**Issue No. 5** | March 2017

# Montesquieu Law Review

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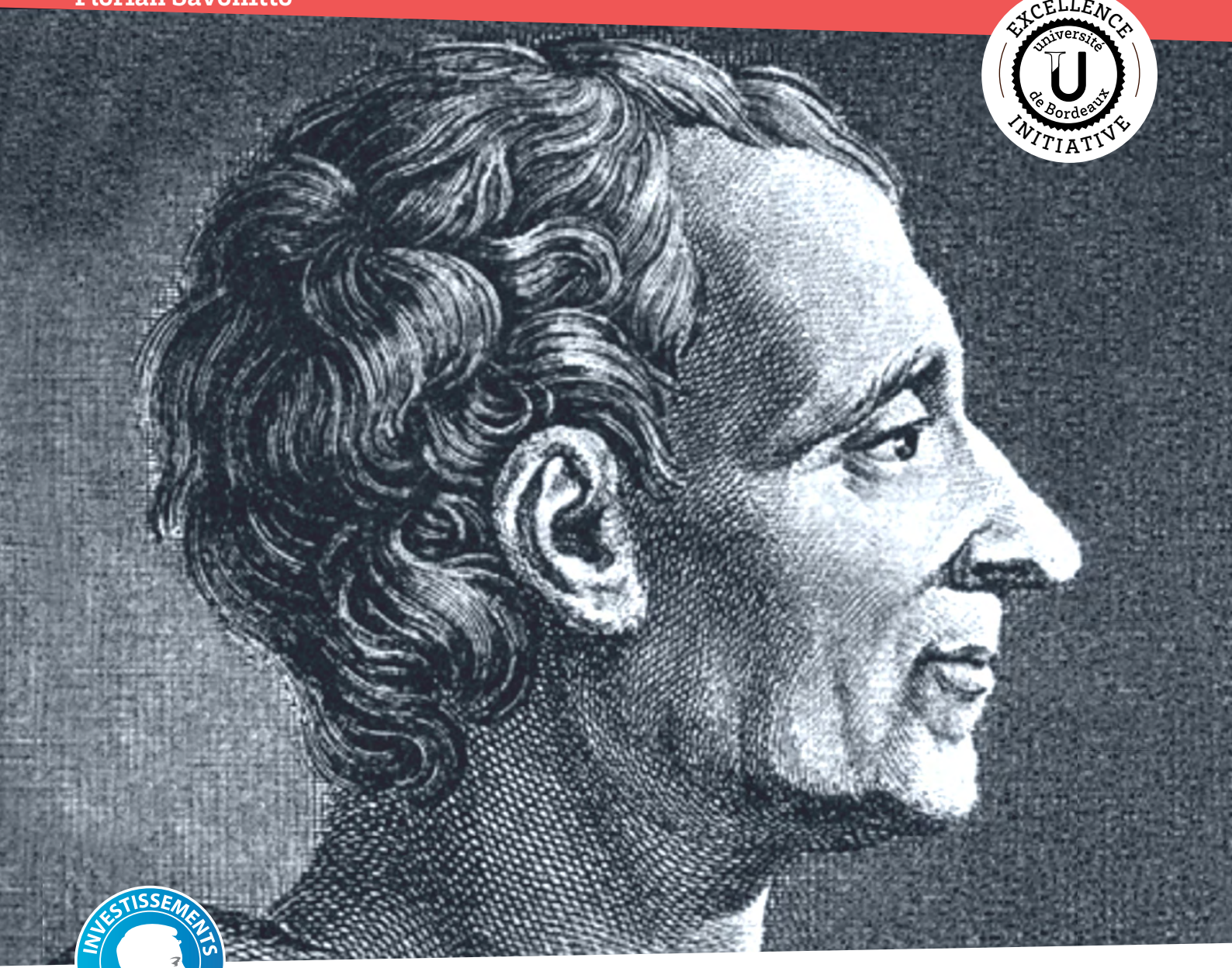

Program supported by the ANR
n°ANR-10-IDEX-03-02

Forum Montesquieu
Faculté de droit et science politique
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Constitutional Law:

# The utility of the QPC in light of the state of emergency

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"*Faithful as you are to your history and your traditions, I have no doubt that you will prove the pessimists and misanthropes wrong about the reforms of 23 July 2008; no doubt, you will make the unconstitutionality exception (...) as fruitful as their a priori review*" (1).

The Law of 20 November 2015 extending the application of Law No. 55-385 of 3 April 1955 on the state of emergency and strengthening the effectiveness of its provisions (2) rightly offered the opportunity to demonstrate the full utility of *a posteriori* constitutionality reviews of the laws that came into force on 1 March 2010, namely the *question prioritaire de constitutionnalité* or priority preliminary rulings on constitutionality (QPC). Neither 60 senators nor 60 members of the French Parliament made a referral to the Constitutional Council in the context of its *a priori* review. They thus followed the injunction issued during the parliamentary debates led by Prime Minister Manuel Valls, who exhorted them not to make such a referral: "*There is always a risk in making a referral to the Constitutional Council (...) There are also measures that were passed yesterday in the National Assembly - I'm thinking of the electronic tag, so everything is clear and transparent - which are tricky in constitutional terms (...) I want us to move swiftly because I want to (...) give law enforcement and the justice system every means to prosecute those who are a danger to the nation, the Republic and the French people*" (3).

The circumstances thus allowed the Prime Minister to convince parliamentarians not make a referral to the Constitutional Council. It was in fact a question of dealing with the series of attacks experienced by France on 13 November 2015. These led the President of the Republic to declare, a state of emergency as provided under the Law of 3 April 1955 throughout mainland France as of 14 November; he then met parliamentarians in Congress at Versailles on 16 November to announce that, by the end of the 12-day period granted by law, a bill extending the state of emergency by three months would be presented to them together with proposals for a constitutional review intended to provide a sustainable response to the "war" on terrorism in which France is allegedly engaged.

And yet the constitutionality of the legislative measures behind the state of emergency has been in doubt from the outset. This state of crisis creates a system of emergency powers resting "*on an extension, limited in time and space, of the powers held by the civil authorities, without their exercise being free of any review*" (4). This derogation from ordinary law temporarily infringes rights and freedoms. Provision was made under "*the Law of 3 April 1955 to respond to the "events" or "troubles" in Algeria - terms intended*" (5) both to conceal the beginning of the War of Independence, the name of which could not be spoken, and to delegitimise the members of Algeria's National Liberation Front so that they were perceived neither as insurgents nor as combatants but "*as mere criminals (...) whose behaviour could not be justified by any political cause in a context of decolonisation*" (6). These circumstances explain why the triggering of these exceptional measures is provided only in the event of "*imminent danger resulting from serious*

*breaches of public order*" or "*events presenting, by their nature and gravity, the character of public disaster*". However, during the debates of the time, some members of the French Parliament already considered this legislation suspending fundamental freedoms as "unconstitutional" (7). However, without a constitutional court, there were no legal obstacles to these exceptional measures, which were implemented twice under the Fourth Republic (8).

At the birth of the Fifth Republic, the constitutionality of the law on the state of emergency was again called into question, owing to the constituent power only constitutionalising two emergency schemes: the concentration of constitutional powers in the hands of the Head of State, under Article 16 of the Constitution; and increasing the powers of the military authorities under martial law, as provided under Article 36. However, the introduction of the Constitutional Council was always likely to undermine that legislative edifice. That was not the case during the first application decided by General de Gaulle on 22 April 1961 following the "Generals' putsch" that had taken place the day before in Algiers. Such a situation was not justified by the late inclusion – on 16 July 1971 (9) – of the texts mentioned in the Preamble to the 1958 Constitution (including the Declaration of the Rights of Man and of the Citizen 1789) in the reference norms for reviewing the constitutionality of laws. This is explained both by the concomitant implementation of the state of emergency and Article 16, and by the authorisation conferred by referendum of 13 April 1962 to the President of the Republic to decide on any extension of the state of emergency, in Parliament's stead, any referral to the Constitutional Council being prevented for lack of a parliamentary law.

By contrast, during the second application of the state of emergency, decided on 12 January 1985 to maintain public order jeopardised by the riots between Kanaks and Caldoches on the open process for the independence of New Caledonia, French parliamentarians referred the law of 25 January 1985 restoring the state of emergency within the territory to the Constitutional Council. However, its limited powers resulted in the Council not declaring either the 1985 or the 1955 Law unconstitutional (10). Confined by the terms of Article 61 of the Constitution to reviewing laws prior to their promulgation, only an examination of the former law seemed possible. However, by virtue of a case-law construct developed in the same decision of 25 January 1985 (11) "*compliance with the Constitution of a previously enacted law can be assessed when examining legislative provisions which modify, supplement or affect its scope*" (12). The high hopes that the 1955 Law would be reviewed were immediately quashed. The 1985 Law being deemed to be "*simply the implementation*" (13) of the Law enacted in 1955, a review of the complaints raised against the former would *ipso facto* entail a review of the latter, i.e. a law already enacted, a category for which the Council had no jurisdiction where the conditions established under "New Caledonian" case law were not met. The Constitutional Court, followed by the *Conseil d'Etat* (14), even went so far as to give its *approval* in principle to the exceptional measures: "*Whereas, while the Constitution, under Article 36, expressly covers the state of siege, it has not excluded the possibility for the legislature to make provision for emergency measures intended to reconcile, as has just been stated, the requirements of freedom and the safeguarding of public order; thus, the Constitution of 4 October 1958 did not abrogate the Law of 3 April 1955 on the state of emergency which, incidentally, was amended thereunder*" (15). This ruling extinguished any hope of a substantive review of the 1955 Law, and no further referrals were made to the Constitutional Council on the basis of Article 61 of the Constitution during subsequent applications of the exceptional measures, either in 1986 on the whole territory of the Wallis and Futuna Islands, in 1987 in a number of municipalities in French Polynesia, or in November 2005 in mainland France

owing to the riots in the Paris suburbs which took place following the deaths of two teenagers pursued by police.

This jurisprudential position introduced in 1985 would have precluded any declaration of unconstitutionality had the the Constitutional Council been able to maintain it in 2015. However, the 2015 Law extending the application of the state of emergency and strengthening the effectiveness of its provisions is not "*simply the implementation*" of the Law of 3 April 1955. In other words, it does not aim to extend the rules on the state of emergency instituted by the 1955 Law; it is also intended to modernise and strengthen its measures. Without going back over the conditions and authorities provided to trigger and extend the state of emergency, or the causes likely to bring it to an end, the 2015 Law establishes a new parliamentary review mechanism, amends the rules on house arrest and *astreinte domiciliaire* (a condition of bail whereby the suspect must remain at their home address); facilitates the dissolution of associations or groups; extends the category of arms and ammunition the surrender of which may be ordered; restructures the system of administrative searches; replaces existing press and media controls with further controls on information circulating on the Internet and social media; eliminates any possibility of giving jurisdiction to the military courts to judge crimes and misdemeanours falling in ordinary times within the remit of the assize courts; and increases the penalties for violations of the measures taken in connection with the state of emergency. The substantive updates brought (16) to the 1955 Law by the 2015 Law no longer allow the claim made, as in 1985, that the 1955 Law is thereby neither modified, supplemented nor affected in terms of its scope (17). Consequently the constitutional review emerges in theory in its fullest form with regard to the 1955 legislative provisions, which established the state of emergency, and those which strengthened it in 2015. The risk of a declaration of unconstitutionality has thus never been greater. The Prime Minister, Manuel Valls, therefore deliberately persuaded France's parliamentarians not to make a referral to the Constitutional Council, thereby sacrificing on the altar of efficiency any requirements under the rule of law in which both the Heads of the Executive continue to cloak themselves (18), even refusing to make a direct referral to the Council (19). But while in 2005 the lack of parliamentary referral barred any constitutional challenge being brought against the state of emergency measures, this is no longer the case in 2015 and indeed has not been since the entry into force of the *question prioritaire de constitutionnalité* (QPC – priority preliminary ruling on constitutionality). The three QPC raised by Cedric D. and the Ligue des droits de l'homme, a leading human rights group (20), demonstrate just how useful the *a posteriori* constitutional review of the law can be when such a review is not conducted *a priori* (I). However, let us not exaggerate the merits of the QPC. While it can compensate for some of the shortcomings of an *a priori* review – thanks to applications brought by citizens – constitutional guarantees provided by the review conducted on the basis of Article 61 of the Constitution are superior to that based on Article 61-1. Whilst not supplanting *the a priori* review, the utility of the QPC proves to be rather limited (II).

## I. Proven utility

On the initiative of private citizens, a selection of provisions contained in the Law of 3 April 1955 as amended were submitted to the Constitutional Council, which struck down one provision. This repressive form of utility (B) goes hand in hand with a preventive utility (A). Fearing the possibility of a future referral, the repercussions of which could be beyond their control, French parliamentarians voted to remove any manifestly unconstitutional provision from the Law of 20 November 2015.

### A. Preventive utility

"*I suspect, of course, that you will not find 60 deputies or 60 senators to make a referral to the Constitutional Council, but we must consider the possibility of priority preliminary rulings on constitutionality*" (21). This warning shows that the fear of a constitutionality review remained even though the risk of a parliamentary referral had been avoided. Parliamentarians had considered this risk of unconstitutionality, on the one hand, by purging the 1955 Law of those of its provisions that were deemed unconstitutional and, on the other hand, by making sure not to include unconstitutional provisions in the 2015 legislation.

This preventative aspect is illustrated, firstly, in the amendment brought to Article 14 of the 1955 Law: "*Except for the penalties provided under Article 13, the measures taken on the basis of this Law are subject to review by the administrative court as provided by the* Code de justice administrative *(Administrative Justice Code)*". This is a reversion back to the original scheme. On the one hand, provision was made for military courts to be substituted for the assize courts in dealing with crimes and related misdemeanours. On the other hand, the practice was established of filing an appeal before a consultative administrative commission, the composition of which had "*insufficient signs of independence vis à vis the Prefect*" (22). In comparison, the protection provided by the administrative courts, including the *juge des référés* (interim relief judge), is much greater because they make rulings without delay and may even order the end of the measure in question. In these circumstances, the introduction of a right of appeal under ordinary law before the administrative courts could be regarded "*as depriving a constitutional requirement of a legal guarantee*" (23). The Constitutional Council confirmed that position: it dismissed the complaint alleging infringement of the right of appeal by stating that, in addition to giving rise to a compensatory remedy likely to engage the responsibility of the State, "*the contested provisions do not deprive individuals under house arrest of their right to challenge the measure before the administrative courts, including by way of an application for interim relief*" (24).

Secondly, this preventive aspect is characterised by the rejection, in the parliamentary debates, of two amendments: one extending the duration of house arrest to 24 hours, which would have been contrary to individual freedom guaranteed under Article 66 of the Constitution (25); and the other conferring jurisdiction to the Constitutional Council to assess whether the conditions for declaring a state of emergency are still met, which would fall to the constituent power and not to the legislature (26).

### B. Repressive utility

The constitutional court reviews the balance struck by the legislature between, on one hand, the prevention of breaches of public order; and, and on the other, respect for rights and freedoms recognised to all who reside on the territory of the Republic. Even though only manifest disparities are sanctioned, three QPCs led the Council to build "a constitutional law on the state of emergency" (27). A challenge was brought against the constitutionality of Articles 6, 8 and 11 (1) of the 1955 Law. These concern administrative searches, house arrests, and measures relating to the temporary closure of venues and gatherings in public places.

The repressive utility of the *a posteriori* constitutional review was clear when the Council declared unconstitutional the second sentence of the third paragraph of Article 11 (1) (28). Equating the prerogative given to the administration to copy all computer data which it has been possible to access during a search to a seizure of that data, the Constitutional Court repealed with immediate

effect the provisions infringing the right to respect for private life. It also ordered that a framework be put in place for this practice, particularly with regard to copied data "*unconnected with the person whose behaviour threatens public security and public order having frequented the place where the search was ordered*".

Stopping short of censure, the Council raises, as an aside to the grounds for its decision, a framework for measures taken under the state of emergency for the attention of the police authorities.

Firstly, as regards house arrests (29), it stated rather ambiguously that the reasons for such arrests are not necessarily those that triggered the application of the exceptional measures (30) and that the duration of a house arrest is linked to that of the state of emergency, which requires that they be renewed in the event that the legislature extends the state of emergency.

Next, with regard to measures ordering the provisional closure of venues (31) or banning gatherings in public places, the Council indicated that these must be justified and proportionate, in respect of the former category, to the needs of preserving public order; and, in respect of the latter category, by the fact that such a gathering is "*likely to cause or maintain public disorder*". It also stressed that reasons must be given for individual measures and recalled that all these measures also cease with the state of emergency and must be renewed if the state of emergency is extended. Above all, it circumscribed the scope of such measures, acknowledging that Article 8 has "*neither the purpose nor the effect of regulating the conditions under which protests on the public highway are prohibited*".

Lastly, in respect of administrative searches (32), the Council added that, in addition to the obligation to give reasons, searches conducted at night at a residence must be justified by emergency or the inability to perform such searches by day, and gives rise to a remedy for individuals subjected to administrative searches, ensuring that the State will be held liable.

Generally, the Council specified that the application of the law governing the state of emergency is subject to review by the administrative courts (including by way of application for interim relief) which are responsible for ensuring that reasons are given for the contested measure, which must also be "*appropriate, necessary and proportionate to the aim pursued*" (33).

### II. Limited utility

The QPC does not supplant the *a priori* review. On the basis of Article 61 of the Constitution, an examination of the law is conducted prior to its entry into force and extends, in theory, to all of its provisions. Under the constitutional review conducted *a posteriori,* that is not the case. Not all provisions of the 1955 Law can be challenged before the Constitutional Council, while others will only be contested as a result of or at the end of the state of emergency. The utility of the QPC is limited by its material (A) and temporal (B) scope.

#### A – Utility limited by the material scope of the QPC

In the context of a QPC, the scope of the Constitutional Council's review is more restricted than that of an *a priori review,* which also restricts its utility. On the basis of Article 61-1 of the Constitution, it may only declare unconstitutional those provisions which, as argued by the parties, infringe a right or freedom guaranteed by the Constitution. Thus, it is prohibited for any court

(even constitutional) to raise of its own motion the alleged unconstitutionality of the law. Above all, in order to be the subject of a QPC, the legislative provisions must have been implemented, given rise to judicial proceedings, and infringed constitutional rights and freedoms. However, not all the provisions of the 1955 Law meet even one of those conditions (34).

For some provisions, it is their total lack of application that precludes any *a posteriori* constitutional review: no measures were taken on the basis of Article 11(2) of the Law to interrupt any public online communication service causing the commission of acts of terrorism or glorifying the same. Nor was any Decree adopted on the basis of Article 6-1 to dissolve an association or *de facto* group taking part in the commission of acts that seriously damage public policy or whose activities facilitate or incite the commission of such acts.

For others, it is the lack of litigation before a judicial or administrative court that renders a QPC impossible. This is the case for prefectural requisitions of weapons or persons to assist in searches and in establishing a protective perimeter around sensitive sites and traffic restrictions around such places. Although they may sometimes be numerous, none of these measures have been the subject of any litigation. In the absence of any action before the courts to which may a QPC may be linked, Articles 5, 9 and 10 are shielded from review by the Constitutional Council.

Lastly, other provisions do not fall within the scope of "*rights and freedoms guaranteed by the Constitution*". As those provisions cannot infringe those rights and freedoms, citizens may not challenge them by means of a QPC. Are exempt from any review Articles 1 to 4-1, which determine the conditions and authorities provided for declaring, extending and ending a state of emergency, together with the parliamentary information mechanism.

Ultimately, of the 17 Articles contained in the 1955 Law, 14 have not been the subject of any legal challenge. Only Articles 6, 8 and 11(1) were submitted for review by the Constitutional Council, reducing the spectrum still further. It decided to restrict the scope of the first QPC to the first nine paragraphs of Article 6 and to set aside the latter because no complaint was made against it. This relates to the placement under mobile electronic surveillance of persons under house arrest, i.e; provisions that were "*constitutionally brittle*", according to the Prime Minister.

### B- Utility limited by the temporal scope of the QPC

The maxim according to which "*in the event of a state of emergency,* the courts always come too late" (35) is especially true when referrals are not made to the Constitutional Council before the exceptional legal measures are implemented. Article 3 of the 1955 Law requires Parliament to set the duration of the state of emergency without precluding it being extended further, as evidenced by the Law of 19 February 2016 (which extended it by an extra three months) and by the bill currently being debated at the time of writing. The 2015 Law therefore provided that the state of emergency would run from 26 November 2015 to 26 February 2016. It follows that QPCs can only have truly useful effects for litigants if the Constitutional Council can rule on and repeal legislative provisions that are contrary to constitutional rights and freedoms within that three-month period, the sooner obviously being the better.

The QPC mechanism does not allow the Council to rule on legislative provisions as soon as they enter into force, time limits having been introduced (36). While the lower courts can rule without delay on a QPC referral being made, France's Supreme Courts have a period of three months in

which to hand down a ruling, the Council having the same period from the date of referral. So on average, the latter shall act within 70 days (37). Apart from the first QPC, which was considered in extreme haste by administrative and constitutional judges on 22 December 2015 – a shade more than a month after the extension of the state of emergency – the two others were only considered on 19 February 2016, i.e. 7 days before its lapse and the same day that the President promulgated the law extending it again.

This belated involvement of the Constitutional Council is regrettable for the protection of rights and freedoms of all who reside within the territory. This is illustrated by the ban on public gatherings adopted by France's Prefects in the early days of the state of emergency. Such steps would not have been taken had the Council stated sooner that Article 8 of the 1955 Act had "*neither the purpose nor the effect of regulating the conditions under which are* [such events] *prohibited*" (38) such events.

## Notes

(1) *Discours du président de la République au colloque du cinquantenaire de la Ve République, 3 nov. 2008,* http://www.elysee.fr/president/les-actualites/discours/2008/colloque-du-cinquantenaire-du-conseil.5208.html

(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, JO du 21 nov. 2015, p. 21665.*

(3) M. VALLS, *Séance du 20 nov. 2015, Sénat*, http://www.senat.fr

(4) CE, Ordo, 21 November 2005, *M. A.*, n°287217.

(5) BEAUD O. & GUERIN-BARGUES C., « L'Etat d'urgence de novembre 2015 : une mise en perspective historique et critique », *Jus Politicum*, 2016, n°15, p. 2.

(6) SAINT-BONNET F., « Contre le terrorisme, la législation d'exception ? Entretien avec François Saint-Bonnet », http://www.laviedesidees.fr

(7) BALLANGER R., JO, Déb., Parl., AN, 31 mars 1955, p. 2164.

(8) From 3 April until 1 December 1955 and 17 May until 1 June 1958.

(9) CC n°71-44 DC, 16 July 1971, *Loi complétant les dispositions des articles 5 et 7 de la loi du 1er juillet 1901 relative au contrat d'association*.

(10) CC n°85-187 DC, 25 January 1985, *Loi relative à l'état d'urgence en Nouvelle-Calédonie et dépendances*.

(11) BONNET J., « L'épanouissement de la jurisprudence *Etat d'urgence en Nouvelle-Calédonie* », *AJDA*, 2014, p. 467.

(12) CC n°85-187 DC, 25 January 1985, *op. cit.*

(13) *Ibid.*

(14) CE, Ordo., 21 November 2005, *op. cit*.

(15) CC n°85-187 DC, 25 January 1985, *op. cit.*

(16) See BEAUD O. & GUERIN-BARGUES C., « L'Etat d'urgence de novembre 2015 : une mise en perspective historique et critique », cited above, p. 114 et s.

(17) CC n°85-187 DC, 25 January 1985, *op. cit.*

(18) HOLLANDE F., *Discours du Président de la République devant le Parlement réuni en Congrès*, 16 nov. 2015, http://www.elysee.fr ; VALLS M., Commission des lois, AN, n°43, 27 janv. 2016.

(19) See CC n°2015-713 DC, 23 July 2015, *Loi relative au renseignement*; CC n°2016-730 DC, 21 April 2016, *Loi de modernisation de diverses règles applicables aux élections.*

(20) CC n°2015-527 QPC, 22 December 2015, *M. Cédric D.*; CC n°2016-535 QPC and n°2016-536 QPC, 19 February 2016, *Ligue des droits de l'homme.*

(21) *R.-G. SCHWARTZENBERG, Séance du 19 nov. 2015, Assemblée Nationale,* http://www.assemblee-nationale.fr

(22) CE, Commission permanente, *Avis sur un projet de loi 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*, n°390.786, 17 November 2015, http://www.assemblée-nationale.fr

(23) *Ibid.*

(24) CC n°2015-527 QPC, 22 December 2015, *op. cit.*

(25) V. speeches from the rapporteur and the Secretary of State, *Séance du 18 novembre 2015*, *Assemblée Nationale*, http://www.assemblee-natinonale.fr

(26) See *Ministre de l'intérieur, Séance du 20 novembre 2015, Sénat,* http://www.senat.fr

(27) MERCIER M., *Séance du 10 mai 2016, Sénat,* http://www.senat.fr

(28) CC n°2016-536 QPC, 19 February 2016, *op. cit.*

(29) CC n°2015-527 QPC, 22 December 2015, *op. cit.*

(30) BONNET J. & ROBLOT-TROIZIER A., « L'état d'urgence devant le Conseil constitutionnel : contrôle vous avez dit contrôle ? », *NCCC*, 2016, n°51, p. 95.

(31) CC n°2016-535 QPC, 19 February 2016, *op. cit.*

(32) CC n°2016-535 QPC, 19 February 2016, *op. cit.*

(33) CC n°2015-527 QPC, 22 December 2015, *op. cit.;* CC n°2016-535 QPC and n°2016-536 QPC, 19 February 2016, *op. cit.*

(34) *Mesures administratives prises en application de la loi n°55-385 du 3 avril 1955 depuis le 14 novembre 2015,* http://www.assemblee-natinonale.fr

(35) BEAUD O. et GUERIN-BARGUES C., « L'Etat d'urgence de novembre 2015 : une mise en perspective historique et critique », *art. cit.*, p. 9.

(36) See *Ordonnance n°58-1067 du 7 novembre 1958 pourtant loi organique sur le Conseil constitutionnel.*

(37) « Avril 2015 : Les 5 ans de la QPC au Conseil constitutionnel – Quelques chiffres », http://www.conseil-constitutionnel.fr

(38) CC n°2016-535 QPC, 19 February 2016, *op. cit.*