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I. National practices concerning law-making procedures in case of urgent and/or exceptional circumstances

1/ *Does your national legal order identify urgent and/or exceptional cases as the justification for applying special law-making procedures?*

Indeed, there are 5 legal devices that are part of the French legal system which can possibly justify the enactment of specific legislation, using, for this purpose, special law-making procedures: * "Ordonnances", which are to be regarded as a delegated power to enact laws ("Décrets lois"); * the State of Siege; * the State of Emergency; * the Exceptional Powers ("pouvoirs exceptionnels"); * the Theory of the Exceptional Circumstances (which is actually a judge-made doctrine).

Are the concepts of "urgency" and "exceptionality" used cumulatively or alternatively as conditions for the special law-making procedures?

In the framework of the French legal order, the concepts of "urgency" and "exceptionality" are used in principle in an alternative way as conditions to trigger the special law-making procedures. Yet, the French Council of State has approved the possibility to implement them cumulatively (for instance, it admitted the possibility to adopt the Theory of the Exceptional Circumstances during a State of Siege: CE, 6 août 1915, *Delmotte*). But it may depend on the kind of regime which is applied: according to the Defence Code (art. L. 2131-1, para. 2), it is prohibited to apply, on the same territory, both the State of Siege and the State of Emergency.

Are there distinct or common law-making procedures applying in urgent and/or exceptional cases?

All the above-mentioned procedures are distinctly applicable because the factual and/or legal circumstances which are required are so accurately described within the national legal order that it seems unlikely, if not impossible, that the specific/urgent situation to face matches with many legal bases; in general, a single legal basis should apply to the situation in case. The French constitutional history shows that in practice, each procedure is used separately from the others.

2/ *Do the eventual special law-making procedures in case of urgent and/or exceptional circumstances derive from de facto practices or are they set out in the Constitution and/or in ordinary legislation?*

Out of the 5 existing procedures encountered in the French legal order (and described above), which empower the institutions to adopt draft legislations in crisis situations characterized by urgency, most of them are enshrined in the Constitution: Article 38 of the French Constitution deals with "ordonnances" (also known as "Décrets lois"); Article

36 of the Constitution recognizes the State of Siege, although it has been later completed by 2 laws (the Law of 9th August 1849 and the Law of 3rd April 1878 respectively); Article 16 of the Constitution focuses on the Exceptional Powers ("pouvoirs exceptionnels") that are granted to the President of the French Republic in times of crisis. As far as the State of Emergency ("état d'urgence") is concerned, it has been originally set out in ordinary legislation, in particular in the Law of 3rd April 1955. More recently, this law has been partially amended by the Law of 20th November 2015, following the terrorist attacks in Paris. Finally, the Theory of the Exceptional Circumstances ("théorie des circonstances exceptionnelles") derives from the case-law of the French Council of State.

What are the main principles and the concrete proceedings of law-making in urgent and/or exceptional circumstances in your national legal order?

All these procedures share a common feature: their rigidity, which is due to their exceptional character. Through such strictly formalized procedures, the aim is to ensure that they are implemented only on an exceptional basis.

a. One of the most prominent procedures is that of article 38 of the French Constitution.

According to this constitutional provision, the Cabinet is granted the possibility to issue *ordonnances* that are normally the preserve of statute law, for a limited period of time, after authorization from the Parliament and consultation with the Council of State ("Conseil d'État"). They shall come into force upon publication, but shall lapse in the event of failure to table before Parliament the bill ratifying them by the date set by the enabling act. By expiration of that date, they may be amended solely by an act of parliament in those areas governed by statute law. This special law-making procedure has been used very often by most governments of the Fifth Republic, and it is still frequently used. In statistical terms, it is possible to point out that more than 250 *Ordonnances* have been adopted so far (since 1958).

b. The State of Siege is briefly set out by article 36 of the French Constitution.

The procedure as such is short: a State of Siege is decreed by the Council of Ministers; only the Parliament can authorise the extension of a State of Siege beyond a period of 12 days. Indirectly, the President of the Republic has sole right of initiative (since he chairs the Council of Ministers). A State of Siege may only be declared in the event of an imminent danger resulting from a foreign war or from an armed insurgency (armed revolt). One could notice that both concepts (foreign war/armed insurgency) seem sufficiently precise to prevent any potential misuse of power.

c. The procedure relating to the State of Emergency stems from the law.

As to the material scope of the law, a state of emergency may be declared in 2 cases:

1. First, where there is an imminent danger to the public order;

2. Secondly, in relation to events which amount to a public disaster (including natural disasters on an exceptional scale).

Both are basic concepts, which are in principle easy enough to define. A State of Emergency may involve all or a part of the territory of metropolitan France, overseas departments as well.

As far as the procedure itself is concerned, a State of Emergency shall be declared by the Council of Ministers (through an Order, called "Décret"). This Order accurately determines its territorial scope (which includes the parts of the national territory that are affected by the State of Emergency).

d. The most peculiar procedure, which is the only one of its kind in the world, is certainly that of the Exceptional Powers.

Article 16 of the French Constitution deals with "the Crisis Powers" which are granted to the President. The genesis of this provision is important to know: The drafters of the Constitution of the Fifth Republic were deeply influenced by the memory of the 1940 defeat (which led to the establishment of the Vichy regime). At that time, the executive power was weak and the President, powerless. Taking due account of the historical experience, the new constitutional project was grounded in a strong President, holder of numerous powers, who should be regarded as the leader of the Nation, especially in times of crisis.

Several conditions – formal as well as substantial – have to be met for article 16 to be implemented.

1. The national institutions, the Nation's independence, territorial integrity or the execution of international commitments should be under serious or immediate threat.

2. The regular functioning of the public powers should have been interrupted.

3. In these special circumstances, the President can take the necessary action to solve the crisis. Yet, the emergency powers must seek to provide the constitutional public powers with the means to accomplish their mission as soon as possible.

In addition to these substantial requirements, many formal conditions constitute significant guarantees for the citizen.

- First of all, the President is in a position to take the necessary measures after formally consulting the Prime Minister, the Presidents of each of the 2 chambers, and the Constitutional Council ("Conseil constitutionnel").

- The President shall then inform the whole Nation of the implementation of Article 16.

- Moreover, the Constitutional Council shall be consulted each time the President adopts a measure on the basis of article 16.

- For the duration of the Emergency Powers, the Parliament meets without convocation and the National Assembly ("Assemblée Nationale") may not be dissolved as well.

- Finally, during this crisis period, the Constitution shall not undergo any revision, which is implicitly set out by article 16.

e. The Theory of the Exceptional Circumstances was created on the initiative of the administrative Judge.

In special crisis situations, the respect of the rule of law may paralyse the administration or delay its action; in this context, the Judge had to choose between the efficiency of public action and the respect of the rule of law. In an attempt to reconcile both of them, the *Conseil d'État* admitted that exceptional circumstances could exempt the administration

from its liability, meaning that the administration could break the rules that it shall normally comply with.

Nonetheless, this regime remains strictly circumscribed by the case-law:

The notion of Exceptional Circumstances has been concretely defined as jurisprudence evolved.

- It can refer to the war (CE, 28th June 1918, *Heyriès*);

- It has been extended to other factual situations, such as political tension stemming from the *Libération* (the liberation which occurred after WWII) (T. confl., 27th March 1952, *dame de la Murette*);

- Threat of nation-wide general strike (CE, 18th April 1947, *Jarrigion*);

- Social unrest;

- Natural disasters (for a volcanic eruption in Guadeloupe, see CE, 18th May 1983, *Félix Rodes*), among other examples.

The case-law has widely contributed to set criteria to better define the concept of Exceptional

Circumstances: it usually refers to an abnormal situation, imposing a burden on the administration to act, in order to avoid compromising the general interest; in such a peculiar situation, the respect of ordinary rules is not possible.

3/ *What is the respective role of the legislative and the executive power, and eventually of other institutions, in dealing with urgent and/or exceptional circumstances?*

Do the Head of the State, the Parliament and the Government retain a particular role?

The French constitutional system is halfway between the Parliamentary regime and the Presidential regime (for this reason it is called "semi-presidential system"). Therefore, its originality explains that some legislative devices – which are unique – require an in-depth analysis. In France, when it comes to legislative procedures that differ from ordinary law (except for the implementation of article 38 of the Constitution), the President of the Republic holds the initiative; in other words, he is typically the one who decides to start special law-making procedures. For the exercise of the Exceptional Powers, he is entitled to make the decision alone; the decision to declare the State of Siege or the State of Emergency belongs to the Council of Ministers, which is traditionally chaired by the President, Chief Executive. Yet, while the President takes the initiative, the procedure can only be successful with the approval of the Parliament. As the guardian of individual freedoms, the *Assemblée nationale* has a key role to play. It provides safeguards against possible abuses and offers an effective institutional counterbalance to the French President by way of checks and balances. In terms of legitimacy, these institutions (Parliament/President) are on an equal footing: they are both directly elected by the people (by direct universal suffrage).

Apart from the procedure laid down in article 38 ("Ordonnances"), the Government tends to be under the President's control, particularly when both President and Prime Minister belong to the same party. This is in fact another characteristic of the French regime: the

President and the Parliament are the main players in the legislative procedure; the passing of legislation is the result of a close cooperation between them.

The delegation of power to enact law (art. 38 of the Constitution) constitutes a constitutional mechanism which is specific to all Parliamentary regimes; by the way, this provision is reflected in the Italian and Greek legal orders (the wording is nearly the same). As a matter of fact, in the framework of this procedure, the Government and the Parliament are the protagonists of the legislative process, in line with the parliamentary tradition: the Government holds the initiative and seeks the Parliament's support to carry on with the procedure.

4/ *On what occasions and how frequently have the urgent and/or exceptional law-making procedures been applied in your national legal order?*

Have they been activated in abusive ways and has there been a political criticism against their application?

Article 38 ("Ordonnances")

Décrets-lois were widely/abusively used during the Third and the Fourth Republic in France, which resulted in huge governmental instability. This legislative device was streamlined (*rationalisé*) later on to become a constitutional device (constitutionalized).

Nowadays and since 1958, it has been used very often by most governments of the Fifth Republic, and it is still frequently used. In statistical terms, it is possible to point out that more than 250 *Ordonnances* have been adopted so far.

The goals pursued by such measures vary; they range from the maintenance of law and order in Algeria to the implementation of EU directives into the national legal system, and include privatisations and sometimes the adoption of legal adjustments to French overseas territories, or even emergency measures to encourage employment.

The motivation behind these *Ordonnances* is legitimate when it comes to face emergency situations; it tends to be less legitimate when the technical nature of the subject compels the administration to deal with the problem to solve it quickly (this specific case may possibly be a source of abuse.

Hence the question: is the efficiency of the administration really at stake? Does it require an exceptional regime? Both questions should be answered on a case-by-case basis, by means of an assessment in concreto).

In order to avoid abuses, the French Constitution contains guarantees; many of them have been enshrined by the Constitutional Council (*Conseil constitutionnel*).

Firstly, there are formal guarantees:

- The initiative of the procedure belongs to the government, which implies that the government alone may ask the Parliament for authorization to adopt *Ordonnances*.

- The Enabling Act formally gives this authorization. As soon as it is adopted, the government may draft *Ordonnances*; then, these *Ordonnances* are adopted by the Council of Ministers, after seeking the opinion of the Council of State. Eventually, the President of the Republic shall sign the *Ordonnances*

(Art. 13, French Constitution).

- Existence of a deadline: the *Ordonnances* are of limited duration. In practice, the Enabling Act set a deadline, which conditions the validity of the *Ordonnances*; it is clear that if they are adopted by the government within this time-limit, they will produce legal effects; otherwise, they will lapse.

In addition, substantial safeguards complete these procedural guarantees:

- The main substantial guarantee is certainly the material scope of Article 38:

Article 38 can be invoked whatever the subject, as long as it comes to the legislative field (article 34 of the Constitution precisely defines the sphere of competence belonging to the Parliament).

However, there are derogations:

1. *Ordonnances* cannot cover the fields that fall within the scope of organic laws;

2. The government cannot issue *Ordonnances* either in the area of Finance Acts, or in the framework of the Laws on the Funding of Social Security.

- As far as the content of the *Ordonnances* is concerned, the constitutional text specifies that the aim which should be achieved by the government is the implementation of its programme ("In order to implement its programme"). In that regard, the Constitutional Council ruled that in this perspective, the government has to identify accurately the purpose(s) of the measures that he intends to establish and the area(s) of these measures as well (*décision n° 99-421 DC*).

To conclude, in respect of fundamental rights and since 1958 (Fifth Republic), the implementation of article 38 hasn't aroused any political criticism.

Article 36 (State of Siege)

As a rule, a state of siege may only be declared in the event of an imminent danger resulting from a foreign war or from an armed insurgency (armed revolt). Both concepts (foreign war/armed insurgency) seem sufficiently precise to prevent any potential misuse of power.

Many safeguards have been provided by the 2 laws which established the State of Siege:

1. Firstly, beyond a period of 12 days, a State of Siege can only be declared by Law (= specific category of legal acts according to the hierarchy of norms).

2. This law/decree expressly identifies the parts of the national territory it applies to (thus, it mentions the territorial scope of the law/decree).

3. A State of Siege is designed (at least in theory) to last for a limited period of time; this duration is fixed by the Law.

4. After the expiration of this time-limit, the Law (and subsequently, the State of Siege) ceases by right to produce its effects, UNLESS a new Law is adopted with the aim of prolonging its scope.

In practice, a state of siege produces different kinds of consequences (threefold effect):

- a transfer of competence: the police powers, normally exercised by civil authorities, are transferred to the military authorities. As a matter of fact, a State of Siege grants powers that normally lie with the civilian authorities to the military. Yet, it is not

automatic since the military authorities should consider this transfer of competence necessary.

- **an extension of police powers:** it may consist of day and night search of the private premises of citizens; removals of convicted persons ("crime-recidivists") or of individuals not domiciled in the area covered by the State of Siege; publication bans and prohibition of meetings, when these publications/meetings cultivate and bring about disturbances; a curfew may also be introduced/imposed.

- **an extension of the jurisdiction of military courts** in times of war: crimes and misdemeanours against the State's security fall within the jurisdiction of military courts in time of conflicts, which usually lie with ordinary courts.

Problem: a State of Siege tends obviously to restrict public and personal freedoms, without going as far as undermining constitutional or legal guarantees. It mainly leads to considerably increasing the powers of the Government. The Defence Code establishes the general principle that "notwithstanding a State of Siege, all the rights that are enshrined in the Constitution can be freely exercised, provided that their enjoyment has not been suspended" (Art. L 2121-8). So far, a State of Siege has NEVER been declared under the Fifth Republic.

State of Emergency

Significant guarantees have been introduced by law:

- The initial period of a State of Emergency is 12 days; but its extension beyond 12 days must be authorized by the Parliament; it implies that after 12 days, a law must be enacted by the Parliament to give effect to the State of Emergency. This law automatically sets its final duration.

- Furthermore, any act which extended a State of Emergency was null and void 15 days after the resignation of the government or the dissolution of the National Assembly.

- The National Assembly and the Senate shall be immediately informed of the measures adopted by the government during the State of Emergency. They may also require any additional information in the framework of the control and the assessment of these measures.

- The main guarantee is, of course, the judicial review: in practice, any citizen who is empowered to go to court may refer to the administrative judge and contest the Decree or the Law relating to the State of Emergency.

Such an exceptional regime automatically produces legal effects:

Basically, a State of Emergency leads to an increase/an extension of the police powers in favour of either the Prefect or the Minister of the Interior.

These new powers are the following:

- to prohibit the movement of persons or vehicles in certain areas;

- to ban public meetings and close temporarily certain public places;

- to put someone under house arrest;

- to order searches;

- to order the surrender of weapons and ammunition;

- to block websites that advocate terrorism or incite terrorist acts;

- to restrict the right of residence and prohibit the stay on the national territory of certain persons.

Wide range of powers, whose exercise is accompanied by appropriate safeguards (I don't want to go into details; see the Law itself, which is obviously more precise in this regard).

A few practical examples:

In 1955: the Law of 1955, which first created this exceptional regime, was enacted because of a wave of terrorist attacks perpetrated by the Algerian *Front de libération nationale* (FLN) from November 1954. A State of Emergency was proclaimed in April 1955 and extended for 6 months. It involved at that time the departments of French Algeria.

In 1985: a State of Emergency was declared on the 12th January 1985 in New Caledonia, due to serious tensions resulting from the People's quest for independence.

In 2005: a State of Emergency was decreed on the 8th November 2005 to put an end to the violence in the Parisian suburbs (*banlieues*); it enabled the Prefects of the areas concerned by the State of Emergency to impose a curfew. The State of Emergency involved all or parts of 25 departments, and comprised the whole region of *Île-de-France*. It finally ended on the 4th January 2006.

In 2015: since the 14th November 2015, a State of Emergency has been declared to face terrorist attacks; it has been prolonged 6 times:

- extension of the regime for 3 months from the 26th November 2015 (Law of 20th November 2015);

- extension of the regime for 3 months from the 26th February 2016 (Law of 19th February 2016);

- extension of the regime for 2 months from the 26th May 2016 (Law of 20th May 2016);

- extension of the regime for 6 months from 26th July 2016 (Law of 21st July 2016);

- extension of the regime for 7 months (Law of 19th December 2016);

- the State of Emergency will come to an end on the 1st November 2017 (Law of 11th July 2017).

So far, no infringement of fundamental rights could be identified and the public response to terrorism appears to be proportionate. Nonetheless, the media harshly criticized the successive and numerous extensions which happened since November 2015.

Article 16 ("Pouvoirs exceptionnels")

A series of strong guarantees have been conveniently set out (see question 2/ above).

The use of article 16:

It has, so far, been used/triggered once (from 23rd April to 29th September 1961) and at that time, it has provoked serious criticism.

The facts:

In April 1961, disaffected partisans of French Algeria staged an attempted coup masterminded by 4 generals of the French Army. Following this putsch, General de Gaulle decided to use article 16.

However, some days later, the public authorities had fully returned to smooth functioning. Despite the country's institutions return to normal functioning, the then President, General de Gaulle, unduly/abusively extended the period for which article 16 was allowed. The purpose was the creation of the appropriate legal tools with a view to ensure the return of order and peace in Algeria. The main legal problem is that the decision enacted by the President of the Republic to use article 16 and all the legislative acts adopted pursuant to this provision **cannot, in any event, be subject to judicial review.**

The *Conseil d'État*'s case of 2nd March 1962, *Rubin de Servens*, ruled that the presidential decision implementing article 16 is part of a specific category (« les actes de gouvernement ») which cannot be reviewed by the national Judge. In other words, the measures adopted in the framework of article 16, which come under the legislative field, can never be subject to judicial review, which is highly problematic for fundamental freedoms.

Since the constitutional Act of 23rd July 2008, the duration of implementation of such provision is subject to Parliamentary scrutiny (democratic and political control). It means that after 30 days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the President of one of the 2 chambers (*Assemblée Nationale*, *Sénat*), by 60 deputies or 60 senators for the purpose of ascertaining whether the conditions for their application are still satisfied. This is certainly a significant improvement. To conclude, this provision has always been controversial and widely criticized.

The Theory of the Exceptional Circumstances

The advantage of this case-law doctrine is that the power is not embodied in one single person (like the President for instance), but it is clearly exercised by administrative Courts (collegiality).

Obviously, a tendency to personify power turns out to be dangerous.

This theory has been used during WWI and WWII; it has been rigorously limited by the Judge, through its jurisprudence.

5/ ***Are the urgent and/or exceptional regulatory procedures and measures subject to judicial review in your country?***

In particular, is this review the task of a constitutional court?

Is the existence of the "urgent" and/or the "exceptional" situation a factual or a legal issue?

Is there a special duty for the executive to give reasons for the application of an urgent and/or exceptional regulatory procedure? Are these reasons subject to judicial control, and, if so, to what extend?

In principle, all the urgent and/or exceptional law-making procedures are subject to direct or indirect judicial review in France.

Article 38 of the Constitution

As far as the judicial review is concerned, there are 2 different stages that have to be analysed:

- Either the *Ordonnances* have not been ratified by the Parliament within the time-limit defined by the Enabling Act: in this case, they must be regarded as administrative acts, which can, as such, be reviewed by ordinary Courts (CE, 24th November 1961, *Fédération nationale des syndicats de police*).

- Or the *Ordonnances* have been actually ratified by the Parliament: since they are not administrative acts any more, they become legislative acts by their very nature. So, the Constitutional Council takes over from the administrative Courts and can carry out the judicial review. The Constitutional Council performs a control of the constitutionality of the ratification law (*Loi de ratification*) and, through it, of the *Ordonnances*.

It seems that the existence of the "urgent" and/or the "exceptional" situation is exclusively motivated by the legal context. Naturally, the government has to demonstrate that the proposed measures are necessary to implement its programme.

To conclude, the underlying purpose of *Ordonnances* is inspired by the concern for legislative efficiency in a context of emergency. Article 38 has been often criticised because it strips the Parliament of its legislative competence; however, the present analysis has clearly demonstrated that *Ordonnances* are, in the French legal order, increasingly subject to the judicial review of the administrative and the constitutional judges. The *Conseil constitutionnel* has developed a significant body of case-law to define the scope of its review in the field of article 38

(http://www.conseilconstitutionnel.fr/conseil-constitutionnel/francais/a-la-une/mars-2015-les-ordonnances-de-larticle-38-de-la-constitution.143307.html).

The State of Siege

The urgent and/or exceptional character of the situation arises from concrete facts.

In practice, the State of Siege results in a transfer of competence from the public/civil authorities to the military authorities. No judicial Court (French Constitutional Council, Council of State) is competent to exercise its control over the act ("Décret") adopted by the Head of State to proclaim the State of Siege. This *Décret* cannot be subject to any supervision. Though, the extension of the regime beyond twelve days is subject to the authorization of the Parliament. This is the only safeguard included in the Constitution.

The State of Emergency

Like the State of Siege, the State of Emergency is justified by the facts of the case at hand. This exceptional regime was created in 1955 to offer the Government an alternative to the State of Siege. By the way, it cannot be applied once the State of Siege has been decreed (these are alternative regimes). The Constitutional Council is obviously competent to review the constitutionality of the laws relating to the State of Emergency. The Administrative Judge stated that the *Décret* that institutes the State of Emergency can be reviewed by the Council of State which will examine the conditions for its adoption.

Until 1960, the French Legislator alone could proclaim the State of Emergency; from now on, the President and the Government as well can adopt the initial declaration of a State of Emergency.

As the State of Siege, the extension of the regime beyond twelve days is subject to the authorization of the Parliament.

Article 16 relating to the Exceptional Powers is extremely problematic in terms of judicial control.

The decision fully belongs to the President of the Republic. The judicial review is particularly deficient when the procedure is triggered: the Council of State considers itself to be incompetent because of the legal nature of the President's decision. Indeed, the decision enacted by the President of the Republic to use article 16 and all the legislative acts adopted pursuant to this provision cannot, in any event, be subject to judicial review. The *Conseil d'État*'s case of 2nd March 1962, *Rubin de Servens*, ruled that the presidential decision implementing article 16 is part of a specific category, called «actes de gouvernement » which cannot, in any event, be reviewed by the national Judge. Moreover, when the procedure starts, the President shall seek the advice of the Constitutional Council, but such opinion is not binding on the Head of State.

In addition, it is impossible to review the extension of this emergency regime: the French Council of State considers that it is not its task to limit the duration and validity of article 16 once it has been triggered.

The only obligations that the President has to comply with are the following:

- First of all, he shall address the Nation and inform it of such measures;

- Secondly, he should consult the Constitutional Council (even if its advice is not binding).

There is all the same one strong guarantee: after thirty days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators, so as to decide if the conditions laid down in paragraph one still apply. It shall make its decision by public announcement as soon as possible. It shall, as of right, carry out such an examination and shall make its decision in the same manner after sixty days of the exercise of emergency powers or at any moment thereafter.

The implementation of article 16 is supposed to be based on a factual issue.

As a consequence, this provision may clearly jeopardize fundamental rights because the limitations to the President's power are insufficient.

The Theory of the Exceptional Circumstances

One of the fundamental elements of this doctrine is the existence of a judicial review. In particular, the ordinary courts can review the acts which have been adopted during the emergency period. This review is carried out over the existence of the "exceptional circumstances" invoked by the administration ű the judge can assess whether the situation at hand is rightly "exceptional".

What is more, the court will check the proportionality of the administrative measure; it means that it will determine whether the administrative act is consistent with the legality of a State of Emergency (construed by the courts); otherwise, the judge will automatically annul/cancel it.

For sure, the main problem of this doctrine is the ex-post judicial review. It implies that the

administrative authorities can still implement arbitrary measures under the guise of "exceptional circumstances".

The assessment of the urgent and/or the exceptional situation is more a factual issue.

6/ ***Do you think that any general or particular feature of your national special law-making procedures could be used at a European level for the management of urgent and/or exceptional circumstances?***

Which criteria could be apt to guide this transposition?

I believe that only legal devices which belong to the parliamentary system could be rightly transposed into the EU legal order. By contrast, French procedures that share many similarities with the semi-presidential regime are not intended – by their very nature – to be used at European level. Except for the Exceptional Powers of article 16, all other urgent law-making procedures can easily be incorporated into the EU legal order. The EU *sui generis* political system has no Head of State and promotes collegiality instead of centralizing powers in the hands of one individual.

Accordingly, due consideration has to be paid to article 38 (*Ordonnances*), the provisions linked to the State of Siege and the State of Emergency and, to some extent, the Theory of Exceptional Circumstances.

More precisely, these procedures have a common feature: the government initiates the proceedings and is regularly controlled by the Parliament throughout the procedure. We could imagine a similar procedure at EU level which would be launched by the Commission and then require the approval of the EU Parliament and/or the Court of justice of the EU (judicial review of the statement of reasons).

7/ ***Do you think that under the current circumstances your national Government would be willing to grant competence for urgent and/or exceptional legislation to the EU?***

The current French Government would probably be willing to grant competence for urgent and/or exceptional legislation to the European Union to some extent. Anyway, France has the duty to work for a strong(er) EU, as a leading force of the integration process.

II. Potentialities of an urgent and/or exceptional law-making procedure at the European level

1/ ***How could an urgent and/or exceptional law-making procedure be established at the EU level?***

In particular, could one use the current EU rules by broadening their scope of application or is it necessary to introduce new provisions, exclusively destined to address urgent and/or exceptional circumstances?

Is a revision of the Treaties necessary or is it possible to reach a solution by means of secondary law? In the former case, would it be sufficient a simplified procedure according to the article 40 TEU?

Chronologically, there are many questions to answer:

- Firstly, who is in a position to decide that there is an emergency? (like the European Parliament, the Council of the EU and the Commission, the Member States may also have a role to play).

- Secondly, how could the concept of emergency be defined?

- Thirdly, is it wise to identify specific situations of emergency?

One of the obstacles to the adoption of an emergency legislation would be the allocation of powers within the EU: there are only sectorial fields of competence, based on the principle of attribution of powers, which strictly follow the evolution of the integration process (specialty principle).

Therefore, as far as sensitive matters are concerned (such as security, public order, defense and other regal powers), the Member States remain competent as they are sovereign States. The underlying issue of the whole research deals with sovereignty and the question of the identity of the EU.

Although soft law cannot be regarded as the panacea to legislate, it can all the same play a significant role. Why is soft law so useful in terms of law-making? Because such a category of law has mainly an advantage: it is flexible and enables the legislator to adopt quickly measures which are perfectly adjusted to the crisis situation. These are certainly tailor-made solutions to a specific problem. At least in situations where the Treaty legal basis does not suit the case at hand, EU institutions could exceptionally rely on soft law.

It already exists many legal bases in the Treaties to deal with all kinds of urgent situations (for instance, art. 78, para. 3, TFEU; art. 122, para. 2, TFEU; art. 222 TFEU; art. 42, para. 7, TEU; art. 25 and 28 of Regulation (EU) 2016/399 of 9th March 2016 on a Union Code on the rules governing the movements of persons across borders (Schengen Borders Code), among other provisions). I'm not convinced that a revision of the Treaties would be currently necessary. It seems indeed that some specific procedures have already been instituted to cope with urgent and/or exceptional circumstances in a sectorial perspective.

However, I consider that the European authorities would be better off using existing well-proven procedures in the Member States as a first step to establish an original EU law-making procedure in urgent and/or exceptional cases. Such an approach would be particularly in line with the subsidiarity principle.

What is more, I believe that a reform of the Treaties to introduce a new legal basis dedicated to urgent and/or exceptional matters would not be an appropriate solution: this choice would force the EU institutions to strictly determine the scope of the notions (emergency, urgency) and either to restrict too much their ambit or to define them too

broadly (which would be useless). I'm not sure it would be a good idea because the legal bases in the Treaties (above mentioned) appear to be currently sufficient to deal with wide range of crisis situations. I see no point in legislating in this sense at this time.

2/ *Which cases are to be considered as "urgent" and/or "exceptional" in the EU legal order?*

Taking into account the current context, cases could be regarded as "urgent" and/or "exceptional" in the following instances:

- uncontrolled floods of immigrants and refugees coming from outside the EU (humanitarian crisis);

- ecological/environmental disaster(s) (oil spills, nuclear accidents, forest fires, pollution of various kinds);

- natural disaster(s) (earthquakes, hurricanes, floods, droughts, volcanic eruptions, storms and so on);

- energy supply difficulties which amount to a threat to public order;

- coming to power of an extremist/undemocratic political party which constitutes a threat to the protection of freedoms;

- state of war, armed attacks;

- terrorist attacks;

- aggression on the territory of one or more Member States (…).

Perhaps it would be valuable to distinguish according to the level (severity) of the emergency; as a matter of fact, one could make a distinction through the legislative process between natural disasters and other kinds of emergency related, for instance, to terrorism. In the former case, the procedure may be lighter and simplified respect to the latter case. In practice, it could imply the inaction of the European Parliament, whose vote/opinion would be – in this specific case – regarded as superfluous.

As far as the definition of an "aggression" is concerned, it could be interesting to refer to the definition which is given by the General Assembly of the United Nations. The UNO gives indeed a broad scope to the concept of "aggression" in its Resolution 3314 related to the definition of Aggression (14th December 1974). This act can be a useful source of inspiration for the EU.

Is it necessary to distinguish between "urgent" and/or "exceptional" cases?

I'm not sure it would be necessary to distinguish between "urgent" cases and/or "exceptional" circumstances. By the way, within the European Union, there is no consensus on this issue among Member States: considering national legislations, some Member States make a clear division between these two concepts whereas others tend to consider them interchangeable.

Yet, it might prove appropriate to propose a clear-cut distinction between the above mentioned notions; in that case, one could suggest that "urgent" cases would be assessed by reference to a fact that calls for an immediate response from the European authorities. Therefore, "urgent" cases are linked to the immediacy of the fact. Instead, "exceptional" cases are characterized by their lack of regularity; it is more the frequency of the fact

which is taking into consideration. By definition, such exceptional circumstances rarely occur on the time scale.

Force majeure is certainly a very convenient concept which is well developed through French law. It appears to be less blurred than exceptional/emergency issues. It is widely recognized and used by many Member States (that is why it is clearly circumscribed by specific criteria set by national case law).

In fact, the EU already got some inspiration from *Force majeure* and introduced this notion in its case-law. I am deeply convinced that it should matter in the framework of an urgent and/or exceptional law-making procedure.

Are there any sensitive domains that should be excluded from the application of urgent and/or exceptional EU lawmaking procedures?

I personally cannot see any value in narrowing the scope of both concepts. Because they overlap with the essential functions of the State and touch directly on issues of national sovereignty, it belongs to the Member States to accurately determine the scope of these notions. Of course, due attention must be paid to the protection of fundamental rights in order to be sure that so-called urgent matters never take precedence over human rights and civil liberties.

3/ *Can you suggest a possible model for urgent and/or exceptional EU law-making procedures?*

In particular, what would be the different phases of such procedures, the institutions involved and their respective roles as well as the applicable timetable for the issuing of an urgent and/or exceptional EU regulatory measure?

First of all, one should be aware of the Council's role and understand that it can be blocked easily simply because of non-agreement among the Member States. In other words, no unanimity/no majority in the Council can lead to the inefficiency of the procedure and can possibly weaken the EU, especially in a context of emergency.

The EU constellation of specialized agencies could be conveniently involved in the law-making procedure, maybe to be asked for advice. Their wide range of expertise is indeed an asset.

In line with the subsidiarity principle, one could imagine a legislative procedure relevant in a crisis context in which the Member State(s) would alert the Union about the emergency situation it/they has/have to face. The Member States would then meet extraordinarily within the Council and act by a majority of its members. In case of emergency, it seems perfectly logical to call on the national institutions of the Member State(s) facing the emergency to propose a draft legislative act (instead of the Commission). Who better than the Member State knows the situation? This option also saves time and enables to draw up a draft proposal very quickly. Later on, this proposal could be submitted to the European Parliament for adoption and open to debate. Eventually, either the European Union Agency for Fundamental Rights could be consulted, or the Court of Justice of the EU could deliver an opinion.

4/ *What kind of control is to be provided for the eventual urgent and/or exceptional EU law-making procedures and measures?*

Would you consider a system of judicial review or rather a system of political accountability?

In what terms should either system operate?

Ideally, both systems should coexist. As far as political accountability is concerned, although it is not always efficient, it seems inconceivable not to establish such a control. Art. 7 TEU already institutes a sanction proceeding in case of "serious and persistent breach by a Member State of the [EU] values"; since the EU is originally based on political cooperation, it would be paradoxical to exclude a system of political accountability. Yet, stigmatizing/humiliating a Member State (as a logical consequence of such political control) cannot suffice to solve a problem. Hence the necessity of a judicial review, which would complement political accountability. Chronologically, political accountability should precede judicial review.

Judicial review turns out to be accompanied by many safeguards respect to political accountability: collegiality and independence are the prominent guarantees that it offers. The Court of Justice of the EU has acquired international recognition as its case-law is considered to be a worldwide reference. Its long-standing experience should be used as an asset. For instance, the institutions (especially the Council of the EU) could possibly be asked to seek advice from the Court of justice; the EU Judge would be entrusted with the task of assessing the validity of the motivation linked to urgent/emergency cases (= preliminary assessment/ruling).

Otherwise, a legal mechanism similar to the French model could be introduced: like the *Conseil Constitutionnel*, the EU Court of Justice would be endowed with the capacity to check a posteriori the legal act and the good development of the legislative process by the same token. The Court would then be in a position to set its own criteria and perform its review uniformly. The advantage of such a control would consist obviously in the uniform interpretation and application of the Treaties, which are vested in the EUCJ.

The *Question prioritaire de constitutionnalité* (Priority Preliminary Ruling on Constitutionality) is a legal device which is part of the French legal order since 2010. It could be transposed to the EU (filtering system by the Supreme Court of the Member State concerned before it refers possibly to the EUCJ under a preliminary ruling procedure).