
Counterterrorism and Fundamental rights in France

A French context marked by the establishment of the state of emergency and the stepping up of counterterrorism

Following the Paris attacks of 13 November 2015, France introduced the state of emergency, a regime stemming from a law of 3 April 1955, enacted at the time to deal with the “events” in Algeria. Since then, the state of emergency has been extended six times and is due to come to an end on 1 November 2017².

In compliance with its obligations under the European Convention on Human Rights³, France informed the Secretary General of the Council of Europe of a number of measures taken in the context of the state of emergency which would be likely to derogate certain rights guaranteed by the Convention.

The state of emergency is an exceptional regime which, in the event of immediate danger resulting from serious breaches of public order, enables the authorities to take such administrative policing measures as restrictions on freedom of movement, administrative searches during the day and at night, house arrests, closing of meeting places and places of worship, prohibition of parades, identity checks, searches of baggage and vehicles, and dissolution of associations.

Such restrictions of rights and freedoms provide few guarantees and require no prior judicial control. The regime's

implementation does not prevent recourse to common law tools for preventing and countering terrorism, which remain in force.

Since the state of emergency was first introduced and during its successive extensions, the Defender of Rights has publicly expressed its fears as regards the risk of its perpetuation. Such fears have since been confirmed, as, in June 2017, in order to exit the state of emergency, the government decided to present a bill widening the scope of the special measures implemented to counter terrorism and incorporating a number of measures relating to the state of emergency into common law⁴. Il est actuellement en cours de discussion devant le Parlement. It is currently being debated in Parliament.

In this context and in accordance with its various missions⁵, the Defender of Rights decided to collect all individual complaints relating to problems connected with implementation of measures taken pursuant to legislation on the state of emergency

and mobilise its 450 territorial delegates to this end. It examined complaints covered by its fields of competence, on a case-by-case basis and in full independence and impartiality. A legal information page was also opened on the Institution's website.

The Defender of Rights has taken action on the subject in a number of ways, mainly via recommendations addressed to the government and opinions communicated to Parliament in the context of examination of bills.

Defender of Rights' recommendations following the processing of complaints

Between November 2015 and July 2017, the Defender of Rights received a total of 110 complaints, 75 of them concerning measures expressly taken in application of the state of emergency (51 searches, 21 house arrests [one of which led to the complainant losing his job and another to an airport safety coordinator losing his authorisations and approvals], 2 searches followed by a house arrest and an exit ban, and 1 search followed by house arrest and a request for removal of subsidiary protection), 35 concerning situations indirectly connected with the state of emergency and having negative professional consequences (loss of jobs, etc.) or resulting in restriction of freedom of movement (refusal of access to public areas, identity checks, etc.), and a good many testimonies.

Most complainants alleged that searches were carried out at night, with a heavy police presence armed with handguns and/or masked, and emphasised that no explanation was given.

Some of them reported acts of physical and psychological violence, in particular with regard to children present⁶, and a few others spoke of inappropriate and discriminatory remarks due to the religious practices of the individuals undergoing searches⁷.

Following its processing of individual complaints, the Defender of Rights communicated recommendations to the government.

Recommendations regarding searches carried out in the presence of children

The Defender of Rights found that interventions by the police and gendarmerie in domiciles where children are present may have harmful consequences for the latter. A number of referrals reported searches being conducted in the middle of the night and in the presence of children, with no precautions taken. A Ministry of the Interior circular of 25 November 2015 firmly reminded police officers and gendarmes carrying out searches of their duty of exemplarity and that they must take care to respect the dignity and safety of all individuals placed under their responsibility.

In a decision of 26 February 2016⁸, the Defender of Rights made recommendations in this regard, drawing on the legal precedents set by the European Court

¹ Law no.55-385 of 3 April 1955 bearing on the state of emergency.

² Parliament should adopt the bill extending the state of emergency during summer 2017.

³ Article 15 of the Convention.

⁴ Bill strengthening internal security and counterterrorism.

⁵ Missions of defence of rights and freedoms in relations with public services, combating discrimination, defence and promotion of the rights of the child, and monitoring compliance with the security forces' code of ethics.

⁶ Some 10 complaints made general allegations of acts of violence and 10 others complained of children being present during the operation and the traumas they suffered in consequence.

⁷ This concerns 3 complaints.

⁸ Decision 2016-69 of 26 February 2016: https://juridique.defenseurdesdroits.fr/files/DDD/DEC/DDD_DEC_20160226_MDS-MDE-2016-069.pdf.

of Human Rights⁹, which sanctioned the authorities concerned when the possible presence of children was not taken into account during the planning and execution of police operations.

It is essential to ensure that interventions do not traumatise children, so that they suffer no lasting disturbance and the image they have of the police and gendarmerie is not a negative one that may later contribute to aggressive attitudes towards the forces of order. A number of precautions should be taken before, during and after the operation.

For example, the Defender of Rights recommended that, before the intervention, information be collected on the presence, number and ages of any children present, and that, if possible, a social worker or psychologist should be included in the team, or a police officer or gendarme from the Family Protection Brigade. At the very least, a member of the team conducting the search should be made specifically responsible for the protection of any minors present.

The Defender of Rights finally recommended that, in addition to the necessity of putting children in a separate room, initial and continuing training delivered to security forces, especially masked special units such as the *Recherche, Assistance, Intervention, Dissuasion* (RAID – Search, Assistance, Intervention, Deterrence), the *Groupe d'Intervention de la Police Nationale* (GIPN – National Police Intervention Group) and the *Groupe d'Intervention de la Gendarmerie Nationale* (GIGN – National Gendarmerie Intervention Group), pay particular attention to the need for surveillance of and dialogue

with children to be carried out by officers specifically assigned to the protection of minors. On 23 March 2016, the Minister of Justice showed his interest in these recommendations and the Prefect of the Paris Police took action on them¹⁰.

Recommendations on carrying out searches

Noting that there was some confusion as regards the report to be made out following a search operation, the Defender of Rights recommended that a circular from the Minister of the Interior standardise practices by requiring the drafting of two distinct documents¹¹: a detailed report on the search to be communicated to the Public Prosecutor with all due speed as a record of the operation and a report on the operation¹² to be signed by the occupant of the premises searched.

It also recommended that security force's obligations in the context of administrative searches connected with the state of emergency be complemented by individuals subject to such searches being systematically notified of the prefectural order concerned, and provided with a copy of the search report signed by him/her and an information document on applicable law with regard to compensation for any damage caused.

The authorities took action on some of these recommendations.

Recommendations aiming to facilitate access to compensation

The Defender of Rights recommended that access to the right to compensation be facilitated by providing for exceptional mechanisms for compensation of damage caused by administrative policing measures taken in application of the state of emergency and at the origin of abnormal disorders, and that the parties concerned be informed of them.

On 6 July 2016, the Council of State, the supreme court of France's administrative system, delivered an opinion on the legal regime governing searches conducted on the basis of the state of emergency¹⁴.

The opinion was in line with the Defender of Rights' recommendations as regards the need to formalise the motives for issuing search orders, the material conditions to be complied with when conducting searches, the special care to be taken with regard to any children present during such operations, and access to compensation.

Opinions and hearings before Parliament on bills

The state of emergency regime provides for institution of parliamentary control. The law stipulates that Parliament be informed with all due speed of measures taken by the Government during the state of emergency and may demand any complementary information required for monitoring and assessing such measures. In this context, the Defender of Rights has regularly informed Parliament of individual complaints received and recommendations it has made in order to support Parliament in its mission and shed new light on issues involved. It was heard by the Senate on 20 January 2016¹⁵.

The law also allows the Defender of Rights to propose legal and regulatory reforms. Drawing on its processing of individual complaints, it makes general recommendations based on experience and principles alike. Such power to propose reforms is reinforced by its institutional independence and constitutional status, which give it full legitimacy and considerable freedom to promote modifications to policies implemented by the legislation in force.

It is in this context that, since 2015, the Defender of Rights has delivered opinions on bills extending the state of emergency, as well as on various laws designed to strengthen legal provisions for preventing

and countering terrorism. These laws were all fast-tracked in Parliament and were not subjected to any in-depth debate.

In 2015, the Government presented a bill on intelligence providing a legal framework for intelligence services' activities. The Defender of Rights delivered two opinions to Parliament and was heard by the bill's rapporteurs. Highly critical and drawing on legal precedents set by the ECHR and the CJEU, it drew up a series of observations bearing on the field of application, methods of control operated by the National Commission for Control of Intelligence Techniques (CNCTR), and the implementation of judicial control and its effectiveness¹⁶. Action was taken on a

⁹ ECHR, *Gutsanovi v. Bulgaria*, 15 October 2013.

¹⁰ Note of 16 March 2016 from the Director General of the National Police, bearing on account being taken of the presence of young children during interventions in domiciles.

¹¹ Decision 2016-153 of 26 May 2016 bearing on the implementation of administrative search measures in the context of the state of emergency: https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_dec_20160526_mld-mde-2016-153.pdf.

¹² An accurate, detailed record of how searches are conducted, in particular during the phase in which premises are cordoned off (detailing use of weapons, any use of physical restraint and the conditions under which it had to be employed, any use of handcuffs and significant remarks exchanged, drawn up in the same form as reports bearing on judicial police operations) and mentioning any breakages that may have occurred.

¹³ See in particular the above-mentioned Decision 2016-153 of 26 May 2016.

¹⁴ Council of State (CE), opinion, 6 July 2016, nos.398234 and 399135.

¹⁵ Opinion 16-03 of 25 January 2016 : https://juridique.defenseurdesdroits.fr/files/DDD/AVIS/DDD_AVIS_20160125_16-03.

¹⁶ Avis 15-04 du 2 avril 2015 : https://juridique.defenseurdesdroits.fr/files/DDD/AVIS/DDD_AVIS_20150402_15-04.pdf;

Avis 15-09 du 29 avril 2015 : https://juridique.defenseurdesdroits.fr/files/DDD/AVIS/DDD_AVIS_20150429_15-09.pdf.

number of its recommendations but by no means all of them. The law is soon to be examined by the ECHR as a petition has been sent to the Court this year, and the Defender of Rights may well take part in proceedings as a third party in the case¹⁷.

The same year and on the same subject, the Defender of Rights delivered two opinions on measures for surveillance of international electronic communications¹⁸.

On 1 November 2015, it was also heard by the rapporteurs for the Senate's information mission on security in railway stations in the face of the terrorist threats¹⁹. The Government then tried to have the Constitution revised in order to have the state of emergency regime and forfeiture of nationality included in it. The Defender of Rights publically disagreed with forfeiture of nationality for individuals with dual nationality²⁰.

In 2016, the Government again submitted a bill designed to step up the fight against organised crime, terrorism and their funding. Among other things, it provided for reinforcement of investigative methods in legal proceedings (recourse to night-time house searches) and enabled the judicial authority to make use of new intelligence techniques provided for by the law bearing on intelligence. Visual inspection and searches of baggage during identity checks was also provided for, as well as reinforcement of the administrative authority's powers in the context of prevention of terrorism, including possible use of house arrest measures and other obligations with regard to individuals returning from theatres of terrorist operations, and 4-hour administrative

detention, including for children. In its opinions, the Defender of Rights set out its reservations on the bill and made a number of recommendations, criticising in particular the incorporation of exceptional administrative measures restricting rights and freedoms into our common law.

In 2016 and 2017, two new laws were enacted bearing on public safety and stepping up the fight against terrorism. One of them introduced a common framework for the use of weapons. The Defender of Rights made several criticisms emphasising the fact that the bill in question complicated the legal regime governing use of weapons and gave the security forces the feeling that they had greater freedom in this area²¹.

Finally, as stated above, a new bill widening the scope of special counterterrorism measures and incorporating a number of measures connected with the state of emergency into common law is currently being debated in Parliament, and is the subject of much criticism on the part of civil society and the Defender of Rights²².

In its various opinions, the Defender of Rights has systematically emphasised the principles and requirements imposed by domestic and European law: the requirement that the law be clear and predictable, the principles of necessity and proportionality, and the guarantees required to ensure the right balance between protection of rights and freedoms and the need for public safety and prevention and punishment of criminal offences.

Direct interventions vis-à-vis the authorities and legal support for complainants

The Defender of Rights' interventions have led to a number of modifications being made to constraints resulting from house arrest measures, enabling account to be taken of complainants' everyday realities (jobs, family situations, etc.). It has also intervened to provide complainants with legal support in proceedings they initiate, and ensure that the authorities concerned systematically deliver documents authorising house arrest measures and searches (orders, reports, etc.).

Other actions by the Defender of Rights

Alongside these various actions and in certain situations, the Defender of Rights has deemed it appropriate to communicate publically and hold press conferences. It has also been in regular contact with European and international bodies. Finally, it has commissioned a study on legal analysis of the issues involved in dissemination of exceptional measures in the context of the state of emergency in France, which is being carried out by the Centre for Research and Studies on Fundamental Rights (CREDOF).

¹⁷ ECHR, Petition n°. [49526/15 ASSOCIATION CONFRATERNELLE DE LA PRESSE JUDICIAIRE v. France](#) and 11 other petitions (see attached list).

¹⁸ Opinion 15-21 of 21 September 2015 and 15-22 of 7 October 2015: https://juridique.defenseurdesdroits.fr/files/DDD/AVIS/DDD_AVIS_20150922_15-22.pdf.

¹⁹ Opinion 15-25 of 1 December 2015 bearing on security in railway stations in the face of the terrorist threat: https://juridique.defenseurdesdroits.fr/files/DDD/AVIS/DDD_AVIS_20151201_15-25.pdf.

²⁰ See for example: <http://www.lcp.fr/afp/decheance-de-nationalite-la-citoyennete-est-indivisible-pour-le-defenseur-des-droits>.

²¹ Opinion 17-01 of 16 January 2017: https://juridique.defenseurdesdroits.fr/files/DDD/AVIS/DDD_AVIS_20170116_17-01.pdf; Opinion 17-02 of 24 January: https://juridique.defenseurdesdroits.fr/files/DDD/AVIS/DDD_AVIS_20170124_17-02.pdf.

²² Opinion 17-05 of 7 July 2017: https://juridique.defenseurdesdroits.fr/files/DDD/AVIS/DDD_AVIS_20170707_17-05.pdf; Opinion 17-07 of 27 July 2017: https://juridique.defenseurdesdroits.fr/files/DDD/AVIS/DDD_AVIS_20170707_17-07.pdf.

