal procedure for gross misconduct owing to "*events that have been brought to the attention*" of their employer.

The complainant has been summoned by their employer and found themselves the subject of a disciplinary suspension owing to the fact that they had written the nickname 'KALKAL' (the name of a terrorist) on their locker 2 months earlier. Furthermore, their employer informed them that they intended to report them to the police.

Two security agents were dismissed for wearing a beard from a security company where it appeared that Muslim employees had been harassed since the attacks.

Furthermore, whilst no such hypothesis has yet been referred to the Defender of Rights to date, it has observed that house arrest combined with a ban on leaving the hometown can effectively prevent the individual concerned from getting to their place of work. Indeed, employees often work outside of the towns in which they live. With this in mind, the Defender of Rights would call for greater flexibility with regard to arrangements made in the framework of house arrest measures so as not to prevent the individual concerned from working.

As far as the **specific case of the security agents** is concerned, an airport security coordinator referred his case, regarding a decision by the prefect that withdrew his authorised access to the controlled-access security area of an airport as a result of his being questioned for holding an undeclared category C weapon, which resulted in him being summoned before the District Court of Toulouse and placed under judicial supervision, to the Defender of Rights. Since the grounds on which the individual was questioned were not compatible with him operating within a controlled-access security area of an airfield, the prefect used the power bestowed upon them by the regulations in force.

An employee of a major private security company with both private security and fire safety authorisation had his professional security agent's license withdrawn by the National Council for Private Security Activities (CNAPS), in accordance with Article L. 612-20 of the French Domestic Security Code (emergency power of the President of the Authorisation and Monitoring Committee (CAC)), on the grounds "*that the administrative investigation, and the record of the wanted individual in particular, has shown that there are serious and consistent indications that his behaviour is likely to prove detrimental to the security of both people and*

property, to public safety and to State security and that it is contrary to probity". Following this decision, his employer informed him that his professional license was no longer valid and suspended his employment contract until he could produce a new license. No consideration was given to the fact that he could still perform his fire safety role, which does not require the individual to hold a professional security agent's license. The complainant submitted an RAPO (obligatory prior administrative appeal) to the CNAPS.

This case highlights a form of communication that is not provided for in the textual provisions between police forces and the CNAPS, when the latter, in the framework of administrative investigations undertaken for the purposes of assessing an agent's morality, can only access information regarding the facts that led to the conviction, in accordance with Article 230-8 of the French Code of Criminal Procedure.

- **The context surrounding a state of emergency also creates a number of difficulties with regard to accessing certain public places.**

A scarf-wearing individual and member of the school's parent-teacher association who was refused access to the school after a lunch break owing to the establishment's internal rule prohibiting religious signs, despite the fact that she had been allowed to enter the establishment without any problems that same morning to prepare for an event that said association was organising, therefore referred her case to the Defender of Rights. Since the principle of religious neutrality outlined in Article L.141-5-1 of the French Code of Education does not apply to pupils' parents, the Defender of Rights raised the issue with the principal of the school since the decision to deny the individual in question entry to the establishment could have been deemed discriminatory based on the individual's belonging to a religious community.

The Defender was also approached by parents who were dissatisfied with the terms governing access to school establishments when they go to pick their children up from their childcare centre. Parents were, in fact, told that the doors would be closed at 4:40pm and then opened for 5 minutes at fixed intervals of half an hour to enable parents to collect their children but that they could not enter the establishment and that doing so would result in their child(ren) being definitively excluded from the centre. In any case, in light of the combined provisions of the Vigipirate plan and the provisions of the CGCT (French General Code of Local Authorities), it was deemed that the mayor in question could legally enact any measures they considered appropriate to ensure safety and security in areas surrounding school establishments with regard to extra-curricular activities.

Whilst a state of exception may provide an appropriate response in a situation of exceptional and imminent danger, this temporary restriction of freedoms must be linked to its ultimate aim, and therefore to the return to a state of law.

"We are not going to eradicate terrorism or more easily fight those committing acts of terrorism by constitutionalising the state of emergency. Indeed, the state of emergency is not a preventive measure but rather a form of treatment. The Constitution is not made for that; it is intended to outline the general rules regarding the upholding of the rights and obligations of all citizens with equal rights" (President of the CNB (French National Bar Council)).

The Defender of Rights would recommend that the state of emergency be more closely monitored by imposing material and time limits and that a strict causal link between the reasons for the measure put in place and those behind the state of emergency be required.

It would recommend that a series of guarantees be incorporated into the constitutional bill on national protection, such as the upholding of the principles of need and proportionality.

Indeed, whilst the Defender of Rights is convinced of the need for exceptional temporary measures designed to deal with exceptional situations to be put in place, it would encourage the necessary conciliation between legitimate security requirements and increased guarantees that must be provided with regard to respecting rights and freedoms.