

Fighting Terrorism with Emergency Legislation

An Interview with François Saint-Bonnet

By Florent Guénard

The state of exception has a long history in France. Intended as a measure for dealing with crises of any sort, it is now used as a response to terrorism. According to legal expert François Saint-Bonnet, however, there is no evidence that it is the right solution to the kind of terrorism that strikes today.

Books & Ideas: Why is emergency legislation used?

François Saint-Bonnet: The concept of obvious necessity has long been used to circumvent limitations on the powers of leaders facing a serious peril for the political community. *Salus populi suprema lex est* (the welfare of the people is the supreme law) or *necessitas legem non habet* (necessity has no law) are formulas that have justified the transformation of a *normal state* of limitation of power into an unlimited *state of exception*. From the time of the French Revolution, it was believed that the laws limiting powers – in other words, those that often safeguarded freedoms – should not be suspended under any circumstances. However, this did not last long, because the law and even the Constitution were often put on hold, particularly during the Reign of Terror and the early part of the 19th century. The government declared a siege in areas where monarchists were stirring up trouble during the Republic, where republicans were plotting under the Restoration and where Bonapartists were active under the July Monarchy. These suspensions of freedoms were extremely violent and shifted political opponents into the category of enemies of the regime. As a result, considering they were at war with the regime, they could not claim the same legal protection as their fellow citizens.

For this reason, the 1848 Constituent Assembly wanted to establish a new legal framework for the state of siege. It fixed a middle ground between “normal” legality and the rule of arbitrariness: a legality of exception, but a form of legality nonetheless. This logic was the origin of the law of 9th August 1849 and it is still in force under Article 36 of the Constitution. It can be applied in two opposing cases: in the event of national *consensus* (an “imminent peril resulting from a foreign war”) or of *dissensus* (an “armed insurrection” by a section of the population). It consists in transferring the main powers of the civil authorities to the military in those areas declared to be in a state of siege.

This law was enforced in some 20 departments during the war of 1870, during the four years of the First World War across the whole of France, and from September 1939 (the constitutional limitations of power were themselves cancelled on 10th July 1940 under the Vichy Regime).

The state of siege was not declared during the Algerian war. It was vital that National Liberation Front (FLN) members should not appear as combatants or insurgents by opposing them with military force; they had to be perceived as mere criminals (murderers, perpetrators of attacks) whose behaviour could not be justified by any political cause in the context of decolonization. For this reason, the law of 3rd April 1955 on the state of emergency was adopted, placing particular emphasis on avoiding any links with a war of independence, in defiance of the facts: there was rather a vague mention of an “imminent peril resulting from serious breaches of public order”. And to divert attention away even further from political considerations, a state of emergency could also be declared in the event of “public calamity” such as a natural disaster. It is true that an earthquake had been followed by disastrous scenes of looting a few months earlier, in September 1954. This law provided for a strengthening of civil powers: there was no question that they would be transferred to the military.

There is also the case of Article 16 of the 1958 Constitution which, even after its reform in 2008, is characterised primarily by its bestowing of entirely discretionary power upon the president of the Republic. It may be applied when “the normal functioning of constitutional public powers” is clearly interrupted – when the political institutions of the state can no longer normally fulfil their duties because of a grave peril. It has only ever been applied once, on 23rd April 1961, during the Generals’ putsch in Algeria. General de Gaulle kept it in force for almost six months.

These three emergency laws (state of siege, state of emergency, Article 16) have been shaped by their own particular histories but share the characteristic of having sought to resolve intense yet brief crises (insurrection) or crises that were not so brief but generated national unanimity (a war including an invasion of territory). This is not the case for the jihadist terrorism we have been witnessing for at least 15 years, which is showing no signs of ending. There can be no question of enforcing a state of emergency for such a long period of time: the answer lies elsewhere.

Books & Ideas: Does the enforcement of a state of emergency constitute a threat to our democratic principles?

François Saint-Bonnet: The notion of democratic principles is three-dimensional: consideration for the will of the people; respect for fundamental rights and freedoms; and a concern to limit power. Emergency legislation tends to curtail all three.

First, when these measures are applied, the electoral processes are often interrupted or suspended. This was the case during the First World War. It was thought that the election contest, which consisted in highlighting the differences and opposing ideas between the political programmes, was likely to undermine much-needed national unity. Unity demanded unanimity. However, it would seem that nobody thought to postpone the regional elections due to be held on 6th and 13th December. After a few hours of national unanimity, the political debate reasserted its rights despite the state of emergency. However, the extension and modification of the 1955 law gave rise to virtually no debate, and the vote was almost unanimously won on 19th and 20th November 2015.

Second, these laws lead to a loss of freedoms and an expansion of political and administrative power. Under a state of emergency, curtailed freedoms can affect individuals, spaces and groups of people and flows. Individuals can find themselves deprived of any respect for their private lives: house arrests (made easier to enforce under the amendment of 21st November 2015), invasion of privacy through secret surveillance, prohibited areas, searches ordered by the government (and not a judge), even during the night. Public spaces can be closed off, resulting in traffic restrictions and curfew orders (placing limitations on people's freedom to come and go). People can be prevented from gathering through a ban on meetings, theatrical performances and cinema screenings (cinema news played an important role during the Algerian war: the latter prohibitions were repealed in November 2015). In 2015 there was a new ban on *de facto* associations and groups, in other words people who have regular links and a minimal level of organisation but have not declared anything to the authorities. The authorities have the power to prevent flows of information and communication by controlling newspapers and radios (this measure was also taken out of the law in November 2015) as well as oral and written communications, which are prevented or limited by measures applied to individuals.

Third, emergency legislation limits counter-powers. This can be done through political control: although the president must consult, he or she alone decides to implement Article 16. On the other hand, the state of siege or state of emergency can only be extended beyond 12 days by parliament, which can overturn the government's decision, although this is unlikely. It may also involve legal control, in other words, procedural guarantees may be limited in two ways: by transferring competence from the civil authorities to the military (as in the case of a state of siege), or from the judicial authorities to the prefectural authorities, such as "administrative" house arrest measures. In theory, any restriction on a freedom, such as being prevented from moving beyond a certain perimeter, cannot be preventative and can only be ordered by a judge, as guardian of individual freedoms.

The state of emergency declared on the evening of the attacks on 13th November restricted freedoms. However, public approval seemed high: on 18th November, 84% of people questioned were ready “to accept more controls and a certain restriction of their freedoms” (French Institute of Public Opinion).

There was therefore a form of democratic acceptance of the loss of democratic freedoms. However, while this justification may appear sound, it has three weaknesses. Its first weakness is that it is the result of emotional rather than reasoned acceptance. People’s shock at the horror of the jihadist terrorist attacks tended to alter their discernment. This does not mean that the state of emergency was not justified for a few days or even weeks, but it is absolutely imperative that we resist our own emotions in order to make a cold, reasoned analysis of the reality of the situation. The government often gives in to the temptation of keeping people’s emotions high in order to adopt measures that would be deemed unacceptable in times of calm. George Bush broadly abused that process during his presidency.

The second weakness is that it arises from a confusion between protecting the state or society against a danger, and establishing order. The use of emergency legislation is justified by the urgency and absolute necessity to act swiftly; in short, by the immediacy of the reaction linked to the sense of legitimate defence, which is an instinct or reflex. It makes it possible to “save” what must be saved. However, these regimes are in no way designed to provide a lasting response to a lasting threat. Once the moment of extreme danger has passed, there must be a return to “normal” legality, even if it means adopting new, specific measures to deal more effectively with a particular threat, and even if it means modifying the balance between security and freedoms in full knowledge of the facts and with full reason.

The third weakness is that it results in an undesirable surrendering of the control requirement. The more the authorities curtail freedoms, the more vigilant the citizens must be, in order to face up to threats and to defend their freedoms. This tendency to give *carte blanche* to the authorities, very prominent in 1961 because the situation needed to be resolved by the “saviour” Charles de Gaulle, is nonetheless far less marked today. The repeal of the 1955 law regarding the control of newspapers and radios is part of that shift.

Books & Ideas: Can emergency legislation be implemented reasonably in an emergency?

François Saint-Bonnet: The president of the Republic said two things: immediately, the state of emergency would be extended for three months and the law “revised”, and the Constitution amended so as to enable the authorities to act “in conformity with the state of law, and against belligerent terrorism”.

The three-month extension did not mean that the state of emergency would be maintained for three months; the president could put an end to it beforehand. In addition, he could have been forced to end it by the judge if he refrained from doing so when the situation no longer justified it (Conseil d’État jurisprudence of 2005). The revision of the 1955 law was different: it is never a good idea to legislate on an emergency *during* an emergency.

Was it strictly necessary to relax the requirements for house arrests and searches by amending the law when that swift action prevented a calm, clear debate? Was it vital to remove press controls as compensation? It would have been sufficient not to activate this measure and to take it out of the law at a later stage.

***Books & Ideas* : How can the law tackle the issue of terrorism without using emergency legislation?**

François Saint-Bonnet: It is important to identify the specificity of jihadist terrorism. These individuals are neither delinquents nor “traditional” combatants. They are not delinquents because they do not fear death; in fact they desire it because it is likely to bring them glory in the eyes of their brothers. The “traditional” delinquent, on the other hand, does fear death: the thief wants to enjoy the goods he has stolen and the rapist wants to continue to rape. These are offences or crimes that society must fight against in the belief that it can prevent criminals from continuing their activity by threatening them with the death penalty, in the past, for the most serious crimes, and long periods of imprisonment today. The entire modern penal system is based on the logic that the death penalty without excessive cruelty is the pinnacle of repression. When we are dealing with people who do not fear it and who pre-empt it with suicide bomb belts, it is the entire modern repressive system, and therefore criminal law as a whole, that appears derisory when applied to them. That is why it seems necessary to remove the legal treatment of terrorism from criminal law and resist the temptation to introduce a kind of super criminal law, which Günther Jacobs calls the criminal law of the enemy. Jihadist terrorists are not combatants either. This legal category refers to international conventions on the law of war which, while recognizing the right of some individuals to kill in certain circumstances, subjects them to conditions that can be summarised by the idea of loyalty: not attacking unarmed people without a uniform, not using banned weapons, limiting the use of force, taking prisoners by treating them with dignity rather than killing them, and so on. In short, it is about recognising the other side’s combatants as a “just enemy” or an alter ego. In this logic, combat is, to a certain extent, “ritualised”. Reality never matches up with this ideal, but it is posited because it has been conceived. Jihadist terrorism in no way resembles this form of fighting: shooting at unarmed people, finishing them off while they lie on the ground and beg, and blowing oneself up when the moment of combat arrives. We should not, therefore, try to bring the combatant closer to the jihadist terrorist by inventing a category such as “illegal combatant” as envisaged by the various Patriot Acts of 2001. In short, we must not destabilise the categories that have been gradually built up by modernity, on the one hand that of criminal law now bound by rights and freedoms that are the legitimate source of pride of modern democracies; on the other hand, that of the law of armed conflicts, similarly constrained by binding standards resulting from a century and a half of effort by legal experts and leaders shaped by humanity.

The correct approach would be to construct *ex nihilo* a specific law applicable to jihadist terrorists, a law that would contaminate neither criminal law (the law of delinquency) or international law (the law of war). This would mean establishing criteria that would be as specific as possible for these jihadists who fuel such hatred of modernity, in order not to create too wide a net in which people with no involvement in terrorism could

be caught, as was deplorably the case in the United States in the 2000s. Identifying such criteria would inevitably require rather intrusive surveillance measures, hence the need for strengthened legal and political controls. If the overall power of the state over individuals were increased, that increase must be “offset” through a strengthening of control, which must be achieved by means of effective remedies, greater vigilance by jurisdictions monitoring the government and an alert civil society: press, human rights organisations, magistrates’ and lawyers’ organisations, etc.

Once these criteria have been identified, of which modern freedoms should we deprive those who hate modernity?

Certainly not those relating to expression and communication. No matter how odious and criminal an idea is, it cannot be opposed by pretending it does not exist. That is why the shutting-down of jihadist websites and the criminalisation of the use of such websites (law of 13th November 2014) is not necessarily the right answer. It is better to educate people about what the ideology of jihadism means and explain the propagandist mechanisms at work. It should be added that the strength of democracy is its readiness to confront ideas, and it must be the side that leads this fight. Above all, it must not give its enemies the chance to appear as the victims or martyrs of freedom of expression.

It would also be futile to deny them freedoms relating to procedural guarantees and, in general, the support given to the judge, especially the judicial judge. The more freedoms are attacked, the more need there is for control. In the law of freedoms people usually say that it is preferable for a guilty person to be free than for an innocent person to be in prison; however this needs to be rethought in the face of terrorism, even if it is not easy to do so.

The right to nationality cannot be taken away, either. Depriving an individual of his French passport has no effect whatsoever for someone who already hates France, because he no longer sees himself as a fellow citizen. Is it a case of proving to the “good French people” that the “bad ones” are no longer living among them? This is certainly a reassuring way out and a kind of voluntary blindness. And it takes away the possibility of turning the enemy into a friend and future model by means of “deradicalisation” programmes.

On the other hand, the fundamental question of *habeas corpus* must be raised, in other words the impossibility of detaining an individual who has not committed an offence or crime. Similarly, it is necessary to examine the question of respect for privacy and thus the surveillance of a person without his knowledge in order to establish whether or not he fits into the category in question.

Since 1945, the level of protection given to our freedoms has continued to increase, while the level of threats, particularly after the fall of the wall, has declined. People began to think that this high level of protection was immutable. There were even references to the “ratchet” theory to describe the fact that the legal protection of freedoms would always move forward and would never regress. That time is over. Freedoms come at a price, which was paid dearly by those who resisted in 1940 or went underground later. The price is either human lives or freedoms. The modern legal system is based on society’s emergence from the

state of nature described by all philosophers as an “intolerable” state of insecurity and on the fact of entrusting the state with the task of guaranteeing the security of individuals who have turned their backs on violence; it is the very condition of the potential fulfilment of fundamental rights. The balance between security and freedoms is inevitably unstable and is always “current”: it may undergo democratic reassessment, but on the condition that emotions and authoritarian arguments are quickly left behind and arguments based on reason are renewed.

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