

# A “New Normal”: Legality in Times of Necessity: French Administrative Law under the Health Emergency

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## Abstract

States of emergency test the limits of constitutionalism and our commitment to the rule of law (Dyzenhaus 2012). They tell us something about the ultimate power in a society and the very nature of state powers. French constitutions have a long history of arising from crises, revolutions and overthrows. The current political regime was born in 1958 at the time of the Algerian war of independence. More recently, the French have lived under a sustained period of emergency regulations following the terrorist attacks in Paris in November 2015. Now that a state of health emergency has been declared and extended it is possible to reflect on how key principles relating to the rule of law, such as legality and judicial control, are being re-shaped. This helps us to reflect on how the state seeks to command compliance from its citizens and how a balance is struck between necessity and legality. Key stages can be identified: a first stage when (judicial) control is muted and a second stage when judges re-assert their role once the risks linked to the pandemic have been curbed. This differentiation both confirms the risk of normalising an executive state of emergency (at the time of the peak) and the possibility of a judicial state of emergency emerging (once the first wave is over) (Ginsburg and Versteeg 2020). This brings into question how the next steps in the health emergency can be made subject to robust scrutiny and accountability mechanisms as necessity evolves.

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## Key words

Emergency, executive powers, legality, enforcement, compliance

## I. Introduction

Is the health emergency state confirming the “banalisation”,<sup>1</sup> “normalisation”<sup>2</sup> or “experimentation”<sup>3</sup> of the exceptional trend that academics denounced regarding the state of emergency during the period 2015-2017 (triggered by the Paris attacks at the Bataclan and the Stadium of France on 13 November 2015)? The UN special rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms has expressed concern that the state of emergency “is being used across the world.”<sup>4</sup> In shifting the attention from a community’s potential for long-term well-being to its physical survival in the short term, states of emergency do not leave time and space for rational collective argumentation based on careful weighting between quantitative evidence and qualitative factors in an iterative and/or incremental manner. This leads to

<sup>1</sup> Jean-Louis Halpérin, Stéphanie Hennette Vauchez and Eric Millard (eds), *L’état d’urgence, de l’exception à la banalisation* (Presses Universitaires de Nanterre 2017).

<sup>2</sup> Stéphanie Hennette Vauchez, ‘Introduction’, in *Ce qui reste(ra) toujours de l’urgence*, 2018, 6-7.

<sup>3</sup> Véronique Champeil-Desplats ‘Aspects théoriques: Ce que l’état d’urgence fait à l’état de droit’, in *Ce qui reste(ra) toujours de l’urgence*, 2018, 33.

<sup>4</sup> Report to the UN Secretary General, UN Doc. A/72/43280, 27 September 2017, paragraph 16.

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probes into whether the executive is all-powerful or whether courts and similar mechanisms provide for a form of judicial accountability, as Ginsburg and Versteeg have asserted.<sup>5</sup> In answering this question for the French health emergency this paper highlights that states of emergency need to be looked at as processes with differentiated stages and constellations of actors, not as monoliths.

A long tradition in legal scholarship discusses emergencies in terms of law versus facts (politics or morality): do we need to find solutions to emergencies in the law or outside of it?<sup>6</sup> Revolving around the boundary between legality and extra-legality, this question is especially relevant when it comes to enforcement and mechanisms to ensure citizens' compliance, maybe against their consent. The legitimacy of this enforcement is related to a conservative function of the state of emergency: the state of emergency is supposed to ensure that public bodies and social life are safeguarded against a great evil so that "normal" life can resume with the usual freedoms and liberties. States of emergency test the commitment of a legal order to the principle of legality and the rule of law.<sup>7</sup>

Among all the states of emergency established across the world to respond to the Covid-19 pandemic, analysing one case in depth, such as the French health emergency, helps with developing a more analytical approach. Three features of French administrative law – true any time, anyway – magnify the bluntness of the decision-making available to French public bodies during the Covid-19 pandemic. First is the centralisation of power in the national government, in tandem with an endemic reluctance to decentralise decision-making. Second is the limited space for dissenting voices in decision-making. Third is a narrow understanding of "legality" and compliance, based on a binary dogmatism with little room for pragmatism and flexibility. Yet, the Covid-19 pandemic highlights how these features are in need of adaptation when it comes to addressing new challenges.

After a brief contextualisation of the state of emergency in France the different phases in the health emergency will be analysed, namely its adoption, its enforcement, its extension and the resistance against it. The signs of wear and tear that ordinary French administrative law faces given the Covid-19 pandemic lead to a call for reimagining French administrative law – making it fit for the challenges of the 2020s.

## II. A History of Crises

France has a long constitutional history of crises, with a regime dealing with state emergencies (then in the form of *état de siège*) going back to the 19<sup>th</sup> century.<sup>8</sup> At the end of the First World War the French High Administrative Court developed the doctrine of "exceptional circumstances", according to which legality could be set aside when circumstances made it impossible for the administration to comply with the law, provided some conditions were met.<sup>9</sup> This led to the inclusion in the 1958 Constitution of an article granting extensive powers to the French president in cases of serious and immediate

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<sup>5</sup> Tom Ginsburg and Mila Versteeg, 'Binding the Unbound Executive: Checks and Balances in Times of Pandemic,' 25 May 2020, available at SSRN: <https://ssrn.com/abstract=3608974>.

<sup>6</sup> Kim Lane Scheppele, 'Legal and Extralegal Emergencies', in Gregory Caldeira, Daniel Kelemen and Keith Whittington (eds), *Oxford Handbook of Law and Politics* (OUP 2008) 165-184.

<sup>7</sup> David Dyzenhaus, 'States of emergency', in Michel Rosenfeld and Andras Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 442-462.

<sup>8</sup> Sébastien Platon, 'From One State of Emergency to Another – Emergency Powers in France', *Verfassungsblog*, 9 April 2020.

<sup>9</sup> C.E., 28 June 1918, *Heyriès* and C.E., 28 February 1919, *Dol et Laurent*.

threats to the institutions of the Republic and of interruption to the proper functioning of the constitutional public authorities. This was meant as an answer both to the peculiar circumstances of the French surrender in 1940 and to the Algerian war of independence. This last event also caused a statute<sup>10</sup> – still in force today – to be adopted in 1955 to regulate “states of emergency”. This statute was amended to provide the legislative framework for dealing with the terrorist attacks in Paris in 2015. Many of the specific powers introduced to address the threats of new attacks were then enshrined in the ordinary criminal procedure, in effect enacting permanent changes in the normal legal framework.

### III. The Health Emergency as Adopted in the Law: Procedures vs. Circumstances

When Covid-19 struck France social distancing was first introduced on 14 March.<sup>11</sup> As the population did not comply with these first instructions the prime minister took more restrictive measures on 16 March based on “*the exceptional circumstances resulting from the Covid-19 pandemic*”. On 23 March the statute on the health emergency was adopted to introduce new provisions in four areas: public health, economic life, elections,<sup>12</sup> and parliamentary processes. In particular, the statute lists ten areas where individual freedoms can be curtailed, including a ban on free circulation except for essential travel, a ban on gatherings and restrictions on the freedom to trade. In cases of repeated breaches of the ban on circulation a criminal sanction of up to six months jail and 3,750 EUR fine was provided for. Three comments can be made about this system concerning the efficiency of governmental action, time malleability, and the limited parliamentary and judicial control over the state of emergency.

First, this state of health emergency has led to centralising power around the prime minister and the Home Office (in charge of public security), with the support of the *préfets* (i.e., representatives of the state at the departmental level) in order to maintain public order and public health.<sup>13</sup> In addition, as from 24 March, a scientific advisory body was set up to advise the French president in tandem with the “Comité analyse, recherche et expertise”.<sup>14</sup> On 24 March the French president declared, “*We will overcome the virus thanks to science and medicine*”.<sup>15</sup> French scholarship has expressed doubts as to whether covid-19 necessitated this totally new system as the previous 1955 emergency system was already available for cases of “*events presenting, by their nature and seriousness, the character of a public calamity*”. Tweaks to the existing system may have been possible.<sup>16</sup> Indeed, it

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<sup>10</sup> Loi n°55-385 du 3 avril 1955 *relative à l'état d'urgence*.

<sup>11</sup> Arrêté du 14 mars 2020 *portant diverses mesures relatives à la lutte contre la propagation du virus covid-19*. For a starting point into the many implementing measures and most important political speeches, see: <https://www.vie-publique.fr/dossier/273938-dossier-coronavirus-mesures-pour-endiguer-lepidemie-discours-publics>.

<sup>12</sup> Olivier Béaud, ‘La surprenante invocation de l’article 16 dans le débat sur le report du second tour des élections municipales’, *JP Blog*, 23 March 2020.

<sup>13</sup> Senate, *Deuxième rapport d'étape sur la mise en œuvre de l'état d'urgence sanitaire*, 29 April 2020, Mission de suivi de la loi d'urgence pour faire face à l'épidémie de Covid-19 (hereafter Senate, *Second report*), 91-93.

<sup>14</sup> <https://www.enseignementsup-recherche.gouv.fr/cid151204/le-comite-analyse-recherche-et-expertise-care-covid-19.html>.

<sup>15</sup> <https://www.elysee.fr/emmanuel-macron/2020/03/24/medecins-chercheurs-et-scientifiques-mobilises-contre-le-covid-19>.

<sup>16</sup> Olivier Beaud, ‘L'état d'urgence sanitaire: était-il judicieux de créer un nouveau régime d'exception?’, (2020) *Recueil Dalloz* 891; Jean-Eric Gicquel, ‘Covid-19: crise sanitaire et crise des normes’, (2020) *Recueil Dalloz* 719; J. Petit, ‘L'état d'urgence sanitaire’, (2020) *AJDA* 833.

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has been argued that most of the measures to fight Covid-19 had already been taken the day before the statute was adopted.

Second, the health emergency has impacted the time taken over the law-making process. For instance, time was especially squeezed for the adoption of the statute on 23 March. Adopted in less than three days (from 20-22 March), the bill was discussed without any real opportunity for amendments:<sup>17</sup> there were repeated calls during the discussions to shorten discussions and press ahead, and for comments to be limited to essential matters.<sup>18</sup>

Third, the health emergency has been subject to little parliamentary or judicial control over executive decision-making.<sup>19</sup> By way of parliamentary control, two missions, one of information (Lower Chamber) and one of monitoring (Upper Chamber),<sup>20</sup> are provided for. The former is chaired by a person close to the president, Richard Ferrand. For the 2015 emergency MPs could ask for investigations on the spot or hearings, an option that was not made available to MPs in the 23 March statute.

Control by constitutional, administrative and ordinary judges is also limited. In addition to the 23 March statute, an “organic” statute had been adopted to suspend time limits in preliminary references to the Constitutional Council: preliminary references pertaining to the constitutionality of the health emergency could hence be delayed until at least September 2020, thus escaping scrutiny when it would be most needed. The adoption of this statute had to comply with time requirements in accordance with the French Constitution: normally such a bill needs to wait for fourteen days between being tabled and being discussed. Covid-19 did not allow for such a delay.<sup>21</sup> However, in its ruling on this organic statute the Constitutional Council confirmed its constitutionality despite the obvious breach of the constitution, due to the “*peculiar circumstances of the case*”.<sup>22</sup>

#### IV. The Health Emergency as Enforced:<sup>23</sup> Legality, Prevention and Repression

The health emergency caused many practical questions to arise regarding its implementation and enforcement. This provides food for thought regarding a better understanding of how “legality” is conceived under French administrative law. “Legality” is highly specific, heavily reliant on sanctions by police and directed towards the efficiency of governmental action (*i.e.* central vs. local level) with little leeway for differentiation.

First, the legality principle in administrative action may refer to the fact that a statutory basis is needed to justify administrative decisions, especially when they limit individual

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<sup>17</sup> Paul Cassia, ‘L’état d’urgence sanitaire: remède, placebo ou venin juridique?’, *Mediapart*, 23 March 2020.

<sup>18</sup> Pierre Januel, ‘Le Sénat en état d’urgence sanitaire’, *Dalloz Actualité*, 20 March 2020.

<sup>19</sup> Manon Altwegg-Boussac, ‘La fin des apparences’, *Revue des droits de l’homme, Actualités Droits-Libertés*, (<http://journals.openedition.org/revdh/9022>).

<sup>20</sup> Senate, Commission des lois, *10 premiers jours d’état d’urgence sanitaire : premiers constats - Analyse des décrets et ordonnances (justice, intérieur, collectivités territoriales, fonction publique)*, 2 April 2020); Senate, *Second report* (n. 13).

<sup>21</sup> <https://actu.dalloz-etudiant.fr/le-billet/article/un-nouveau-repli-du-conseil-constitutionnel-dans-son-role-de-contrepoids/h/a1247a77d164c980639f8913ab0be8bf.html>.

<sup>22</sup> CC, Décision n°2020-799 DC, 26 March 2020, *Loi organique d’urgence pour faire face à l’épidémie de covid-19*, §3 (available at <https://www.conseil-constitutionnel.fr/decision/2020/2020799DC.htm>).

<sup>23</sup> For an overview of the enforcement measures (staff, technologies etc), see Senate, *Second report*, (n. 13) 32 ff.

freedoms. In the case of Covid-19 the case law-based justification of “exceptional circumstances” was first relied upon, then dismissed in favour of a formal statutory-based exception, although it came back through the window in the constitutional case law in the form of “peculiar circumstances”. In addition, the French High Administrative Court has a particular understanding of the legality principle. As of 1 May the French High Administrative Court had decided eighty cases based on a specific procedure called “*référé-liberté*”, a procedure allowing a quick process when public bodies have harmed individual freedoms in a serious and obviously illegal way. In most cases the French High Administrative Court dismissed the challenges (often at the admissibility stage). In the very few cases where it did not, it asked the government to specify some aspects of its regulations, although with some oddities. One of the cases, decided the day before the health emergency was adopted, asked the government to clarify the exemptions to the lockdown for health grounds, to reassess the possibility of short trips near the home and to assess the risks caused by open-air markets.<sup>24</sup> Another decision led to the curious result that the government had to adapt its soft law guidance on the use of bikes during the lockdown but not to amend its hard law regulation in any way.<sup>25</sup> In both cases, the contribution of the French High Administrative Court to what counts as legality for protecting individual freedoms was minimal during the peak of the health emergency.

Second, respect for the legality principle is paramount when it comes to implementing the law and exercising coercive powers. Normally, “administrative policing”, a well-developed concept relying on the key idea that “freedom is the principle and restrictions the exception”, is used to balance individual freedom with public order (and matters such as public health), with an emphasis on prevention using administrative tools instead of repression through (criminal) sanctions. However, the health emergency reshapes this classic understanding: it organises repression and criminal sanctions up to incarceration in cases of infringement of the measures limiting freedom of circulation.<sup>26</sup> The government wanted to send a strong signal to the population with heavy criminal sanctions (up to six months in jail in cases of four violations). The enforcement by the police of these provisions has implications for individual freedoms and the risks of abuse have been real. For instance, problems of interpretation by the police force have been flagged up due to the sloppy formulation of the offences.<sup>27</sup> Very little guidance was provided to the police regarding which travel was allowed. In other cases, the police resorted to extensive surveillance techniques in order to ensure compliance. In Paris it rolled out drones, which led to concerns over privacy.<sup>28</sup> All in all, “legality” seems to be underpinned by the need to force citizens to comply with legal requirements at any cost.

Third, the uneasy balance between (central) legality designed in Paris and its implementation to address local circumstances is also a key element of French administrative law. Centralisation reaches very far. Many mayors tried to take measures to address the Covid-19 pandemic in their local government, some introducing curfews,

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<sup>24</sup> C.E., 22.03.2020 (ord), n°439.674, *Syndicat Jeunes Médecins*.

<sup>25</sup> C.E., 30.04.2020 (ord), n°440.179, *Fédération française des usagers de la bicyclette*; <https://www.interieur.gouv.fr/Actualites/Communiqués/Situation-relative-aux-autorisations-de-deplacement-a-velo-dans-le-cadre-du-confinement>.

<sup>26</sup> Jean-Claude Planque, ‘Le droit pénal bousculé par le covid-19’, *The Conversation*, 11 May 2020.

<sup>27</sup> Senate, *Second report*, (n. 13) 40.

<sup>28</sup> Jean-Michel Normand, ‘Confinement: la surveillance policière par drones dénoncée par deux associations’, *Le Monde*, 4 May 2020. After the complete lockdown ended, the *Conseil d’Etat* forbade this (C.E., 18 May 2020, n°440.442 and 440.445 (ord.)), *Association La Quadrature du Net and Ligue des droits de l’homme*).

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some forbidding access to open spaces or closing down hotels. In many cases they had to backtrack as the central government found these measures inappropriate.<sup>29</sup>

One case sheds interesting light on this “central legality”, that of the *Ville de Sceaux*.<sup>30</sup> The *Ligue des droits de l’homme* challenged the decision of this local government to require masks for people circulating on the streets. The Home Office joined the challenge: it considered that the local by-law was implying that citizens could move freely on the streets at a time when people were not supposed to do so according to the national statutory framework. The French High Administrative Court quashed the local by-law: local provisions based on general administrative policing (*i.e.*, to protect security, salubrity and tranquillity) cannot derogate to a case of special policing (here: health protection) as a matter of principle. Only if two conditions were met could the mayor derogate from the national measures: firstly, when local specificities required the derogation; secondly, provided that the consistency and efficiency of the national provisions were not put in jeopardy. The principle and the first exception are in line with previous case law. However, the second condition is a striking innovation: the French High Administrative Court is not supposed to innovate but to follow case law closely when a decision is taken in speedy proceedings.<sup>31</sup> As a consequence, mayors have seen curtailing of their ability to take measures differing from the national policy. This situation causes one to wonder: what matters most with legality in France? Uniformity across the country or efficient compliance despite differing needs in concrete local circumstances? In other words: legality for the sake of legality or legality for the sake of citizens’ well-being?

## V. The Health Emergency Extended: Exiting the Lockdown Incrementally

Exiting the lockdown is challenging for most countries: governments face competing demands to relaunch the economy and re-establish individual freedoms on the one hand and to prevent the virus from reappearing on the other hand. On 11 May a statute extended the health emergency until 10 July. Once the emergency was extended critical voices became more insistent among the French population<sup>32</sup> and legal scholarship.<sup>33</sup> The political discussions behind the extension of the health emergency have revolved around two key matters: first, mandatory isolation; secondly, tracing people in contact with sick people.

Regarding mandatory isolation, a loosening of the governmental approach can be noticed. In the first announcements mandatory isolation was widely conceived of to include vulnerable people and any person reported sick with Covid-19 on the French territory. However, the opposition to such a broad limitation to the freedom of circulation led the government to clarify that isolation would be voluntary in principle and that mandatory isolation would be limited to people travelling from abroad. Further exceptions were added for travellers coming from the EU, the Schengen space and the UK. Isolation for sick and vulnerable people would be purely voluntary. Asked to scrutinise the constitutionality of

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<sup>29</sup> Senate, *Second report*, (n. 13) p. 28.

<sup>30</sup> C.E., 17.04.2020, n°440.057 (ord.): ‘Le maire presque privé de pouvoirs de police pour lutter contre le coronavirus’, (2020) *AJDA* 815.

<sup>31</sup> Paul Cassia, ‘Le Conseil d’Etat démasque Sceaux, et vice-versa’, *Mediapart*, 19 April 2020.

<sup>32</sup> Matthieu Goar, ‘Gestion du coronavirus: l’exécutif français jugé plus durement que ses homologues européens’, *Le Monde*, 2 May 2020.

<sup>33</sup> Paul Cassia, ‘Le confinement: 67 millions de privations arbitraires de la liberté de circuler’, *Mediapart*, 13 May 2020.

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this extension, the Constitutional Council accepted these measures as constitutional provided that they were so interpreted that any measures forbidding a person to leave his/her home for longer periods than twelve hours a day would be authorized by a judge.<sup>34</sup>

Regarding tracing people who had been in contact with sick people, two different strategies have been devised. The first one relies on human intervention, namely the training of small teams visiting the homes of people at risks, taking samples and educating them on protective behaviour. 20,000 to 30,000 people are needed to “break” the transmission of the virus among the population in this way. This means a highly resource-intensive system for tracing the virus. The second strategy relies on new technologies, namely an app called *StopCovid*. Problems have surfaced, with a risk of habituation to being monitored by technologies among the population,<sup>35</sup> complex technical implementation and a lack of guaranteed success. The app has been delayed. The Constitutional Council interpreted the statute extending the health emergency in such a way that the data for scientific research had to be anonymised; it also considered some provisions to be non-constitutional. These included, first, the requirement for assent to the implementation decrees from the French data protection authority; secondly, the obligation for public bodies to transfer their decisions pertaining to tracing to the Senate and the National Assembly.<sup>36</sup> This leaves a black hole when it comes to the monitoring of data processing in the coming weeks and months. The legality of this app is being shaped incrementally in an arm-wrestling match between public authorities and private technological firms<sup>37</sup> as much as between the executive and the legislative.

## VI. The Health Emergency as Resisted: Discussion, Contestation, Monitoring

Polls showed a broad consensus regarding the French health emergency at first. Protests emerged only marginally, a striking feat for a country where the situation was rather different only a few weeks before. The “yellow vests” had been challenging Macron’s reforms for months in 2018-19 and painful reforms to the retirement system triggered demonstrations until the start of Covid-19. However, as the lockdown began getting longer, increasing opposition arose. Seventy criminal complaints were logged against the prime minister and the ministers of health, justice and/or the Home Office for their management of the crisis, for instance. At least three different levels of resistance to the health emergency can be identified, which could shape the exit from the lockdown, administrative law and life beyond it.

First, scientific, civic and scholarly discussions have flourished during Covid-19. If the French president has relied on science to address the pandemic, scientific controversies have quickly emerged, most famously in relation to hydroxychloroquine.<sup>38</sup> Civil society and MPs have started an open consultation on how society could look after Covid-19.<sup>39</sup> In scholarly circles Covid-19 has sparked discussions in traditional and modern media to an

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<sup>34</sup> CC, Décision n°2020-800 DC, 11 May 2020, *Loi prorogeant l'état d'urgence sanitaire et complétant ses dispositions*, paragraph 43.

<sup>35</sup> Senate, *Second report*, (n. 13) 77-85.

<sup>36</sup> CC, Décision n°2020-800 DC, (n. 34), paragraphs 67, 70, 77-78, 82.

<sup>37</sup> Damien Leloup, ‘Application StopCovid: La France isolée dans son bras de fer avec Apple et Google’, *Le Monde*, 28 April 2020.

<sup>38</sup> Emmanuel Drouet, ‘Chloroquine et infections virales: Ce qu’il faut savoir’, *The Conversation*, 6 April 2020.

<sup>39</sup> <https://lejourdapres.parlement-ouvert.fr/>.

extent never witnessed before. One academic has drafted a petition for the “return to ordinary legality”.<sup>40</sup>

Second, civil society has been organising its activity in various ways, including a “réseau de vigilance sur l'état d'urgence sanitaire”,<sup>41</sup> which monitors administrative action and its possible abuses. The *Commission nationale consultative des droits de l'homme* has set up a monitoring centre dedicated to the lockdown situation.<sup>42</sup> Civil society is also actively involved in challenging administrative measures. The “référés-libertés” in front of the administrative judge mentioned above are most-often initiated by professional organisations and not-for-profits, representing sectorial, professional and social interests. Even though they did not succeed in clearly curbing the course of the health emergency in the first phase of the health emergency, their indirect impact cannot be understated. This willingness to call public bodies to account has led mayors to withdraw their by-laws once judicial challenges have been initiated.

Third, a wave of criticism has arisen against the French High Administrative Court, perceived as the protector of the executive during this crisis.<sup>43</sup> One specific issue pertains to its dual role of being both an advisor to the government and an administrative judge.<sup>44</sup> In the 2000s a discussion emerged around the application of article 6 Eur Conv H R to this institution, with Strasbourg eventually accepting this dual role and some of its associated features. At the time French academics strongly defended these specificities.<sup>45</sup> Today, this willingness has faded away: academics and practitioners denounce the lack of independence of the administrative judge.<sup>46</sup> They pinpoint that most challenges against administrative measures have been rejected, and the ones which have not been rejected are more symbolic than substantive.<sup>47</sup> The head of the French High Administrative Court, Bruno Laserre, and the head of the litigation section, Jean-Denis Combrexelle,<sup>48</sup> have tried to defend their institution – but to no avail.

The awkward position held by the *Conseil d'Etat*, between the executive and citizens, between responsiveness to necessity and protection of individual freedoms, has come very much to light with Covid-19. From the moment easing out from the lockdown came

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<sup>40</sup> Olivier Pluen, ‘Réflexion sur la diffusion de la doctrine pendant l'état d'urgence sanitaire, suivie d'une proposition de loi ou pétition visant à favoriser le retour à la «légalité ordinaire»’, *RDLF* 2020 chron. n°39.

<sup>41</sup> <https://www.voxpublic.org/Verbalisations-abusives-le-Reseau-de-veille-sur-l-etat-d-urgence-sanitaire.html?lang=fr>.

<sup>42</sup> <https://www.cncdh.fr/fr/travaux-en-cours/observatoire-de-letat-durgence-sanitaire-et-du-confinement>.

<sup>43</sup> See above section IV.

<sup>44</sup> John Bell, ‘What is the function of the Conseil d'Etat in the preparation of legislation?’ (2000) 49(3) *ICLQ* 661.

<sup>45</sup> John Bell, ‘From ‘Government Commissioner’ to ‘Public Reporter’: A Transformation in French Administrative Court Procedure?’ (2010) 16(4) *European Public Law* 533–538; Axel Barbelin, ‘Rapporteur public: chronique d'une controverse annoncée’, (2010) *AJDA* 1574.

<sup>46</sup> Mathieu Touzeil-Divina, ‘Quand le Conseil d'Etat n'avance plus masqué pour réaffirmer qu'il est, même en juridiction, le Conseil «d'Etat» et non «des collectivités» - Observations sur C.E., Ord., 17 April 2020, *Commune de Sceaux* (n°440.057) à propos de l'obligation du port du masque dans l'espace public (municipal)’, *Journal de droit administratif* 18 April 2020. William Bourdon and Vincent Brengarth, ‘Le Conseil d'Etat se dévitalise alors qu'il devrait être l'ultime bastion des libertés’, *Le Monde*, 12 April 2020.

<sup>47</sup> Some criticisms are strong (e.g. Paul Cassia, ‘Etat d'urgence sanitaire: Le Conseil d'Etat (ne) change (que) sa méthode’, *Mediapart*, 2 May 2020); some more nuanced (e.g. Claire Saunier, ‘La position délicate du juge des référés face à la crise sanitaire: entre interventionisme ambigu et déférence nécessaire’, *JP Blog*, 11 April 2020).

<sup>48</sup> Jean-Denis Combrexelle, ‘Les juges administratifs du Conseil d'Etat se situent loin des polémiques’, *Le Monde*, 12 April 2020.



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closer it started taking a different stance towards the legality of the administrative decisions. While no administrative decisions pertaining to the health emergency were quashed from March 23 onwards, the French High Administrative Court ordered the administration to provide masks in prisons on 8 May.<sup>49</sup> The approaching easing out of the lockdown as from 11 May features clearly in the judgment.<sup>50</sup> This judgment was then followed by two decisions, one enjoining public authorities to stop using drones in public spaces in Paris<sup>51</sup> and the other enjoining changes to the regulation of religious celebrations.<sup>52</sup> It has been noted that these judicial decisions, although technically taken in the form of speedy proceedings and thus temporary, have become final: the very compliance by the executive with these decisions makes any further proceedings redundant.<sup>53</sup>

## VII. The Health Emergency and a “New Normal” Legality: Reimagining Administrative Law?

The health emergency sheds light on the need to reimagine the conceptual, instrumental and functional components of French administrative law, to reconcile individual autonomy and collective concern for the common good. In more general terms, the very notion of “legality” may have to be re-visited to move beyond a positivist and black-letter approach to what it means beyond the legality/illegality dichotomy and why legality is a key feature of the rule of law. Factors such as time, quantitative and qualitative evidence for administrative decision-making, balancing individual privacy with collective health and spatial decentralisation and differentiation, impartial review of administrative action, exercising coercive powers in the light of social cohesion, and improved flows of better-explained information (inside the administration, between administrations and public bodies, across society) would all need to be given some place in the next administrative covenant in France. A new articulation between legality and extra-legality is needed. French administrative law could help provide conceptual frames and a practical toolkit to articulate the social and the political spheres for living together. Such a renewal of French administrative law scholarship is much needed to address the social and economic consequences resulting from Covid-19 – in France and beyond.

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<sup>49</sup> C.E., 7.05.2020 (ord.), n°440.151, *Garde des Sceaux*.

<sup>50</sup> Paragraphs 21, 25-26, 29, 33.

<sup>51</sup> C.E., 18 May 2020, n°440.442 and 440.445 (ord.), *Association La Quadrature du Net and Ligue des droits de l'homme*. Olivia Tambou, ‘Que faire face au développement des drones? Libres propos autour de l’ordonnance du Conseil d’État’, *Dalloz Actualité*, 25 May 2020.

<sup>52</sup> C.E., 18 May 2020, n°440.366, 440.380, 440.410, 440.531, 440.550, 440.562, 440.563 and 440.590 (ord.), *W*.

<sup>53</sup> John Bell, ‘The importance of urgent interim orders in contesting French government rules on covid-19’, *British Association of Comparative Law Blog*, 3 June 2020.