

The State of Health Emergency in France: Social Order, Whatever it Costs

Since March an arsenal of measures has been deployed in France to stop the spread of covid-19. Far from being limited to the medical field, these measures imply profound changes in the functioning of state institutions, particularly the judiciary. The state of health emergency establishes an authoritarian State, destroys the rights of the defence and exacerbates the security-based reflex. In this context, collective defence groups and legal teams remain active during the lockdown so as not to leave anyone face the police and the judicial system alone.

After being denied for weeks¹, the danger level of covid-19 has given rise to an arsenal of measures to stop the spread of the disease. Far from concerning only the medical field, these measures imply profound changes in the functioning of state institutions, particularly the judiciary. Since the law providing for the conditions of the state of health emergency² (EUS) has been published the 23 March 2020, since the EUS has been established on the same day³, and even more so since an order specifying the "adaptations" of the criminal justice system to the health crisis has been introduced⁴, voices have been raising to denounce what is perceived as a drift from the rule of law. We can be pleased to note a stronger reaction after a few days of collective astonishment. But we can also, however, contrary to the idea of drift, analyse the state of emergency as a quintessential moment of state justice, that is to say, a moment when it appears in its most condensed and explicit form, when it no longer has to bother with any democratic adornment in order to assert itself naked.

From the "whatever it costs" hammered out in the presidential speech of March 16, it would be naïve to believe the promise of budgetary largesse without any counterpart. Rather, it had to be understood that, whatever it costs, the State will impose its economic and social order, even if it means suspending the most fundamental rights, a terrible social regression and massive impoverishment. The state of emergency is not just the lockdown, far from it. It will not end along with lockdown, far from it. The state of health emergency does not only imply that we must change our daily lives to protect our collective health. It also implies the establishment of an authoritarian state to safeguard the social order in view of the announced capitalist offensive.

Establishing a new regime

The effects of the Act of 23 March⁵ on daily life have been extensively commented in the media and on social networks: social distancing, prohibition to go outside unless derogation, regulation of transport, prohibition of all gatherings, meetings or collective activities (including religious and political), closing of schools, requisitioning of property and persons, possibility of quarantine, placement or isolation of those affected. However, the consequences of the same Act on the functioning of institutions were not particularly emphasized. Neither were the consequences of the Constitutional Council's validation of the infringements of the Constitution itself⁶. Reducing the stakes of the EUS to the modalities of confinement prevents any consequent criticism of the management on the crisis. For this law concerns much more than health. It puts in place a political regime that is unfortunately not new. When powers are concentrated in the hands of the executive and be used in a discretionary way, it has a name, even if it offends the myths of the country of human rights and the Europe of democracy.

While there are already provisions in the Public Health Code to grant special powers to the Minister of Health in the event of a health disaster, the government has chosen to introduce a new regime

of exception in order to have complete freedom to regulate in a very large number of areas of social, economic, political and legal life. With the law of 23 March, the executive can govern by ordinance. Forty-two texts were thus adopted between 25 March and 15 April⁷. Without any debate. A bit like a permanent 49-3 (in France, a type of legislative procedure that depends only on the executive) but with the added bonus of no consultation with Parliament. It is not that we were counting on Parliament to defend us, but it is significant that it was rendered mute⁸ and that the separation of executive and legislative powers was ended. Locally, the role of the prefects is strengthened, since it is up to them to enforce and modulate the measures decided by the government - for example the reinforced confinement in Alsace on the Easter weekend⁹ or the attempts to requisition hunters for militias in Seine-et-Marne in the beginning of April¹⁰. In the street, it is the police who arbitrarily decide whether our movements are legitimate or not, without any text specifying the conditions of the offence of not respecting the confinement¹¹ and without the police courts being able to rule in case of dispute: from now on, any person in the street is a delinquent unless there is proof to the contrary, or rather unless the cops randomly acquiesce. They are given a blank cheque for abusive checks and violence, especially in working-class neighbourhoods where the usual police brutality has intensified. Moreover, repeated offences for unrespected confinement have become a misdemeanor, which is completely contrary to the rules of law¹².

This exceptional regime is enshrined in law beyond the duration of confinement and beyond the duration of the state of health emergency. On 23 March, the EUS was decreed for a period of two months, by derogation from the regime just created. However, it may be renewed for all the territory or just a part of it. It can also be removed and re-established if necessary. As many times as the government deems it useful and this until 1st of April 2021, or even longer if the law is extended. And outside periods of state of emergency, the Minister of Health retains the right to enact measures restricting collective and individual freedoms until the "lasting disappearance of the health crisis". Outside periods of emergency, we will therefore remain in the exceptional. And after the emergency and the exceptional, nothing will prevent Parliament from returning to its ordinary functions to perpetuate some of the provisions of the EUS. For example, as soon as the scrapping of labour law was ordered on 25 March, the head of Medef (the largest employer federation in France) called for a general extension of working hours. Until 31 December, many sectors will be working under conditions that were thought to be outdated. 12-hour days, 60-hour weeks, abolition of RTT (extra days off for employees who work more than 35 hours a week), holidays, the labour ordinance shows that there is no sense of history that would lead us towards progress but always a class struggle to be fought so as not to be further devoured. And after December 31, what will happen? Everything suggests that the economic crisis advancing under the shroud of covid-19 will be the perfect pretext to exacerbate exploitation.

The rights of the defence are wiped out

The introduction of a new regime is a political choice, not a virological fatality determined by the health disaster. Guilt and repression against the working classes are not enough to hide the government's denials, its lies, its deadly management, the absurdity of its contradictory instructions, nor the pettiness of its budgetary policies, the ferocity of its reforms, its logic of privatization at any price. Some of the measures taken cannot in any way be justified on the grounds of health prevention but undoubtedly serve a strategy of domestication of the population. This is the case with the ordinance amending the rules of criminal procedure¹³. During EUS periods and one month afterwards, the prescription periods are suspended, the time limits for appeals are doubled and, above all, the conditions of police custody, judgements and detention are completely transformed. Within a few days, the rights of the defence have been wiped out at all stages of the judicial process, from arrest by police to release from prison. The courts are open at a minimum, all civil or administrative hearings are postponed, only criminal justice, considered essential,

continues its course. In other circumstances, one could welcome the fact that the State justice system is stopped, but this is of course at the expense of those arrested, locked up and convicted. Judicial institutions are reduced to the strictest needs of power: that of punishing and imprisoning.

It would take too long to describe here all the provisions made in the field of criminal justice. To make a long story short, it should be noted that in police custody the right to speak confidentially with a lawyer has been reduced to a simple phone call, with no guarantee that the police will not listen to the conversation. As for the courts, judgments can be made by videoconference, and even by telephone. Concerning correctional audience, a decree makes it possible to transform collegial jury into a single-judge hearing. Pre-trial detention may be extended for six months without any debate, without the possibility of defending oneself orally. In fact, many judges have automatically extended detentions coming to an end without even summoning the person to a hearing. The same is true when one is under house arrest. And if one is in prison after having been sentenced, the possibilities of defending oneself, whether for sentence adjustments, sentence reductions, leave or release under duress, are reduced to mere written submissions. Some minors are not spared by this logic of reducing the rights of defence, quite the contrary: pre-trial detention, "educational measures" and prolonged placements, hearings before a single judge, extension of police custody without presentation to a magistrate. The early release of about 5,000 prisoners at the end of their sentences is not a generous gesture and will not be able to compensate for the prison inflation that this government, like its predecessors, has amplified.

As far as the rights of foreigners are concerned, it is still a security-based response to health risks. Asylum applications are virtually suspended and the time limits for appeal have not been adapted to the current inability of the administrative services to examine the files, whether for asylum applications, detention or deportation¹⁴. Detention centers for foreigners are still holding people illegally, including sick people¹⁵, despite the fact that it is now impossible to deport them to the border.

Our enemies have not changed

All over France, and particularly in the suburbs, revolts are multiplying and the nights are incendiary. The anger keeps rising among the ordinary targets of the police, among those whom the confinement assigns to misery, among the workers exposed to the virus, among us, the whole population who know that, covid or not, we will always remain on the same side of the fence. In the flood of repressive measures and authoritarian practices, it is necessary to defend ourselves together. The objective of our collectives is to never leave anyone isolated in front of the police and judges. To the extent of the means available to each collective, we therefore remain available to contest fines for unrespected confinement, to put people in contact with lawyers, and to accompany the relatives of people injured, mutilated or killed by the police. Today, we are adapting to all the constraints imposed by the confinement and we are organizing ourselves for the future.

The observation of a general abandonment of constitutional principles and fundamental rights is a challenge, even if we are not defending the State or its justice. Why should the fight against a disease inexorably lead to an acceptance of general repression, a resignation to being dispossessed of free will, a change of regime and a hardening of judicial and prison conditions? While, behind the use of technology to trace contamination, we are already seeing the beginning of the trivialization and extension of the exploitation of personal data - it was not until 2020, however, that the police began to use the data provided by operators - the process is likely to be the same in all areas. As we get used to drones¹⁶, virtual social life, information mediated by algorithms, we also get used to living under a bell jar and under surveillance. Like any law of exception, the EUS will be more than a parenthesis. At "best" it will be an inspiring precedent for those who govern, at worst it will be a

transitional phase. The provisions of the 1955 state of emergency, updated in 2015, thus became part of ordinary law in 2017. How can we not fear that the EUS law of 2020 will initiate new laws but also new practices of governmentality for the years to come? This moment is not a failure of law, justice and democracy, but a demonstration of the fact that the law, retranscribing the existing balance of power in society, can be shaped according to the needs of power. It formalizes a social order. *Whatever it costs.*

What this state of emergency allows is not in any way to develop means likely to break with the criminal logic that led us to this disaster. On 16 March, during the presidential address, we heard the declaration of war and we know who it came from. Erecting a so-called common enemy, calling for national unity, the tactics are outdated and the blackmail obvious. If there is a war on the horizon, it is only on the social front and our enemies remain the same, before, during and after the pandemic.

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¹ Let us remember that defence council on the covid, on 29 February, which concluded with a 49-3 on pension reform, and the numerous prevarications on masks and tests.

² Law No. 2020-290 of 23 March 2020 as an emergency law to deal with the covid-19 epidemic.

³ Decree No. 2020-293 of 23 March 2020 prescribing the general measures necessary to deal with the covid-19 epidemic in the context of the state of health emergency.

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041746694&categorieLien=id>

⁴ Order adapting the rules of criminal procedure on the basis of Act No. 2020-290 of 23 March 2020 as a matter of urgency to deal with the covid-19 epidemic.

⁵ Decree No. 2020-293 of 23 March 2020 prescribing the general measures necessary to deal with the covid-19 epidemic in the context of the state of health emergency.

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041746694&categorieLien=id>

⁶ For an analysis on the decision of the Constitutional Council of 26 March 2020 on the Organic Law of 22 March 2020: <https://blogs.mediapart.fr/paul-cassia/blog/270320/le-conseil-constitutionnel-dechire-la-constitution>

⁷ [https://www.vie-publique.fr/dossier/273985-les-ordonnances-covid-19-mars-et-avril-2020-dossier`](https://www.vie-publique.fr/dossier/273985-les-ordonnances-covid-19-mars-et-avril-2020-dossier)

⁸ <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041746313&dateTexte=20200327>

⁹ <http://www.haut-rhin.gouv.fr/Actualites/Espace-presse/Communiqués-2020/Coronavirus-des-mesures-plus-restrictives-pour-garantir-le-respect-du-confinement> ; <http://www.haut-rhin.gouv.fr/Actualites/Espace-presse/Communiqués-2020/Coronavirus-des-mesures-plus-restrictives-pour-garantir-le-respect-du-confinement>

¹⁰ <http://www.seine-et-marne.gouv.fr/content/download/42700/320256/file/recueil-d77-077-04-2020-recueil-des-actes-administratifs-special.pdf>

¹¹ 4th paragraph of Article L. 3136-1 of the Public Health Code. <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041746313&dateTexte=20200327>

¹² The fine for violation of containment is 135 euros the first time, 200 euros for a repeat offence within 15 days. If the offence is repeated more than three times in 30 days, the criminal court may sentence the offender to 6 months in prison and a fine of 3,750 euros. <https://www.nextinpact.com/news/108893-le-delit-violations-repetees-confinement-attaque-toutes-parts.htm>

¹³ Order adapting the rules of criminal procedure on the basis of Act No. 2020-290 of 23 March 2020 as a matter of urgency to deal with the covid-19 epidemic.

¹⁴ Article 9 of Ordinance No. 2020-427 of 15 April 2020 on various provisions relating to time limits for dealing with the covid-19 epidemic.

¹⁵ For example in Vincennes. In application of the ministerial protocol of 17 March and the interim order of the Paris Administrative Court of 15 April, the administration should stop detention and refer infected detainees to a centre managed by the Regional Health Agency (ARS) if they do not have a home. However, as the ARS refused to manage prison leavers on the grounds that there was a risk of disturbing public order, the prefecture is transforming the detention center for foreigners into a containment centre for prison leavers.

¹⁶ On 12 April, the Ministry of the Interior launched a call for tenders for 565 "everyday micro-UAVs", 66 "national-capacity" UAVs and around 20 "specialised nano-UAVs".

<https://www.boamp.fr/avis/detail/20-51423/0>