

# The balance between security and liberty

The effects of France's counter-terrorism  
action on individual rights

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# 1. Introduction

In the last year, France has gone through multiple traumatic events that will shape the country's political stance on security matters for the upcoming future. Over the course of ten months, two major terrorist attacks occurred in Paris and its suburban area, and have prompted the French government to take drastic measures to counter this emerging terrorist threat.

Before the attacks took place, France had been threatened on numerous occasions by terrorist groups affiliated with al-Qaeda or the Islamic State, because of several interventions in Africa and in the Middle-East. During the weeks leading to the first attacks in January 2015, other terrorist attempts were thwarted, according to the General Directorate for Internal Security, the French intelligence agency <sup>(1)</sup>.

Charlie Hebdo, the satirical magazine whose headquarters were targeted in January, was already the subject of many threats and lawsuits, coming from political figures and in particular far-right extremists. The magazine is famously known in France for its atheist and anticlerical editorial policy, and has always openly criticized religion and religious fundamentalists, for which they have also been sued by Christian and Muslim associations alike. In 2006, Charlie Hebdo published twelve highly controversial caricatures depicting Muhammad, originally published by the Danish newspaper Jyllands-Posten, and drew the attention of Islamist groups. In 2011, after the victory of the Ennahdha movement in Tunisia, Charlie Hebdo named one of its issue "Charia Hebdo", criticizing the victory of the Islamist party. As a response, part of the magazine's headquarters were burned down, and the building started to be put under surveillance by law enforcement <sup>(2)</sup>. Finally in 2013, al-Qaeda put French caricaturist and journalist Charb on their "most-wanted list" for "crimes against Islam" <sup>(3)(4)</sup>.

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<sup>1</sup> Le Monde, [http://www.lemonde.fr/societe/article/2014/11/03/plusieurs-projets-d-attentats-dejoues-en-france\\_4516873\\_3224.html](http://www.lemonde.fr/societe/article/2014/11/03/plusieurs-projets-d-attentats-dejoues-en-france_4516873_3224.html)

<sup>2</sup> Le Point, [http://www.lepoint.fr/chroniqueurs-du-point/emmanuel-berretta/charlie-hebdo-victime-d-un-incendie-criminel-02-11-2011-1391649\\_52.php](http://www.lepoint.fr/chroniqueurs-du-point/emmanuel-berretta/charlie-hebdo-victime-d-un-incendie-criminel-02-11-2011-1391649_52.php)

<sup>3</sup> FranceTV Info, [http://www.francetvinfo.fr/monde/proche-orient/le-dessinateur-francais-charb-recherche-par-al-qaida\\_272687.html](http://www.francetvinfo.fr/monde/proche-orient/le-dessinateur-francais-charb-recherche-par-al-qaida_272687.html)

<sup>4</sup> The Telegraph, <http://www.telegraph.co.uk/news/worldnews/europe/france/11330505/Murdered-Charlie-Hebdo-cartoonist-was-on-al-Qaeda-wanted-list.html>

On January 7, 2015, two heavily armed men entered the building in which Charlie Hebdo's offices were located, in the 11<sup>th</sup> *arrondissement* of Paris. Eleven people were killed, including the building's caretaker and ten employees or guests of Charlie Hebdo, who were attending a weekly meeting at the time. The attack lasted around five minutes, wounding another eleven people. The police were alerted by neighbors who heard gunshots being fired, and arrived on site minutes later to try and block the assailants' retreat. However, the police were quickly outpowered by the two heavily armed terrorists, who shot their way through the three police patrols, killing one of them. The attackers started to flee immediately, but were forced to abandon their vehicle and hijacked another, leaving behind documents and information. The police was soon able to identify the suspects as brothers Chérif and Saïd Kouachi, and issued a national search warrant for the two fugitives, leading to a multi-agency manhunt that will end in the outskirts of the Paris region, in Dammartin-en-Goële. On January 9, the two terrorists were found and soon took refuge in a factory, initiating a shootout with the police. A special operations unit of the French National Gendarmerie (GIGN) will eventually storm the place, free the hostages and kill the two terrorists.

On January 8, while police forces were focusing their efforts on the manhunt of the two Kouachi brothers, a third terrorist, Amedy Coulibaly, kills a policewoman in Montrouge, south of Paris. The next day, he enters a Kosher supermarket at the Porte de Vincennes in Paris. Armed with assault weapons, he kills four Jewish people and holds many others hostage for several hours. He claims to belong to the Islamic State and demands the liberation of the Kouachi brothers, at the time still on the run. The assailant will be killed during the police rescue operation. The Charlie Hebdo attack was later claimed by the terrorist organisation al-Qaeda in the Arabian Peninsula <sup>(5)</sup>.

A few months later, France is hit by another series of coordinated terrorist attacks, again in Paris and its surrounding areas. On the night of November 13, three groups of heavily armed men were involved in suicide bombings and public shootings, around the Stade de France in Saint-Denis, while an international friendly football game was played, and in the East of Paris.

The first attack took place at the Stade de France, where the French president and several other political figures attended the game. The terrorists were denied access to

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<sup>5</sup> Reuters, <http://www.reuters.com/article/us-france-shooting-agap-idUSKBN0KN0VO20150114>

the stadium, but still managed to set off their explosives, killing one person and seriously injuring a dozen people. At the same time in the 10<sup>th</sup> and 11<sup>th</sup> arrondissements of Paris, a second group of terrorists started firing shots at several outdoor terraces, killing over 30 people. The perpetrators were already known for terrorist acts in Syria and originated from a Belgian terrorist cell. Lastly, a third group entered the Bataclan theatre, where a concert was scheduled, and started shooting at random. The police arrived on the scene, accompanied by an elite tactical unit, and launched an assault on the theatre. In total, 89 people were assassinated, and the terrorists died detonating their explosive vests.

Both events generated considerable reactions and responses from the political sphere and the public, both domestically and at the international level. In France, more than 4 million people took part in the Republican marches, which were a series of rallies and demonstrations that took place all over the country's largest cities to honor the victims of the attacks. Such gatherings were also organized across the world in the following days, in commemoration and in the name of freedom.

The investigations for the attacks of January revealed that the main targets were the Charlie Hebdo journalists, who had indeed faced previous death threats by al-Qaeda in response to their publications. During the attacks of November, the police and witness statements confirmed they were ordered by the Islamic State <sup>(6)(7)</sup>. Therefore, the attacks have been widely considered, at least in the West, as an outrageous violation of the freedom of expression, and an attack to the core values of Western society.

In France, those events also revealed that the current counter-terrorism policies put in place were too ineffective, and that the system had to be improved in order to better prevent this kind of attack on the nation, its population and its values. As a response to the January attacks, the French government drafted a new law (*Loi Renseignement*) that reinforced intelligence services and surveillance techniques, with the objective to strengthen the prevention of terrorism. In short, this new "bill on intelligence" will provide a proper legal structure to French intelligence agencies, as well as more powers and more legitimacy to their actions. Up until then, the surveillance techniques and

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<sup>6</sup> France 24, <http://www.france24.com/fr/20151114-lei-revendique-attentats-paris-nom-insultes-prophete>

<sup>7</sup> Europe 1, <http://www.europe1.fr/faits-divers/le-groupe-etat-islamique-revendique-les-attaques-a-paris-2620397>

methods used by these services were previously left unsupervised and were considered very controversial, as they were seen mainly as a violation of privacy rights.

In the wake of the November attacks, French president François Hollande announced to the Parliament his constitutional reform to extend “forfeiture of citizenship” to people with dual nationality born in France, a sanction hitherto only applicable to naturalized French citizens. While this measure was later abandoned by the President due to a lack of consensus, it originally created a lot of controversy, and was seen as a violation of human rights.

Following the November attacks, François Hollande also declared a state of emergency, which meant, among other things, that some public places will be closed, road traffics might be forbidden, and police search warrants will be allowed in the Paris region <sup>(8)</sup>. This state of emergency was soon extended to the whole territory, including overseas regions, and remains in place until this day. It should be renewed at the end of May, for at least the duration of the 2016 UEFA European Championship, which is scheduled to be held in France in June and July.

What all these measures have in common is the objective to enhance the security of the French nation and its citizens, mainly against terrorist attacks and other threats to national security. However, they also share the same flaws and have been widely criticized for being rights-abusive measures. For example, the bill on intelligence authorizes techniques of surveillance that were previously illegal and considered a violation of the right to privacy. The state of emergency is now seen as a pretext to have more control over the population and a way to contain public rallies and demonstrations, which have always been a way for French people to express their views regarding social and political issues.

Even though there has not been a terrorist attack in France since November 2015, it could be said that the threat is still very real, as the attacks in Brussels in March 2016 have shown. For that reason, advocates of security policies could argue that those preventive measures are warranted for the protection and security of both the state and population. And if an attack were to happen again on French territory after those security measures were being lifted, the government would probably be accused of not

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<sup>8</sup> Elysée, <http://www.elysee.fr/chronologie/#e11544,2015-11-13,declaration-du-president-de-la-republique-a-la-suite-de-des-attaques-terroristes-a-paris>

learning the lesson from previous attacks and of not doing enough to prevent terrorist attacks.

The concepts of security and liberty appear to be competing each other, and could be represented in a sort of balance, which would be adjusted accordingly, depending on the socio-economic context. Therefore, it seems necessary to find a right balance between security concerns and the respect of liberties. In the case of France, the attacks of last year have caused a shift in the balance, making the security concerns apparently more important than the respect of privacy and other human rights. This paper aims to analyze that balance in the case of France and the effects of the new security measures as a response to terrorism, and poses the following questions:

- Faced with the increasing threat of terrorism in France, how to combine the need for security and the preservation of individual liberties?
- To what extent have the new security measures passed by the French government affected the balance between security and liberty?



## **2. Methodology**

As mentioned in the introduction, the purpose of this paper is to analyze the balance between security and liberty, and how France's political response to terrorism affected individual liberties. In order to answer the problem formulation and conduct this research in the most efficient way, this paper focuses on two major policies passed by the French government in the wake of the two deadly terrorist attacks in 2015.

This section outlines the methodological approach used to tackle this issue, how the data has been collected, and delves deeper into the way the selected theoretical framework can apply to the data. It also includes thoughts and reflections on what justifies this particular topic, and considers the limitations of the research.

### **2.1. Philosophy of science**

#### **2.1.1. Ontology**

Ontology can be defined as "the science or study of being" (Blaikie, 1993), and usually deals with the nature of reality. The central point of ontology concerns whether social entities exist in a reality external to social actors or are constructed from the perceptions and actions of social actors (Bryman, 2015). These two positions are respectively referred to as objectivism and constructionism. While objectivism views social phenomena to have an existence that is independent of social actors, constructionism considers those social phenomena to be continually accomplished by social actors (2015, 29). This paper tends to follow this second position, as it can be said of the social phenomena present in this paper, such as governments, policies or societies, that they are not stable, fixed or objective entities. Indeed, they are more the result of the interaction of individuals and are heavily influenced by humans. Although for example, a security policy can be considered as an objective external force, independent of social actors, it is still created through a complex process involving many different actors. Therefore, a constructionist view is most suited and preferred for this paper, where social entities are seen as interacting with each other.

### 2.1.2. Epistemology

Often associated with ontology, the branch of epistemology deals with the source of knowledge, and how it can be obtained in a given nature of reality. According to A. Bryman, it concerns the question of what is regarded as acceptable knowledge in a discipline. In social sciences, a central issue is “the question of whether the social world can and should be studied according to the same principles, procedures, and ethos as the natural sciences” (Bryman, 2015, 24). In the case of this paper, it is more suited to adopt an interpretivist approach, as opposed to positivist. The position of interpretivism implies that the researcher believes the reality is multiple and relative (Hudson & Ozanne, 1988). It is also accepted that those multiple realities depend on other systems and social actors to be understood (Lincoln & Guba, 1985). In this regard, the interpretivist approach views social phenomena in the same manner as a social constructionist ontological approach, described in the previous section. It will be useful to explain and analyze the effects of security policies on the civil liberties of individuals, and *a fortiori* the nature of the balance between security and liberty.

## 2.2. Analytical methods

### 2.2.1. Methodological approach

In order to obtain optimal results and answer the problem formulation in the most adequate way, this paper uses a deductive methodological approach. Deductive reasoning works from the more general to the more specific. The research usually starts from the theoretical aspects of the subject at hand, and is progressively narrowed down to more specific hypotheses. This is opposed to inductive reasoning, which works the other way around, from specific observations to broader generalizations and theories, where the theory is the result of the research (Bryman, 2015).

The starting point of this paper is the assumption, or theory, that new security measures passed in France after terrorist attacks, such as the law on intelligence and the state of emergency, have had a considerable impact on the balance between security and liberty. The approach is therefore to examine those measures and policies, and to study empirical data related to the effects they have had on the balance. From this point, observations are made, connecting the original assumptions to the findings.

### 2.2.2. Data collection

As mentioned in the previous section, the aim of this paper is to investigate the consequences of France's policy on the balance between security and privacy, by examining the content of these security measures. To better understand their effects on individual rights, it appears relevant to conduct a qualitative content analysis of these measures. A qualitative analysis is defined as the "nonnumerical examination and interpretation of observations, for the purpose of discovering underlying meanings" (Babbie, 2014, 382). This method seems to be the most appropriate to explore the implications behind security measures, and is in accordance with the interpretivist stance chosen above. Consequently, a qualitative content analysis is paired with qualitative data.

In order to guide the research and verify the assumption that security measures influence the balance between security and liberty, this paper uses primarily qualitative empirical data, which can be divided into three categories in this case:

- The main elements used for the analysis are the two policies implemented by the French government as a response to the 2015 terrorist attacks, the law on intelligence and the state of emergency. Both texts can be found on governmental websites. These sources are considered official, therefore the authenticity and reliability of these data are very high. For example, *Légifrance* is the official website of the French government, and its role is to publish legislation, regulations and legal information. In addition, the official websites of both houses of the Parliament, the *Assemblée Nationale* and the *Sénat*, were used to conduct this research. They also provide additional resources, such as a history of the amendments made to the legislation, summaries and transcripts of parliamentary sessions.
- To identify the consequences of the security measures on the population, several reports published by national and international institutions were used, containing various figures, statistics and testimonies. Sources include for instance global organizations Amnesty International and Human Rights Watch, as well as independent national commissions, such as the National Consultative Commission on Human Rights. Their main role is to issue recommendations or publish reports, which can usually be considered highly reliable and unbiased.

- Finally, to further document the effects of the new policies, newspapers articles were also of help to fill the gaps and establish connections between security and liberty. Chief among them are French daily newspaper *Le Monde*, which is widely regarded as one of the most important and respected newspapers in the world <sup>(9)</sup>, and international news agency Reuters.

## 2.3. Theoretical framework

The purpose of this paper is to analyze the balance between security and liberty. It is therefore necessary to first define those concepts, and establish a broad consensus on how their relationship is generally understood, through a proper theoretical framework.

### 2.3.1. Human rights

The concept of liberty, which is at the core of the problem formulation, falls under the larger field of human rights. The first part of this paper's theoretical framework will therefore focus on the general principles of human rights, and the way they are governed and controlled. Two important historical documents are mentioned, the Universal Declaration of Human Rights, and the European Convention on Human Rights, which established the foundations for an international human rights framework. France abides by these two documents, and the respect of human rights and civil liberties is anchored deep into French history. The concept of human rights will have a significant role in the later parts of this paper, when examining the balance between security and liberty.

### 2.3.2. Security and liberty

Secondly, the theoretical framework will address the broader relation between human rights and anti-terrorism, especially the issues raised by national security and its effects on the liberties of the citizens. The research will therefore be built around a review of various academic papers written by human rights scholars such as Paul Hoffman, Jack Donnelly and Jeremy Waldron, in which they go over the existing balance between security and liberty, and the consequences of this relationship on policy and the so-called "war on terrorism".

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<sup>9</sup> Encyclopaedia Britannica, <http://global.britannica.com/topic/Le-Monde>

*Paul Hoffman*

A historical account of the war on terrorism and its effects on liberties is given by Paul Hoffman, where he describes several examples throughout history of human rights abuses in times of crisis. He notably argues that discarding human rights norms can be detrimental to anti-terrorism efforts. His views are relevant for the case of France, as it offers more perspective on how the same kind of situation has been dealt with in the past, and if France will follow that same pattern.

*Jack Donnelly*

Jack Donnelly's approach focuses more on the internal mechanisms of human rights, and how they can be ranked depending on the socio-economic context. He imagines a hierarchy of rights and interests which offers a helpful way to determine the value attributed to security and other liberties. This tool will be useful to demonstrate how the importance of rights, and therefore the balance, has evolved in the case of France.

*Jeremy Waldron*

Lastly, the theoretical framework will be based upon Jeremy Waldron's image of balance, where he offers concrete solutions on how to properly adjust the balancing rhetoric. His views will be of help to check if the response of the French government was appropriate, to what extent it affected the balance between security and liberty, and if it could be adjusted using Waldron's guidelines.

## **2.4. Project rationale**

### **2.4.1. Justifications**

This paper is primarily interested in the attacks that took place in Paris in 2015, the political responses that ensued, and their effects on individual liberties. In this perspective, a certain balance between two seemingly competing concepts has to be adjusted to respond to the raising level of threat to national security in France. On one side of that balance stands the right to security, regarded as a human right to which everyone is entitled. On the opposite side, other civil liberties, such as the right to privacy, the right to assembly or the right to travel freely. This paper attempts to show that the government's response to terrorism has led to changes in that balance, which

eventually have consequences on individual rights. This particular approach is justified, considering that the security measures related to the government's response have given rise to a lot of criticism, from the population and media alike, and have sparked many debates in the political sphere.

On a sidenote, this paper is bound to discuss policies and liberties at length; that is why for readability purposes, "policies" will sometimes be referred to as "laws", "measures" or "legislation", while "liberties" may also be called "human rights", "civil liberties", "individual rights" or "freedoms".

#### 2.4.2. Limitations

The main interests of this paper are represented by events that first took place in January 2015. The adoption of the law on intelligence was spread out from February to August. The second attack occurred in November 2015, and the associated response, namely the state of emergency, has been in effect ever since. As of May 2015, there are still new developments related to this issue, that could eventually have an impact on the findings of the research. In this regard, the results of this paper contain some limitations, as it lacks a certain amount of perspective on events that are relatively recent.

Furthermore, while discussing global phenomena such as human rights and anti-terrorism, this paper is limited to the case of France. Therefore, it offers only a domestic approach to the global fight against terrorism. It could be interesting to focus on how France's response to terrorism has affected individual liberties, compared to other instances in different countries.

### 3.Theory

The theories that have been selected in this chapter will first and foremost serve as a guide to the research, and will eventually help the paper go forward and answer the problem formulation exposed earlier.

After introducing the core principles of the human rights, established by the Universal Declaration of Human Rights adopted in 1948, this paper will first focus on Paul Hoffman's views on human rights and terrorism. In his work, Hoffman uses a historical approach on the relation between the ongoing war on terrorism and its effects on liberties, citing for example conflicts around the world and throughout recent history. He also discusses the impact of the September 11 attacks in the United States, which shaped the future of anti-terrorism and became a turning point in the response to terrorism attacks, including the response after the 2015 attacks in France.

Secondly, it will be interesting to review Jack Donnelly's work on the theories of human rights, and their relevance in today's anti-terrorism struggle. Donnelly presents a hierarchy between rights, and suggests they interact with each other depending on the economic, political and social contexts. He adds that their importance over one another is mostly relative and subject to a lot of variables, as this paper will cover in more details below. Donnelly also discusses the different concepts of liberties and the antagonistic relationship between national security and human rights, which will be a crucial topic in the analysis of the problem formulation.

The final step of this theoretical framework will be based upon Jeremy Waldron's image of balance, where he discusses again the intricacies behind security and liberty. Waldron uses a broader approach to the issue, and offers some more concrete solutions and details about the balance between rights and security. For example, he opens with a strong statement by claiming that due to political defeatism, it seems nowadays to be the general acceptance that some adjustments are necessary in civil liberties. Waldron then goes into more details about the curtailment of liberty in the wake of terrorist attacks and admits that a balance is necessary, even in normal circumstances. In the case of France, however, it could be argued that the circumstances have not been normal since the first attack in January 2015. This chapter will cover in depth the relevance of

Waldron's approach for the topic at hand. Finally, he offers some guidelines he believes are necessary to the balance rhetoric, and tools regarding civil liberties and how to define and understand them.

### 3.1. Human rights

The problem formulation and its implications fall into the broader field of human rights, and it is necessary to go over these concepts in more details. The universal ideals of human dignity, and therefore human rights, are represented by the Office of the United Nations High Commissioner for Human Rights (OHCHR). Their mission "is to work for the protection of all human rights for all people, to help empower people to realize their rights, and to assist those responsible for upholding such rights in ensuring that they are implemented." <sup>(10)</sup> They possess a unique mandate from the international community to promote and protect human rights, and are legitimately considered the governing body in regards to human rights.

The OHCHR defines human rights as "rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. [...] These rights are all interrelated, interdependent and indivisible." <sup>(11)</sup> Human rights are interrelated and interdependent in the sense that the improvement of one right facilitates advancement of the others. In the same logic, abuses made towards one right affect the others to the same extent. This specific characteristic of human rights is relevant to the topic at hand, as it can be applied to the right to security and the right to privacy. The State usually has the obligation to provide the right to security to all citizens, as well as to ensure national security altogether; however each citizen also has the right to privacy, which can be abused and tempered with by the State or other entities while trying to ensure national security. This example is one of the reasons why a notion of balance exists between human rights, which will be explored later in this chapter.

Human rights are embodied by the Universal Declaration of Human Rights (UDHR), which was adopted by the UN General Assembly in Paris, on December 10, 1948. This document, drafted by representatives from all over the world, is what laid the foundations for fundamental human rights and their protection. Article 12 of the UDHR

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<sup>10</sup> OHCHR, <http://www.ohchr.org/EN/AboutUs/Pages/MissionStatement.aspx>

<sup>11</sup> OHCHR, <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>



mentions the right to privacy, and is therefore the one most relevant to this paper, stating that:

*“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has a right to the protection of the law against such interferences or attacks.”* <sup>(12)</sup>

The article unambiguously stipulates that privacy is a fundamental right, amongst the rights to life, liberty and security (Article 3), and cannot be interfered with for arbitrary reasons. However, one can wonder what could actually justify such interference. In that regard, the European Convention on Human Rights (ECHR) is more explicit, in its Article 8 entitled “Right to respect for private and family life”. In addition to granting the same right as in the UDHR - “Everyone has the right to respect for his private and family life, his home and his correspondence”, this article says that public authorities cannot interfere with the right to privacy, except in particular situations, such as: “in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime [...]” <sup>(13)</sup>. Interestingly enough, these exceptions are very similar to the ones found in the recent French “Bill on Intelligence”, to justify advanced techniques of surveillance, which will be analyzed later.

France abides by these two official documents, and French law also mentioned the right to privacy as early as in 1804, with the creation of the *Code Civil* <sup>(14)</sup>, or “Napoleonic Code”, which established the statuses of individuals and their properties. In its Article 9, this document already mentioned that each individual is entitled to the respect of their private life. However, French legislature gives no legal definition of privacy, and only jurisprudence decides in matters of alleged violations.

From these official documents, it would appear matters of national security trump the right to privacy. The priority given to security would therefore be higher in the hierarchy of rights, compared to the priority given to privacy. This is of course oversimplified, but again, the notion of balance is inevitable when dealing with human rights and liberties. Determining the nature of that balance and finding optimal solutions to

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<sup>12</sup> United Nations, <http://www.un.org/en/universal-declaration-human-rights/index.html>

<sup>13</sup> ECHR, [https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/Convention\\_ENG.pdf](https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/Convention_ENG.pdf)

<sup>14</sup> Legifrance, <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721>

discrepancies between human rights is the issue raised in this paper, with the example of the French government's response to the 2015 terrorist attacks. In order to tackle this problem, it seems justified to review some theories and ideas put forth by several authors in the recent years.

### **3.2. Paul Hoffman: "Human Rights & Terrorism"**

Paul Hoffman is a civil rights and human rights lawyer, who has served with many international human rights organizations, including Amnesty International. In his paper, he aims to demonstrate that the war on terrorism that has been waged since the early 2000s, can potentially threaten the international human rights framework as a whole. He considers human rights as a casualty of the war on terrorism, and suggests we must restore the balance between liberty and security in order to respond to terrorist attacks. Paul Hoffman's starting point was the events of September 11, 2001, and how they set in motion the so-called war on terrorism at a global scale. However, his arguments are now reverberating throughout Europe, especially in the case of France, who is now going through a similar period of post-terrorism in 2016, as the United States were back in 2001.

Hoffman starts off by saying that terrorist attacks raise a lot of interrogations, and have the power to question and reconsider the balance between liberty and security. For example, is the threat so imminent that the international human rights framework must be discarded, "regardless of human rights consequences"? Are universal human rights norms a hindrance in times of crisis and under the threat of a terrorist act? In this regard, Hoffman defines said act, in this context, as "acts of violence directed at civilians for political or religious objectives" (Hoffman, 2004, 933). While the impulse to discard human rights during such a situation could be understandable, Hoffman assures it is shortsighted and self-defeating. However, he maintains that changes have to happen in order to respond to the terrorist threat appropriately.

Indeed, the international community is in need of new tools and strategies in order to deal with these seemingly ever-increasing threats (or at least more visible) to global peace and security. Structures need to be built to coordinate international efforts. However, there is no agreement on such tools, and the war on terror is therefore being

waged “on its own imperatives, regardless of existing norms” (2004, 933). Those existing norms notably include human rights and ensuring they are respected in the process. Hoffman argues that this particular way of responding to terror is, by itself, a threat to human rights. While the theoretical objective of the war on terror is eventually to eradicate all terrorist threats, it would do so at the expense of international human rights and humanitarian law, which have been carefully developed over the last decades. Without a proper structure and adherence to fundamental human rights norms, it makes it easier for terrorist organizations to find and recruit new adherents.

Hoffman goes as far as saying that the war on terrorism actually “undermines our security more than any terrorist bombing” (2004, 933). On the other hand, he admits that the horror of the September 11 attacks “understandably overshadows the human rights consequences [...] in the public’s consciousness” (2004, 934).

Here, the situation can easily be translated to what is happening in France. After two terrorist attacks in less than a year, the French government is undergoing tremendous pressure to respond, put both by its opponents and the population, who (understandably) demand a retaliation towards the perpetrators of these attacks. In the case of France, as it was in the case of the United States, human rights are relegated to a position of secondary importance, under an imminent threat to national security. This paper will attempt to show that this might not be the optimal solution. The balance between rights is ever so present, and the notion of hierarchy between national interests also appear to be of utmost importance in times of crisis.

“When societies trade human rights for security, most often they get neither” (2004, 934). To further his argument, Hoffman gives a historical account of what has happened in the past when such situations arose. These trade-offs most usually led to mass murder or genocide, arbitrary arrests and imprisonment, suppression of speech or religion and so on. He gives as examples the fight against Communism, which gave justification for massive human rights violations, notably in the Phillipines (Plantilla, 1997) and Indonesia. He also mentions the “Desaparecidos” during Argentina’s war and repression, where between ten and thirty thousand people were “disappeared” in the early 1980s <sup>(15)</sup>. The list goes on, and ultimately, minorities and other marginalized groups are discriminated against, which is counter-productive in the fight against

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<sup>15</sup> Human Rights Watch, <https://www.hrw.org/legacy/wr2k1/americas/argentina.html>

terrorism, as it creates more enmity between law enforcement and affected communities. Finally, as was mentioned earlier, disregarding human rights norms can facilitate the recruitment of terrorist organizations, who can prey on the victims of human rights abuse, their friends and family, and in a more general way, all discontented individuals who have been affected by rights-abusive measures.

Hoffman concludes this argument by saying that discarding universal human rights norms set several decades ago, only serves to undermine shared values, and taints the vision that the public has of the international cooperation, which are vital elements of the counter-terrorism efforts.

Paul Hoffman then presents human rights as a casualty of the war on terrorism. He demonstrates that since the September 11 attacks, the United States as well as many other governments, have put the international human rights framework at risk. Indeed, he mentions particular examples, usually associated with the United States, that violated "international human rights and humanitarian norms in the name of security" (Hoffman, 2004, 938). Among notable examples, the case of the Guantanamo prison, which has always been under severe criticism, renditions, deportations and extraditions without rights, and discrimination. He argues that such arrests and detentions have produced virtually no terrorists (2004, 947). On the contrary, as mentioned earlier, measures based on discriminative reasons tend to create frictions between law enforcement, authority figures and the targeted communities.

However, particularly in the case of France, those measures are being taken by the government while under pressure, by the media, the population and political opposition. The state needs to take action to reassure the population, to show that they are in control and are responding firmly to the attacks. Otherwise, the government would be accused of not doing enough in order to retaliate against terrorism. In other words, it could be said that these measures are purely symbolic, in order to satisfy a greater number of people, but to the expense of a lesser number's rights and liberties. Hoffman goes on by saying that adherence to human rights standards is the right thing to do, and "necessary to enlist the entire community in the effort to achieve greater security for everyone" (2004, 947). Of course, it is easier said than done, as when faced with an actual terrorist attack, governments will take more drastic measures to reassert their authority (in the case of France, advanced surveillance techniques and the

establishment of the state of emergency nation-wide for an undetermined amount of time).

Lastly, Hoffman recognizes that all human beings have a right to security and to life. A right that should be provided by governments, who have a responsibility to ensure and fulfill these rights. Moreover, they are required to take action to prevent and punish terrorist attacks, which would be construed as a violation to those liberties. However, he specifies that the right to security “must be fulfilled within the framework of human rights protection, not at the expense of human rights” (2004, 949). In other words, the right to security is just as important as other rights, and cannot be placed above everything else. However, Hoffman adds that it does not necessarily mean the international society is putting individual rights over security needs. It all comes down to adjusting the balance. Again, this notion of balance is constantly present when discussing the importance of one right over another. The implicit hierarchy between rights, whether it is relative or absolute, is a concept that will be covered in more details in the following section.

Hoffman concludes by saying that the international human rights framework has not been an obstacle to governments who wish to respond accordingly to terrorist threats. Rather, those very rights have been built as a result of past experiences of dealing with terrorism, which have led to the devastation of societies where populations suffered from rights-abusive measures, in the name of security.

### **3.3. Jack Donnelly: “Anti-Terrorism & Human Rights”**

This section will cover the views of Jack Donnelly on the matters of human rights, and their relation with terrorism. At first, Donnelly approaches the nature of human rights from a more scientific angle, in the sense that he defines and explains them as an inherent part of human nature. Secondly, Donnelly's theory of hierarchy between rights and national interests will be introduced, as well as their consequences in the case of France and the problem at hand.

Jack Donnelly's definition of the nature of human rights confirms what has been set by the Universal Declaration of Human Rights: “they are held by all human beings,

irrespective of any rights or duties they may (or may not) have as citizens, members of families, workers, or parts of any public or private organization or association" (Donnelly, 2012, 19). Therefore, everyone should enjoy these human rights, regardless of status, race, religion, gender etc. However, while all human beings have human rights, not all enjoy these rights.

According to Donnelly, it is possible to classify rights based on their sources and the way they are "created". For example, legal rights come from the domain of the law, and must be upheld within the law. Similarly, constitutional rights arise from the constitution. Following this logic, human rights should therefore "arise from humanity" (2012, 21). To demonstrate how humanity is the stem of human rights, Donnelly refers to the UDHR and several other declarations, all of which mention that all human rights derive from the inherent dignity of the human person. This is how human rights are generally understood nowadays. Donnelly goes on by saying that human dignity is usually regarded as a natural characteristic of human beings, and is therefore a part of human rights as well. However, Donnelly disagrees with the general understanding that "The human nature that underlies human rights is sometimes explained in terms of (basic) human needs" (2012, 21). He considers a list of human needs would make an inadequate list of rights, and deplores that science is limited when it comes to providing a viable theory of human nature. Indeed, he adds that "we have human rights not to what we need for survival but to what we need for a life of dignity" (2012, 22), and that human nature reflects what human beings might become, not what they "are". In that regard, a scientific explanation is not suited to give a definition of human rights.

Jack Donnelly also examines the consequences of anti-terrorism on international human rights. Again, the example of the September 11 attacks is used to demonstrate the priority given to different sets of objectives. He observes that during the decade prior to the attacks, a number of decisions have been made at the global level to establish a better international human rights framework. It seemed that a lot of importance was given to democracy and human rights objectives. However, Donnelly points out that the rise of those objectives in the hierarchy of US foreign policy interests might simply have been due to the fall of communism and therefore anticommunism measures, consequently leaving more space to pursue other objectives.

To further his argument, Donnelly considers the position of human rights in a classic model of foreign policy, composed mainly of the following three basic interests: security, economic, and “other interests” (2012, 235). He adds that security interests are generally of the utmost importance, and trump every other interest. Economic interests come second, and are given priority over “other” interests, though not always. In certain situations, economic interests might even be considered as important as minor security interests. In any case, it is generally accepted that all “other” interests come last in this hierarchy. According to Donnelly, this model represents quite accurately the priorities of U.S. foreign policy, and could also be applicable to most other countries (including France).

Donnelly then suggests that the place of an interest within this hierarchy can be modified either absolutely, or relatively. In other words, the absolute value accorded to a particular interest (for example, privacy rights) may change, or the absolute value of another interest of the hierarchy may change (for example, national security concerns), leading to a change in the relative value of the first interest (privacy rights), which has remained absolutely constant (2012, 236). Using this approach, Donnelly suggests that the importance attributed to human rights objectives in the 1990s were mostly relative rather than absolute. Indeed, after the end of the Cold War, security interests in the United States have decreased substantially, leaving more room for other interests considered to be of lesser importance. He also adds that during the Cold War, security interests such as protecting democracy were seen as a valid reason to tolerate human rights violations directed against “enemies of freedom”. Here, it is possible to establish a link with Hoffman’s historical approach of the relation between human rights and “terrorism”, where he mentioned several examples of human rights violations apparently justified by the fight against communism.

The rise of human rights objectives was therefore vulnerable to security concerns. This makes the priority of those human rights objectives mostly relative, and their status is subject to a shift in the economic or social contexts. For example, the attacks of September 11 eclipsed those objectives as security concerns went up once again, to face the latest threat to national security. In the case of France, the draft of new legislature, as a response to the terrorist attacks of 2015, was also a result of an absolute change in the value of France’s security interests. In both situations, the decline of human rights

objectives, and the respect of human rights, might be unintended. It could even appear as a sensible reason.

However, Donnelly then focuses on the term “security”, and the understanding behind that concept. As he puts it, its meaning is not always constant and obvious. It is not just about “protecting the national territory from invasion”. Again, Donnelly considers a three-variable model (2012, 239):

1. What is to be secured? When security applies to the state, it is referred to as “national security”. On the other hand, security can also apply to the citizens, and is then called “personal security”.
2. Where does the threat lie? Does the threat to security come from an external source (as it is the case here for France), or is the threat internal and therefore much more difficult to anticipate?
3. What is the nature of the threat? A threat to security can be material, with destruction of buildings, infrastructures, public places etc. It can also be moral and ideological, and have more consequences in the long-term, as again it is more difficult to discern.

When a material threat to the state is coming from an external source, the concept of security is usually uncontroversial and agreed upon. In this scenario, it is generally accepted that security would be given priority over other interests of foreign policy. Mainly because those other interests and values are guaranteed and protected by the state itself. A direct threat would then put at risk those values. As Donnelly says, however, it is when we move away from this relatively simple situation that the concept of security becomes much more complicated and ambiguous. Consequently, when the nature of the threat is more diffuse, the balance between security and human rights is also affected.

There is a distinction between personal and state security. While the security of individual citizens is very close to human rights concepts, state security on the other hand is not necessarily connected to human rights. Donnelly uses this example to simplify his argument: “Human rights are about protecting citizens from the state. National security is about protecting the state from its (perceived) enemies. Those enemies may themselves be citizens. And even when the enemies are primarily external, the rights of citizens may need to be sacrificed in order to carry out defensive measures” (2012, 240).



Donnelly concludes by saying that an antagonistic relationship between security and human rights is very likely to arise when the threat to security is perceived as moral rather than material, and coming from an internal source rather than external. However, in the example presented in this paper, France was facing material threats from an external source and still the balance between security and human rights was put in question. In the months following the attacks, the nature of the threat became more ideological, which has not decreased the importance attributed to security concerns. Consequently, the importance given to human rights objectives, and in particular privacy rights, has been considered secondary ever since. This particular case will be developed in more details in the analysis.

### **3.4. Jeremy Waldron: "Security & Liberty"**

This last section will be a review of Jeremy Waldron's image of balance, and his theoretical approach to the mechanism behind security and liberty. Waldron first describes the current situation of human rights and civil liberties, and how they are considered in the political sphere across the world. He then goes into more details about how to measure the balance between security and liberty, before offering guidelines and tools to better comprehend civil liberties and their role in today's society.

Once again, the attacks of September 11, 2001 are at the core of this approach. Waldron believes that in the aftermath of these attacks, there has been a general acceptance that "some adjustment in the scheme of civil liberties is inevitable" (Waldron, 2003, 191). Waldron calls it "political defeatism", and adds that a terrorist emergency is an opportunity for the state to limit liberty. Indeed, in such situations, there is little likelihood that citizens will be opposed to counter-terrorist measures, lest they be considered "insufficiently patriotic". Reductions in civil liberties won't be opposed by the courts either, as they tend to be more lenient towards such measures in times of crisis, though not always.

Before going any further, it is necessary to give a clear definition of what those civil liberties represent and their characteristics. In his argument, Waldron reminds us that they are not "necessarily a homogenous class of rights, principles, or guarantees."

Instead, they represent “a variety of concerns about the impact of governmental powers upon individual freedom” (2003, 195), which he classifies as such:

- The term “civil liberties” first and foremost refers to freedoms that individuals wish to perform, that cannot be restricted by the state. For example: freedom of speech, religion, travel.
- “Civil liberties” may also refer to rights that could be considered secondary, and that can be influenced by government action, such as privacy. The right to privacy is actually the liberty to *not* be put to scrutiny by the government.
- Lastly, Waldron mentions procedural rights and liberties that individuals might have when they are detained by the state. For example, the right to a fair trial, counsel, to not be detained without trial.

Waldron adds that this list is not exhaustive, and there are other liberties associated with democracy and civic duties. However, he considers that these rights have not been endangered by terrorist threats and remained untouched, and prefers to focus on the above categories.

Waldron continues by saying that it is usually understood that “some curtailment of liberty *might* be appropriate in the wake of the terrorist attacks, and that it might be *unreasonable* to insist on the same restrictions on state action...” (2003, 191). This does seem to be true, and not only in the United States, but also in France, where it was often argued by advocates of stricter anti-terrorism measures, after the terrorist attacks, that some extreme measures were necessary. Waldron believes that the idea of balance is behind this reasoning, and would like to strike a new balance between liberty and security. He adds that even in normal circumstances, a balance always seems to be necessary. And even more so as the threat to national security becomes more imminent (see previous section). However, in the case of France, it could be said that the circumstances have not been normal since the first attack in January 2015, a little over 15 months ago. Therefore, the need of balance between liberty and security would be even more pressing in this situation, and the state could still have the opportunity to take measures that put limitations on rights and liberties.

Waldron then goes into more details about the balance itself, and what stands on either side of it. There are usually two sides to an issue, and things to be said for each of them, “values that pull us in opposite directions” (2003, 192). He ponders the meaning of a

shift in the balance, and the reason behind this phenomenon. Something has changed on one side, whether it's new facts or opinions. Indeed, these can provide new reasons, which could then weigh more on one side of the balance than the other. For example, the terrorist attacks of 2015 were a fact that have given rise to a shift in the balance between security and liberty. This shift is in favor of security, as the government is now more aware of imminent threats to the state and its citizens, and security matters would appear more important than individual liberties. Again, the hierarchy between rights and interests explained by Jack Donnelly can clearly be seen in this example. Here, the absolute value of security interests has increased, thus causing a relative change in the value of human rights and liberties interests.

However, Waldron suggests that the notion of balance is much more intricate, and needs to be improved. He recommends several guidelines in order to "subject the balancing rhetoric to careful analytic scrutiny" (2003, 194):

1. He first points out that the very idea of balance, and consequences due to changes in the balance, may not be appropriate to civil liberties. Indeed, he associates civil liberties with rights, which are most usually considered "anti-consequentialist". Therefore, civil liberties would be regarded as immune to consequences, and excluded from any type of balancing.
2. Secondly, Waldron believes that any change to the balance should be put under better examination, in order to determine its "distributive character". Indeed, he claims for example that the "diminution in liberty may affect some people more than others" (2003, 194). Therefore, it would be required to investigate those changes and the impact of their side effects on all populations.
3. In a crisis situation, a reduction in liberty usually means enhancing the power of the state, so that it can be used to combat terrorism. However, Waldron points out that this enhanced power can be used for other things. Therefore, "diminishing liberty might also diminish security against the state" itself, even though it enhances security against terrorism (2003, 195).
4. Finally, it might sound obvious but Waldron adds that it is imperative to pay special attention to the actual consequences of balancing arguments, and that they are not just symbolic actions.

Waldron delves a little deeper into what he considers balancing. He certainly sees it as a tool for dealing with civil liberties, and the way they might be reduced or enhanced. He points out that an increase in risk might be a reason for diminishing liberty. As mentioned earlier, it would constitute a new fact, and therefore a new reason to strike a new balance between rights. It definitely adds something to one side of the balance. As Waldron puts it, "though there are good reasons for protecting civil liberties, civil liberties must give way if the reasons in their favor remain the same while something is added to the reasons on the other side" (2003, 196). However, he adds that this logic is not always adequate, and relating reasons to one another in this simplistic way is inappropriate. Indeed, it is also believed that rights are not be regarded as vulnerable to changes in the society.

In addition, it can be argued that civil liberties themselves carry some sort of balance. Waldron also believes that those "civil liberties are not even defined until some balancing exercise is undertaken" (2003, 198). To further his argument, he gives the following example:

- An individual can be free to move around the country, but he is not free to come within distance of the President. Where that boundary is drawn (from a few feet to a few yards) is "a matter that requires consideration of consequences" (2003, 197). Therefore, the balance not only affects the priority given to a certain liberty, but also the way this liberty is defined and understood.

It is even more difficult to discern the mechanism behind civil liberties when so many changes in society affect the very factors that compose their definition. Before considering a shift in the balance between rights, it would be wiser to first determine how new facts and new considerations affect the very definitions of civil liberties. Waldron adds that this exercise is harder for some liberties than others (for example, the freedom of speech or religion). In the case of France and privacy rights, which are at the center of this paper, it would be relatively complicated to estimate any change in the definition of the right to privacy. Therefore, any government action that might have an influence on those rights should be considered very carefully.

Waldron concludes that there is no consensus on the issues raised by the notion of balance between rights, because of their "depth, complexity, and philosophically controversial character" (2003, 199).

Finally, Waldron insists that the debate about balance needs to be adjusted. Instead of discussing a balance between one thing we all like (liberty) and another thing we all like (security), the discussion should be centered around the interests of a dissident individual or minority against the interests of the community as a whole (2003, 201). Indeed, it is necessary to distinguish between the interests of individuals and the interests of the community : "The interests of each individual are already balanced into the interests of the community as a whole, and the idea of a further balance, between their separate interests and the results of the first balance, is itself therefore mysterious" (Dworkin, 1985, 73)

## 4. Analysis

After examining the different theories and concepts of the balance between rights in the previous chapter, this paper will aim to apply this theoretical framework to the case of France, and to the security measures taken in the aftermath of the 2015 terrorist attacks. In the wake of the January attacks, the French government drafted a new law regarding intelligence services, surveillance techniques and anti-terrorism methods. A few days following the November attacks, French president François Hollande declared a nationwide state of emergency which remains active to this day.

While reviewing the main components of each of these measures <sup>(16)</sup>, this chapter will therefore focus on how they have affected the balance between security and liberty, by analyzing their consequences on the population and their rights.

### 4.1. Loi sur le Renseignement

After the events at Charlie Hebdo in January 2015, the focus was particularly put on surveillance techniques and collection of intelligence data. Following the conclusions of a special report written to evaluate the legal framework of intelligence services, the government submitted the *projet de loi relatif au renseignement* (Bill on Intelligence) on March 19, 2015, which was later adopted by the *Assemblée Nationale* on May 5. This legislation simply adds a new chapter to the already existing *Code de la sécurité intérieure* (code of homeland security), which deals exclusively with measures related to surveillance techniques and collection of data, and is divided into several chapters, each with its own dispositions. Below are the articles most relevant to this paper <sup>(17)</sup>.

#### 4.1.1. General dispositions

The first title of this new bill establishes the general dispositions under which French intelligence services will now act. It is comprised of four articles, each dealing with the legal framework surrounding the field of action of those services.

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<sup>16</sup> Some translations and descriptions of articles were previously written by the same student, as part of a group project on counter-terrorism policies during the 2015 spring semester.

<sup>17</sup> All articles can be found at: <http://www.assemblee-nationale.fr/14/projets/pl2669.asp>

*Art. L. 811-1. – Le respect de la vie privée, notamment le secret des correspondances et l'inviolabilité du domicile, est garanti par la loi. L'autorité publique ne peut y porter atteinte que dans les seuls cas de nécessité d'intérêt public prévus par la loi [...].*

This article states that the respect of privacy is guaranteed by the law, including the secrecy of correspondence and the inviolability of places of residence, and authorities can only breach this guarantee in cases of public necessity intended by the law. Those exceptions should all be related to national security, and are listed in Article L. 811-3:

*Art. L. 811-3. – Les services spécialisés de renseignement peuvent [...] être autorisés à recourir aux techniques [...] pour le recueil des renseignements relatifs aux intérêts publics suivants : 1° La sécurité nationale ; 2° Les intérêts [...] de la politique étrangère [...] de la France ; 3° Les intérêts économiques [...] de la France ; 4° La prévention du terrorisme ; [...] 6° La prévention de la criminalité et de la délinquance organisées ; 7° La prévention des violences collectives de nature à porter gravement atteinte à la paix publique.*

Intelligence services are allowed to collect information and monitor communications in the event of a threat to national security, to France's foreign policy and economic interests, and to prevent terrorism, organized crime or any collective violence that could be detrimental to public order.

Those dispositions seem to be in accordance with the Universal Declaration of Human Rights and the European Convention on Human Rights, by stating that privacy and secrecy of correspondence are guaranteed by law, except in special circumstances. These circumstances, listed in Article L. 811-3, are also mentioned in Article 8 of the ECHR, that is to say in the even of a threat to the Nation, public order or national interests <sup>(18)</sup>. This very first section has raised a lot of objections and criticisms, as those circumstances were considered as too vague and ambiguous, and could basically justify any infringement to human rights or invasion of privacy. Among this list of exceptions, one that particularly stands out is the protection of France's foreign policy interests. As seen in Donnelly's theoretical approach, the different interests of a country's foreign policy can be arranged in a hierarchy, at the top of which security interests are usually found. Donnelly also showed that this hierarchy was subject to changes in the economic,

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<sup>18</sup> ECHR, [https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/Convention\\_ENG.pdf](https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/Convention_ENG.pdf)

political or social context, and the place of those interests within the hierarchy could change either absolutely or relatively. Here, the terrorist attacks of January 2015 have pushed the French government to issue a new law which give new powers to agencies and intelligence services in the event of a threat to France's interests. Therefore, the absolute value of security interests have increased considerably, making them a priority and eclipsing other interests. In this case, the relative value of human rights interests has in turn decreased, and violations or infringements to those rights, like invasion of privacy, would be justified by a threat level judged more important.

Furthermore, the concept of security is not clearly defined and remains largely subject to interpretation, even though it seems to be a recurrent theme in this new law and in the counter-terrorism political discourse in general. If the concept of security as defined by Donnelly is applied here, it can be interpreted this way:

1. What is to be secured? The attacks on Charlie Hebdo were primarily a violation of personal security, and directly affected the citizens. However, for what Charlie Hebdo represented, it is also a violation of the freedom of speech and expression, a valued also shared by the State. To that extent, national security is also to be secured.
2. Where does the threat lie? In this instance, the threat came from an external source, as it was orchestrated and claimed by a branch of al-Qaeda in the Arabian Peninsula. However, the two terrorists involved in the attacks, the Kouachi brothers, were both French citizens. Therefore, the threat is both external and internal, which makes it more difficult to anticipate, and could arguably give more reasons to the government to sanction rights-abusive measures.
3. What is the nature of the threat? The nature of the January attacks was clearly material. Nevertheless, the Islamist ideology advocated by the terrorists has been spread among a number of French citizens, as was seen in (2). Therefore, the threat can be considered ideological and moral until an actual attack occurs, at which point it becomes material.

Depending from which perspective the situation is viewed, the concept of security in the case of France can take many forms and the outline of its definition remains blurry. There does not appear to be one concept everyone could agree on, and the way the threat to security is perceived will decide if rights-abusive measures will be pursued. As



long as, on one side of the balance, the concept of security is unclear and unstable, the human rights side will also remain in a state of uncertainty.

These general dispositions, and in particular the circumstances listed in Article L. 811-3, will be referred to throughout this policy as the grounds for any investigation led by intelligence services.

#### 4.1.2. Procedure

The second chapter of the bill on intelligence focuses on the administrative procedure that authorizes intelligence services to start an investigation. The request of surveillance must go through different governmental bodies, and has to include a detailed description of the techniques that are to be used.

*Art. L. 821-1. – La mise en œuvre sur le territoire national des techniques de recueil du renseignement [...] est soumise à autorisation préalable du Premier ministre. Les autorisations sont délivrées, après avis de la Commission nationale de contrôle des techniques de renseignement, par le Premier ministre ou l'une des six personnes spécialement déléguées par lui.*

This article says that the authorization to implement surveillance techniques on the national territory is delivered by the Prime Minister, or one of the delegates he designated beforehand. The authorization is given following the recommendation of the Commission of control, the government body that handles this type of requests.

*Art. L. 821-2. – Les autorisations [...] sont délivrées sur demande écrite et motivée du ministre de la défense, du ministre de l'intérieur, du ministre de la justice ou des ministres chargés de l'économie, du budget ou des douanes, ou de l'une des trois personnes que chacun d'eux a spécialement déléguées. La demande précise : 1° La ou les techniques à mettre en œuvre ; 2° La ou les finalités poursuivies ; 3° Le ou les motifs des mesures ; 3° bis La durée de validité ; 4° La ou les personnes, le ou les lieux ou véhicules concernés [...]*

A request of surveillance must be issued by the Ministry of Defense, the Ministry of the Interior or the Ministry of the Economy and Budget, and must include the following four elements:

1. The techniques of surveillance to be implemented, which can range from monitoring communications to installing surveillance devices or intercepting computer data.
2. The purpose the collected information will serve, and in what context the investigation takes place.
3. What are the reasons that motivate the request, how is it justified and what evidence can support the request.
4. The name(s) of the individual(s) related to the request, and if applicable, what locations and objects should be put under surveillance.

*Art. L. 821-3. – La demande est communiquée au président ou, à défaut, à l'un des membres de la Commission nationale de contrôle des techniques de renseignement [...] qui rend un avis au Premier ministre dans un délai de vingt-quatre heures [...]*

This request is then examined by the newly created *Commission nationale de contrôle des techniques de renseignement* (National Commission of control of surveillance techniques). The request is submitted to the president of said commission, or one of its members. They will then send their recommendation to the Prime Minister within 24 hours. In the following chapter, the composition and role of the Commission will be presented in more details.

*Art. L. 821-4. – L'autorisation de mise en œuvre des techniques de recueil de renseignement est délivrée par le Premier ministre ou l'une des personnes par lui déléguées, pour une durée maximale de quatre mois, et est renouvelable dans les mêmes conditions de forme et de durée que l'autorisation initiale. [...] La décision du Premier ministre est communiquée sans délai à la Commission nationale de contrôle des techniques de renseignement. Lorsqu'il a délivré une autorisation après un avis défavorable de la commission, le Premier ministre indique les motifs pour lesquels cet avis n'a pas été suivi.*

*Art. L. 821-5. – En cas d'urgence absolue, et par dérogation aux articles L. 821-1 à L. 821-4, le Premier ministre ou les personnes spécialement déléguées par lui peuvent autoriser de manière exceptionnelle la mise en œuvre de la technique concernée sans avis préalable de la Commission nationale de contrôle des techniques de renseignement. [...]*

The decision to grant the surveillance request is then taken by the Prime Minister or one of his delegates. His authorization is valid for a duration of four months at the most, and can then be renewed under the same conditions as the initial request. However, the Prime Minister can still deliver an authorization even though the Commission gave a negative recommendation (Art. L. 821-4). Moreover, in a case of “absolute emergency”, the Prime Minister has the possibility to bypass the Commission of control altogether, and immediately deliver an exceptional authorization to launch a surveillance operation, ignoring the procedure established in the previous articles (Art. L. 821-5). This last article defeats the whole purpose of the Commission of control, questioning the very meaning and existence of this new institution.

The legislation becomes somewhat confusing here. It is first mentioned that a regular request of surveillance has to be motivated by one of the reasons stated in Article L. 811-3; a threat to national security, to France's foreign policy and economic interests, or to prevent terrorism, organized crime and any collective violence that could be detrimental to public order. The text then adds an article anticipating an alternative for the Prime Minister in cases of “absolute emergency”. Yet, such cases are not given a proper definition, and it is unclear how they differ from the reasons first mentioned in Article L. 811-3. Some of these reasons, like the prevention of terrorism and organized crime, are simply the ongoing missions of law enforcement authorities. Therefore, they might not be considered an “absolute emergency”, and will need a regular surveillance request to be dealt with. However, shouldn't a threat to national security or to France's national interests be considered a case of “absolute emergency”? These particular reasons seem to be more sudden, unexpected risks for the Nation, which will have to be dealt with more urgently. It does not appear there is a clear line between an “absolute emergency” and the other reasons that motivate a regular surveillance request. Again, the concept of security is not plainly defined, and it brings consequences to the balance between security and liberty. While it was generally agreed earlier, especially in Donnelly's views (2012, 235), that security matters trump all other interests, we do not know to what degree a threat to security should be evaluated. Therefore, on the other side of the balance, we do not know to what extent it will affect human rights interests, as long as the threat to security is not assessed.

Before subjecting any change to the balance with a wrong estimation of security interests, it appears relevant to follow the guidelines proposed by Waldron regarding the balancing rhetoric (2003, 194), and apply it to the situation in France:

1. Waldron first mentioned that civil liberties and human rights are usually considered “anti-consequentialist”, and should not be subject to changes in the balance. In the case of France, civil liberties and in particular the right to privacy are protected by several documents, such as the Universal Declaration of Human Rights, and to a national level, by the *Code Civil*. However, the right to security is also present in these documents. So when one is weighed against the other, it is not clear which should be given priority.
2. Waldron then pointed out the “distributive character” of any change made to the balance, and how a diminution in liberty may affect some people more than others. The new law on intelligence did not, in appearance, alter the liberties of the majority of the population. However, anyone who has been the target of a surveillance request by intelligence services saw their liberties greatly reduced, whether this request was eventually justified or not.
3. A reduction in liberty is usually followed by an increase in the power of the state. But Waldron also judged that this enhanced power can be used for other things, and argued that “diminishing liberty might also diminish security against the state”. Since the November attacks, France has been in a state of emergency, giving more controlling power to the state, and which has been extended several times since the attacks took place. The details of this measure will be covered in more depth in the next section.
4. Finally, Waldron reminded us that it is imperative to give special care to the actual consequences of any change in the balance, and how they will affect the country, its institutions and its population in the long-term.

#### 4.1.3. Commission of control

The third chapter of this policy is dedicated to the *Commission nationale de contrôle des techniques de renseignement* (CNCTR), and elaborates on its composition, its missions and the range of its competences.

*Art. L. 831-1. – La Commission nationale de contrôle des techniques de renseignement est une autorité administrative indépendante. Elle est composée de neuf membres. [...] Les membres sont nommés par décret. Ce décret désigne le président parmi les membres issus du Conseil d'État ou de la Cour de cassation. Le mandat des membres, à l'exception de ceux prévus au 1°, est de six ans. Il n'est pas renouvelable. [...]*

This article defines the Commission as an “independent administrative authority”, and states that it is composed of 9 members:

- 2 members of the *Assemblée Nationale* and 2 members of the *Sénat*, appointed by the president of their respective chamber
- 2 members or former members of the *Conseil d'Etat*, a government body that serves as the supreme court for administrative justice, appointed by the vice-president of this Council
- 2 magistrates or former magistrates, appointed by the *Procureur général* (general attorney)
- 1 expert in electronic communications, chosen for his expertise in matters of surveillance by the president of the French agency in charge of regulating telecommunications (*Autorité de régulation des communications électroniques et des postes*)

The members of the Commission are chosen by decree for 6 years, and their mandate is not renewable. The president of the Commission is chosen by decree among the members. The Commission is mainly composed of representatives of the legislative and judicial powers of the State (as defined by Montesquieu's tripartite system in the theory of separation of powers <sup>(19)</sup>). In that regard, it can be considered a relatively independent and impartial institution.

*Art. L. 832-1. – Dans l'exercice de leurs attributions, les membres de la commission ne reçoivent d'instruction d'aucune autorité.*

The authority and independence of the Commission is further reinforced in this article, which states that its members cannot receive orders or instructions from any other institution.

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<sup>19</sup> Montesquieu, *The Spirit of the Laws* (1748)

*Art. L. 832-3. – La Commission nationale de contrôle des techniques de renseignement établit son règlement intérieur. Elle ne peut valablement délibérer que si au moins quatre membres sont présents. En cas de partage égal des voix, la voix du président est prépondérante.*

The decisions and recommendations made by the Commission are only valid if at least 4 of its members are present at the time of the vote. In the event of a tie during a deliberation, the president's vote is the tiebreaker.

*Art. L. 833-1. – La Commission nationale de contrôle des techniques de renseignement veille à ce que les techniques de recueil du renseignement soient mises en œuvre sur le territoire national conformément aux dispositions du présent livre.*

*Art. L. 833-2. – Les ministres, les autorités publiques, les agents publics prennent toutes mesures utiles pour faciliter l'action de la commission. [...]*

Finally, the most important objective of the Commission is hereby defined as ensuring that surveillance techniques and data collection methods implemented on the national territory are in accordance with the legal dispositions of the new legislation. Moreover, the importance of the Commission is emphasized in Article L. 833-2, which stipulates that all ministers, public authorities and public workers must take any measure they can to facilitate the action of the Commission.

This chapter illustrates the independence, influence and status of the Commission, ensures that its missions are considered a priority and guarantees that its actions are carried out properly on the national territory. The importance of the Commission was however weakened by previous articles, as the Prime Minister can ignore the recommendations made by the Commission, or simply not consult them in any way in ambiguous cases of absolute emergency. The real powers and authority of the Commission are therefore diminished, and it would appear the government, through the Prime Minister and his cabinet, still holds the power to arbitrarily launch operations that could lead to violations of human rights.

As Jeremy Waldron mentioned in his "Image of Balance", a terrorist emergency is an opportunity for the state to limit liberty (Waldron, 2003, 191). In addition, he assured that citizens and courts alike were less likely to oppose counter-terrorist measures in

times of crisis. However, in the case of France, the bill on intelligence received hostile responses from the population in general.

For example in October 2015, more than 180 journalists from the Legal Press Association (*Association de la presse judiciaire*), worried about the new threats to the liberty of information, took the matter to the European Court of Human Rights, protesting against the mass surveillance of simple citizens allowed by the new law <sup>(20)</sup>. The European Court was also solicited at the same time by the Paris Bar Association (*Conseil de l'ordre des avocats de Paris*), claiming, among other complaints, that the law did not respect the professional confidentiality between a lawyer and his client <sup>(21)</sup>. However, the law was previously judged in accordance with the Constitution by the Constitutional Council (*Conseil constitutionnel*), the highest constitutional authority in France <sup>(22)(23)</sup>, in July 2015.

There were also many other critics and opposition to the new law, from independent commissions and organizations such as the National Commission on Informatics and Liberty (*CNIL: Commission Nationale de l'Informatique et des Libertés*) <sup>(24)</sup> and the French Digital Council (*CNNum: Conseil national du numérique*) <sup>(25)</sup>. In addition, several demonstrations took place from April to June 2015, while the law was being examined by the Parliament.

Despite the situation of crisis and even though the level of threat on the French territory remained quite high, the legitimacy of the new bill on intelligence was not unanimously approved by the population. By following Waldron's guidelines on balancing rhetoric, the general unpopularity of this new legislation should be taken into account when balancing security and liberty, as it falls under the actual consequences of balancing arguments that Waldron warned about. Indeed, too much reduction in civil liberties would bring even more discontentment and dissatisfaction among the population.

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<sup>20</sup> Le Monde, [http://www.lemonde.fr/pixels/article/2015/10/03/des-journalistes-attaquent-la-loi-renseignement\\_4781885\\_4408996.html](http://www.lemonde.fr/pixels/article/2015/10/03/des-journalistes-attaquent-la-loi-renseignement_4781885_4408996.html)

<sup>21</sup> Le Monde, [http://www.lemonde.fr/police-justice/article/2015/10/09/la-loi-renseignement-attaquee-par-l-ordre-des-avocats-de-paris\\_4786665\\_1653578.html](http://www.lemonde.fr/police-justice/article/2015/10/09/la-loi-renseignement-attaquee-par-l-ordre-des-avocats-de-paris_4786665_1653578.html)

<sup>22</sup> Le Monde, [http://www.lemonde.fr/pixels/article/2015/07/23/le-conseil-constitutionnel-censure-trois-articles-de-la-loi-sur-le-renseignement\\_4696112\\_4408996.html](http://www.lemonde.fr/pixels/article/2015/07/23/le-conseil-constitutionnel-censure-trois-articles-de-la-loi-sur-le-renseignement_4696112_4408996.html)

<sup>23</sup> Conseil constitutionnel, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2015/2015-713-dc/decision-n-2015-713-dc-du-23-juillet-2015.144138.html>

<sup>24</sup> CNIL, <https://www.cnil.fr/fr/publication-de-lavis-sur-le-projet-de-loi-relatif-au-renseignement>

<sup>25</sup> CNNum, [http://www.cnnumerique.fr/wp-content/uploads/2015/03/2015-03-19\\_CP\\_Renseignement-2.pdf](http://www.cnnumerique.fr/wp-content/uploads/2015/03/2015-03-19_CP_Renseignement-2.pdf)

#### 4.1.4. Surveillance techniques

The last relevant chapter of this law focuses mainly on the concrete techniques of surveillance that are used by the intelligence services, and under which circumstances they are authorized.

*Art. L. 851-6. – Pour la prévention des atteintes aux intérêts publics mentionnés à l'article L. 811-3, peut être autorisée l'utilisation d'un dispositif technique permettant la localisation en temps réel d'une personne, d'un véhicule ou d'un objet. En cas d'urgence liée à une menace imminente ou à un risque très élevé de ne pouvoir effectuer l'opération ultérieurement, le dispositif mentionné au premier alinéa peut être installé et exploité, par dérogation aux articles L. 821-1 à L. 821-4, sans autorisation préalable.*

In compliance with the reasons listed in Article L. 811-3, intelligence services can be authorized to use a technical device to allow them to locate in real time an individual, a vehicle or an object. However, in case of an emergency due to an imminent threat, this device can be installed and exploited without prior authorization, ignoring the procedure established in previous chapters. Again, the notions of “threat to a national interest” (Art. L. 811-3) and “imminent threat” are opposed here and not clearly defined, as it was the case with the Prime Minister's ability to bypass the Commission of control.

*Art. L. 851-7. – Pour la prévention des atteintes aux intérêts publics mentionnés à l'article L. 811-3, peuvent être directement recueillies [...] Les données techniques de connexion strictement nécessaires à l'identification d'un équipement terminal ou du numéro d'abonnement de son utilisateur [...] Les données techniques relatives à la localisation des équipements terminaux utilisés.*

Under the same circumstances, intelligence services can also collect connexion data to identify the hardware used by an individual, as well as data related to his location. This kind of measure was especially protested by associations such as *La Quadrature du Net*, a group that promotes digital rights and freedoms of Internet users <sup>(26)</sup>.

*Art. L. 852-1. – Peuvent être autorisées [...] les interceptions de correspondances émises par la voie des communications électroniques et susceptibles de révéler des renseignements entrant dans les finalités mentionnées à l'article L. 811-3. Lorsqu'une ou plusieurs personnes appartenant à l'entourage de la*

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<sup>26</sup> La Quadrature du Net, <https://www.laquadrature.net/fr/agissons-contre-le-projet-de-loi-de-surveillance>



*personne visée par l'autorisation sont susceptibles de jouer un rôle d'intermédiaire, volontaire ou non, pour le compte de celle-ci ou de fournir des informations au titre de la finalité faisant l'objet de l'autorisation, celle-ci peut être accordée également pour ces personnes.*

Intelligence services are also allowed to intercept correspondence that goes through electronic communications, likely to contain information that could be detrimental to national interests. Furthermore, this article goes on saying that when one or several individuals close to the original suspect are also believed to participate in the same illegal activities, as an accomplice or intermediary, knowingly or not, the surveillance authorization can apply to them. Therefore, this article implies that the authorization could eventually be extended to a great number of individuals, who possibly had no connection to the original suspect whatsoever.

This particular problem echoes an argument put forth by Paul Hoffman, who claimed that “when societies trade human rights for security, most often they get neither” (Hoffman, 2004, 934). To support his reasoning, Hoffman recounted several historical examples, from the Philippines to Indonesia, where the fight against Communism justified massive human rights violation. Marginalized groups end up being discriminated against, which is detrimental to anti-terrorism efforts, as it creates conflict and animosity between law enforcement authorities and the affected communities. In the case of France, this new law might have those very consequences, as relatives and acquaintances of presumed suspects can be targeted by intelligence services without any authorization, simply for being in the vicinity of the original suspect.

*Art. L. 853-1. – Peut être autorisée [...] l'utilisation de dispositifs techniques permettant : La captation, la fixation, la transmission et l'enregistrement de paroles prononcées à titre privé ou confidentiel, ou d'images dans un lieu privé ; La captation, la transmission et l'enregistrement de données informatiques transitant par un système automatisé de données ou contenues dans un tel système.*

*Art. L. 853-2. – [...] peuvent être expressément autorisés : L'introduction dans un véhicule ou dans un lieu privé à la seule fin de mettre en place, d'utiliser ou de retirer les dispositifs techniques mentionnés aux articles L. 851-6 et L. 853-1 ; [...] l'introduction dans ce système, directement ou par l'intermédiaire d'un réseau de communications électroniques.*

Still under the circumstances of Article L. 811-3, in the event of a threat to France's national interests and after a request has been submitted to the Commission of control, intelligence services are allowed to use surveillance devices to:

- Retrieve video records, phone calls, communications and images, even in private and confidential environments
- Retrieve and intercept the transmission of computer data passing through automated systems

Intelligence services are also allowed to enter a vehicle or private property for the sole purpose of installing, using or removing surveillance devices previously implanted, as well as infiltrate private servers to retrieve computer data.

These articles mainly refer to IMSI-catchers, which are devices used for intercepting mobile phone traffic and tracking movements of mobile phone users, as well as the installation of "black boxes" among telecommunications operators and Internet service providers to monitor the flow of information and connexions. Most of these devices were already used actively by intelligence services before this new law was passed. However, these methods were very controversial and were considered illegal. The new legislation on intelligence and data collection now gives intelligence services a proper legal framework, legalizing methods that have been used for years. These surveillance techniques have a considerably negative effect on human rights, in particular the right to privacy.

It is possible to apply Jeremy Waldron's concept of balance when assessing the necessity of these methods. Waldron believes that an increase in risk might be a reason for diminishing liberty. In the case of France, the terrorist attacks have evidently added something to one side of the balance, the side of security, and an increase in risk has indeed been observed. However, Waldron adds that this logic might not always be adequate, as civil liberties themselves carry some sort of balance. Before striking a new balance between security and liberty, it would then be wiser to first determine how the increase in risk is affecting those very concepts. Here, the new law on intelligence has had more impact on privacy rights than on security and prevention of terrorism. As a result of this new law, the balance has once again shifted, as it represents a new fact to be taken into consideration. On one side, civil liberties and most particularly the right to privacy have been reduced, as the law facilitates the government and intelligence services to invade the privacy of citizens. On the other side, the threat to security has

remained the same, until another terrorist attack took place a few months later. That second attack showed that France still lacked efficient anti-terrorism measures, and that the ones in place were not working well enough. Furthermore, investigations later revealed that almost all attackers were previously known by some European agency or organization. This shows the limits of data collection and surveillance techniques, as even though the perpetrators were being watched and their activities kept on file, they were still able to carry out their attacks.

## **4.2. Etat d'urgence**

Nevertheless, the November attacks have in turn provided a new fact to be taken into consideration, if the balance is to be adjusted again. The threat to security after the January attacks had been under-estimated, and the new law on intelligence was a controversial, if not inappropriate reaction. Therefore, the response to the latest attacks was different, and French president François Hollande declared a nation-wide state of emergency on November 14, which still remains in place today. This section will review the consequences that this measure has had on security and civil liberties.

The November attacks in Paris and its suburban area highlighted the fact that France was still under the imminent threat of terrorism. The consequences on security issues and human rights of the citizens have been numerous, from the establishment of the state of emergency, followed by its extension to several months, to reinforcement of security in transportation, industrial sites and public places.

The level of threat in France can be measured by Vigipirate, the national security alert system, which has been on "attack alert" in Paris and its surrounding area since the January attacks. For the rest of the country, including overseas territories, the level remains at "high vigilance". However, new instructions have been given regarding demonstrations, public gatherings and school trips for example <sup>(27)</sup>. The security measures have therefore been reinforced in several places, with controls of people and vehicles entering public buildings, and more security on industrial sites. In addition to

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<sup>27</sup> Press release, [http://www.umih.fr/export/sites/default/.content/media/pdf/Posture-VIGIPIRATE\\_attentats-du-13-novembre-2015.pdf](http://www.umih.fr/export/sites/default/.content/media/pdf/Posture-VIGIPIRATE_attentats-du-13-novembre-2015.pdf)

new Vigipirate instructions, French president François Hollande has also declared a state of emergency.

#### 4.2.1. History

*November 14 – November 26*

The state of emergency was established on November 14, one day after the attacks, for a period of 12 days, as it is allowed by the law. It is the first state of emergency since the 2005 riots around Paris, which concerned 25 departments, and the first time it has been applied to the whole territory since the 1960s and the Algerian War. The state of emergency also allows the Minister of the Interior and the prefects (the representatives of the state in each French department) to enhance security and restrictions such as <sup>(28)</sup>:

- Forbid the traffic of vehicles and individuals in specific places at specific times
- Create “protection and security zones” where individuals are controlled and regulated
- Forbid the sojourn of an individual in a department, who is trying to hinder the action of public authorities
- Order the temporary closing of music halls, venues, and all sorts of public places
- Forbid public gatherings of all kinds

As a result, in the days following the attacks, many of Paris' public places were shut down, such as schools, museums, libraries, swimming-pools, outdoor markets, and so on <sup>(29)</sup>. In addition, public demonstrations were forbidden by the prefect of Paris, judging that law enforcement units were already mobilized to ensure the general safety of the city, and could not be distracted from this mission to attend other gatherings.

However, despite these enhanced security measures, thousands of people still gathered all over Paris on November 15, to commemorate the victims of the attacks <sup>(30)</sup>. Such spontaneous rallies have shown that the state of emergency and its additional measures were in reality difficult to apply.

The fact that those measures were not sufficient enough also gives pause for thought as for the impact on human rights and civil liberties. By following Donnelly's hierarchy of

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<sup>28</sup> Le Monde, [http://www.lemonde.fr/societe/article/2015/11/14/attaques-a-paris-ce-que-veut-dire-la-declaration-d-etat-d-urgence-en-france\\_4809523\\_3224.html](http://www.lemonde.fr/societe/article/2015/11/14/attaques-a-paris-ce-que-veut-dire-la-declaration-d-etat-d-urgence-en-france_4809523_3224.html)

<sup>29</sup> Les Echos, [http://www.lesechos.fr/14/11/2015/lesechos.fr/021476960130\\_attentats-a-paris---cinema--ecoles--grands-magasins--musees--les-fermetures-se-multiplient.htm#](http://www.lesechos.fr/14/11/2015/lesechos.fr/021476960130_attentats-a-paris---cinema--ecoles--grands-magasins--musees--les-fermetures-se-multiplient.htm#)

<sup>30</sup> L'Express, [http://www.lexpress.fr/actualite/societe/en-images-un-dimanche-de-rassemblement-et-de-recueillement-a-paris\\_1736058.html](http://www.lexpress.fr/actualite/societe/en-images-un-dimanche-de-rassemblement-et-de-recueillement-a-paris_1736058.html)

rights, the enhancement of security measures automatically led to a reduction in civil liberties interests, namely the right to assembly, the freedom of speech and travel, or the right to privacy. Some of these liberties eventually won over the security measures; public gatherings and moments of contemplation happening all over the city showed that the right to gather and assembly was still strong and had not been breached, as well as the freedom of travel. However, it also means that the security measures have failed, and therefore, other civil liberties and rights have been reduced in vain, such as the right to privacy.

### *November 26 – February 26*

On November 18, before the 12-day period was over, the Council of Ministers presented a new bill extending the state of emergency to three months <sup>(31)</sup>. It was examined on the same day by the Commission of Laws (*Commission des Lois*) <sup>(32)</sup>, before being put to the vote by the *Assemblée Nationale* on November 19. The law to renew and extend the state of emergency was passed almost unanimously (551 “yes” votes, 6 “no” votes and 1 abstention <sup>(33)</sup>). Finally, the law was approved by the Senate and definitely adopted on November 20, again with a large majority (336 “yes” votes and 12 abstentions <sup>(34)</sup>).

Furthermore, after the extension of the state of emergency, France informed the Council of Europe that they would derogate from the European Convention on Human Rights <sup>(35)</sup>, as its article 15 allows in “time of war or other public emergency threatening the life of a nation” <sup>(36)</sup>. This move shows that France intends to breach some human rights or civil liberties while under the regime of the state of emergency. This article of the ECHR was designed to avoid penalties from the European Court of Human Rights, and allows France more flexibility if someone targeted by the new security measures included in the state of emergency were to assert their rights. This specific article tilts the balance in favor of security over some civil liberties, but is not applicable to Articles 3, 4 and 7, which protects individuals from torture and inhuman treatments, slavery and punishments without law.

<sup>31</sup> Assemblée Nationale, <http://www.assemblee-nationale.fr/14/projets/pl3225.asp>

<sup>32</sup> Assemblée Nationale, <http://www.assemblee-nationale.fr/14/cr-cloi/15-16/c1516016.asp>

<sup>33</sup> Assemblée Nationale, <http://www2.assemblee-nationale.fr/scrutins/detail/%28legislature%29/14/%28num%29/1191>

<sup>34</sup> Sénat, <http://www.senat.fr/scrutin-public/2015/scr2015-64.html>

<sup>35</sup> L'Express, [http://www.lexpress.fr/actualites/1/politique/etat-d-urgence-la-france-derogera-a-la-convention-europeenne-des-droits-de-l-homme\\_1740153.html](http://www.lexpress.fr/actualites/1/politique/etat-d-urgence-la-france-derogera-a-la-convention-europeenne-des-droits-de-l-homme_1740153.html)

<sup>36</sup> ECHR, p.13, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

### *February 26 – May 26 and beyond*

In the same fashion as the last prorogation, the state of emergency was once again extended for another three months in February <sup>(37)</sup>, until May. It was recently extended for the third time in May <sup>(38)</sup>, for two more months to cover the European Championship to be held in France in June and July. It is expected to be lifted at the end of July, after the completion of the Tour de France.

#### 4.2.2. Measures

The extension of the state of emergency comes with a new law which is comprised of three main concrete new measures. The state of emergency first gives the Prime Minister the possibility to issue a house arrest for individuals, without the approval of a judge. It also allows law enforcement authorities and special forces to launch police raids on private properties, day or night and again without the approval of a judge. Finally, the state of emergency allows to quickly dissolve citizens' associations and forbids public gatherings and social movements <sup>(39)</sup>. While these measures concern the sole motive of security, they have an effect on multiple civil liberties and human rights: the right to privacy, the right to assembly and free speech, and the right not to be detained without charge for example. Indeed, these measures ignore completely the role of the whole justice system, which usually gives the authorization to issue search warrants, house arrests and to hold suspects in custody.

#### 4.2.3. Critics

Here, the rapidity with which the extension of the state of emergency was passed, as well as the unanimous decision, confirms Jeremy Waldron's belief that reductions in civil liberties are not usually opposed in situations of crisis. However, as it was the case after the law on intelligence was passed, numerous critics came from the society, associations, media outlets and international organizations, on the content of the new state of emergency. Mostly, those critics denounced that a great number of police operations were unjustified, and were considered excessive, irrelevant and baseless

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<sup>37</sup> Legifrance, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032079090>

<sup>38</sup> Legifrance, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032551115>

<sup>39</sup> Amnesty International, <http://www.amnesty.fr/etat-urgence>

(40)(41). Also, as the 2015 United Nations Climate Change Conference approached (COP21), numerous environmental activists and militants were targeted by law enforcement authorities (42). Such arrests and police raids were justified by the violent behaviors of those activists during previous demonstrations, and it was believed that behaviors of this nature could represent a threat to public order. While these reasons do fall under the field of application of the state of emergency, this law was originally passed in an effort to prevent terrorism, and not environmental activism and other related causes. Historically, demonstrations and social movements are a part of French culture, and it usually occurs if the socio-economic context is favorable, employers or public authorities are vulnerable and when workers are organized, according to historian Stéphane Sirot (43). Denying this right to the population could be seen as a threat to France's national interests as well.

Finally, the National Consultative Commission on Human Rights (*Commission nationale consultative des droits de l'homme, CNCDH*), a French governmental organization whose purpose is to control and promote the respect of human rights on French soil, published a severe report about the state of emergency, on February 19, 2016 (44). The CNCDH denounces the abuses and misappropriations of the state of emergency, which represents an unjustifiable stepback of the state of law (45) (*Etat de droit/Rechtsstaat*). According to the Commission, those security measures were taken for the most part, to stigmatize a community belonging to a particular faith (i.e. Muslims). The Minister of Interior accounted for 3284 search warrants, 392 house arrests, and a dozen of places of worship shut down. In the end, 29 terrorist offenses were recorded, including 23 for apology of terrorism.

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<sup>40</sup> France TV Info, [http://www.francetvinfo.fr/faits-divers/terrorisme/attaques-du-13-novembre-a-paris/etat-d-urgence-en-france/arrestations-injustifiees-fausse-alertes-cinq-couacs-reperes-depuis-le-debut-de-l-etat-d-urgence\\_1188949.html](http://www.francetvinfo.fr/faits-divers/terrorisme/attaques-du-13-novembre-a-paris/etat-d-urgence-en-france/arrestations-injustifiees-fausse-alertes-cinq-couacs-reperes-depuis-le-debut-de-l-etat-d-urgence_1188949.html)

<sup>41</sup> Le Monde, [http://www.lemonde.fr/les-decodeurs/article/2015/11/23/les-petites-bavures-de-l-etat-d-urgence\\_4815803\\_4355770.html](http://www.lemonde.fr/les-decodeurs/article/2015/11/23/les-petites-bavures-de-l-etat-d-urgence_4815803_4355770.html)

<sup>42</sup> Le Monde, [http://www.lemonde.fr/societe/article/2015/11/27/les-militants-de-la-cop21-cible-de-l-etat-d-urgence\\_4818885\\_3224.html](http://www.lemonde.fr/societe/article/2015/11/27/les-militants-de-la-cop21-cible-de-l-etat-d-urgence_4818885_3224.html)

<sup>43</sup> Alternatives Economiques, [http://www.alternatives-economiques.fr/la-greve-en-france--une-histoire-sociale--xixe-xxe-siecle--par-stephane-sirot\\_fr\\_art\\_165\\_17844.html](http://www.alternatives-economiques.fr/la-greve-en-france--une-histoire-sociale--xixe-xxe-siecle--par-stephane-sirot_fr_art_165_17844.html)

<sup>44</sup> CNCDH report (French & English), <http://www.cncdh.fr/fr/publications/avis-sur-le-suivi-de-letat-durgence>

<sup>45</sup> CNCDH press release, [http://www.cncdh.fr/sites/default/files/160218\\_cp\\_cncdh\\_avis\\_suivi\\_de\\_letat\\_durgence.pdf](http://www.cncdh.fr/sites/default/files/160218_cp_cncdh_avis_suivi_de_letat_durgence.pdf)

The CNCDH is worried about the proportionality of these measures, and reports the realities imposed by the state of emergency:

- Administrative searches often led during the night, not taking into consideration the presence of vulnerable people (including numerous terrorized children)
- Inadapted behavior from law enforcement authorities (abusive handcuffing and holding people at gunpoint)
- Material damage done to private property
- House arrests detrimental to the freedom of travel; additionally, family and professional life greatly disorganized
- Misappropriation of the state of emergency, with no connexion to terrorism, to hinder the actions of activists, militants and trade unionists, and targeting as well clandestine immigration

From this report and the general critics ventured by several associations, media outlets, organizations, it would appear the right to privacy is the main collateral damage of the state of emergency, as was the case with the law on intelligence. Besides, it was established earlier in this paper that the right to privacy is one of several fundamental rights embodied by the Universal Declaration of Human Rights, namely Article 12:

*"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has a right to the protection of the law against such interferences or attacks."* <sup>(46)</sup>

Admittedly, such interference with the right to privacy could be justified, as Article 8 of the European Convention on Human Rights specifies, "in the interests of national security, public safety or the economic well-being of the country [...]" <sup>(47)</sup>. However, the analysis of the security measures pertaining to the state of emergency showed that these measures were often based on arbitrary reasons and came close to discrimination against people of Muslim faith <sup>(48)</sup>.

This observation can be linked to Paul Hoffman's theory, which is once again relevant in this case as the marginalization of minority groups is counter-productive in the fight

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<sup>46</sup> UDHR, <http://www.un.org/en/universal-declaration-human-rights/index.html>

<sup>47</sup> ECHR, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>48</sup> Human Rights Watch, <https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency>



against terrorism and creates tensions between law enforcement and affected communities. There is no denying that the perpetrators of the attacks, both in January and February, were Islamic fundamentalists of Muslim faith. It is also known that the phenomenon of radicalization happens within the French borders, particularly among Muslim communities <sup>(49)</sup>. However, it would be wiser not to humiliate and alienate the rest of the Muslim population living in France, when they could be potential allies, who could also report suspicious behaviors.

This is also mirrored by Jeremy Waldron's approach, and the "distributive character" of changes made to the balance (Waldron, 2003, 194). Again, it is clear that diminution in liberty *does* affect some people more than others. The current strategy employed by the government could result in a lose-lose situation for everyone: less liberties and less support in the fight against terrorism, which is supposed to be the primary objective of the state of emergency.

The effects on the balance between security and liberty are the same. Civil liberties were reduced because security interests were considered more pressing at the time. Now that it was shown that those security measures were mostly ineffective, it can again be said that liberties and rights were reduced in vain, and that the situation regarding security has not changed. Therefore, security interests are still high, and human rights interests are lower than ever.

Finally, it appears the measures relative to the state of emergency have also served to fight against environmental militants and other forms of political activism, while their original purpose was to fight against terrorism. This purpose was the cornerstone of the majority of those security measures, and it is also from which a new balance between security and liberty would be struck. However, by increasing the range of security interests from terrorism to political activism, and by doing so after the enactment of the law, the balance has been distorted, rendering it unstable and inaccurate.

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<sup>49</sup> Le Figaro, <http://www.lefigaro.fr/actualite-france/2016/02/02/01016-20160202ARTFIG00368-islamisme-8250-individus-radicalises-en-france.php>

## 5. Conclusion

After the attacks on Charlie Hebdo's headquarters in January 2015, it appeared that France needed to reinforce their anti-terrorism strategy if the government were to guarantee the safety of both the state and the population. Soon, a new law was passed, redefining the legal framework of intelligence services and giving them more powers and legitimacy to prevent terrorism-related behaviors. Specifically, surveillance techniques that were previously illegal can now be authorized by the government, so long as the request is motivated by a threat to France's national interests.

As these new controversial measures were being debated and criticized, another series of attacks took place in Paris, in November 2015. While some saw in these tragic events the proof that the law on intelligence was inefficient and detrimental to civil liberties, others believed it was not enough to successfully prevent terrorist threats. In the end, the government decided to establish a state of emergency, thus giving law enforcement authorities more control over the population, and allowing arbitrary house arrests and search warrants. The purpose of this paper was to examine the effects of these two policies on individual liberties, and to what extent it affected the balance between security and liberty.

In the case of the law on intelligence, the research was conducted by analyzing the text of the law, to find out if some of its content could indeed lead to human rights infringements. It appeared that the law allowed intelligence services to request rights-abusive surveillance techniques, only if they were motivated by a will to prevent terrorism or any threat to national security. If these motivations were deemed acceptable, a new Commission of control would issue a recommendation to the Prime Minister, who would then authorize the request. However, the law also stipulates that in the case of an absolute emergency, the Prime Minister can bypass the Commission entirely, and grant an authorization immediately.

Firstly, this law received criticism as the reasons that could motivate surveillance techniques were deemed too vague and ambiguous, and could therefore apply in any situation. Secondly, the text makes no distinction between these reasons and the cases of absolute emergency mentioned later. In this regard, the lack of definition for a

concept as important as security, whether it be national or personal, has direct consequences on the balance between security and liberty. If one side is not clearly defined, the balance is distorted, and the other side becomes unstable. In this case, liberties or more generally human rights are, as a result, threatened because their fate is deeply linked to the concept of security, which is not appropriately handled.

The state of emergency is a special regime which, in time of crisis, gives the president and his government the possibility to take extraordinary measures. Since its establishment in November 2015, the state of emergency allowed security measures such as house arrests, search warrants, control of the population, shutting down of places of worship and ban of public demonstrations, among others. By looking at reports from different institutions and organizations, coupled with newspapers articles, it was possible to investigate the effects of these security measures on individual rights, and therefore on the balance. It appears the state of emergency, while originally enacted to fight terrorism, also led to repressive measures against environmental militants and political activists. By doing so, the balance was also affected, as civil liberties were traded off for reasons other than the ones generally accepted and intended by the state of emergency. Furthermore, these measures inevitably led to discriminations towards Muslims, which is according to Paul Hoffman, detrimental to anti-terrorism efforts. Indeed, the marginalization of certain groups creates enmity between law enforcement and the affected communities, and stops any collaboration to prevent terrorism, which should be the overarching objective.

It can therefore be concluded that the new security measures passed by the French government did affect the balance between security and liberty, in the sense that the concept of security is never given a proper framework, unlike human rights. It is generally accepted that security interests should be considered a priority over other interests, especially in times of crisis, as Jack Donnelly demonstrates in his hierarchy of rights. But the balance between those two competing concepts will remain unstable, so long as one side is left unaccounted-for. Therefore, it appears difficult to combine the need for security and the preservation of civil liberties. Moreover, it was shown that these security measures led to abuses unrelated to the fight against terrorism. In that

regard, should the right to security against the state itself be considered as high as the right to security against terrorism?

It can also be argued that measuring the effects of these policies can be misleading. Indeed, when such measures are efficient, there is nothing to discuss or report, except maybe the number of convicted terrorists, and it usually goes unnoticed. However, when they do not work, and something slips through the net of intelligence services, it is much more visible and usually takes the shape of another terrorist attack.

« L'état d'urgence c'est une réponse parmi d'autres au terrorisme. S'il faut limiter certains droits pendant trois mois, franchement, le sacrifice n'est pas trop grand pour essayer de limiter les risques du terrorisme. »

The state of emergency is one answer, among many, to terrorism.

If we have to limit some rights for three months, honestly, the sacrifice is small enough to try and limit the risks of terrorism.

Elisabeth Badinter, Philosopher <sup>(50)</sup>

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<sup>50</sup> 2015, *Paris est une cible*, television program, Arte, 05/01/2016, <https://www.youtube.com/watch?v=Nvelzm2yRgs#t=41m02s>

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