CNCDH
COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L'HOMME
RÉPUBLIQUE FRANÇAISE

Statement of Opinion on the

Constitutional Bill for the Protection of the Nation

(Plenary assembly - 18 February 2016 - Adopted: unanimity, three abstentions)

1. On 16 November 2015, in his speech before the Parliament assembled in Congress, the President of the Republic announced an imminent revision of the Constitution of 1958, intending to add to it the state of emergency, as proposed by the Committee chaired by Edouard Balladur in 2007[1], as well as the forfeiture of nationality. On 23 December 2015, a constitutional bill *for the protection of the nation* was adopted in the Council of Ministers[2].

2. In the first instance, the CNCDH can only, once more, deplore the failure of the Government to consult it when such a step is fully justified, given the extremely sensitive nature of the matter with regards to the protection of fundamental rights and freedoms[3]. The Commission has thus chosen to self-refer on the project of constitutional reform.

3. Legislative work of a high standard requires a methodical analysis carried out over a sufficient period of time[4], even more so when it concerns a law reforming the Constitution. It is thus imperative that Fundamental Law is sheltered from the turbulence of reform, especially in a period of acute crisis. Indeed, any revision of the Constitution implies a period of real debate to clarify in the long-term the public policies to come, and to respond to the concern of publicly and calmly approaching a subject whose seriousness demands that it must not be treated under the influence of emotions. In this

[1]Committee for evaluation and proposals on the modernization and the rebalancing of the institutions of the Fifth Republic, *A more democratic Fifth Republic (Une Ve République plus démocratique)*, La documentation française 2007, p. 20 : '*It must be acknowledged that, even if it is necessary to update the mechanisms of the state of siege (état de siège) and the state of emergency - which the Committee recommends by amending the provisions of Article 36 of the Constitution in order that the regime of each of these crisis situations is defined by the organic law and that the ratification of their extension be authorized by Parliament under harmonized conditions (Proposal 10) - the diversity of potential threats to national security in the era of globalized terrorism justifies the maintenance of exceptional provisions*'.
[2]National Assembly, *Constitutional Bill for the Protection of the Nation*, No. 3381, filed with the Presidency of the National Assembly on 23 December 2015.
[3]See M. Delmas-Marty, *Freedoms and safety in a dangerous world (Libertés et sûreté dans un monde dangereux)*, PUF 2010, p. 129, which raises that as regards terrorism, the curbing of substantial rights is accompanied sometimes by the same for qualified institutions, such as the CNIL or the CNCDH.
[4]See CNCDH April 15, 2010, *Opinion on the development of laws*, online at: www.cncdh.fr

respect, the recurring evocation in political discourse of the 'war against terrorism'[5] to justify the implementation of the state of emergency, its extension and then a constitutional bill, can only be a concern since if the expression is employed to account for the radicalness of the reaction to the radicalness of terrorist violence, it does not result in it being less subject to caution with respect to the definition of war in international law[6].

4. In a *Declaration on the state of emergency and its consequences* adopted on 15 January 2016, the CNCDH hoped that France would be exemplary in its response to the crisis following the terrorist attacks, since it will be observed by all those having expressed their support to France and, furthermore, by the international authorities[7]. On this subject, the CNCDH reaffirms that the state of emergency, and more generally all the legal provisions intended to perpetuate it, intrinsically threaten fundamental rights and freedoms[8]. Paradoxically, the crisis reinforces the State at the same time as it destabilises it, the risk being therefore that ad hoc and provisional restriction of certain freedoms goes beyond what is strictly necessary for that which the circumstances require[9]. For a long time now, it has been shown, in particular within the framework of work completed under the aegis of the United Nations, that the provisional may sometimes extend for sometimes years[10], an observation that has clearly been bolstered since 11 September 2001 with the permanent threat of globalised terrorism[11]. Under these conditions, one can reasonably question whether the spatio-temporal logic which traditionally governs the state of emergency - the law on the state of emergency of 3 April 1955 was above all conceived for territorial control (Article 1) for a limited duration (Article 3) - is today effective and adapted to facing the jihadist threat which is circumscribed neither in space nor in time[12].

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[5]On this question, see M. Delmas-Marty, 'The paradigm of the war against crime: legitimising the inhumane? (Le paradigme de la guerre contre le crime: légitimer l'inhumain?', *RSC* 2007, p. 461 ; D. Charon, 'The *bellicisation* of the fight against terrorism: a challenge in law' (*La bellicisation de la lutte contre le terrorisme: un défi au droit*) Liber amicorum in honour of Renee Koering-Joulin, Nemesis/Anthemis 2014, pp. 113-135 ; D. Salas, *The will to punish, essay on criminal populism* (*La volonté de punir, essai sur le populisme pénal*), Hachette 2005.

[6]Indeed, in political discourse, the term *'war*' could not be taken in its technical meaning '*of armed aggression*', within the meaning of Article 51 of the United Nations Charter of 26 June 1945

[7]CNCDH 15 January 2016, *Declaration on the state of emergency and its consequences, JORF* No.0031 of 6 February 2016, text No. 57.

[8]See F. Saint-Bonnet, *The state of exception (L'état d'exception),* PUF 2001, p. 16.

[9]G. Braibant, 'The State in the face of crises' (*L'Etat face aux crises*), *Pouvoirs* 1979, pp. 8-9.

[10]N. Questiaux, *A Study on the implications for human rights of states of siege or emergency (Etude sur les conséquences pour les droits de l'homme des développements récents concernant les situations dites d'état de siège ou d'exception),* United Nations (Economic and Social Council), E/CN.4/Sub.2/1982/15, 27 July 1982.
The same observation was made in 1997 in the Léandro Despouy Report (L. Despouy, *Tenth Annual Report and List of States which, since 1 January 1985, Have Proclaimed, Extended or Terminated a State of Emergency,* 23June 1997, E/CN.4/Sub.2/1997/19).

[11]M. Delmas-Marty, *op. cit.*, p. 120; W. Mastor, 'The state of emergency in the United States: *the USA PATRIOT Act* and other violations 'under' the Constitution' (*L'état d'exception aux Etats-Unis : le USA PATRIOT Act et autres violations en règle de la Constitution*), *CRDF,* No. 6, 2007, pp. 61-70.

[12]See F. Saint-Bonnet, 'State of emergency: a constitutional statute given to arbitrariness', *JCP, éd. gén.*, No. 4, 25 January 2016, p. 71, which states that '*terrorist jihadists are not spatio-temporal enemies, that is to say individuals who intend to control whole or part of France according to a political or state-like rationality resulting from modernity. Their community is one of believers who have pledged allegiance to the Caliph Al Baghdadi, whatever their nationality. Their space is universal, any territory which does not live under the Sharia Empire is deemed to be land for jihad. Their objectives are not territorial or political, they are to convert or deliver justice by 'avenging insults' to the prophet, through killing. And especially, they do not seek any safety on earth because their true safety is above, with Allah, (…) these are however for Westerners the 'martyrs' by antiphrasis since they consider them as executioners, while the true martyrs are the victims of this blind terrorism. The state of emergency is largely deprived of effectiveness in the face of the jihadist threat* '.
See also on these questions, F. Saint-Bonnet, 'Jihadist terrorism and modern legal categories' (*Le terrorisme djihadiste et les catégories juridiques modernes*), *JCP, éd. gén.*, No. 50, 7 December 2015, p. 1348 ; P. Morvan, 'Jihadist terrorism: a criminological view' (*Le terrorisme djihadiste : regard criminologique*), *JCP, éd. gén.*, No. 1-2 11 January 2016, doctr., p. 34; J.-C. Paye, *The end of the rule of law. The anti-terrorist fight*

5. In a legitimately emotional context, the constitutionalization of the state of emergency and forfeiture of nationality, undertaken in the name of the fight against terrorism, raise political and philosophical questions of great amplitude and complexity, which do not allow for hasty responses[13]. The CNCDH can thus only express its astonishment at the engagement to constitutional reform very shortly after the declaration of the state of emergency[14]. This constitutional reform is also happening at a time when Parliament has just extended the state emergency for a duration of three months (until 26 May 2016)[15] and while a debate is in progress in the National Assembly on a bill *reinforcing the fight against organized crime, terrorism and the financing of these, and improving the effectiveness and the safeguards of criminal procedure*. Indeed, it should be remembered that fundamental law, as Hannah Arendt has written, '*the shadow of foundation*', necessarily fits the time of generations past, present and future[16], and also that several foreign constitutions prohibit the revision of fundamental law under exceptional conditions, such as the state of emergency[17]. In France, the Constitutional Council also believes that a revision of the Constitution should not be engaged in or carried out in the period of application of Article 16[18].

6. In addition to the moment chosen to proceed with such a reform which makes the Constitution an instrument of political conjecture[19], the constitutional bill for the protection of the nation causes, with its dual aims - to add the state of emergency (I) and forfeiture of nationality (II) to the Constitution - the sharpest of concerns with the CNCDH.

I. WRITING THE STATE OF EMERGENCY INTO THE CONSTITUTION

7. Article 1 of the constitutional bill envisages inserting Article 36-1 after Article 36 of the Constitution, written thus: ' *The state of emergency shall be declared in the Council of Ministers, on whole or part of the territory of the Republic, either in the event of imminent danger resulting from serious threats to public law and order, or in the event of occurrences presenting, by their nature and their gravity, the characteristics of public calamity. The law establishes administrative police measures that the civil authorities may take to prevent this danger or to face these events. The extension of the state of emergency beyond twelve days may only be authorized by law. This law shall fix the duration*'.

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from the state of emergency to dictatorship (La fin de l'Etat de droit. La lutte antiterroriste de l'état d'exception à la dictature), La Dispute 2004, p. 10.

[13]See M.-L. Basilien-Gainche, *State of law and states of exception. A concept of the State, (Etat de droit et états d'exception. Une conception de l'Etat)* PUF 2013, p. 238, who writes '*there are some dangers in making laws on exceptional states in acute crisis situations: those in power are justified in making provisions which produce an irrational confusion of powers and excessive restriction of freedoms; an over-flexible definition of conditions and the authorization to concentrate powers too greatly are likely to lead to excessive or usurped use*'.

[14]See B. Francois, 'The separation of powers undermined' (*La séparation des pouvoirs mise à mal*), *Le Monde*, 22 December 2015.

[15]http://www.assemblee-nationale.fr/14/dossiers/prorogation_application_loi_55-385.asp

[16]D. Salas, *Hearing of 26 January 2016.*

[17]For example: Article 169 of the Constitution of Spain, Article 19-7 of the Constitution of Portugal, Article 147 sub-paragraph 2 of the Constitution of Lithuania, Article 170-5 of the Constitution of Albania, Article 117 of the Constitution of Estonia.

[18]Constitutional Council 2 September 1992, No. 92-312 DC., cons. 19

[19]See I. Boucobza and C. Girard, 'Constitutionalizing the state of emergency or how to treat the obsession with unconstitutionality?', *La Revue des droits de l'homme [online] La Revue des droits de l'homme,* put online on 5 February 2016.

8. These new provisions raise two series of concerns, the first one on the actual principle of writing the state of emergency into the Constitution of 1958 (A), the second, on the legal status of the state of emergency which is defined by the constitutional bill (B).

A. NOT WRITING THE STATE OF EMERGENCY INTO THE CONSTITUTION

9. Article 16 of the Declaration on Human Rights states: '*Any society in which the guarantee of Rights is not assured, nor the separation of powers, has no Constitution*'. If the very purpose of a constitution is not only to define the powers by putting them in a framework, but also to guarantee fundamental rights[20] and freedoms, the merits of the presence of provisions relating to the state of emergency in the Constitution must be questioned.

10. Constitutionalising the state of emergency amounts to placing it on the same level in the hierarchy of legal norms as fundamental rights and freedoms, in particular those established in the Declaration of human rights of 1789. Emergency powers and fundamental rights and freedoms are thus connected in normative equality[21]. Under these conditions, the CNCDH fears that the pre-eminence of the latter is, at least symbolically, considerably weakened, compared to the current state of the law which, by enshrining the state of emergency in a law, maintains it at an inferior level than that of the body of constitutional rules[22]. To relativize this observation, it is sometimes advanced that constitutional provisions relating to the state of emergency could, if necessary, be assessed in the light of international and European obligations, in particular those arising from Article 15 of the European Convention on Human Rights (ECHR)[23] and Article 4-1 of the International Covenant on Civil and Political Rights (CCPR)[24]. It should be noted however that an ordinary judge does not control the legal conventionality of constitutional provisions, as the hierarchy of legal norms - which arises in France from Articles 54 and 55 of the Constitution - make the Constitution the supreme law in the internal legal order, this prevails over international standards[25]. It is thus only to the European Court of Human Rights that it will fall, if necessary, to assess the compatibility of the new Article 36-1 with the requirements of Article 15 of the ECHR. It goes without saying that the exercise of such an assessment will be more delicate than that of the Court on an ordinary law[26], since in this latter case, the obligation to exhaust the grounds

[20]On the material concept of Constitution arising from Article 16 of the DDHC, see B. Mathieu, *Constitution: nothing moves and everything changes (Constitution: rien ne bouge et tout change)*, lextenso éditions 2013, pp. 12-13; G. Koubi and R. Romi, *State, Constitution, Law (Etat, Constitution, Loi). Foundations for a reading of constitutional law through the prism of the Declaration of 1789 (Fondements d'une lecture du droit constitutionnel au prisme de la Déclaration de 1789),* Editions de l'Espace européen 1991, pp. 59-68; P. Pactet, *Institutions politiques et droit constitutionnel,* Masson 1989, p. 66 (which evokes constitutionalism); J. Gicquel and J. - E. Gicquel, *Droit constitutionnel et institutions politiques,* Domat 2015, p. 38.

[21]On this, see L. Fontaine, 'The constitutionalization of emergency powers as a safeguard of right? The example of Eastern-European democracies at the end of the 20th century' (La constitutionnalisation des pouvoirs d'exception comme garantie des droits? L'exemple des démocraties est-européennes à la fin du XXè siècle *CRDF* No. 6, 2007, pp. 56-57.

[22]L. Fountain, abovementioned article, p. 56: '*if one attempts to impose onto emergency powers the respect of rights and freedoms with which they enter into conflict, it is necessary to give to the latter a higher normative status: either by recognizing the existence a supra-constitutionality, or by reducing the normalcy of the emergency powers which should thus only remain legislative. The advantage of this last solution could be to not exclude possible control of the use of emergency powers, by subordinating them to the Constitution*'.

[23]See S. Slama, *Hearing of 14 January 2016*.

[24]*General Observation No. 29,* États d'urgence (art. 4) of 24 July 2001, United Nations CCPRCCPR/C/21/Rev.1/Add.11.

[25]CE, Ass. 30 October 1998, *Sarran,* No. 200286 and 200287: '*the supremacy conferred on international engagements does not apply in the internal legal order to the provisions of a constitutional nature*'; Cass. Ass. Plén. 2 June 2000, *Mme. Fraisse*, No. 99-60.274.

[26]L. Fountain, abovementioned article, p. 57.

for appeal internally leads national judges to proceed, upstream, with a verification of legal conventionality.

11. The CNCDH also fears that the new Article 36-1 of the Constitution of 1958 is not only intended, as is explicitly clear from *the Explanatory memorandum* of the constitutional bill, to serve as constitutional grounds for future legislative provisions threatening fundamental rights and freedoms[27] through a considerable reinforcement of policing powers to the benefit of the civil authorities[28]. Presently several provisions of the bill *reinforcing the fight against organized crime, terrorism and the financing of these, and improving the effectiveness and the safeguards of the criminal procedure* aim at enshrining in national law certain measures inspired by the state of emergency and thus, through their normalization, normalize emergency powers. As Guy Braibant quite rightly states, '*crises leave behind them a thick tide of sediment of legal pollution*', when the laws providing for extraordinary measures survive the circumstances which gave rise to them[29]. Furthermore, the Council of State has underlined '*the useful effects*' [30]of the constitutional reform, in that it would provide an '*incontestable basis*' for the reinforcement in law of the administrative police measures taken by the civil authorities during the state of emergency[31]. Without going as far as imagining that because of this 'incontestable basis' any control of the constitutionality of laws to come would be irremediably destined for failure, the CNCDH fears nevertheless that it has as a consequence the displacing of such control, since the constitutional provisions of reference will no longer be only protective provisions for rights and freedoms, but provisions which, in organizing the state of emergency, authorize restrictions of these rights and freedoms.

12. For its part, the Constitutional Council has accepted that the regime of state of emergency be provided for by the law in stating that '*although the Constitution, in Article 36, expressly cites a state of siege, it does not therefore exclude the possibility for the legislator to provide for a regime of state of emergency to reconcile the requirements of liberty and the safeguarding of law and order*'[32]. The state of emergency, contrary to the state of siege of Article 36 of the Constitution of 1958, was deliberately muted by the Constitution - since it is not related to a war and does not transfer policing powers to the military authorities[33]- as in the context of the 'war in

[27]*Explanatory memorandum*, p. 3: '*In order to effectively fight terrorism, as the State has a duty to do, all of the political leaders desired that the state of emergency be implemented and extended under the conditions provided for by the law of 20 November 2015, which has modified the Law of 3 April 1955, sixty years after its adoption. However, due to a lack of a constitutional basis, this modification has remained partial. Such a basis is in fact necessary to modernize this regime under conditions such that the police and gendarmerie may implement, under the control of a judge, the means suitable to fight the threats of violent radicalisation and terrorism. The new Article 36-1 of the Constitution relating to the state of emergency, which is the object of the first article of this constitutional bill, provides the framework for this legal status*'.

[28]For example, identity checks without the need to justify particular circumstances establishing the risk of threat to law and order and, if necessary, the checks of vehicles with the opening of trunks/boots; administrative detention, without preliminary authorization, of those present in the residence or the premises being the subject of an administrative search; administrative seizure of objects and computers during administrative searches (see *Explanatory memorandum*, pp. 4-5.).

[29]G. Braibant, abovementioned article, p. 8.

[30]Council of State (General Assembly/Section of the interior) 11 December 2015, *Opinion No. 390866 on the constitutional bill for the protection of the nation*, § 10.

[31]See National Assembly, *Report No. 3451 in the name of the Law Commission (…) on the constitutional bill (No. 3381) for the protection of the nation*, Paris 2016, pp. 11-12, which specifies moreover that constitutionalization will make it possible to avoid censure of the new legislative provisions by the Constitutional Council.

[32]Cons. const. 25 January 1985, No. 85-187 DC.; Constitutional Council 22 December 2015, No. 2015-527 QPC.

[33]See A.-M. Pourhiet, *Hearing of 11 January 2015,* who specifies moreover that Article 36 of the Constitution of 1958 fixes an absolute rule for parliamentary competence supplementing that of Article 35, according to which '*a declaration of war shall be authorized by Parliament*'. These two provisions are tightly bound and appear in

Algeria' for which in no case was the term to be mentioned[34]. However, the 1958 Constitution does not deal comprehensively with all emergency regimes and it is down to the legislature to ensure respect for the rights and freedoms guaranteed under the Constitution in the context of this particular regime that is the state of emergency. Indeed, constitutional jurisprudence contains *'a constitutionality of exception, or a temporary regime in which the guarantee of freedoms still exists albeit at a lower level than that which citizens enjoy in a normal period*'[35].
Moreover, since the law of 1955 could be quickly adapted to the needs of the moment[36] and that the mechanisms of control - the Constitutional Council and Council of State - functioned overall[37], constitutionalizing the state of emergency is not of any utility. The CNCDH believes that the first necessity would be to improve the provisions of the Law of 3 April 1955 in the sense of a better guarantee of fundamental rights and freedoms in order to remedy the anomalies and deviations which have been observed within the context of the implementation of the state of emergency[38].

B. ON THE REGIME OF THE STATE OF EMERGENCY DEFINED BY THE CONSTITUTIONAL BILL

13. Following the Balladur Committee in 2007, a proportion of commentators decided in favour of writing the state of emergency into the Constitution[39], since that would ensure a limited scope on the restrictions imposed on the concentration of powers and the restriction of fundamental rights and freedoms. The National Assembly, for its part, adopted the constitutional bill on 10 February 2016. The CNCDH however makes a point of underlining the serious defects which taint this bill in its current state

14. In the first instance, the legislative drafting quality of Article 1 of the constitutional bill poses a problem. Firstly, the conditions for declaring a state of emergency are defined in an extremely vague way[40]: the '*imminent danger resulting from serious threats to public order*' and '*the events which present, by their nature and gravity, the characteristics of*

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the same article in the preliminary draft of the Constitution bill, as was also the case in Article 7 of the Constitution of 1946 modified in 1954.

[34]For more details, see A. Heymann-Doat, *Public freedoms and the war in Algeria (Les libertés publiques et la guerre d'Algérie)*, LGDJ 1972.

[35]F. Saint-Bonnet, 'State of emergency: a constitutional statute given to arbitrariness' (*État d'urgence : un statut constitutionnel donné à l'arbitraire*), abovementioned article. See L. Fontaine, abovementioned article, p. 54; M. Rouzeau, 'External crisis and internal security' (*Crise extérieure et sécurité intérieure*), *Pouvoirs* No. 58, 1991, p. 53.

[36]See F. Saint-Bonnet, 'State of emergency: a constitutional statute given to arbitrariness' (*État d'urgence : un statut constitutionnel donné à l'arbitraire*), abovementioned article. In effect, the law of 1955 has evolved according to the problems at hand, and even so very recently with law No. 2015-1501 of 20 November 2015 *extending the application of law No.55-385 of 3 April 1955 relating to the state of emergency and reinforcing the effectiveness of its provisions*.

[37]See A. Heymann-Doat, *Hearing of 11 January 2016*.

[38]See CNCDH 18 February 2016, *Opinion on the monitoring of the state of emergency*, online at: www.cncdh.fr

[39]See M.-L. Basilien-Gainche, *op. cit.*, p. 238; P. Caille, 'The state of emergency. The Law of 3 April 1955 between maturation and distortion' (*'L'état d'urgence. La loi du 3 avril 1955 entre maturation et dénaturation'*), *RDP* 2007, pp. 347-349; F. Rolin, 'The state of emergency (L'état d'urgence), *in*: B. Mathieu (dir.), *1958-2008. Fiftieth anniversary of the French Constitution*, Dalloz 2008, pp. 618-619; D. Rousseau, 'An admissible bill but which must be rewritten' (*Un projet recevable mais qui doit être réécrit*), *Le Monde* 22 December 2015; J.-P. Derosier, 'The state of emergency: an exceptional and provisional regime' (*L'état d'urgence : un régime exceptionnel et provisoire*), *La Semaine Juridique Administrations et Collectivités territoriales* No. 47, 23 November 2015, act., p. 957; J.-P. Derosier, 'A regime of exception which reinforces the rule of law and democracy' (*Un régime d'exception qui renforce l'Etat de droit et la démocratie*), *Le Monde* 2 February 2016; S. Slama, *Hearing of 14 January 2016*.
See R. Drago, 'The state of emergency (laws of 3 April and 7 August 1955) and public freedoms' (*L'état d'urgence (lois des 3 avril et 7 août 1955*) *et les libertés publiques*), *RDP* 1956, p. 704, which proposed writing the state of emergency into the Constitution in order to remove the political state of siege.

[40]See M.-L. Basilien-Gainche, *op. cit.*, p. 240; A.-M. Le Pourhiet, *Hearing of 11 January 2016* ; O. Beaud, *Hearing of 14 January 2016*.

public calamity'. Such reasons are sufficiently broad to make it possible for the Head of State to declare this state of emergency with ease[41] and go beyond the exemptions provided for by international instruments binding France. In this respect, the CNCDH notes that the reasons for declaring a state of exception provided for by Articles 15-3 of the ECHR and 4-1 of the CCPP ensure a better framework for such, and that it is thus advisable to dispel the reserves raised during the ratification of these engagements as quickly as possible, in order to give to the monitoring bodies the possibility of real control.

In addition, the new provisions provide that administrative police measures relating to the state of emergency can be taken, to not only prevent, but also '*to face these events*'. This ambiguous wording shows that these measures would not have the sole and unique objective of the prevention of a breach of law and order[42], which leaves one thinking that one would no longer be within the scope of the administrative police, but of the judicial police. In the view of the CNCDH, it goes without saying that such measures should, barring a misinterpretation of Article 16 of the DDHC, be placed under the governance and the control of the legal authority[43].

15. Secondly, sub-paragraph 2 of Article 36-1 of the draft bill empowers the law to set administrative police measures that the civil authorities can take within the framework of the state of emergency. The CNCDH considers that the constitutional bill - which lays down the principle of writing the state of emergency into the Constitution - could at the very least have provided for a reference to an organic law. Such a reference would allow for a better framing of the regime of a state of emergency, in particular as an organic law is obligatorily subject to a verification of constitutionality by the Constitutional Council. Moreover, the technique of reference to the 'law' is not in any way protective, since the Constitution entitles the legislator to use discretionary power, without being framed in restrictive material provisions[44]. Finally, the CNCDH is surprised by a reference to the law - a material criterion -, rather than to Parliament - an organic criterion -, as is the case in Article 36 within the framework of the state of siege. The executive should not itself be able to, on the basis of an enabling law, modify the legal status of the state of emergency by way of Order under the conditions set out in Article 38 of the Constitution of 1958.

16. Thirdly, Article 36-1 also enables the law to extend the state of emergency beyond 12 days, and for a duration of four months in the latest version of the law[45]. The new provisions do not specify however that the law of extension determines the 'definitive' duration of the state of emergency (as is currently the case with the law of 1955, Article 3), which implicitly authorizes a succession of four-month extensions without a time limit[46]. In this respect, the CNCDH warns against the possibility of a permanent state of emergency and all the more so as the legislator has authorized a second extension without respecting the framework set out by Articles 2 and 3 of the law of 1955[47], which

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[41]O. Beaud, 'State of emergency: a constitutional statute given to arbitrariness' (*État d'urgence : un statut constitutionnel donné à l'arbitraire*), *JCP, éd. gén.* No. 4, 25 January 2016, p. 71.

[42]I. Boucobza and C. Girard, abovementioned article.

[43]See Constitutional Council 19 January 2006, No. 2005-532 DC.

The Constitutional Council has clearly ruled that administrative police measures should not be authorized by the legal authority (Constitutional Council 29 November 2013, *Wesgate Charles Ltd*, No. 2013-357 QPC, in connection with customs officers inspecting ships).

[44]O. Beaud, 'State of emergency: a constitutional statute given to arbitrariness' (*État d'urgence : un statut constitutionnel donné à l'arbitraire*), abovementioned article.

[45]'*The extension of the state of emergency beyond twelve days may only be authorized by law. This sets the duration, which cannot exceed four months. This extension can be renewed under the same conditions*'.

[46]See A. Heymann-Doat, *Hearing of 11 January 2016*; O. Beaud, *Hearing of 14 January 2016*; D. Salas, *Hearing of 26 January 2016*.

[47]See Senate, *Bill No. 356 extending the application of law No. 55-385 of 3 April 1955 relating to the state of emergency*.

require, in such a case, that the procedure be recommenced by a decree. The exceptional state (of emergency), which must remain provisional, should not become permanent: the single and unique objective is a rapid return to normality[48].
In addition, the bill for constitutional reform provides that the extension of the state of emergency is authorized by the law and not by Parliament. For the same reasons as previously, the CNCDH is opposed to the executive, on the base of an enabling law, deciding to extend the state of emergency on the basis of an Order as under Article 38[49].

17. Fourthly, it is appropriate to highlight several shortcomings in the initial version of the constitutional bill, some of which were resolved by the National Assembly on 10 February 2016. The CNCDH highlights the lack of:

- an obligation, in order for the competent authority to declare the state of emergency and for this competent authority to extend it, that it justifies the purpose of the state of emergency (fight against terrorism, etc.), when such an obligation would oblige the administrative authority to order individual police measures with the strictest respect of these purposes;
- limits on the scope of application of the state of emergency, with no objective criterion establishing a correlation with the danger or events cited[50];
- an interdiction on dissolving the National Assembly throughout the duration of the state of emergency, which however the National Assembly had approved in the law adopted on 10 February 2016[51];
- a reminder of the requirements of appropriateness[52], necessity, and proportionality[53], which implies a constant re-examination of the necessity for the emergency measures[54];
- a reminder of the requirement of non-discrimination in the implementation of the state of emergency, given that under Article 4-1 of the CCPP[55] , the derogations should in no case lead to discrimination based '*solely on race, colour, sex, language, religion or social origin*';
- of a mechanism of parliamentary or other control (Constitutional Council) of the monitoring of the state of emergency. In this respect, the National Assembly provided, in the law adopted on 10 February 2016, for the organization of parliamentary control[56] ;
- a mention of a lifting of the restrictions in order to allow a full evaluation by international and European bodies;
- of a listing or reference to inalienable rights. On this subject, certain foreign Constitutions provide for, in states of emergency, either a restrictive list of

[48]N. Questiaux, *op. cit.*, p. 16.
[49]See A.-M. Pourhiet, *Hearing of 11 January 2016*.
[50]See, the group report *The urgency to exit [the state of emergency] (L'urgence d'en sortir)*, p. 56.
[51]Article 36-1 sub-paragraph 3: '*For the duration of the state of emergency, Parliament shall meet without convocation and the National Assembly shall not be dissolved*'
[52]In particular to guarantee the appropriateness between the circumstances which are at the origin of the state of emergency and the means implemented.
[53]In this respect, note that the European Court of Human Rights exerts control of proportionality on the basis of Article 15 of the ECHR. Reiterating that States do not enjoy unlimited power, the Court of Strasbourg states that it '*is competent to decide, in particular, if they exceeded the extent of the requirements of the crisis. The national assessment is thus accompanied by European control. When it exerts this control, the Court must at the same time weigh up what is appropriate for relevant factors such as the nature of the rights affected, the duration of the state of emergency and the circumstances which created it* ' (ECHR 26 May 1993, *Brannigan and Mc Bride vs. The United Kingdom*, req. No. 14553/89 and 14554/89, § 43).
[54]ECHR 26 May 1993, abovementioned case of *Brannigan and Mc Bride vs. The United Kingdom*§ 54 which states that Article 15-3 '*demands a permanent review of the necessity for emergency measures*'.
[55]See also Article 27-1 of the American Convention on human rights.
[56]Article 36-1 sub-paragraph 4: '*The regulations of the assemblies provide for the conditions under which Parliament controls the implementation of the state of emergency*'

fundamental rights which may be limited[57], or a hard core of inalienable rights[58]. In international and European law[59], the idea of establishing a list of inalienable rights, in the event of exceptional circumstances, was developed in 1982 within the framework of the United Nations[60], then in 1995 by the Commission of Venice under the aegis of the Council of Europe[61].

18. Taking into consideration what precedes, the CNCDH recommends that any law relating to the state of emergency (constitutional, organic, or ordinary) focus on:

- ***Regarding the implementation of the state of emergency:***

- Clearly and narrowly defining the specific, objective circumstances[62] justifying the declaration of the state of emergency;
- Providing for the obligation, for the competent authority which declares the state of emergency and for competent authority entitled to prolong it, to justify the purposes of the state of emergency;
- Establishing safeguards for the spatial implementation of the state of emergency;

[57]Article 91 of the German Fundamental Law specifies that the restrictions within the framework of the state of emergency can relate only to the rights guaranteed in Articles 10 and 11, namely: the confidentiality of correspondence and communications, and the freedom of movement and establishment.
Article 116 of the Spanish Constitution provides that the fundamental rights that may be restricted may only be those provided for in Article 55-1, namely: the right to freedom and safety, the inviolability of the home, the confidentiality of communications, the freedom of movement and residence, freedom of expression and information, the right to free assembly and the right to strike.

[58]It is this which is used in the Bulgarian, Hungarian, Slovenian, Russian, Polish, Croatian, Estonian and Macedonian constitutions (for a detailed presentation see L. Fountain, abovementioned article, pp. 54-55).
For example, Article 233 of the Polish Constitution: '*the law defining the extent of the restriction on freedoms and human and civil rights during the state of siege and the state emergency cannot limit the freedoms and rights provided for in Article 30 (human dignity), in Articles 34 and 36 (nationality), in Article 38 (protection of life), in Articles 39, 40 and the fourth sub-paragraph of Article 41 (humane treatment), in Article 42 (criminal responsibility), in Article 45 (access to justice), in Article 47 (personal possessions), in Article 53 (conscience and religion), in Article 63 (right to petition) and in Articles 48 and 72 (family and child).*
It is forbidden to limit freedoms and human and civil rights based only on race, sex, language, religion or non-belief, social origin, ancestors or wealth.
The law defining the scope of the restriction on freedoms and human and civil rights during the state of calamity may limit the freedoms and rights provided for in Article 22 (economic freedom), the first, third and fifth paragraphs of Article 41 (personal liberty), Article 50 (inviolability of the home), the first paragraph of Article 52 (freedom of movement and residence in the territory of the Republic of Poland), the third sub-paragraph of Article 59 (right to strike), Article 64 (right to property), the first paragraph of Article 65 (freedom to work), the first paragraph of Article 66 (right to safety and hygiene in the workplace) and the second paragraph of Article 66 (right to rest)'

[59]In international and European law, the inalienable rights are the right to life (Article 6 CCPP, Article 2 ECHR, Article 4 ACHR), the prohibition of torture (Article 7 CCPP, Article 3 ECHR, Article 5 ACHR), the prohibition of slavery (Article 8 CCPP, Article 4 ECHR, Article 6 ACHR), the prohibition of retroactive criminal measures (Article 15 CCPP, Article 7 ECHR, Article 9 ACHR), the right to the recognition of legal personality (Article 16 CCPP, Article 18 ACHR), and the freedom of conscience and religion (Article 18 CCPP, Article 12 ACHR). It would also be appropriate, as it arises from a general Observation of the Committee on Human Rights, *General Observation* No. 29 (2001) and recommendations of the Commission of Venice (European Commission for democracy through law, *op. cit.*., p. 26.), to add to this list procedural rights (right of access to justice, right to effective appeals, presumption of innocence, right of defence, right to silence, etc.).

[60]N. Questiaux, *op. cit.*, p. 15.

[61]European Commission for Democracy through Law, *Exceptional powers (Les pouvoirs d'exception)*, CoE, coll. Science et technique de la démocratie, 1995, pp. 25-26.

[62]See European Commission for Democracy through Law, *op. cit.*, p. 25 *('Emergency situations which may lead the declaration of a form of state of emergency must be clearly defined and delimited by the Constitution. In other words, it is necessary that the existence of a real and imminent danger is clearly specified*').
Note that the Strasbourg Court, interpreting Article 15 of the ECHR states that the words '*in case of war or other public emergency threatening the nation*' indicates '*a crisis situation or situation of exceptional imminent danger and which affects the whole population and constitutes a threat to the daily life of the community forming the State*' (ECtHR 1 July 1961, *Lawless vs Ireland*, req. No. 332/57, § 28).

- Prohibiting the dissolution of the National Assembly throughout the duration of the state of emergency[63] and providing for its assembly without convocation;
- Providing for regular control by the Constitutional Council, in order to verify that the conditions for the purposes of the state of emergency remain[64];
- Providing for parliamentary control of the implementation of the state of emergency;
- Stating the requirements of appropriateness, necessity, and proportionality[65];
- Guaranteeing the requirement of non-discrimination in the implementation of the state of emergency;
- Referring to the inalienable rights in international commitments;

- ***Regarding the extension of the state of emergency:***

- Prohibiting the executive, on the basis of an enabling law, from deciding to extend the state of emergency on the basis of an Order as under Article 38;
- Setting out the duration of the state of emergency and more specifically that of an extension beyond 12 days by providing for the fact that only Parliament shall make this decision; that Parliament establishes the definitive duration in respect of the persistence of the circumstances having justified the implementation of the state of emergency. Following this extension, it is the responsibility of the executive to decide to start the procedure again, if the circumstances justify this;

- ***Regarding the measures to be taken within the framework of the state of emergency:***

- Proceeding with a reference to the organic law, and not to the fundamental law, to define the administrative police measures relating to the state of emergency[66], it being specified that the executive shall not modify by itself, on the basis of an enabling law, the legal status of the state of emergency by way of Order under the conditions set out in Article 38 of the Constitution of 1958.

II. WRITING THE FORFEITURE OF NATIONALITY INTO THE CONSTITUTION

19. Presently, Article 34 of the Constitution merely states that '*The law establishes the rules on nationality*'. In the version adopted in the Council of Ministers, the second article of the bill for constitutional reform modifies the scope of the law, by specifying that it applies to '*nationality, including the conditions under which a French-born person who holds another nationality can be stripped of French nationality when they are convicted of a crime constituting a serious threat to the nation*'. The National Assembly amended the text, which is now written in the following way: the law establishes the rules concerning '*nationality, including the conditions under which a person can be stripped of French nationality or the rights accorded to this when they are convicted of a crime constituting a serious threat to the nation*'.

[63]See National Assembly, *abovementioned Report No. 3451*, p. 19.
[64]As is provided for in the last sub-paragraph of Article 16 of the Constitution of 1958 which states: '*After thirty days of the exercise of the emergency powers, the Constitutional Council may be called upon by the President of the National Assembly, the President of the Senate, or a grouping of sixty deputies or sixty senators, for the purpose of examining whether the conditions stated in the first subparagraph remain. It pronounces its decision within the shortest possible time through a public statement. It automatically proceeds with this examination and decides under the same conditions after sixty days of the exercise of the emergency powers and at any moment beyond this duration*'.
[65]See European Commission for Democracy through Law, *op. cit.* p. 26; Public Defender of Rights, 25 January 2016, *Opinion No. 16-03*, p. 12:
[66]See O. Beaud, *Hearing of 14 January 2016*; S. Slama, *Hearing of 14 January 2016*.

20. From the outset, the CNCDH must express its firm opposition to the extension of the scope of application of the forfeiture of nationality[67] and, more strongly, that this be by way of a reform of the Constitution.

A. ON THE PRINCIPLE OF THE WRITING THE FORFEITURE OF NATIONALITY INTO THE CONSTITUTION

21. The *Explanatory memorandum* of the constitutional bill justifies the need for constitutional reform due to the existence of a fundamental principle recognized by the laws of the Republic that the Constitutional Council could be led to apply, if an ordinary law provided for the possibility of stripping a French-born person of their nationality. This eventuality is founded on the idea that '*the laws of the Republic have consistently reserved the punishment of deprivation of nationality to the case of a dual-national who has become French*'.
    Yet this risk of unconstitutionality is far from being proven, since the forfeiture of nationality, contrary to what the explanatory memorandum states, has always been provided for by French law, including French-born French persons. Recourse to preventive reform is thus not justified.
    In any event, the CNCDH believes that the Constitution aims at ensuring, under the terms of Article 16 of the DDHC, the safeguard of rights, and that measures restricting rights and freedoms, such as the forfeiture of nationality, should not feature in it[68].

22. Although the Council of State, in its aforementioned opinion of 11 December 2015, certainly supports such a project, it has nevertheless been very measured on the necessity for a constitutional amendment to include the forfeiture of nationality of dual nationals who are convicted of terrorist offences as in the 1958 Constitution, its main argument may ultimately be summarized through the laconic observation that '*the principle of this measure should be included in the Constitution in view of the risk of unconstitutionality which would weigh on ordinary law*"[69]. It is astonishing that the test of constitutionality is considered here to be a risk, and from that, as an argument in favour of constitutionalization, whereas this test has the sole purpose of ensuring the respect of the Constitution, a respect which arises as an object of duty. Moreover, the constitutionalization of the forfeiture of nationality limits, as has been previously raised in connection with the state of emergency, the test of its legal conventionality[70] .

23. Consequently, the CNCDH asserts its strongest reservations on the appropriateness of the legislative process chosen, that is to say a constitutional law, and thus on the relevance of the constitutional reform itself. The same applies to the extension of the scope of application of the forfeiture of nationality.

B. ON THE FORFEITURE OF NATIONALITY DEFINED BY THE CONSTITUTIONAL BILL

1. Regarding the personal scope of application of the forfeiture of nationality

[67]See CNCDH 6 January 2011, *Opinion on the modifications made by the National Assembly to the bill on immigration, integration and nationality*, online at: www.cncdh.fr, § 15.
[68]See A.-M. Le Pourhiet, *Hearing of 11 January 2016*; O. Beaud, 'This project of constitutional reform is pointless and inept' (*Ce projet de réforme constitutionnelle est inutile et inepte*), *Le Monde* 2 February 2016.
[69]Council of State (General Assembly/Section of the interior) 11 December 2015, *abovementioned Opinion,* § 5.
[70]On this matter, one must however raise the issue of the control which the Court of Justice of the European Union is likely to exert when a citizen of the Union becomes a stateless person following the withdrawal of their nationality by a State of the Union, since they thus lose the status of citizen of the Union conferred by Article 20 of the TFEU, which is the fundamental status of nationals of Member States (CJUE March 2, 2010, *Janko Rottman vs. Freistaat Bayern,* C-135/08).

a) The criticisms held by the CNCDH concern the version of the constitutional bill adopted in the Council of Ministers on 23 December 2015

24. Article 2 of the draft constitutional bill provides, in its initial version, for the extension of the deprivation of nationality to any '*person born in France who holds another nationality*'. Further to French nationals by acquisition whose forfeiture of nationality is already provided for, under certain conditions, if they are dual nationals, the extension targets French nationals by attribution, that is to say people born French and who hold another nationality (dual or multinational)[71]. On this subject, the CNCDH makes several criticisms.

25. First criticism, the first article of the Constitution of 1958 sets out that '*France is an indivisible Republic, secular, democratic, and social. It ensures the equality of all citizens (…)*'. However the new provisions listed above implicitly introduce differential treatment, which is no longer between 'French persons of birth' and 'French persons by acquisition'[72], but between those who are exclusively French (single nationality) and those who have another nationality (dual nationality).This type of distinction is radically contrary to all republican principles, in particular those set out in Article 1 of the Constitution[73]. As all French persons are equally French, the CNCDH reiterates its irreducible opposition to the creation of categories of French persons[74]. In addition, such distinctions can only threaten social cohesion at a time when it is absolutely necessary to refuse any form of stigmatization and rejection of the 'Other'. In short, these are the very bases of the republican pact which are thus being called into question, whereas, not without paradox, this questioning is one of the aims pursued by the perpetrators of acts of terrorism[75].

26. Second criticism, an additional distinction is introduced, in an indirect way, by the constitutional bill, since not all dual nationals are in the same situation. In effect, if it is permissible for certain people to give up a nationality other than their French nationality, others cannot do so, since they are from - sometimes against their will - a State whose right of nationality is part of a system of perpetual allegiance. The French Constitution, in a remarkable abandonment of sovereignty, would thus put the fate of certain French persons in the hands of foreign States whose law radically contravenes a founding principle of the Republic: the elective nature of citizenship.

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[71]More precisely, the extension of the personal scope of application of the forfeiture of nationality targets dual- or multi-nationality people or people born French by filiation (Articles 18 and 20 of the Civil Code), those born French to a parent who was born in France ('double right of birthplace' provided for by Article 19-3 of the Civil Code), as well as those born in France to stateless parents or foreign parents or who do not pass down their nationality because of foreign laws which oppose this (Article 19-1 of the civil code).

[72]See Constitutional Council 16 July 1996, No. 96-377 DC which states that with '*regard to the law of nationality, people who have acquired citizenship and those to whom French nationality has been assigned at birth are in the same situation*' However, under the terms of this same decision, '*the legislature has been able, taking into account the objective to reinforce the fight against terrorism, to provide for the possibility for a limited period for the administrative authority to strip French nationality from those who have acquired it, with no difference in treatment resulting from this which violates the principle of equality* ' (cons. 23). Confirmation Constitutional Council 23 January 2015, No. 2014-439 QPC.

[73]See C. Teitgen-Colly and F. Julien-Laferrière, 'Acts of terrorism and the rights of foreigners' (*Actes de terrorisme et droit des étrangers*) *AJDA* 1996, p. 86, for a critique of this distinction introduced in 1996 by the law *aiming to reinforce the repression of terrorism* (…) and to which the Constitutional Council had accepted in 1996 (abovementioned decision of 16 July 1996), a distinction which it confirmed in 2015 (abovementioned decision of 23 January 2015), but in stressing however the limits posed by the law on the forfeiture of nationality of French nationals by acquisition.

[74]See F. Jault-Seseke, S. Corneloup and S. Barbou des Places, *Rights of nationality and foreigners,* PUF 2015, No. 220, pp. 187-188.

[75]See in particular D. Bénichou, F. Khosrokhavar and P. Migaux, *Jihadism. Understanding it to better fight it (Le jihadisme. Le comprendre pour mieux le combattre),* Plon 2015.

27. Third criticism, the quality of bi- or multi-nationality of a French person is not an element recorded by the registry office. Contrary to naturalized people who the administration knows the nationality of origin of by definition, French-born French persons are, in the eyes of the State, simply French: the State is unaware of other nationalities which could have been passed down to them by one of their parents, or which they could have acquired during their lifetime. Which type of investigations will the administration be entitled to perform to identify 'a French-born person who holds another nationality'? The CNCDH makes a point of expressing, on this point, its grave concerns.

b) Criticisms held by the CNCDH on the version of the bill adopted by the National Assembly on 10 February 2016

28. In the version of the constitutional reform bill adopted by the National Assembly, there is no longer any reference to '*French-born persons*', but only to '*persons*'. This modification extends the personal scope of application of the forfeiture of nationality to French persons by attribution (known as French by birth)[76], whereas this forfeiture was applicable up to that point only to French nationals by acquisition in certain conditions (in particular to dual nationals). Consequently, this forfeiture now covers, without exception, all cases of acquisition and attribution of nationality. Although the CNCDH welcomes the abandoning of the distinction between French by acquisition and French by attribution, it can only deplore the generalisation of the reduction of the right to nationality, since this is a constitutive aspect of the person and confers fundamental rights on the holder[77]. To this is added that when a person is stripped of their nationality that has been previously acquired (by way of filiation for example), there are no legal or administrative tools allowing to establish with any certainty if they hold another nationality whose attribution depends exclusively on the goodwill of foreign States who are sovereign in the establishment of the rules of attribution of their nationality.

29. In addition, the National Assembly has deleted from Article 34 the reference to the holding of another nationality by a person who is the subject of a forfeiture of nationality. In this respect, the CNCDH draws attention to Article 15 of the Universal Declaration of Human Rights, which in stating that '*Every individual has the right to a nationality*', prohibits the creation of stateless persons. Although this Declaration is not endowed with true legal value[78], it nevertheless establishes universal values to which the CNCDH is particularly attached. It is on this basis that law No. 98-170 of 16 March 1998 *on nationality,* labelled the 'Guigou Law', amended Article 25 of the Civil Code, which, since then, has forbidden stripping a person of their nationality, when this sanction '*results in rendering them stateless*'. Article 25 of the Civil Code reserves this sanction for dual nationals.
These provisions only bolster the various international commitments undertaken by France to reduce cases of statelessness[79], a situation which can lead to the negation of any rights. Could France, by the extension of the forfeiture of nationality to all French

[76]The extension relates to the attribution of nationality by declaration, in the event of marriage to a French person (Article 21-2 of the civil code) or through simple adoption (Article 21-12 of the civil code); through the collective effect which benefits children of a foreign national who acquires French nationality (Article 22-1 of the civil code); by a decision of the public authority (Article 21-15 of the civil code); by application of the right of birthplace for children born in France to foreign parents (Article 21-7 of the civil code).
[77]Council of State (General Assembly/Section of the interior) 11 December 2015, *abovementioned Opinion,* § 5.
[78]CE 23 November 1984, *Roujansky,* No. 60106, 60136, 60145, 60191, 60223, 60257, 60353, 60385, 60395, 60398, 60401, 60437, 61273, 61971.
For a proportion of commentators, the principles which it establishes arise from the *jus cogens* (peremptory norm), E. Decaux, 'The right to a nationality as a human right *' (Le droit à une nationalité en tantque droit de l'homme)', rtdh.eu* 2011/86, p. 260.
[79]See on this question E. Decaux, abovementioned article, p. 237.

persons, even non-dual nationals, renounce the condition of statelessness? Some propose this, but it goes without saying that if such were the case, for the CNCDH this proposal would constitute a major regression. Note that this risk is not totally provided for by the commitment of the Government to ratify, as soon as possible, the Convention of 30 August 1961 of the United Nations *on the reduction of cases of statelessness*[80]. Nor would it be so with the ratification of the Convention of the Council of Europe of 6 November 1997 *on nationality*[81], since these two documents do not guarantee the suppression of all cases of statelessness[82]. Under these conditions, the CNCDH, in underlining its attachment to Article 15 of the universal declaration of human rights, is opposed to any modification of the law which is grounded on giving a constitutional basis to the removal of the statelessness condition, such as is in particular provided for in Article 25 of the Civil Code.

2. Regarding the material scope of application of the forfeiture of nationality

30. In the first instance, the CNCDH raises the total indeterminacy of the conditions for application of the forfeiture of nationality. Nothing is specified as regards:

- the legal nature of the sanction (administrative or criminal);
- timescales (in particular the time between the acquisition of nationality and the committing of the offence giving grounds for the forfeiture[83], as well as the time between the committing of the offence and the forfeiture);
- the precise nature of the offences which justify the forfeiture.

Beyond this, the CNCDH makes a point of expressing its gravest concerns with regard to the various versions of the constitutional bill.

a) The criticisms held by the CNCDH concern the version of the constitutional bill adopted in the Council of Ministers on 23 December 2015

31. In its initial version, the draft constitutional bill provides that the forfeiture of nationality may be imposed in cases of a conviction for an offence '*which constitutes a serious threat to the nation*. The National Assembly has not modified this wording, which very broadly defines the material scope for the forfeiture of nationality, a forfeiture which - whether it be an administrative sanction or a criminal sanction[84] - is obligatorily subjugated to the respect of a certain number of principles of criminal law and criminal procedure. Additionally, the highly undefined nature of the offence authorizing the implementation of the forfeiture, namely a conviction for an offence '*which constitutes a serious threat to the nation* ', forces the questioning of the respect of the principle of offences and penalties established in law (Article 7 of the DDHC). Indeed, Book Four of the Criminal Code ('*Crimes and offenses against the nation, the State and public order*') includes a first Title ('*Threats to the fundamental interests of the nation*'), under which figure, to begin with, Article 410-1 which defines the fundamental interests of the nation[85] and

[80]This Convention was signed by France on 31 May 1962. It has however not yet been ratified.
[81]This Convention was signed by France on 4 July 2000. It has however not yet been ratified.
[82]In effect, Article 8 of the Convention of 1961 and Article 7 of the Convention of 1997, provide for, in exceptional circumstances, cases of the loss of nationality.
[83]On this timescale, the Constitutional Council considered that it '*can not be extended without causing a disproportionate threat to the equality between people who have acquired French nationality and those to whom French nationality was attributed at birth*' (Cons. const. 23 January 2015, decision cited above).
[84]See National Assembly, *Report No. 3451, op. cit.*, p. 20: '*It will be the responsibility of the ordinary legislator to specify if the forfeiture of nationality must be pronounced by the executive power or by a judge. This second solution is the preference of your rapporteur, insofar as it would allow for a better individualization of the punishment*'.
[85]Article 410-1 of the criminal code: '*The fundamental interests of the nation are understood within the meaning of the present Title to be its independence, its territorial integrity, its security, the republican form*

covers no less than four chapters defining a multiplicity of crimes and offences. As for terrorism *strictly speaking*, its various criminal forms appear in Title II ('*Terrorism*') of the same book of the Criminal Code (Book Four), thus deepening the lack of clarity on the criminal behaviour that is punishable by the forfeiture of nationality.

b) Criticisms held by the CNCDH on the version of the bill adopted by the National Assembly on 10 February 2016

32. More serious still, Article 34, in the version adopted by the National Assembly, provides for the possibility of pronouncing a forfeiture of nationality in the event of a conviction for a minor offence (délit), that is to say an offence of relative seriousness and yet at the same time the Council of State had excluded this possibility[86]. This extension of the material scope of application of the forfeiture of nationality appears to be contrary to the requirements of necessity and proportionality of a punishment arising from both Article 8 of the DDHC, and also from European Union law[87]. To this is added the potential violation of international commitments which stipulate that a State Party may in its national law only provide for the de facto loss of nationality or loss of nationality upon the initiative of the Sate in limited circumstances, of which '*conduct which seriously threatens the essential interests of the State Party*' (Article 7 of the Convention of 6 November 1997 *on nationality*, Article 8 of the Convention of 30 August 1961 *on the reduction in cases of statelessness*)[88]. Such is unquestionably not the case for a vast number of offences listed in Book Four of the Criminal Code mentioned above, in particular when it concerns an abuse of the freedom of expression such as incitation to acts of terrorism or justification of such acts (Article 421-2-5 of the Criminal Code). For these reasons, the CNCDH condemns the extension to lesser offences (délits) of the material scope of application of the forfeiture of nationality.

33. Finally, the Commission notes that Article 25 of the Civil Code already allows, in its current draft, for the deprivation of nationality in cases of a conviction '*for an act classified as a crime (crime) or offence (délit) which constitutes a threat to the fundamental interests of the nation or for a crime (crime) or offence (délit) which constitutes an act of terrorism*'. For the same reasons as previously stated, the CNCDH recommends the removal of the word 'offence' (*délit*) from Article 25 of the Civil Code.

34. To conclude, the extension of the personal and material scope of application of the forfeiture of nationality carries a considerable risk of violating the principles of appropriateness, necessity, and proportionality, contained in particular in European Union law. Nationality is, it should be underlined, a constitutive aspect of a person which confers fundamental rights onto the holder.

3. Regarding the effectiveness of the forfeiture of nationality

35. First of all, the Commission questions, as has the Council of State[89], the effectiveness of such an administrative or criminal sanction in the face of this new form of terrorism. The sanction will not dissuade any potential terrorist from acting. It will thus be ineffective in the prevention of crime. It would equate to:

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of its institutions, its means of defence and diplomacy, the safeguarding of its population in France and abroad, the balance of its nature and its environment, and the essential elements of its scientific and economic potential and its cultural heritage'.

[86]Council of State (General Assembly/Section of the interior) 11 December 2015, *abovementioned Opinion,* § 8

[87]See CJUE 2 March 2010, *Janko Rottman vs. .Freistaat Bayern*, C-135/08.

[88]See above, CNCDH 6 January 2011, *Opinion on the modifications made by the National Assembly to the bill on immigration, integration and nationality*, § 15.

[89]Council of State (General Assembly/Section of the interior) 11 December 2015, *abovementioned Opinion,* § 7

- a deprivation of civic and civil rights which is a complementary sanction defined in the Criminal Code (Article 131-26);
- the reintroduction into the Criminal Code of the crime of 'national indignity' which, moreover and contrary to what is frequently held, is not a sanction but a crime created by the Order of 26 August 1944 and which is punishable by a loss of civil rights. The history of this offence is a reminder of dark periods of history[90] and the definition of constitutive aspects moreover raises many questions on the requirements of the principle of criminal legality (Article 7 of the DDHC)[91].

36. Subsequently, the CNCDH is concerned about the discriminatory consequences of a forfeiture of nationality, which could, in any event, apply only to dual nationals. The stigmatization of these persons constitutes a catalyst for social division.

37. In addition, the forfeiture of nationality will not protect French society from the presence on French soil of those which are deprived of French nationality for acts of terrorism, even if this is the principal goal of the bill for constitutional reform. In effect, people deprived of French nationality, and thus who become foreign, may be the subject of a removal procedure, but the effectiveness of this provision is not guaranteed, since removal is only possible when respecting a certain number of rights - starting with the absolute right not to be exposed to treatment which is contrary to Article 3 of the ECHR (torture, inhumane or degrading treatment, etc.) -, which is monitored, in particular, in addition to French jurisdictions, by the European Court of Human Rights[92]. It is thus that France found itself in the impossible situation of returning French persons deprived of their French nationality to their country of origin[93]. In addition, in cases where the person who is deprived of French nationality does not have any other nationality, the implementation of a removal procedure is in practice destined to failure, since determining the receiving country is impossible.
    Beyond this, the CNCDH must insist on the political and diplomatic responsibilities of France with regard to the countries of origin towards which it decides to return people who are convicted of acts of terrorism, and who may have never lived in the countries concerned. The image of France would be tarnished if its removal policy were to consist of forcing on the receiving countries the responsibility of accommodating these persons.

38. Finally and above all, the forfeiture of nationality is an inappropriate sanction with regard to the seriousness of the offences committed. In effect, it is essential that the radical transgression of the social order, that crimes of terrorism constitute by the blind violence which they sow, is not forgotten. However it is nevertheless pertinent to reflect on an appropriate response to this extreme violence which threatens civil order and endangers political society. This response should not consist in attempting to radically exclude those who have radically betrayed the social contract. Indeed, the maturity of political society is measured by its capacity to recognise and to overcome its internal divisions, however serious they are[94].

[90]See A. Simonin, *Dishonour in the Republic. A history of indignity 1791-1958 (Le déshonneur dans la République. Une histoire de l'indignité 1791-1958)*, Grasset 2008.
[91]For more details, see R. Parizot, 'Against national indignity' (*Contre l'indignité nationale*), *Rec. Dalloz* 2015, p. 876.
[92]Court EDH (Gde Chbre) 28 February 2008, *Saadi vs. Italy*, No. 3701/06.
[93]Court EDH 3 December 2009, *Daoudi vs. France*, req. No. 19576/08 and *mutatis-mutandis* Court EDH 6 September 2001, *Beghal vs. France*, req. No. 27778/09. In view of this, one could not conclude that France always respects the guarantees of Article 3 of the ECHR. The CNCDH has indeed been informed of recent removals to Algeria and Morocco.
[94]F. Worms, *Hearing of 3 February 2016.*

CONCLUSION

39. The CNCDH recommends the pure and simple abandonment of the constitutional reform.

LIST OF PARTICIPANTS TO HEARINGS

Mr Olivier Beaud, Professor of public law at the University of Paris 2, Pantheon-Assas, *Hearing of 14 January 2016*;

Maître Florian Borg, Trade Union of French Lawyers, *Hearing of 3 February 2016*;

Mr Laurent Borredon, Journalist (*Le Monde*), *Hearing of 11 January 2016*;

Mr Bernard Cazeneuve, Minister of the Interior, *Hearing of 3 February 2016*;

Ms Lila Charef, Chief legal officer, Collectif contre l'Islamophobie en France, *Hearing of 11 January 2016*;

Mr Mattias Guyomar, State Councillor, *Hearing of 3 February 2016*;

Ms Arlette Heymann-Doat, Emeritus Professor of Public Law at the University of Paris-Sud, *Hearing of 11 January 2016* ;

Ms Anne-Marie Le Pourhiet, Professor of Public Law at the University of Rennes 1, *Hearing of 11 January 2016*;

Mr Yann Livenais (Trade union of the Administrative Jurisdiction - Syndicat de la Juridiction Administrative), *Hearing of 14 January 2016*;

Mr Yasser Louati, spokesperson for the Collectif contre l'Islamophobie en France, *Hearing of 11 January 2016*;

Maître Laurence Roques, Trade Union of French Lawyers, *Hearing of 3 February 2016*;

Mr Denis Salas, magistrate, President of the French association for the history of justice, *Hearing of 26 January 2016*;

Mr Serge Slama, Lecturer in public law at the University Paris Ouest-Nanterre, *Hearing of 14 January 2016*;

Mr Benjamin Sonntag, Co-founder of the La Quadrature du Net, *Hearing of 26 January 2016*;

Mr Christopher Talib, Campaign manager at La Quadrature du Net, *Hearing of 26 January 2016*;

Ms Sophie Tissot, President of the Union for Administrative Magistrates, *Hearing of 26 January 2016*;

Mr Patrick Wachsmann, Professor of public law at the University Robert Schuman, Strasbourg III, *Hearing of 14 January 2016*;

Mr Frederic Worms, Professor of philosophy at the Ecole normale supérieure, *Hearing of 3 February 2016*.