Special Issue
Böckenförde Beyond Germany

Constitutionalizing Emergency Power in a Time of Jihadist Terrorism: France 2016 as a Case of Misunderstanding and Failure

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Abstract

In this article, I present some aspects of the debate on the state of emergency that ensued in France after the terrorist attack at the Bataclan on November 13, 2015. The proposal by President Hollande to constitutionalize emergency provisions triggered the debate. I will also discuss why that attempt failed. In agreement with what Ernst-Wolfgang Böckenförde wrote in his article "The Repressed State of Emergency: The Exercise of State Authority in Extraordinary Circumstances," I intend to show that constitutionalizing emergency measures—rather than presenting a threat to the *Rechtsstaat*—may be the best way to protect it. In the absence of a constitutionalized definition of competence and limits of such an exceptional power, the government can act without limits as to the exceptional measures that it may want to take.

[D]emocracies of all types recognize with practical unanimity that there are situations in which it is reasonable to abandon competitive and to adopt monopolistic leadership. In ancient Rome a non-elective office conferring such a monopoly of leadership in emergencies was provided for by the constitution. The incumbent was called magister populi or dictator. Similar provisions are known to practically all constitutions, our own included: The President of the United States acquires in certain conditions a power that makes him to all intents and purposes a dictator in the Roman sense, however great the differences are both in legal construction and in practical details. If the monopoly is effectively limited either to a definite time (as it originally was in Rome) or to the duration of a definite short-run emergency, the democratic principle of competitive leadership is merely suspended. If the monopoly, either in law or in fact, is not limited as to time—and if not limited as to time it will of course tend to become unlimited as to everything else—the democratic principle is abrogated and we have the case of dictatorship in the present-day sense.[1]

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[1] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 296 (3d ed. 2008).

A. The State of Emergency and the German Autumn

Ernst-Wolfgang Böckenförde wrote his article on emergency power in a historical context—focusing on the 1970s—characterized in Europe by what could be called internal terrorism. Groups and organizations—like the Red Army Faction in Germany and the Red Brigades in Italy—perpetrated murderous actions against the citizens and the political order of their respective countries. After September 11, a new threat emerged in the life of citizens of western democracies: Jihadist terrorism.

In this article, I will suggest a definition of the phenomenon of jihadist terrorism and claim that the basic thesis of Böckenförde's article on "the Repressed State of Emergency" applies equally to this new threat, considering notably the recent failed attempt to constitutionalize emergency powers in France.

Böckenförde argued in favor of a constitutionalization of a state of emergency in the following manner:

> Should the constitution persist in refusing to recognize a legal state of emergency, this leads not to non-action by state organs in such situations, but to action that ignores the established legal boundaries that do not seem appropriate to the emergency, and to a transition to a realm devoid of legal constraints. Therefore, if the state of emergency is to be circumscribed and controlled by the law, this cannot be accomplished through a refusal, that is, by the assertion that the state of emergency does not occur legally, but only through the availability of powers and modalities that are related to this situation and are fitted to it. This holds also—and especially—if the state of emergency is to retain its character as something exceptional, meaning that it should revert as quickly as possible to the normal state of affairs. The mere refusal or repression of the state of emergency remains pure wishful thinking that loses touch with reality . . . An explicit regulation of the state of emergency is thus indispensable if the goal is to avoid the undefined comprehensive authorization of a supralegal state of emergency that would, in the final analysis, dissolve the constitutional state.[2]

[2] Ernst-Wolfgang Böckenförde, *Der Verdrängte Ausnahmezustand. Zum Handeln der Staatsgewalt in Außergewöhnlichen Lagen*, 31 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1881 (1978), *translated in* ERNST-WOLFGANG

Mirjam Künkler and Tine Stein, in their excellent introduction to Böckenförde's *Political Theory of the State*,[3] draw attention to the political situation of West Germany in the 1970s, when, like in Italy, the extra-parliamentary opposition—which developed at the margin of the Student Movement—turned to violent actions and qualified as terroristic. On January 28, 1972, the social-democratic government enacted the Radicals Decree which made it impossible for members and former members of the Communist Party—and other political parties judged to be anti-constitutional—to work as civil servants. This *Berufsverbot* (professional ban) affected professions across all social milieux—from university professors to caretakers in public buildings to bus drivers—and triggered widespread criticism among intellectuals and beyond.[4] Böckenförde showed that the Emergency Acts passed in West Germany in 1968 represented a threat to the liberal-democratic political order and argued that it was more detrimental to the rule of law to pass anti-liberal laws in a period of ostensibly normal politics than to do so in the context of an explicitly acknowledged state of emergency—which is time-bound. In an article written in 1981, *Ausnahmerecht und demokratischer Rechtsstaat*,[5] Böckenförde outlined how emergency measures could be constitutionalized, separating notably the state organ declaring the emergency from the one exercising emergency power, in limits established by the constitution.

B. Jihadist Terrorism

I. An Attack on the State's raison d'être

Jihadist terrorism is a quite recent phenomenon that made its tragic appearance in western societies when the Twin Towers were destroyed in New York City on September 11, 2001, producing almost 3,000 casualties. Many lethal terrorist attacks were committed after 2001 in Madrid, London, and more recently in Brussels, Barcelona, Nice, Copenhagen, Berlin, Paris, and Manchester by jihadist organizations or by people sympathizing with

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BÖCKENFÖRDE, *The Repressed State of Emergency: The Exercise of State Authority in Extraordinary Circumstances, in* 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 118, 125 (Mirjam Künkler & Tine Stein eds., 2017).

[3] Mirjam Künkler & Tine Stein, *Böckenförde's Political Theory of the State*, *in* ERNST-WOLFGANG BÖCKENFÖRDE, 1 CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 38 (Mirjam Künkler & Tine Stein eds., 2017).

[4] *See* ERNST-WOLFGANG BÖCKENFÖRDE, *Rechtsstaatliche Politische Selbstverteidigung als Problem*, *in* EXTREMISTEN UND ÖFFENTLICHER DIENST. STUDIE DER FRIEDRICH-EBERT-STIFTUNG 9 (1981); Ernst-Wolfgang Böckenförde, *Verhaltensgewähr oder Gesinnungstreue? Sicherung der Freiheitlichen Demokratie in den Formen des Rechtsstaats*, FRANKFURTER ALLGEMEINE ZEITUNG, Dec. 8, 1978, at 9.

[5] *See* Ernst-Wolfgang Böckenförde, *Ausnahmerecht und Demokratischer Rechtsstaat*, *in* DIE FREIHEIT DES ANDEREN: FESTSCHRIFT FÜR MARTIN HIRSCH 259 (Hans-Jochen Vogel, Helmut Simon & Adalbert Podlech eds., 1981). Despite Böckenförde's conception of a constitutionally embedded state of emergency here, the Basic Law was not amended in this regard and until today does not make provisions for an internally necessitated situation of exception.

them. This terrorism—different in form and motivations from the one that plagued countries like Italy and Germany in the 1970s—represents a new existential threat: Born outside the borders of the western democratic constitutional state, it constitutes a fight against a specifically perceived way of life, a social and cultural form of modern society characterized by pluralism and tolerance. It tries to use religion to make credible a conflict of civilizations, which is largely created and fueled by the terrorist attacks. It is a paramount challenge to the power and legitimacy of the modern *Rechtsstaat.*[6]

The modern state, conceptualized during the last four centuries in the West, has its rationale and foundation in its ability to keep the pledge that is at the root of its legitimacy and of citizens' obligation to obey its orders. I am referring to the pledge to protect and guarantee the first right of citizens—*omnes et singulatim*—the right to life and limbs: Their physical integrity, in the language of Thomas Hobbes. If the state—the political authority—is not capable of protecting and guaranteeing this right, its existence and claim to the monopoly of legitimate violence vanishes, and the political obligation of citizens to obey its commands loses its rational justification. This is, for instance, currently the case in Syria vis-à-vis the power of Bashar al-Assad.

One could easily object that in any society, in any political regime, even the most democratic—by which I mean the most irreproachable from the point of view of governmental action—many lives meet a brutal end. For example, one can think of car accidents or of avalanches, or a number of violent deaths including domestic violence and shootings on US university campuses. Yet we need to distinguish between private—or accidental—violence and public violence. The government certainly has the duty to enact laws that can let us hope for a lessening of the number of people who die in car accidents. More generally, any modern state establishes—as Locke clearly wrote—a judicial system to prosecute crimes, to judge and to punish the guilty by decisions of courts of justice. Still, if this unfortunate physical private violence does not exceed a limited threshold, the legitimacy of the political authority of the state is not called into question or significantly diminished.

Arguably, the situation is different in the case of violence of a terrorist matrix. With a terrorist attack, the public authority—and for the same reason its legitimacy—is straightaway and directly called into question and shaken. The Italian Red Brigades spoke of their violent actions as attacks on the "heart of the state" (*cuore dello stato*). When we think of it, there is nothing really surprising in what I want to claim. The jihadist terrorist is not a private enemy of the citizens who are his—or more rarely, her—target. The terrorist does not kill someone with whom he has a personal conflict; he kills people whom he does

[6] I prefer to use the German term—and more exactly the expression—"*verfassungsmäßiger Rechtsstaat*," rather than the vague English concept of rule of law because, among other things, the UK has no written constitution and no distinction between constitutional provisions and statutory legislation, nor a Constitutional Court.

not know. This differs from the violence of the anarchists who used to kill such prominent officials as kings and presidents of the republic.[7] The jihadist terrorist kills people without a name—citizens qua citizens—to show that the state is not capable of protecting its people and that it is not a legitimate state. This means that the state is not the institution able to guarantee the most fundamental right of all and each member of a political community: The life and physical integrity of its citizens. Therefore, it is the state in its first *raison d'être* that is challenged and called into question by the terrorist attacks. In this sense, the jihadist terrorist is not simply someone who violates the law of the state, but an enemy of the political community. Someone—like the Hobbesian fool—who refuses the authority and the legal order of the *Rechtsstaat* that he tries to undermine in its true nature, or like a group of *mafiosi,* who do not recognize the state's authority as superior to their own.

It is France, the French state, the state of French citizens, and the idea of the *République* that the terrorists carried out the November 13, 2015 attacked. They had no specific reason to kill the people they killed; it was France and its state that they wanted to hit by killing innocent victims on French soil. The jihadist is a soldier of a strange war; his enemy is a western liberal democratic state,[8] and this state must paralyze or destroy the terrorists in an act of self-defense to protect its citizens. This contextual basis can help us to understand why terrorist attacks trigger within a population—as well as in a government—a disconcerting worry that is almost unique when compared to the worry that other forms of violent death create.

II. Measures Against Jihadist Terrorism

The fight against terrorism has become—unfortunately in the last few years—a preoccupation and challenge of paramount significance. At the same time, the fight became one of the essential tasks of any western *Rechtsstaat* if it wants to survive and avoid the return of authoritarian political systems which fueled fear and racism.

This raises the question: Which steps must a government take to fight—and defeat—terrorism? The answer to this question has been the subject of numerous writings.[9] It is a

[7] Examples of this anarchist violence include Pietro Acciarito's attempted assignation of Italian King Umberto I on April 22, 1897; Sante Caserio's assassination of French President Marie-François Sadi Carnot in 1894; and Michele Angiolillo's assassination of Spanish Premier Antonio Cánovas del Castillo in 1987. It may be stressed that, in general, the leftist terrorism of the 1970s killed people who were chosen as specific targets because of their political or official functions: Politicians, prosecutors, and entrepreneurs, not people without a name. Contrast this with the terrorism of a fascist matrix—one can think of the Italian massacres of *Banca dell'Agricoltura* in Milan in 1969 or of Bologna's train station in 1980.

[8] In this article, I am not considering terrorism in the Middle East, which is essentially connected with political and religious conflicts. This is a more complex topic that I am not qualified to discuss.

[9] *But see* DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR (2007); Bernard Manin*, The Emergency Paradigm and the New Terrorism*, *in* LES USAGES DE LA SÉPARATION DES POUVOIRS—THE USES OF

fight characterized not only by the fog of victory,[10] but also by the fog of war because the reasons, the goals, and the motivations of the terrorists of such a strange war are complex, controversial, and—at the end of the day—confused.

The thesis presented by Böckenförde concerning the terrorism of the 1970s is equally persuasive in the face of jihadist terrorism because on one side the aim is the same. On the one hand, jihadist terrorism shakes the legitimacy of the state as the agency which has to protect the life of the citizens. On the other hand, the risk of constitutionally unregulated emergency measures is the same—the permanent disruption of the legal status quo. It is important to note that jihadist attacks are often perpetrated by citizens of the very countries that are under attack. This was similar in the terrorism of the 1970s—such as the members of the RAF— who were all German citizens. The challenge that the *Rechtsstaat* has to face is the same in both cases and it is evident that—from a legal point of view—the response must be conceptualized in the same way.

It cannot be my purpose here to sketch out possible answers to the question of which specific constitutional provisions should be incorporated in the constitution.[11] Therefore, I limit myself to stressing the need for constitutionalization to avoid arbitrary governmental measures emerging in emergency situations. With that being said and irrespective of constitutional provisions enabling and disabling emergency powers, it seems evident that to fight against jihadist terrorism, different measures need to be taken not only at the national level—such as constitutional provisions—but also the international level in the form of supranational regulations, that can take form in the following ways:

(1) It may be inevitable to revise the Geneva Conventions on the laws of war, which were established after World War II primarily as a legal instrument concerning conflicts between so-called sovereign states.[12] Jihadist terrorism introduced a new form of violence largely unprecedented because one of the parties of the conflict has no public identity, no territorial borders, and is radically different from a classical state.[13]

THE SEPARATION OF POWERS 136–70 (Sandrine Baume & Biancamaria Fontana eds., 2008); Seung-Whan Choi, *Fighting Terrorism through the Rule of Law?*, 54 J. CONFLICT RESOL. 940–66 (2010).

[10] *See* Gabriella Blum, *The Fog of Victory,* 24 EUR. J. INT'L L. 391–421 (2013).

[11] *See* Böckenförde, *supra* note 5.

[12] The 1977 Additional Protocol (II) provides for conflicts between a state and a non-state party in its territory. Arguably, these rules are not satisfactory where the non-state party is not present in the territory, but the party is dispersed globally or resides in another state.

[13] Derek Jinks well develops this point:

> There are three important reasons to question whether the Global War On Terrorism is governed by the [Geneva] Conventions. These reasons, pitched at a high level of generality for the moment, are: (1) adverse legal and policy consequences might follow from

(2) It may be necessary to develop further cooperation among the police, prosecutors, and intelligence services of states because jihadist terrorism has an international dimension and the answer cannot be only local or national.

It is barely necessary—but important—to add that the main point concerning terrorism is not punishment of the crimes but prevention of them. Not only is it impossible to punish and incarcerate suicide bombers, it is also clear that to forestall rather than punish terrorist attacks is the most important task of the state, of any *Rechtsstaat*—which, as I said, runs the risk of losing its political legitimacy if it is not able to protect the life and limbs of its citizens. We also need to recognize that preemptive measures by intelligence agencies cannot easily be controlled by the judicial power—again an object of vast debate, notably both in Israel and the US.

(3) It may be necessary—and it has already been done in different countries—to amend the criminal code and criminalize certain activities of propaganda because the technical means used by terrorists and organized crime are no longer those existing 40, 20 or even 10 years ago. The advent of the internet and other sophisticated technologies that were absent in the past have opened new possibilities for terrorists, and criminal codes should reflect this new reality.

Considering all that, it may seem that these measures are very different from the constitutionalization defended by Ernst-Wolfgang Böckenförde in his article published almost 40 years ago. I do not think so. Jihadist terrorism is two-faced. On the one hand, it is a new, and unfortunately enduring, threat in our life. So, it has—in and of itself—nothing to do with exceptional circumstances. It is a new form of criminality and threat that must be coped with even though—as I have been claiming—it is more crucial to prevent terrorist attacks than to punish the perpetrators.[14] Böckenförde—of course—had much to say about the rights of the enemies of freedom. On the other hand, terrorism can burst out suddenly in some dramatic events that require emergency measures. But I shall return to this question soon, considering—in a critical way—a different possible position: One that

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> characterizing the GWOT as a 'war' in the legal sense; (2) terrorist organizations like al Qaeda are not states and conflicts with such entities are materially different from inter-state wars and civil wars; and (3) terrorist organizations enjoy no protection under the rules of wars because they do not accept or observe these rules themselves.

Derek Jinks, *The Applicability of the Geneva Conventions to the 'Global War on Terrorism'*, THE UNIVERSITY OF TEXAS SCHOOL OF LAW, PUB. L. & LEGAL THEORY RES. PAPER NO. 93, at 6 (Apr. 19, 2006), http://ssrn.com/abstract=897591.

[14] *See* Künkler & Stein, *supra* note 3.

defends the idea that terrorist attacks have to be fought only by statutory—and not constitutional—laws.[15]

C. The Political Reasons for the French Attempt to Introduce a Constitutional Reform

A constitutional reform concerning emergency powers was approved with important amendments by both houses of the French Parliament on February 10, 2016, but was subsequently abandoned. This proposal was advanced by President Francois Hollande in his speech to Congress immediately after the terrorist attack on November 13, 2015, when 130 people—both French citizens and foreigners—were brutally murdered.

This terrorist attack triggered a strong popular demand for security measures to which the President tried to react. Liberal or left leaning political parties in France—as is generally the case elsewhere—have a reputation to take citizens' security less seriously than conservatives. The *Front National*—the nationalist ultra-conservative party in France—famously made security policy the core of its propaganda, accusing the socialist party of laxity. Therefore, the socialist government had good reason to oppose this insinuation and to send signals to the citizens of its will to protect their security.

I. Constitutionalizing Emergency Powers

Were there serious legal reasons—independent of the short-run interests of political actors especially in light of the imminent presidential election and from the demands of public opinion—to constitutionalize emergency powers in France? The constitution of the French Fifth Republic from 1958 contains two provisions that represent a suspension (*derogatio*) of what can be called regular government.[16] Article 16—modified in 2008—was the first and allows the President of the Republic to take emergency measures. The second, Article 36, concerns the state of siege.

The first clause of Article 16 states:

> Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international

[15] Concerning this last point, it may be worth noticing that the French government presented the bill of a statute of 248 pages: Project de loi N° 3473 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale (strengthening the fight against the crime organized on terrorism and their financing, and improving the efficiency and security of the criminal proceedings), *Assemblée Nationale* [National Assembly], Oct. 4, 1958, http://www.assemblee-nationale.fr/14/projets/pl3473.asp. The statute was promulgated on June 4, 2016.

[16] *See* Pasquale Pasquino, *State of Emergency and Rule of Law. Emergency Government in Constitutional Theory, in* SPHERES OF EXEMPTION, FIGURES OF EXCLUSION 149–68 (Gry Ardal & Jacob Bock eds., 2010).

> commitments are under serious and immediate threat, and *where the proper functioning of the constitutional public authorities is interrupted* [emphasis added], the President of the Republic shall take the measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the assemblies and the Constitutional Council.[17]

Article 36[18] states that, "Martial law shall be decreed by the Council of Ministers. Its extension beyond twelve days may be authorized only by Parliament."

Article 16—used only once by Charles de Gaulle in 1962 to curb the fascist component of the French army during the war for the independence of Algeria—presupposes disruption of the working of constitutional organs. This form of disruption was something that was not the present at the time of the terrorist attack on November 13, 2015, because the day after the attack the entire *Congrès* met with the President and the government.

Article 36—The article on martial law—is a constitutional provision allowing the transfer of power of the police from civil to military authority, the creation of military courts, and the increase of police powers. According to Article 36, martial law can be declared by a meeting of the cabinet only in the case of an impending threat resulting from a war with a foreign power or from an armed insurgency. President Hollande, observing in his speech before the *Congrès* that none of these constitutional provisions would have been applicable in a circumstance like the one of November 13, suggested amending the constitution because the constitutional dispositions just mentioned are not adequate to tackle the types of terrorist attacks experienced.

It was observed with some good arguments[19] that jihadist terrorism is a phenomenon not characterized by a short duration—like an emergency or an exceptional condition—but that it is very likely going to stay with us, our worries, and anxieties, for an unforeseeable stretch of time. Therefore, some have suggested that the fight against terrorism lives in the fog of victory. Others pointed out that unlike other violent events, it does not have a regular and continuous presence. For example, no significant terrorist attack has taken place in the United States since September 11, 2001.

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[17] 1958 CONST. art. 16 (FRN).

[18] *Id.* at art. 36.

[19] Bernard Manin, *The Emergency Paradigm and the New Terrorism: What if the End of Terrorism Was Not in Sight?*, *in* LES USAGES DE LA SÉPARATION DES POUVOIRS 136, 135–71 (Sandrine Baume & Biancamaria Fontana eds., 2008).

The authorities must be able in that case to take exceptional measures, not just ordinary ones. If a group of criminal terrorists explode the hotel Lutetia and paralyze the center of Paris, it will not be enough to have a reformed criminal code or legal measures allowing control of the cell phones of the terrorists in question because this control would be useful to *prevent* the attack. The political authority must be able to take the necessary dispositions to protect the citizens' lives threatened by the possibility of a cascade of other attacks. And, if needed, to suspend some rights guaranteed by the constitution—like freedom of movement requiring citizens to remain in their apartments in some specific areas. In other words, it will not be sufficient to enact some new ordinary legislation to fight terrorism. On the contrary, like Böckenförde, I believe that this last choice could have rather negative consequences because ordinary legislation—in contrast to provisional and short-term emergency measures defined by the constitution—may introduce to the legal system permanent norms impinging on citizens' exercise of fundamental rights.

In France, for instance, a statute enacted in 1955[20] allows the suspension of a crucial tenet of any *Rechtsstaat*: The guarantee of fundamental rights. The existence of this statute prompted those opposing the constitutional amendment to argue that there was no need to change the constitution precisely because the statute authorizes the suspension of fundamental rights. The statute was enacted by the Parliament of the French Fourth Republic during the Algerian war and modified many times. It even allows the renewal of such a suspension indefinitely; thus, the state of emergency was extended five times between the November 2016 terrorist attack and November 2017. In the United Kingdom, where there is no written constitution, the special laws against Northern Irish terrorism were also renewed regularly for a period of many consecutive years.[21]

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[20] *See* Loi 55-385 du 3 avril 1955 relative à l'état d'urgence, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000695350 (modified many times, most recently in 2018). The French Constitutional Council was established only after this law was passed, under the 1958 Constitution of the Fifth Republic. After the introduction of the *question prioritaire de constitutionnalité* in 2010, allowing for a constitutional challenge of acts already in force during regular court proceedings, it was asked to review the constitutionality of the statute three times: Conseil Constitutionnel [CC] [Constitutional Coucil] Feb. 19, 2016, decision No. 2016-536, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-536-qpc/version-en-anglais.147081.html (administrative searches and seizures in the event of a state of emergency); Conseil Constitutionnel, Feb. 19, 2016, decision No. 2016-535, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2016/2016-535-qpc/version-en-anglais.147082.html (policing of meetings and public places during a state of emergency); Conseil Constitutionnel, Dec. 22, 2015, decision No. 2015-527, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-527-qpc/version-en-anglais.146959.html (house arrest in the event of a state of emergency). These opinions modified only marginally the content of the law. A systematic analysis of this law and its applications can be found in: OLIVIER BEAUD & CÉCILE GUÉRIN-BARGUES, L'ÉTAT D'URGENCE—ETUDE CONSTITUTIONNELLE, HISTORIQUE ET CRITIQUE (2016).

[21] The Prevention of Terrorism Acts of the United Kingdom were in force from 1974 to 1989. *See* Prevention of Terrorism (Temporary Provisions) Act 1974, c. 56 (Eng.), http://cain.ulst.ac.uk/hmso/pta1974.htm. The previous temporary Prevention of Violence Act of 1939 against the Irish Republican Army (IRA) was repealed in 1973. For a

Now, in a constitutional *Rechtsstaat* like that existing in France, Germany, or Italy today, with a hierarchy of norms, it is paradoxical that an ordinary statute (*loi*) could suspend constitutionally protected rights. Somewhat surprisingly, the highest courts in France have not much to say about this. It is therefore indispensable that the constitution—as Böckenförde suggested—frames and limits emergency powers.

The essential task of constitutionalizing emergency powers is, indeed, exactly to control the measures that the government and the Parliament can take in exceptionally dangerous circumstances. This is the main claim of Böckenförde's work on the topic, which I entirely share—a point that has not been understood, or even really discussed, in France during recent months when the debate raged concerning the proposal of a constitutional amendment because it is considered illiberal.

Many of those who took part in that debate in France argued in a way that indicates a deep misunderstanding of the very function of a liberal constitution. Those, for instance, who strongly opposed the idea of constitutionalizing the emergency measures claimed—quite correctly—that this decision was not the best instrument to fight terrorism. In that sense, the effort of placing emergency measures on a constitutional basis would be pointless and—according to some critics—dangerous. Yet these critics did not realize that in a constitutional *Rechtsstaat*, the decision to constitutionalize emergency powers has a completely different function. It cannot obviously reduce or even preclude terrorist attacks; its possible role and function is to prevent abuses of power by the parliamentary majority and the executive acting based on measures which in the absence of a *constitutionalized law of the exception*[22] would be able to do what it wants and for the duration it likes through statutory legislation controlled by the majority itself. The point is that powers suspending fundamental rights, as Loi n° 55-385 does—because this is the consequence of the declaration of an *Ausnahmezustand* or state of exception[23]—must be limited by norms of constitutional, super-majoritarian rank, which in principle protect those rights and cannot be at the disposal of simply elected majorities that could use them in their own self-interest. This is the basic principle of liberal constitutionalism that the French debate largely ignored. The rigidity of the French constitution has traditionally been

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complete transcript of the act, see Prevention of Violence Act 1939, HANSARD, http://hansard.millbanksystems.com/acts/prevention-of-violence-temporary-provisions-act-1939.

[22] See Pasquale Pasquino & John Ferejohn, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210 (2004).

[23] *See* Pasquale Pasquino, *Machiavel: Dictature et Salus Populi*, *in* RAISON(S) D'ÉTAT(S) EN EUROPE 11 (Brigitte Krulic ed., 2010); Pasquale Pasquino, *Locke on King's Prerogative*, 26 POL. THEORY 198 (1998); Pasquale Pasquino, *Between Machiavelli and Carl Schmitt. Remarks on Rousseau's Dictatorship*, 1 STORIA DEL PENSIERO POLITICO 145 (2013).

weakened by the misleading notion that both the constitution and the statutes (*lois*) are expressions of the general will.[24]

In line with Article 89 that defines the procedure for constitutional revisions, the constitutional amendment was introduced by the government and then discussed and amended by the two houses of the French Parliament, which—as mentioned—approved it with several changes. It was retracted in 2016 by the government, before a pending final approval by the *Congrès.* If we look at the text of the constitutional amendment that was eventually withdrawn,[25] it seems at the same time vague and contrary to the spirit of liberal constitutionalism. It is vague because the last clause puts off to a future organic law the concrete forms of enforcement of the provision.[26] Worse, the amendment does not remove the renewal of the emergency power from the control of the majority and of the government.

It would have been wise instead to follow the suggestion of Böckenförde to the effect that the declaration of an emergency should not be in the same hands as the agency exercising the special powers of suspending fundamental rights. This principle assigning to two different actors the declaration of a state of emergency on one side, and the exercise of exceptional powers on the other, was established already by the Roman Republican constitution—according to which the Senate declared the emergency and the dictator had, for a limited period, six months, exceptional powers suspending the fundamental rights of *provocatio ad populum* and *tribunicia intercessio.*

Moreover, the proposed amendment was deficient in that it granted the majority in parliament the competency to renew the emergency powers de facto indefinitely. It would be advisable if instead either the agreement of the opposition—or better, if the Constitutional Court were required to renew the enactment of the *Ausnahmezustand.*

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[24] Paradoxically, the French established the principle of a rigid constitution in 1791. But the control of the hierarchy of norms between the ordinary laws and the constitutional provisions was assigned de facto to a specialized body only with the constitution of 1958. Only from 2010 onwards can enacted statutes be scrutinized by the *Conseil Constitutionnel.* The ideology of the *loi expression de la volonté générale* has been for more than two centuries a major obstacle to establish in France a fully working constitutional democracy.

[25] See Appendix for the original draft and an English translation of it.

[26] A *loi organique* in the French constitutional law is an intermediary rung in the hierarchy of norms between the ordinary statute law and a constitutional norm. The procedure of its enactment is more complex, notably such a legal norm must be scrutinized *ex officio* by the Constitutional Council, before its promulgation. Article 46 of the French Constitution specify the procedural details. *Ratione materiae,* an organic law has object provisions concerning the organization and functioning of the public powers.

II. Politique Politicienne

One can wonder why President Hollande decided, notwithstanding the comfortable majority in the two Houses of parliament, to withdraw the proposed amendment. The reasons are not clear, and we are left with only speculation. It seems to me that Hollande was worried, on one side about the divisions within public opinion, notably the liberal one. Even more, on the other side as to the split within the Socialist party, and, thus, the risk of having a divided party behind him, lessening in significant measure the already feeble chances he had to be the candidate of the left in the next presidential election. As we now know, Hollande decided wisely not to run in the elections, and the candidate of the socialist party was even unable to run in the runoff.

I agree with Böckenförde that the emergency measures ought to have been constitutionalized and not left to ordinary, majoritarian legislation. But in the French case, a possible useful amendment to the constitution—born inside a legal and political culture not able to realize the enabling and disabling function of the constitution to which Böckenförde drew attention—failed because of the short-run rationality of electoral politics.[27] On October 18, 2017, the French Parliament—after the definitive abandonment of the project of a constitutional amendment—adopted an ordinary law to fight terrorism that came into force after the suspension of the emergency measures on November 1, 2017.[28] The emergency measures enacted by the existing 1955 statutory law lasted 23 months.

[27] *See* Jean-Philippe Derosier, *Non á l'État liberticide*, LA CONSTITUTION DÉCODÉE (Oct. 9, 2017), http://constitutiondecodee.blog.lemonde.fr/2017/10/09/non-a-letat-liberticide/.

[28] The text of the new law can be read here: Project de Loi 6 renforçant la sécurité intérieure et la lutte contre le terrorisme [strengthening internal security and the fight against terrorism], *Sénat* [Senate], Oct. 18, 2017, http://www.senat.fr/petite-loi-ameli/2017-2018/17.html (Fr.).

Appendix

Proposed constitutional amendment—not adopted

Article 36-1—*L'état d'urgence est décrété en conseil des ministres, après consultation des présidents des assemblées, sur tout ou partie du territoire national, en cas de péril imminent résultant d'atteintes graves à l'ordre public.*

« Les mesures de police administrative pouvant être prises par les autorités civiles pour prévenir ce péril sont strictement adaptées, nécessaires et proportionnées. Il s'agit de mesures exceptionnelles de prévention.

« Il ne peut être dérogé à la compétence que l'autorité judiciaire, gardienne de la liberté individuelle, tient de l'article 66.

« Pendant la durée de l'état d'urgence, une proposition de loi ou de résolution ou un débat relatif à l'état d'urgence sont inscrits par priorité à l'ordre du jour à l'initiative de la conférence des présidents de chaque assemblée ou d'au moins deux groupes parlementaires pendant la session ordinaire ou une session extraordinaire ou, le cas échéant, pendant une réunion de plein droit du Parlement.

« L'Assemblée nationale et le Sénat sont informés sans délai par le Gouvernement des mesures prises au titre de l'état d'urgence. À leur demande, le Gouvernement leur transmet toute information complémentaire relative à ces mesures.

« La prorogation de l'état d'urgence au-delà de douze jours ne peut être autorisée que par la loi et dans la stricte mesure où la situation l'exige. Celle-ci en fixe la durée, qui ne peut excéder trois mois. Si les conditions de l'état d'urgence demeurent réunies, cette prorogation peut être renouvelée selon les mêmes modalités. Il peut être mis fin à l'état d'urgence par la loi ou par décret délibéré en conseil des ministres.

« Une loi organique détermine les conditions d'application du présent article. »

Translation:

Article 36-1—The state of emergency is declared by the council of ministers after consulting the presidents of the parliamentary assemblies (*Assemblée Nationale* and *Sénat*), on a section or the totality of the national territory, in case of imminent danger resulting from significant threats to the public order.

Police measures that could be taken by civil [meaning non-military] authorities in order to prevent this danger are strictly adapted, necessary and proportionate. These are exceptional preemptive measures.

It is not possible to derogate from the constitutional competences of the judicial authority, the guardian of citizens' individual freedom, pursuant to Article 66 of the Constitution.

During the state of emergency, a bill of a statute or of a decision or a debate concerning the state of emergency will be put immediately on the agenda at the initiative of the presidents of each house of the parliament or at least of two parliamentary groups during the ordinary session or of an extraordinary session, or, as the case may be, in a mandatory meeting of the Parliament.

The *Assemblée Nationale* and the *Sénat* are informed immediately by the Government as to the measures taken under the state of emergency. At their request, the Government transmits any complementary information regarding those measures.

The extension of the state of emergency after twelve days can be authorized only by statute [meaning the agreement of the parliament] and only to the strict extent required by the situation. The statute establishes the duration of the state of emergency, which cannot last more than three months. If the conditions justifying the emergency measures continue to exist, the extension can be renewed following the same procedure. The state of emergency can be terminated either by a statute law or by a decision of the council of ministers.

An organic law will define the conditions of enforcement of this article.