

# The French Habeas Corpus and Covid-19

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On 29 January 2021, the [French Constitutional Council published an important decision](#) on the protection of the right to liberty during the [state of sanitary emergency](#). The Constitutional Council decided that extending the duration of pre-trial detention without a decision made by a judge was contrary to article 66 of the Constitution. The decision implies that while authorities can resort to exceptional powers during a pandemic, they must still respect basic human rights. The fight against Covid-19 does not justify any kind of restriction of individual freedom.

## The state of sanitary emergency

The state of sanitary emergency was declared through an Act of Parliament of 23 March 2020. Under this Act, the Prime minister is given a range of exceptional powers in order to tackle the pandemic and the government is allowed to legislate on a number of issues. (See [Aurore Gaillet & Maximilian Gerhold](#) and [my post](#)). Article 11-I 2° d) of the Act of March 2020 authorized the government to legislate to adapt the rules on pre-trial detention. The Constitution (art. 38) provides that Parliament may authorize the government to legislate. The order (*ordonnance*) is granted the value of an Act of Parliament once it has been ratified by Parliament. On 25 March 2020, the government adopted an order which automatically extended the duration of pre-trial detention. It was extended for six months for the most serious offences and to two or three months for the others. Despite the extension, it was still possible to go before a judge and ask to be released. The government wanted to avoid freeing prisoners because the courts were disorganized in the spring. Many people were concerned about the hygiene situation in jails because of the well-known overcrowding of French prisons, which is largely due to the number of prisoners awaiting their trial (29,5 percent, almost 20 000 at the beginning of 2018 according to the Council of Europe). The automatic extension of pre-trial detention was applied from 26 March until 11 May. There were so many protests that the Act of Parliament of 11 May 2020 (that extends the sanitary state of emergency) has suppressed it.

## The decision by the Constitutional Council

Through a preliminary reference (*question prioritaire de constitutionnalité*), the highest Court for criminal law (*Cour de cassation*) asked the Constitutional Council to assess the validity of the automatic extension. Article 66 of the Constitution provides that “No one shall be arbitrarily detained. The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute”. It is commonly referred to in France as the right to individual freedom or the French *Habeas corpus*.

In its decision of 29 January, the Constitutional Council has, rightly, decided that extending the duration of pre-trial detention without a decision made by a judge was contrary to article 66 of the Constitution. Article 66 has been interpreted for years as meaning that restrictions to individual freedom should be necessary, adequate, and proportional. A judge must decide as quickly as possible on any restriction. The pandemic does not justify any derogation.

The present decision must be read together with another decision on the same topic. On 3 July 2020, the Constitutional Council decided that the provision authorizing the government to legislate to extend the duration of pre-trial detention was not contrary to article 66 of the Constitution because it did not *per se* prohibit the intervention of a judge. The Constitutional Council explained that only an order based on the statutory authorisation might be deemed contrary to the Constitution. One could have read this interpretation as a warning to the government. The warning was not taken into account and six months later, the order was found contrary to the Constitution.

## The Constitutional Council and the ECHR

The decision of the Constitutional Council is also consistent with the case-law of the European Court of Human rights. It is modelled on the case-law on the right to liberty and security (article 5 of the Convention). Nobody should be detained without a swift decision of a judge. It is also similar to the case law on derogations to the Convention under article 15. The Strasbourg judges do not really question the decision to derogate from the Convention. They accept that terrorism is a “threat to the life of the nation” that justifies derogations from the Convention, but they check that the derogations to article 5 are proportionate and that detention is still subject to the control of a judge ([ECtHR, A v UK, 19.2.2009](#)). In the same way, the Constitutional Council allowed the French Parliament to give exceptional powers to the government in order to tackle the pandemic but did not accept a blatant misuse of those powers by the government acting as legislator.

The decision by the Constitutional Council affirms an important principle: Despite being comparatively free to resort to exceptional powers, authorities still must respect basic human rights. It is reassuring to know that the fight against Covid-19 does not justify any kind of restriction of individual freedom and that the Constitutional council has played its role of guardian of the Constitution.

