The Spatial Dimension of the Regime of Exception in France

NOTE / This paper is part of a wider project entitled "Toward a Theory of Dual Constitutionalism"

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A founding dichotomy of Public Law is that of Rule-by-Law, defined as arbitrary, vs Rule-of-Law. Historically, Rule-of-Law has flourished in the center through the use of Rule-by-Law in the periphery. This paper examines the case of France and offers an account of the current spatial legacies of the foundational use of Emergency Law in Algeria.

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Martial Law is a part of every Constitution

Ernst Fraenkel, 1941

La liberté était dans le centre, et la tyrannie aux extrémités

[Freedom was in the centre, and tyranny in the extremities]

Charles de Montesquieu, 1748

In an influential article[1], Pascale Pasquino and John Ferejohn advocated for "constitutional dualism", defined as "the notion that there should be provisions for two legal systems, one that operates in normal circumstances to protect rights and liberties and another that is suited to dealing with emergency circumstances"[2]. In their view, "dualism", whereby exists "the constitutional authority to use law to suspend law", thus creating an exceptional regime alongside the regime of ordinary law, is "universal". There is some truth in this statement: whether emergency laws are specifically enshrined in the formal constitution, or part of the

[1] John Ferejohn and Pasquale Pasquino, "The Law of Exception: A typology of Emergency Powers", *International Journal of Constitutional Law*, 2004.
[2] Ibid., p. 234.

material constitution in the form of a statute[3], most countries in the world, even the UK[4], have adopted constitutional systems providing for derogations to constitutionally enshrined rights in times of "emergencies" or crisis[5]. International human rights law and regional human rights treaties also recognize the possibility of derogations to human rights in case of emergencies[6]. The European Court of Human Rights leaves a very wide 'margin of appreciation' with regards to the application of article 15[7] – although it is precisely one of the core areas where the Court could really have a value added.

It thus inscribes into international law states of emergency as part of the legitimate international legal order. The use of emergency powers as a technique of governmentality was widely in force in colonial times[8], at that time also recognized as valid and legitimate by international law. Its main effect was to discriminate between colonizers (not under emergency rule) and colonized (under emergency rule). What emergency powers did so clearly in colonial settings and more subtly in non-colonial settings was to create discrimination between people who are protected under the law and those who are not, based on space and time. It also discriminated *ratione personae*, based on types of people targeted by orders restricting freedom of movement, imposing curfews, and subjected to administrative preventive detention, as well as *ratione materiae*, based on subject-matters to which derogatory law and procedures were to be applied

[3] Here, I am specifically making the point that the debate over whether or not emergency provisions are constitutional clauses or statutes is irrelevant as emergency provisions are by nature constitutional in the material sense of a constitution.

[4] Dicey famously claimed that the UK had no martial law. "Martial Law" in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country of parts of it by military tribunals, is unknown to the law of England. We have nothing equivalent to the what is called in France the "Declaration of the State of Siege" under which the authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army… This is an unmistakable proof of the permanent supremacy of the law under our constitution" AV. Dicey, Introduction to the study of the law of the Constitution, 1959 ed., pp. 287-288. It seemed he was wrong. See David Dyzenhaus, "The puzzle of Martial Law", *University of Toronto Law Journal*, vol. 59, n. 1.

[5] See Victor Ramraj, *Emergencies and the Limits of Legality*, Cambridge University Press, 2008.

[6] International Covenant on Civil and Political Rights, Art. 4 "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation…"; Article 15 of the European Convention of Human Rights.

[7] See especially Lawless v. Ireland (No.3) (App. 332/57) judgement of 1 July 1961. The ruling, establishing a wide 'margin of appreciation' for states, is the standard reference for Strasbourg case law on Art. 15 (regarding derogation). See also: Ireland v. United Kingdom, (App. 5310/71), judgment of 18 January 1978; Brannigan and McBride v. United Kingdom (Apps. 14553/89;14554/89), judgment of 26 May 1993; Aksoy v. Turkey (21987/93, judgement of 18 December 1996); Demir v. Turkey, (22280/93, judgment of 5 December 2002); Yaman v. Turkey, (32446/96, judgement of 2 November 2004); Sakik v. Turkey (23878/94;23879/94;23880/94, judgment 26 November 1997) and Sadak v. Turkey (25142/94;27099/95, judgment of 8 April 2004). Quoted in Stephen Humphreys, Legalizing Lawlessness: On Giorgio Agamben's State of Exception, *European Journal of International Law*, Volume 17, Issue 3, 1 June 2006, Pages 677–687.

[8] Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, Ann Arbor: University of Michigan Press, 2003.

such as national security, terrorism, or rebellion. Thus, legal duality materializes itself on several axes : *ratione materiae*, *personae*, *temporis* and *loci*.

Yet literature on the state of emergency has almost exclusively explored the *ratione temporis* dimension of legal or constitutional dualism. The ambition of this paper is to emphasize the *ratione loci/personae* dimensions as equally important modalities of the state of exception.

Once deployed, the exception brings back the politics of enmity based on "raison d'etat". Raison d'etat is a concept rooted in the very build-up of States. The definition of raison d'etat is given by Foucault as a type of rationality that has state consolidation and survival as its core objectives.

> The state is what must exist at the end of the process of the rationalization of the art of government. What the intervention of raison d'État must arrive at is the state's integrity, its completion, consolidation, and its re-establishment if it has been compromised, or if a revolution has overturned it or momentarily suspended its strength and specific effects. The state is therefore the principle of intelligibility of what is, but equally of what must be; one understands what the state is in order to be more successful in making it exist in reality. The state is the principle of intelligibility and strategic objective that frames the governmental reason that is called, precisely, raison d'État[9].

Along the lines of these analyses, emergency powers, whose *raison d'être* is *raison d'Etat*, embody the very principle of the State. Derogatory systems of law always coexist with regular rule of law. When the State of exception is declared, some courts continue to apply some form of rule of law to matters not affected by the State of exception; in reverse, under "normal" circumstances, rule-by-law still subsist, especially for those treated as "enemies of the State", such as terrorists or illegal immigrants. An extreme case of Rule by Law under emergency provisions is Nazi Germany. As Ernst Fraenkel showed, matters not considered as 'political' or applying to those considered as first-class citizens, were still, even under Hitler's regime, adjudicated according to the Rule of Law.

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[9] Michel Foucault, *Security, Territory, Population, Lectures at Collège de France*, 1977-1978, New York : Palgrave, p. 376. See also Thomas Poole, *Reason of State*, Cambridge University Press, 2015.

In his 1941 book, Ernst Fraenkel analysed Nazi Germany's case law in detail to investigate the rule-of-law / rule-by-law behaviour of German courts. His findings led him to conceptualize the dual state framework, whereby two autonomous court systems coexist, a "rule of law" one and an arbitrary one, the former being subservient to the latter. He calls the realm of arbitrary rule the "prerogative State", while the legalistic one is called the "normative State". As he puts it, "a superficial view of the German dictatorship might be impressed either by its arbitrariness or by its efficiency based on order. It is the thesis of this book that the German dictatorship is characterized by the combination of these two elements[10]." In Fraenkel's account, "the Normative and the Prerogative State" are "competitive" rather than complementary[11], and the Normative State is subordinate to the Prerogative State, not the other way round. As he puts it, the "Presumption of jurisdiction rests with the Normative State. The jurisdiction over jurisdiction rests with the Prerogative State. The limits of the Prerogative State are not imposed upon it, there is not a single issue in which the Prerogative State cannot claim jurisdiction. (…) Where the Prerogative State does not require jurisdiction, the Normative State is allowed to function". This means that first, the Prerogative State decides of the scope of its jurisdiction and competence, which it can expand at will, to the detriment of the Normative State. Second, Normative State courts refuse to engage in judicial review of acts of the Prerogative State. The Normative State courts are to remain deferential to the Prerogative State courts. Although Fraenkel does not refer expressly to Schmitt, his idea of the Prerogative State builds on Schmitt's idea that the sovereign is dormant until it "wakes up" to declare an emergency, and then has unlimited power[12].

Giorgio Agamben builds on Schmitt's idea to state:

> The state of exception tends increasingly to appear as the dominant paradigm of government in contemporary politics. This transformation of a provisional and exceptional measure into a technique of government threatens radically to alter—in fact, has already palpably altered—the structure and meaning of the traditional distinction between constitutional forms[13].

[10] Ernst Fraenkel, ibid, p. xvi.
[11] Ernst Fraenkel, *ibid*, p. 46. He makes an analogy with the competition between the church and the state in the building of the modern State.
[12] Carl Schmitt, *Political Theology*, 1922.
[13] Giorgio Agamben, *State of exception*, *op. cit.*, p. 2.

Indeed, the traditional Manichean view according to which Constitutions can rather easily be described as either liberal or non-liberal, democratic or authoritarian, rule of law or rule by law, and that each one corresponds to another, is now dissolving. Singapore, a state under emergency law since its creation, has recently provided the case study for what was thought of as oxymorons such as "authoritarian constitutionalism[14]" and "authoritarian rule of law[15]". Likewise, Israel, a state whose history is intertwined with emergency law since its creation, has been described either as a full democracy or an apartheid state. The United States of America is known to have conducted torture in Guantanamo and secret prisons around the world, despite being a liberal state. France, whose history of emergency legislation is one of the longest in the world, has been under a state of emergency for two years, yet remains well ranked in "rule of law" rankings despite the massive use of administrative detention and house raids without prior judicial authorization. In fact, French democracy, like other European liberal democracies, has flourished while committing atrocities in the colonies.

Indeed, not only has liberalism been built on authoritarianism empirically, but also theoretically. John Locke, usually credited as the founding father of the idea of constitutional limits on government, also rooted his liberal project in the principle of an executive "prerogative" not bound by law. "This power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called prerogative[16]." Montesquieu also maintained the case for suspension of the law, for the liberal system to be effective[17]. Both thinkers admit the fact that the two types of rationalities are mutually interdependent.

Indeed, authoritarianism is not 'the other' in relation to liberalism as constitutional studies have traditionally emphasized[18]. Binary thinking of constitutionalism, mirrored in binary thinking about the norm versus the exception or arbitrary rule vs the rule of law, must be overcome to build a comprehensive scholarly study of constitutionalism seeing liberalism and

[14] Mark Tushnet, "Authoritarian constitutionalism", *Cornell Law Review*, 100 (2015) 391-461.
[15] Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore*, CUP, 2012.
[16] John Locke, *Two Treatises on Government*, para. 160.
[17] « Mais, si la puissance législative se croyait en danger par quelque conjuration secrète contre l'État, ou quelque intelligence avec les ennemis du dehors, elle pourrait, pour un temps court et limité, permettre à la puissance exécutrice de faire arrêter les citoyens suspects, qui ne perdraient leur liberté pour un temps que pour la conserver pour toujours ». Montesquieu, *L'Esprit des lois*, [1748], Livre XI, ch. 6.
[18] See Mc Ilwain, *Constitutionalism : Ancient and Modern*, Liberty Fund, 2010.

authoritarianism as enabling one another. There is still today a general assumption that the function of constitutions is mainly to limit State power, rather than enhance it.

This article will link the dualistic constitutionalism approach developed by Pasquino and Ferejohn to Fraenkel's dual State framework. In doing so, it will attempt to theorize the existence of a "prerogative constitution" embedded in the "liberal" constitutional framework that regulates an authoritarian core Prerogative State itself in permanent coexistence and competition with the Normative State. The 'prerogative constitution' can be found to be embedding the 'raison d'etat' protecting the very existence of the State built on a specific national identity – religious, ethnic – embedded in the constitution as constitutional identity. It is in turn protected by emergency provisions and metaconstitutional norms such as eternity clauses.

The dual state framework has so far been applied to apartheid South Africa[19] as well as 'hybrid regimes' such as contemporary Russia[20], Pakistan[21] and Turkey[22], corresponding in the comparative constitutional law literature to the study of illiberal constitutionalism[23]. Yet, if the operations of competing normative orders are most obvious in so-called hybrid regimes, they can also be found in liberal regimes, whose States are likewise obeying to their *raison d'etat*. Fraenkel identifies the origin of the growth of the Prerogative State in Martial Law and as he puts it, "Martial Law is part of every Constitution[24]".

Martial Law, once activated, creates a parallel military/police state, with its own rules, executive and judiciary guided by its own rationality and legitimacy. Thus, this article proposes that constitutional settings be placed on a *continuum* based on the potentialities offered by the constitutional framework of emergency and crisis provisions of each jurisdiction, as well as the discriminating boundaries they set in motion whenever the emergency is declared. In doing

[19] Jens Meierhenrich, *The legacies of Law: long-run consequences of legal development in South Africa, 1652-2000*, New York and Cambridge: Cambridge University Press, 2008.
[20] Richard Sakwa, "The Dual State in Russia", *Post-Soviet Affairs*, 2010, pp. 185-206.
[21] Anil Kahlan, "Gray Zone" Constitutionalism and the Dilemma of Judicial Independence in Pakistan", *Vanderbilt Journal of International Law*, vol. 46, January 2013, pp. 1-94.
[22] Mehtap Sooyler, *The Turkish Deep State, State consolidation, Civil-military relations and democracy*, London : Routledge, 2015.
[23] Li-Ann Thio, "Constitutionalism in Illiberal Polities", in Andras Sajo et Michel Rosenfeld, Oxford Handbook of Comparative Constitutional Law, 2012, pp. 133 –148; Mark Tushnet, "Authoritarian Constitutionalism", Cornell Law Review, vol. 100 issue 2, January 2015.
[24] Ernst Fraenkel, *ibid.*, p. 24.

so, it zooms out from the State center to explore State margins, places where the Exception is traditionally being tested and implemented.

This paper will examine the case of France, an established liberal-democratic Republic often hailed as "*la patrie des droits de l'homme*". The French framework of exception rests on several and complicated sets of emergency laws: Martial Law empowering the Army on the one hand, extraordinary crisis powers given to the Executive on the other hand, both entrenched in the Constitution or constitutional statutes. The French current constitutional framework, built on colonialism, was born out of the Algerian emergency, which also provided the test of French modern techniques of exception. Therefore, the following paper will highlight the process of dual constitutional normativity in France based on an exploration of its relation with Algeria - and the obedience with which courts have showed deference to the suspension of human rights decided by the executive, based on *raison d'etat* /constitutional identity.

I. Martial Law Abroad : From the Conquest of Algeria (1830) to the Algerian War of Independence (1954)

France has an extensive experience of laws that can be included in the wide concept of "state of exceptions". Martial law was first promulgated in October 1789[25], two years before the First Constitution. Ten years later, a constitutional state of exception appeared for the first time, in the Constitution of Napoléon Bonaparte in 1799 (Constitution of Year VIII). Article 92 allowed the Assembly or the Government to "suspend the empire of the constitution" for a limited time and on a specific territory, on the model of the Roman Dictator. At the time, Napoleon had been fighting in Egypt and was about to lead its troops throughout most of Europe, killing and submitting populations abroad while modernizing the country and laying the foundations of its Rule-of-Law regime on French soil : the Council of State was created in 1799, the Code Civil adopted in 1804.

Later, the violent conquest of Algeria, from 1830 to 1847, corresponded to France's first successful experiment with "parliamentarism". From the start of the French colonization process onwards, the army was authorized to use derogatory measures towards Algerians : it could order administrative measures of detention and internment into camps[26]. These powers

[25] Loi du 21 octobre 1789 contre les attroupements, ou loi martiale.
[26] Didier Guignard, *L'abus de pouvoir dans l'Algérie coloniale (1880-1914)*, Presses Universitaires de Nanterre, 2010, p. 43.

were later codified in the "Code of the Indigenat" (1865) which distinguished between Subjects (Algerians) and Citizens (with French nationality)[27]. To Subjects was applied a derogatory system resembling a state of exception : suspension of habeas corpus, regulation of the right to assemble and limitation of other civil and political liberties, especially freedom of movement[28]. The Code was abolished in 1946, but French authorities managed to maintain some of its dispositions until the Algerian War started in 1954.

II. The War of Algeria and the birth of the civilian Martial Law : the "State of Emergency" (1955)

In 1955, France adopted a new legislation to deal with what was called at the time the "events" in French Algeria[29] : the "Emergency Law". Its article 15 declared a state of emergency for six months. The reasons for creating a new piece of legislation were twofold : first, the aim was to bypass the military, whose autonomy and power in Algeria had grown; second, French authorities did not want to declare Martial Law as this would amount to recognizing that Algeria was not a regular French department. At first, the *loi d'urgence* gave the Assembly rather than the President the authority to declare a state of emergency – until President Charles De Gaulle changed it to give himself the right to declare it in 1960.

Although the spirit of the law was to grant civilian oversight of the military it empowered, article 12 of the 1955 law gave military courts jurisdiction over crimes against the State[30]. When a regulation prohibited lawyers from traveling to Algeria (to help Algerians), the Council of State exerted judicial review and declared the ban to be legal[31]. Otherwise, the Council of State declined competency to exert judicial review of decrees taken in application of the law[32]. Police powers had been transferred to the Army – which led to widespread practices of torture, extrajudicial killings and "disappearances". In Algeria, a multitude of military tribunals were

[27] See for instance Isabelle Merle, « Retour sur le régime de l'indigénat : Genèse et contradictions des principes répressifs dans l'empire français », *French Politics, Culture & Society*, Vol. 20, No. 2, Special Issue: Regards croisés: Transatlantic Perspectives on the Colonial Situation (Summer 2002), pp. 77-97

[28] Isabelle Merle, « Retour sur le régime de l'indigénat : genèse et contradictions des principes répressifs dans l'empire français », ; Gregory Mann, « What was the indigénat ? The "Empire of Law" in French West Africa », in *Journal of African History*, vol. 50, n° 3, 2009, p. 331-353.

[29] In November 1954, terrorist attacks took place in Algeria, perpetrated by the Algerian National Liberation Front.

[30] At first, the « Tribunaux permanents des forces armées ».

[31] *Ibid.*, p. 67.

[32] Arlette Heymann-Doat, *Droit et non-droit, Guerre d'Algérie*, Dalloz, 2012, p. 54.

created by decree to deal with the crimes it deemed fit, based on procedures initiated by a 'military prosecutor'[33] – organizing the impunity of the army. Some of these tribunals were created in application of article 16 of the Constitution, which gives the President extraordinary powers[34].

> **Article 16** Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council.

The decision to use article 16 is a presidential unilateral decision, excluded from the scope of judicial review since the Council of State declined competency to exert judicial review in 1962[35]. The 1958 Constitution of the 5th Republic also retained Martial Law as its article 36[36].

> **Article 36** A state of siege shall be decreed in the Council of Ministers. The extension thereof after a period of twelve days may be authorized solely by Parliament.

The effect of Article 36 is threefold : first, it transfers ordinary civilian police powers to the military, second, the military is given extraordinary police powers such as the power to raid houses day and night, ban publications and forbid meetings, and third, it transfers jurisdiction on specific crimes from the civilian courts to the military courts. It is declared by the President for a period of 12 days, renewable with the approval of the Parliament. Under the 5th Republic, article 36 was never used, unlike the Emergency Law, whose effect is similar.

III. Legacies of the Algerian War : The Exception on Algerians in Paris (1961-2005)

The emergency law was not only applied in Algeria, but also on the French territory per se, targeting specific populations of Algerians. For instance, in 1961, a curfew was imposed on "Algerian workers" in Paris and the suburbs – they were prohibited from travelling in groups

[33] Namely : Haut Tribunal Militaire, Tribunal Militaire Spécial, Cour militaire de Justice, cours martiales d'Oran et d'Alger, Tribunal de l'Ordre Public.
[34] Namely the Haut Tribunal Militaire and the Tribunal Militaire Spécial.
[35] Conseil d'Etat, Rubin de Servens, 2 mars 1962.
[36] A constitutional law, dated December 1954, had included it in the Constitution of the 4th Republic as Article 7.

of more than four. A protest ensued, leading to dozens or hundreds of deaths. No one was ever prosecuted. Likewise, special courts operated in France with jurisdiction over crimes related to the 'events in Algeria' – judging Algerians[37]. After the end of the war, the military was given a full amnesty. Meanwhile, the courts continued to condemn journalists for exposing torture cases perpetrated by France in Algeria, right up until the 1990s[38] - while it was no offence to document torture cases happening in other countries.

In total, the exception lasted more than 40 years. For Algerians in Algeria and for Algerians in France, the mechanism of the Dual State was an everyday reality, with extrajudicial killings, torture, arbitrary detention being legal, and the use of military courts, as well as amnesties for wrongdoers and the prohibition of judicial review of acts taken in application of the emergency law. As Charles de Gaulle famously said "First, there is France, then there is the State, and finally, to the extent that it is possible to preserve the first two, there is law"[39].

The exception did not disappear from the legal system with the end of the War in Algeria in 1962. The Cour de Sûreté de l'Etat, one of the many jurisdictions of exception created as part of the War in Algeria, survived until the 1980s. It lasted almost 20 years, and judged more 5,000 people[40]. In the 1960s, it prosecuted and judged individuals involved in the fight for independence of Algeria, but also turned, in the 1970s, against the leftist movements, and in the 1980s the separatists (Basque, Corsicans, etc.). Upon its death, a new criminal court with specific reach, the *Cour d'Assises Spéciale* was then created to succeed it. At first, it dealt with military offences, but then, from 1986 onwards, also terrorism[41]. Since then, all cases labelled as "terrorist" go to the Special Court. When asked to rule on the constitutionality of such system, the Constitutional Council said that the "difference in the application of the law" was not an "unjustified discrimination[42]". This court is designed to hand down more severe judgments than its 'ordinary' counterparts.

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[37] Ordonnance du 8 octobre 1958.
[38] The Canard Enchainé was prosecuted for defamation after it released information about the War in Algeria in 1989.
[39] Jean Foyer, « Charles De Gaulle et l'idée de justice », in Charles De Gaulle et la justice, p. 32.
[40] Vanessa Codaccioni, *Justice d'exception, L'Etat face aux crimes politiques et terroristes*, Paris, CNRS, 2015.
[41] La Cour d'Assises spéciale was created in 1982. The rules pertaining to this court are derogatory : there is no popular jury, and the professional judges decide with a simple majority, not a 2/3 majority as in other criminal trials. The sentences are heavier than in ordinary trials. Vanessa Codaccioni, *Justice d'exception, L'Etat face aux crimes politiques et terroristes*, Paris, CNRS, 2015, p. 276.
[42] Constitutional Council, 3 September 1986.

Since 1996, a new category was added in the Penal Code, criminalizing the fact to be "associated with others as part of a terrorist conspiracy"; which has been prone to abuses by security forces[43]. Moreover, it can be argued that the existence of such an offense in the Criminal Code violates the principle of presumption of innocence. Thus, special derogatory courts have continued and continue to operate today in France outside of emergencies. In 2008, anarchists were prosecuted (and jailed) for being "associated as part of a terrorist conspiracy" to sabotages of high-speed train lines. The main evidence used by the anti-terrorist police was a book the group allegedly wrote, calling for the abolition of the State/the Republic. In 2018, the case was dismissed for lack of evidence[44].

The emergency law was in force in Algeria "only" for a couple of months, from 3 April 1955 to 1 December 1955. Until 2005, it had been very seldom applied on French metropolitan territory: 17 May 1958 to 1 June 1958 and 23 April 1961 to 24 October 1962, both times in relations to the Algerian War. In the 1980s, it was enforced in the islands of Wallis and Futuna (29 October 1986) and in French Polynesia (24 October 1987). Thus, until the end of the 1980s, the emergency law had been declared only in relation to 'French colonies'. This changed – to a limited extent - in 2005, when it was declared in the suburbs of Paris. The 'colonial' question remained vivid as populations subjected to the emergency law in the suburbs were mostly immigrants and sons and daughters of immigrants, especially from Algeria.

IV. Toward a permanent State of Exception : a nationwide State of Exception (2015 – 2017)

In 2015, following the terrorist attack on the Bataclan in Paris, a state of emergency was declared nationwide, but a map of the implementation of exceptional measures such as house arrest shows major discrepancies between departments[45]. It targeted mostly the 'radicalized' Muslim population, bringing back memories of its use in the 1960s against the Algerian population. The emergency decree allows the following: it empowers the Minister of the Interior and its representatives at the local level to pronounce house arrests and house searches without prior judicial authorisation, forbid circulation and gatherings, order places of gathering

[43] Fédération Internationale des Droits de l'Homme, « France : La porte ouverte à l'arbitraire », January 1999, available at https://www.fidh.org/IMG/pdf/france.pdf.
[44] See the book on the whole case : David Dufresne, Tarnac, Magasin Général, Fayard, 2012.
[45] Assemblée Nationale, Communication sur le contrôle de l'état d'urgence
Réunion de la commission des Lois du 13 janvier 2016, http://www2.assemblee-nationale.fr/static/14/lois/analyses_chiffrees_1.pdf.

to be closed. There is no need for the administration to motivate its decisions. Within two years of implementation, it led to 4 469 house searches, 754 house arrests, 19 mosques shut down[46]. In total, these measures led to only 6 prosecutions, what means that about 99% people put under house arrest, with obligation to report to the police station every day three or four times a day, had presumably nothing to do with terrorism.

To date, the various administrative and civil courts as well as the Constitutional Council – the military courts had no longer jurisdiction[47] - have either declined competence to review; or have acted in a very deferential manner. The Supreme Administrative Court (*Conseil d'Etat*) has decided that it was justified to put under house arrest people who might take part in the environmentalist protest at the COP 21[48]. The Supreme Court accepted that operations of search and raids into houses could be motivated after the conduct of the operation[49] or that orders to put under house arrests could be motivated after the house arrest[50]. When it has invalidated specific measures, it was usually not with retroactive effect. Although the law authorized the declaration of a state of emergency for a maximum period of twelve days, it lasted two years. The Constitutional Council and the Council of State issued several decisions related to the six renewals of the state of emergency – and always found it justified[51].

To 'tidy up' the juridical order, it was attempted, in December 2015, to constitutionalize the emergency law which allows violations of the Constitution, as article 36-1 of the French constitution. The project read as follows: "The state of emergency is declared in the council of ministers, on part or whole of the territory of the French Republic, either in case of imminent danger resulting from grave breaches to the public order, or in case of events presenting, by their nature and their gravity, the character of public calamity.[52]" This law also planned to strip bi-nationals of their French nationality if they had been convicted of terrorism-related offences.

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[46] Official numbers available here : https://www.interieur.gouv.fr/Actualites/L-actu-du-Ministere/Bilan-de-l-etat-d-urgence.

[47] In 2015, the emergency law was revised to suppress article 12 which originally granted the military the power to prosecute in the military court any criminal case it chose – this article had become irrelevant as terrorist cases were already tried in a special court.

[48] Conseil d'Etat, 11 décembre 2015, Domendjoud.

[49] Cour de Cassation, chambre criminelle, 28 mars 2017, n° 16-85.072.

[50] Cour de Cassation, chambre criminelle, 3 mai 2017, n° 16-86.155.

[51] Conseil constitutionnel, décision QPC du 19 février 2016 ; Conseil constitutionnel, décision QPC du 23 septembre 2016 ; Conseil constitutionnel, décision QPC du 2 décembre 2016 ; Conseil constitutionnel, décision QPC du 2 décembre 2016 ; Conseil constitutionnel, décision QPC du 9 juin 2017 ; Conseil constitutionnel, décision QPC du 1 décembre 2017 ; Conseil constitutionnel, décision QPC du 11 janvier 2018.

[52] Projet de loi constitutionnelle, le 23 décembre 2015.

It was finally abandoned. Yet this shows that France is also marked by the general trend to constitutionalize emergency provisions for the defense of a (constitutional) identity perceived as threatened.

EPILOGUE. Constitutional Identity and Raison d'Etat

French constitutional lawyers like to deny the existence of a French Constitutional Identity as it refers to supraconstitutional norms, which put constitutional lawyers from the positivist school at unease[53]. Yet the words of "Constitutional identity" have been referred to by the French Constitutional Council from 2006 onwards[54]. More importantly, the French Constitution has an eternity clause, referring to the "Republican Form of Government", which can never be amended. Yet the question of what exactly the Republican Form of Government refers to is open to interpretation. Is the secular character of the Republic part of the Republican Form of Government ? As Article 1 of the Constitution states, France is a Republic with adjectives : "France is an indivisible, secular, democratic and social Republic". France's constitutional identity is to be a (Secular) Republic – this "deep feature" of its constitutional order is protected by eternity or entrenched clauses (art. 89 of French Constitution) as well as martial law or emergency provisions. Reviewing legislation targeting Muslim women wearing niqab in public spaces, the Council found it fully constitutional[55].

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The "remains" of exception are still visible in France. Specific spaces, such as suburbs, populated with specific segments of French society, especially Muslims, are directly targeted by the State of Exception but also subject to institutionalized discrimination under 'normal times' and ordinary legislation. Moreover, the Exception becomes normalized : in November 2017, the state of emergency was repelled, replaced by ordinary law "against terrorism" which transferred into the Criminal code the dispositions of the 1955 *état d'urgence,* most notably the

[53] Edouard Dubout, « Les règles ou principes inhérents à l'identité constitutionnelle de la France » : une supra-constitutionnalité ? », *Revue Française de Droit Constitutionnel*, 2010/3 (n° 83), pp. 451 – 482.
[54] Conseil constitutionnel, 27 juillet 2006.
[55] Conseil constitutionnel, 7 octobre 2010.

possibility to order house raids and search without judicial authorization and to restrict freedom of movement of individuals, also without judicial authorization[56].
As Agamben suggests, the important question is that of the relationship between the state of exception and the "regular State", and of how they blur into one another.

> The state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other[57].

In the case of France, the history of Algeria *is* the history of French democracy, from the 2nd to the 5th Republic. For more than a century, it provided a space where the army could abuse its power with impunity without threatening civilian authorities on French soil, until General De Gaulle used Algeria for its re-conquest of power in 1958. Not only was French constitutionalism as a whole born out of emergency legislation, but the very birth of the 5th Republic was the product of the Algerian State of Exception.

Martial law has been the very prerequisite to constitutionalism – the raison d'état the prerequisite to the State. Martial law, tied to the military, has historically participated in the formation of modern and constitutional-liberal States, and has been substantially modified and expanded after WWII in the context of decolonization. These laws, which have been maintained and revised along constitutional developments, are now being constitutionalized worldwide. The laws of exception thus constitutionalized are in fact enabling laws. They enable a parallel system to work : the military and security forces are given extraordinary powers, liberties are suspended, and in case of trials, a special justice is put into place. This constitutionalization trend has two consequences: first, emergency legislation is given hypothetical permanence, and second, it gets entrenched beyond the reach of constitutional justice – although based on the case of France, constitutional justice would not strike down emergency legislation violating provisions of the Constitution.

The Dual Constitutionalism theory offers to focus on the concrete operations of coexisting juridical orders, one marked by the suspension of a number of rights in relation to the raison

[56] Three laws have dealt with terrorism. The law of 13 November 2014 « renforçant les dispositions relatives à la lutte contre le terrorisme », the law of 3 June 2016 « renforçant la lutte contre le crime organisé, le terrorisme et leur financement », and finally the law of 30 October 2017.
[57] Giorgio Agamben, *State of Exception*, Chicago:University of Chicago Press, 2005, p. 23.

d'etat, the other by the guarantee of these rights, in relation to the Rule of Law obligations of constitutional government. As such, it de-exceptionalizes both authoritarian and liberal-democratic governmentality. The Rule of Law is inherently tied to the Rule by Decree or Force – if the latter does not enable the former, at least, it accompanies it, in different physical spaces that might not be considered as a coherent whole if one refuses to look. Linking the inside to the outside, liberal democracy to Martial Law, is exactly what Montesquieu suggests when he writes, about Great Britain: "I admit, however, that the usage of the freest peoples that ever lived on earth makes me believe that there are cases where a veil has to be drawn, for a moment, over liberty, as one hides the statues of the gods".