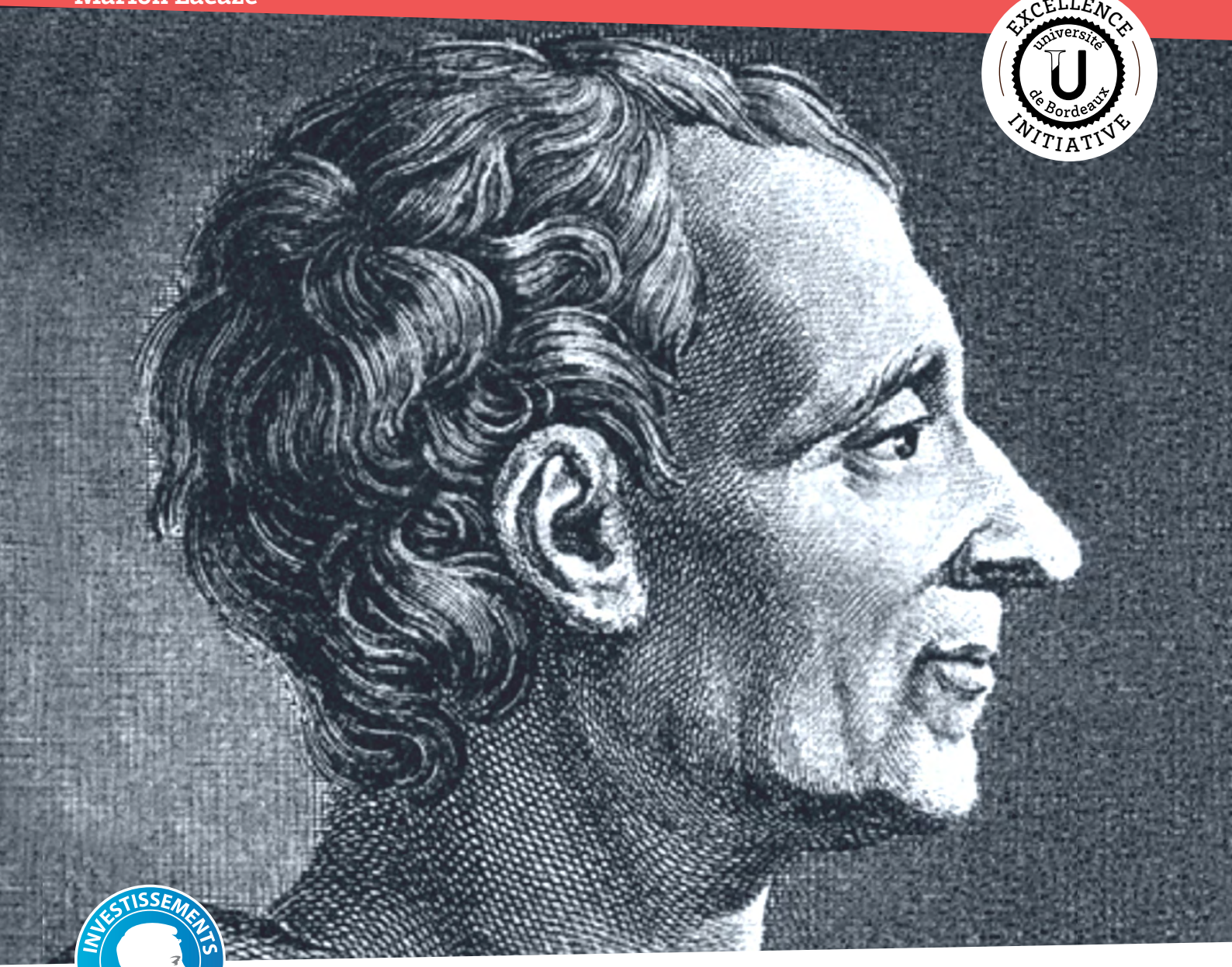
Issue No. 5 | March 2017

Montesquieu Law Review

State of emergency and criminal law
Marion Lacaze



Program supported by the ANR
n°ANR-10-IDEX-03-02

Forum Montesquieu
Faculté de droit et science politique

université de Bordeaux

Criminal Law:

State of emergency and criminal law

Marion Lacaze, **Associate Professor**, ISCJ, University of Bordeaux

On the evening of 13 November 2015, the President of the Republic, François Hollande, first announced his intention to declare a "state of emergency", which was officially done a few hours later. Adopted on the basis of Law No. 55-385 of 3 April 1955 regarding the state of emergency, this exceptional legal scheme allows the implementation of special administrative measures *"in the event of imminent peril resulting from serious breaches of public order or in case of events having, by their nature and gravity, the character of public calamity*". Triggered by Order of the Council of Ministers (1), it can only be extended beyond twelve days by the French Parliament passing the appropriate legislation; this had been done on three occasions before the President announced, during the traditional 14 July address to the nation, that the state of emergency would come to an end on 26 July 2016 (2). However, the killings in Nice which occurred that same evening swept that prospect aside and led to the adoption of a further law extending the state of emergency (3).

While there has been little discussion of the question as to whether the conditions had been met for its proclamation, the early days of the state of emergency were marked by considerable legal uncertainty. Doubts soon arose, in fact, concerning the constitutionality of the measures (4) and to such an extent that the Government felt it necessary to enshrine the state of emergency in the Constitution (5). The essential difficulty lay more in the administrative qualification attached to all the measures provided by the text, than it did in the issue of proportionality. While some of those measures simply increased the prerogatives previously recognised, in ordinary law, to the administrative authority (prohibition of public meetings or events, temporary closure of public establishments, interruption of online communication services, or dissolution of public groups, etc.), still others do not fall so readily within the jurisdiction of the administrative courts. This is particularly the case for the two most symbolic measures under the state of emergency: house arrest and administrative searches. The now explicit sidelining of the ordinary courts from reviewing such measures (6) has fuelled a great deal of lively debate, even prompting the First President of the Court of Cassation to express a view on the issue (7). However, the Constitutional Council had not, until that point, had the opportunity to rule on this thorny issue.

The jurisdiction of administrative courts to hear matters concerning administrative acts, elevated to the rank of constitutional principle (8), is doubly limited: by Article 66 of the Constitution, first of all, which enshrines the judiciary as the *"guardian of individual liberty* "; and, secondly, by the monopoly of the ordinary courts to hear matters concerning police measures, i.e. measures which are intended to record offences and identify the perpetrator(s) or search for evidence (9). Although the administrative courts are recognised as independent and impartial (10), the challenge was no less important in view of the differences that continue to oppose the reviews conducted respectively by the two court orders. Criminal measures are, in fact, always decided or reviewed in the short term by a judge. In administrative law, however, the decision rests with the executive and the measure is in principle reviewed only *after* the event, by means of non-suspensive

remedies. Above all, the administrative courts may base their assessment on elements that could not be described as evidence, e.g. the administration's *"notes blanches"* (intelligence reports, literally "white notes"), where their content can be discussed in an adversarial context (11). Thus, the use of administrative law was publicly justified by the need to act quickly in the event of imminent danger, something that would not be allowed by more rigid criminal proceedings. There then follow arguments and problems in recent reforms relating to terrorist matters. The legislative trend to shift the war on terror to the administrative framework had already, in fact, been expressed in the Laws of 13 November 2014 (12) and 25 July 2015 (13) and again in the Law of 3 June 2016, which is especially came create a "holding period" of 4 hours and a new type of administrative house arrest (14).

But the connection between ordinary law and exceptional law raises all the more questions because the state of emergency is ongoing. If the discussion on the persistence of the conditions (15) was brought to an end by the events of July 2016, those as to its effectiveness have become all the more lively and indeed have blurred the traditional boundaries. Even as the *Conseil d'Etat* pointed out that the state of emergency must remain temporary (16), the French Parliament increased the most recent extension period from three to six months. And aside from the further strengthening of measures permitted by the state of emergency, it added provisions to this legal extension amending the ordinary law (17). However, while the last few months have allowed case law to position itself on a number of difficulties and reject the idea of the need for constitutional reform, new questions have also emerged. In the absence of express legislative provision, uncertainly on the links between the administrative and criminal phases are compounded. While the state of emergency does not affect the monopoly of the ordinary courts in the investigation and prosecution of criminal offences, new problems present themselves to the courts and are creating legal uncertainty. The constitutional admission of the sidelining of criminal law by administrative law (I) does indeed raise specific difficulties in case of subsequent public prosecutions, and the return of the criminal courts in the review of administrative action (II).

I. Criminal law sidelined by administrative law

Despite the existence, in terrorist matters, of investigative rules that deviate considerably from ordinary law, criminal procedure has experienced competition from administrative procedure under the state of emergency. By entering *"the 'grey areas', that is to say, the cases in which the evidence was not sufficient to prosecute*" (18), it allows administrative anticipation of known measures of criminal procedure (19) in the neutralisation (A) and identification (B) of terrorist risk.

A. The neutralisation of terrorist risk by administrative house arrest

Criminal procedure allows house arrest against indicted persons (20), i.e. against whom there is *"serious or concordant evidence making it probable that they could participate as a perpetrator or accomplice in the commission"* of the offence charged (21). However, such conditions seemed too restrictive in the context of the state of emergency. Thus Article 6 of the Law of 3 April 1955, in the version amended by the Law of 20 November 2015 allows the Minister of the Interior to impose, during the period of the state of emergency, the house arrest for up to 12 hours daily, of a person *"in respect of whom there are serious reasons to believe that their behaviour is a threat to security and public order"* (22). The condition is more flexible owing to the *Conseil d'Etat* admitting that it was not necessary that the threat invoked be relative to the risk that justified the declaration of a state of emergency (23). The measure may be accompanied by prohibitions and obligations which are not unlike those of judicial review, such as the obligation to report

periodically to the police or prohibition to enter into relationships with certain people. Moreover, people who have finished serving a sentence for acts of terrorism less than eight years previously may be placed under mobile electronic surveillance, which can be added to cases in which such action is permitted by the Criminal Code *"as a security measure"* (24) post-sentence. But more than the broad terms of their delivery is the sidelining of the ordinary courts in reviewing the house arrest in question.

In line with the ever increasing withdrawal of the concept of *"individual freedom"* (25), and its past case law on the rights of foreign nationals (26), the Constitutional Council, however, approved the jurisdiction of administrative courts on the grounds that house arrest does not include the deprivation of liberty. However, it added a new reservation, stating that it would become so if it were to exceed 12 hours per day (27), which did not contradict the description chosen by the legislature (at least in the absence of mobile electronic monitoring (28)). Although France has informed the Council of Europe of its determination to assert the exemption to Article 15 ECHR (29), it is certainly possible to detect in this reservation a precaution inspired by the case law of the ECtHR, which is known to assess the deprivation of liberty aspect of house arrest in light of various criteria, including the duration of the measure and its impact on the social and professional life of the individual (30). It can also be noted that the *Conseil d'Etat*, while considering that the alleged emergency condition for the implementation of a *référé-liberté* (urgent application for release from custody) is to be assumed (31), affirmed their exclusion from the scope of Article 5 of the Convention, without reference to Article 15 (32).

However, while the dividing line between the deprivation and restriction of liberty may seem tenuous, it is certainly truer of that between administrative and judicial police, challenged by administrative searches.

B. Identification of the risk of terrorism by administrative searches

Despite the obvious weakness of the "final" criterion in a field where the anticipation of punishment is especially broad (33), neither the *Conseil d'Etat* (34) nor the Constitutional Council (35) have questioned the description of searches as administrative measures, simply making use of careful wording so as not to indicate that the "elements" sought can be regarded as evidence. But if the nature of administrative searches seems unlikely to allow a distinction administrative and judicial searches, the same cannot be said for their respective rules. As part of the state of emergency is in fact more flexible than criminal proceedings (36), the searches are possible, day and nightv"*when there are serious reasons for considering that this place is frequented by a person whose behaviour is a threat to security and public order*" (37). And, if it could be believed that they remained subject to review by the judicial authorities (38), this is not the avenue that has been pursued since 14 November 2015 (39). Like the presence of an officer of the *police judiciaire* (judicial police), the requirement to inform the Public Prosecutor's Office would then appear to aimed at facilitating the changeover to legal proceedings in the event of a finding of infringement.

Widely used in the early days of the state of emergency, these administrative searches then underwent a sharp slowdown (40), and were dropped by the Law of 20 May 2016 extending the state of emergency. Aside from the depletion of "targets", two more legal reasons may explain this development: firstly, the recent extension of night raids, in the event of "emergency", a simple preliminary inquiry into terrorism cases (41); and secondly, and perhaps especially, the loss of interest in the measure owing to the censure of the provision, introduced by the Law of 20

November 2016, which allowed the copying of the contents of any computer hardware present in the searched premises. "*Similar to a seizure*", this did not comply with the Constitution owing to a lack of legal safeguards and any *a priori* review by a court (42). The Constitutional Council, however, gave no answer to the question of which court has jurisdiction to conduct such a review, and took care to accommodate the applicants' argument that such a measure must be examined as a police measure. Thus the legislature of 21 July 2016 considered itself able to create a new category of administrative seizure, with the exploitation of data collected – but not the seizure itself – to be authorised by an administrative court (43).

Although the attachment of measures under the state of emergency to the administrative police (formally) precludes them from serving the purpose of searching for an offence, it would appear that a number of them have resulted, directly or indirectly, in criminal prosecutions (44). This leads to the reappearance of the ordinary courts, whose monopoly is preserved here and which enjoy a special jurisdiction to review the administrative measures at the root of the prosecution (45).

II. The return of the criminal courts in the review of administrative action

The administrative beginnings of criminal proceedings pose particular challenges in the context of the state of emergency, whether it be the scenario of a breach of administrative obligations or prohibitions (A) and, moreover, incidental legal proceedings (B).

A. Indirect jurisdiction of the criminal courts for non-compliance with administrative measures

As with numerous administrative prohibitions or obligations, the non-compliance the measures taken under the state of emergency is criminally sanctioned. The result, under Article 111-5 of the Criminal Code, is that "[t]*he criminal court has jurisdiction to interpret administrative, regulatory or individual acts and to assess the lawfulness thereof when the outcome of the trial before it depends on that review*". From a theoretical point of view, the solutions adopted in other disputes should be applicable without any particular difficulty. It is well established that the objection of unlawfulness raised in the criminal court is barely any different to a review by the administrative court in an action for judicial review. In both cases, the court reviews the external lawfulness of the administrative act considered and its internal lawfulness, and therefore the manifest error in the assessment of its conditions (46). But there is the concern that this indirect jurisdiction of the criminal courts is fraught with practical difficulties ... which could run the risk of conflicting with the ECHR on the grounds of the right to an effective remedy (47). The administrative information that allows the imposition of administrative measures, and especially the *"notes blanches",* is in fact external to the criminal proceedings and disclosure to the ordinary court is in practice often difficult.

But the most serious uncertainties concern the scenario of incidental proceedings following the discovery of elements in the context of an administrative search.

B. The uncertain jurisdiction of the criminal court in the event of incidental proceedings

As in ordinary law, the discovery of evidence suggesting the commission of an offence in the course of an administrative police measure leads in principle to a switch over to criminal proceedings (spot searches, preliminary or judicial investigations). However, the Law of 21 June 2016 sows confusion as it is difficult to distinguish the criterion for making the switch from that applicable to administrative seizures, namely that "*the search reveals the existence of elements(...)*

relating to a threat to public security and public order constituted by the behaviour of the individual" (48). In addition, this adds to the issue of the jurisdiction of the criminal courts to assess the lawfulness of administrative measures taken prior to the criminal investigation. The law, in fact, did not consider this possibility, and the solutions that were beginning to emerge would appear to have been undermined by the Law of 21 July 2016.

Prior to this, a consensus seemed to be emerging around the need for a review by the criminal courts, although uncertainties remained as to its extent and basis (49). Regarding the place of the administrative search itself, it seemed possible to apply a solution well-established in ordinary law on nullity, namely that the criminal court hearing the case in question has jurisdiction to review its lawfulness and annul, if applicable, those acts based on the unlawful measure. Regarding the review of the administrative decision ordering the search, some even doubted the possibility of review (50), while others distinguished between lawfulness (which can be reviewed) and the appropriateness of the measure (which cannot) (51). However, the criminal courts themselves appeared to rule out such a distinction, upholding challenges based on insufficient reasons for search orders (52). The recent opinion of the *Conseil d'Etat* follows the same lines, admitting actions for compensation and applications for judicial review. This only applies, however, to actions brought before the administrative courts, and the question of the basis of the criminal courts' jurisdiction remains untouched. While France's parliamentarians, followed by her scholars and courts, considered that the criminal courts could invoke Article 111-5 of the Penal Code (53), the application of this Article outside of substantive law would be unprecedented. Above all, the scenario of an administrative seizure prior to the referral to the criminal courts further complicates the examination. Literally defensible in respect of the administrative decision ordering a simple search, the use of Article 111-5 of the Penal Code would appear to be precluded in the case of a judicial decision authorising the exploitation of any items seized. And although Parliament's preparatory works have not raised the issue, and despite the fact that an administrative review would appear to be limited to the conditions for such exploitation (54), it might be considered that such a judicial decision breaks the link between administrative search and seizure and judicial police measures (55), which would deprive the criminal courts of any examination of the previous administrative measures. Unless the Constitutional Council censures the provisions establishing these seizures (56), the unprecedented overlap between administrative and criminal proceedings threatens the jurisdiction of the criminal courts in the event of incidental proceedings, and with it any review of the fairness of the proceedings as a whole. If a requalification of these measures as judicial police measures may seem too bold, it is doubtful that the Court of Cassation will resign itself to being excluded. Faced with such uncertainty, it must be hoped that the Court of Cassation and the Constitutional Council will soon fill the gaps in the existing legal measures.

Notes:

(1) *Décret n° 2015-1475 du 14 novembre 2015 portant application de la loi n° 55-385 du 3 avril 1955* (applicable to mainland France); *Décret n° 2015-1493 du 18 novembre 2015 portant application outre-mer de la loi n° 55-385 du 3 avril 1955* (applicable to France's overseas territories).

(2) *Loi n° 2015-1501 du 20 novembre 2015 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence et renforçant l'efficacité de ses dispositions* ; *Loi n° 2016-162 du 19 février 2016 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence*; *Loi n° 2016-629 du 20 mai 2016 prorogeant l'application de la loi n° 55-385 du 3*

avril 1955 relative à l'état d'urgence.

(3) *Loi n° 2016-987 du 21 juillet 2016 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence et portant mesures de renforcement de la lutte antiterroriste*.

(4) See in particular Savonitto (Florian), « Etat d'urgence et risque d'inconstitutionnalité », *RDLF* 2016, chron. N°15.

(5) *Projet de loi constitutionnelle de protection de la Nation*, n° 3381, tabled before the French Parliament on 23 December 2015. The bill was abandoned, however, owing to divisions within Parliament on the other part of the legislation, on the deprivation of nationality.

(6) Article 14-1 of Law No. 55-385 of 3 April 1955, introduced by Law No. 2015-1501 of 20 November 2015.

(7) Louvel (Bertrand), « Audience solennelle de rentrée 2016 ».

(8) Cons. const., n° 86-224 DC of 23 January 1987.

(9) See in particular Cons. const., n° 2015-713 DC of 23 July 2015.

(10) ECHR, *Sacilor-Lormines v France* (3rd section), Application No. 65411/01, 9 November 2006.

(11) CE, Section du Contentieux, 11 December 2015, n°394991.

(12) *Loi n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme.*

(13) *Loi n° 2015-912 du 24 juillet 2015 relative au renseignement*.

(14) *Loi n° 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale.*

(15) See in particular Commission des Lois, « Communication d'étape sur le contrôle de l'état d'urgence », 17 May 2016.

(16) CE, 18 July 2016, Section de l'Intérieur, *Avis sur un projet de loi prorogeant l'application de la loi n°55-385 du 3 avril 1955 relatif à l'état d'urgence et modifiant certaines de ses dispositions*.

(17) Law n° 2016-987 of 27 July 2016.

(18) Popelin (Pascal), *Rapport n° 3495 fait au nom de la commission des lois*, submitted on 11 February 2016.

(19) See Calvar (Patrick), director general of internal security, and Ballestrazzi (Mireille), chief director of the *police judiciaire* within the Ministry of the Interior, hearings of 8 January 2016, in *Rapport n°3784 au nom de la Commission des lois*, 25 May 2016, indicating that intelligence allows action to be taken "prior to" the judicial context, without having to "dress the target up in legal proceedings".

(20) Article 137 et seq., CPP.

(21) Article 80-1 CPP.

(22) According to official figures, 404 people were under house arrest between 14 November 2015 and 13 May 2016, 374 of whom had links to the radical Islamist movement; Commission des Lois, « Communication d'étape sur le contrôle de l'état d'urgence », 17 May 2016. As at 15 July 2016, there remained 77; see *Exposé des motifs du Projet de loi n°3968 prorogeant l'application de la loi n°55-385 du 3 avril 1955 relative à l'état d'urgence.*

(23) See the series of decisions regarding the house arrests imposed in respect of environmentalists during the COP 21: CE, Section du contentieux, 11 December 2015, n° 395009, 394990, 394992, 394993, 394989, 394991 et 395002.

(24) Article 131-36-9 et seq, Penal Code.

(25) The reduction of individual freedom to the deprivation of liberty is the result in particular of the decision in Cons. Const. n° 99-411 DC of 16 June 1999.

(26) Cons. const. No. 2011-631 DC of 9 June 2011.

(27) Cons. const. No. 2015-527 QPC of 22 December 2015.
(28) The scenario has not yet been put before the Constitutional Council.
(29) Secretary General of the Council of Europe, "France shall inform the Secretary General of her decision to derogate from the European Convention on Human Rights under Article 15", 25 November 2015.
(30) See in particular Council of Europe, *Guide to Article 5 of the Convention.*
(31) Article L 521-1 et seq., Administrative Justice Code.
(32) CE, Section du Contentieux, 11 December 2015, cited above. The solution was included in Law No. 2016-987.
(33) See in particular Herran (Thomas) *The distinction between administrative police and judicial police in light of the recent Law on Intelligence*, Montesquieu Law Review, Issue 4, March 2016: available at http://montesquieulawreview.eu/mlr4/mlr4_e/herran_e.pdf.
(34) CE, Section de l'intérieur, 17 November 2015, avis n° 390.786.
(35) Cons. const. n° 2016-536 QPC, 19 February 2016.
(36) Art. 92 Criminal Procedure Code on judicial investigations; Art. 56 Criminal Procedure Code for flagrancy investigations; and Art. 76 Criminal Procedure Code for preliminary investigations; Art. 706-89 et s. Criminal Procedure Code for night raids in cases of terrorism.
(37) Article 11 of Law No. 55-385 of 3 April 1955.
(38) CE, Juge des référés, 14 November 2005, n°286835 ; Mercier (Michel), *Rapport n° 368 fait au nom de la commission des lois*, submitted 3 February 2016.
(39) See in particular, and criticising the intervention – observed in practice – of the Public Prosecutor's Office in determining the *"target"*: Mazières (Olivier de), préfet, chargé de l'état-major opérationnel de la prévention du terrorisme au ministère de l'intérieur, audition du 8 janvier 2016, in *Rapport n°3784*, cited above.
(40) 3,579 administrative searches were officially logged between 14 November 2015 and 13 May] 2016, most in the first few weeks.
(41) Article 1 of Law No. 2016-731 of 3 June 2016.
(42) Cons. const. n° 2016-536 QPC, 19 February 2016; Cahn (Olivier), « Un Etat de droit, apparemment », *AJ pénal*, April 2016, n° 4, p. 201 et s.
(43) *Exposé des motifs du Projet de loi n°3968*, cited above.
(44) The official figures, as at 21 June 2016: 37 prosecutions and 20 sentences for breahces of administrative measures under the state of emergency and 218 prosecutions and 67 convictions resulting from administrative searches. See Ministère de la Justice, « Suivi judiciaire des mesures prises pendant l'état d'urgence ».
(45) Article 14-1 of the Law on the state of emergency does not seem to hinder this, in light of parliamentary preparatory work; see in particular Mercier (Michel), *Rapport n° 368*, cited above.
(46) Vautrot-Schwarz (Charles), « La plénitude de juridiction du juge pénal sur l'interprétation et l'appréciation de la légalité des actes administratifs », *in Histoires et méthodes d'interprétation en droit criminel,* Dalloz, 2015, p. 60 et s.
(47) The requirement exists regardless of whether the measure is considered as custodial, and thus may result either from Article 5(3) ECHR or from Protocol n°4; see, *mutatis mutandis,* ECHR, *Stamose v Bulgaria* (4th section), Application n° 29713/05, 27 November 2012.
(48) Article 5 of Law No. 2016-987.
(49) For a more complete study in the same sense, see Herran (Thomas), « Le contrôle des perquisitions administratives à l'occasion des procédures judiciaires incidentes à l'état d'urgence », Gaz.Pal, n° 27, 19 July 2016.

(50) Gouès (Serge) & Bronnekant (Hélène), hearing of 7 January 2016, in *Rapport n°3784,* cited above.

(51) Gelli (Robert), Directeur des affaires criminelles et des grâces au Ministère de la justice, audition du 8 janvier 2016, in *Rapport n°3784*, cited above.

(52) Commission des Lois, « Communication d'étape sur le contrôle de l'état d'urgence », 17 May 2016.

(53) See the decisions cited by Mercier (Michel), *Rapport n° 368*, cited above.

(54) This interpretation was argued by the Minister of Interior in both cases decided to date before the *Conseil d'Etat*, sitting as an interlocutory appeals court. Implicitly approved in the first Ordinance, it would appear somewhat relativised on the reading of the second Ordinance. Without commenting specifically on the issue, the *Conseil d'Etat* contented itself with reviewing the lawfulness of the seizures and the conditions of exploitation, however, before asserting that "*operations of search and seizure were conducted in accordance with the procedural rules* ". One might then understand that the decision to search should be excluded from the review conducted by the administrative court, but not its execution. See CE, 5 August 2016, *Ministère de l'intérieur*, ordonnance n°402139; CE, 12 August 2016, *Ministère de l'intérieur*, ordonnance n°402348.

(55) Such a consequence would be even more likely if the review of the execution of the search at the time of the decision authorising the exploitation of the data collected were to be confirmed.

(56) In the absence of any *a priori* referral, the Constitutional Council has not yet decided on the new administrative seizures at the time of writing.