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*The protection of fundamental freedoms
through the
référé-liberté procedure*

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WARNING : this version is an automatic translation, in english, of the Phd presented in 2006 in the University of Aix-Marseille

Table of abbreviations

AEAP	Annuaire européen d'administration publique
AJFP	Actualité juridique – fonction publique
AIJC	Annuaire international de justice constitutionnelle
Ass.	Assemblée
AJDA	Actualité juridique – droit administratif
APD	Archives de philosophie du droit
BJCL	Bulletin juridique des collectivités locales
BJDCP	Bulletin juridique des contrats publics
BJDU	Bulletin juridique de droit de l'urbanisme
Bull.	Bulletin des arrêts de la Cour de cassation
CAA	Cour administrative d'appel
Ccass	Cour de cassation
CC	Conseil constitutionnel
CE	Conseil d'Etat
Chron.	Chronique
Civ.	Chambre civile de la Cour de cassation
CJCE	Cour de justice des communautés européennes
Coll. ter	Collectivité territoriale – Intercommunalité
Com.	Chambre commerciale de la Cour de cassation
Concl.	Conclusions
Cons.	Considérant
Constr. urb.	Construction et urbanisme
CEDH	Cour européenne des droits de l'homme
CJEG	Cahiers juridiques de l'électricité et du gaz
Com. électr.	Com. com. Communication et commerce électronique
CRDF	Cahiers de la recherche sur les droits fondamentaux
D.P.	Recueil Dalloz
Dr. adm.	Droit administratif
DH	Dalloz hebdomadaire
DP	Dalloz périodique
Dr. Soc.	Droit social
EDCE	Etudes et documents du Conseil d'Etat
GAJA	Les grands arrêts de la jurisprudence administrative, 13 ^{ème} éd., Dalloz, 2001 (M. LONG, P. WEIL, G. BRAIBANT, P. DELVOLLE, B. GENEVOIS)
GDCC	Les grandes décisions du Conseil constitutionnel, 12 ^{ème} éd., Dalloz, 2003 (L. FAVOREU, L. PHILIP)
GP	Gazette du Palais
JCP G	Juris-classeur périodique (Semaine juridique), édition générale

JCP A	Juris-classeur périodique (Semaine juridique), édition Administrations et collectivités territoriales
Jcl.	Jurisclasseur
JO	Journal officiel
Lebon T.	Tables annuelles du Recueil <i>Lebon</i>
LPA	Les petites affiches
Ord.	Ordonnance
RA	La revue administrative
Rec.	Recueil des décisions du Conseil constitutionnel
RDI	Revue de droit immobilier
RDSS	Revue de droit sanitaire et social
RDP	Revue du droit public et de la science politique
REDP	Revue européenne de droit public
RFAP	Revue française d'administration publique
RFDA	Revue française de droit administratif
RFDC	Revue française de droit constitutionnel
RGCT	Revue générale des collectivités territoriales
RGDM	Revue générale de droit médical
RIDC	Revue internationale de droit comparé
RJDA	Revue de jurisprudence de droit des affaires
RJE	Revue juridique de l'environnement
RRJ	Revue de la recherche juridique – Droit prospectif
RTDCiv	Revue trimestrielle de droit civil
RTDE	Revue trimestrielle de droit européen
RTDH	Revue trimestrielle des droits de l'homme
RUDH	Revue universelle des droits de l'homme
S.	Sirey
SC	Sommaires commentés
Sect.	Section
Soc.	Chambre sociale de la Cour de cassation
TA	Tribunal administratif
TC	Tribunal des conflits
TGI	Tribunal de grande instance

Introduction

*"In the field of complex relations
between the administration and citizens, there is room for conflict situations. The rule of law is, in this respect, the one that does
not leave
their resolution to the interventions of the strongest or the most resourceful.
It is the one that establishes procedures aimed at resolving these conflicts in a way that not only meets the requirements of legality
but also has the virtues of simplicity, speed and efficiency"¹.*

1. "In the field of the protection of fundamental rights by the administrative judge, history will perhaps distinguish two eras: the old and the new, i.e. before and after the reform of the administrative summary procedure (...)"². The idea of a historical break thus evoked by President Vandermeeren originates in Article 6 of the Act of 30 June 2000³, which introduced into the Code of Administrative Justice⁴ a provision worded as follows

"Article L. 521-2. Upon receipt of a request to this effect justified by the urgency of the matter, the interim relief judge may order all measures necessary to safeguard a fundamental freedom which a legal person under public law or a body under private law entrusted with the management of a public service would have seriously and manifestly illegally infringed in the exercise of its powers. The interim relief judge shall give a ruling within forty-eight hours.

With this provision, the legislator introduced an original and entirely new procedure for the protection of fundamental freedoms against the acts and actions of public authorities. This legal remedy, which will be referred to as *référé-liberté* or *référé-liberté fondamentale*⁵ has been in force since 1^{er} January 2001, the date on which the provisions of the Code of Administrative Justice and those of the Act of 30 June 2000 came into force⁶. After explaining the reasons for and stages of its creation, it is appropriate to consider the contribution, role and characteristics of the procedure under Article L. 521-2 of the Code of Administrative Justice.

1 F. DELPEREE, "Contrôle juridictionnel et nouvelles protections", *AEAP* 1983/VI, p. 255.

2 R. VANDERMEEREN, "La réforme du référé administratif", in *Regards critiques sur l'évolution des droits fondamentaux de la personne humaine en 1999 et 2000* (G. LEBRETON dir.), L'Harmattan, 2002, p. 143.

3 Law No. 2000-597 of 30 June 2000 on summary proceedings before the administrative courts, *OJ* 1^{er} July 2000, p. 9948. This law was completed by the application decree n° 2000-1115 of 22 November 2000, *OJ* 23 November 2000, p. 18611. The large number of comments on this reform testifies to its extreme importance. On the bill, see M.-C. ROUAULT, "Le projet de loi relatif au référé devant les juridictions administratives : un pas vers l'institution d'un véritable juge administratif de l'urgence", *LPA* 3 August 1999, n° 153, pp. 9-18 ; O. DUGRIP, "Le projet de loi relatif au référé devant les juridictions administratives: la réforme des procédures d'urgence", *JCP G* 1999, Act, pp. 2281-2283; S. DEYGAS, "La loi sur les référés administratifs. Une réforme attendue et redoutée", *Procédures* 1999, chron. n° 8; F. THIRIEZ, "Le projet de loi relatif aux procédures d'urgence devant le juge administratif des référés", *LPA* 21 April 1999, n° 79, pp. 4-7; J.-M. FEVRIER, "Un projet de loi sur les procédures d'urgence", *Dr. adm.* 1999, comm. n° 203; S. DEYGAS, "De nouveaux pouvoirs pour le juge des référés administratifs", *Procédures* 2000, comm. n° 193. *ID.*, "Publication of the application decree on administrative summary proceedings", *Procédures* 2001, chron. 1. On the law itself, see M. FOULETIER, "La loi du 30 juin 2000 relative au référé devant les juridictions administratives", *RFDA* 2000, pp. 963-983; B. PACTEAU, "Vu de l'intérieur: loi du 30 juin 2000, une réforme exemplaire", *RFDA* 2000, pp. 959-962; C. BOITEAU, "Le référé devant les juridictions administratives", *JCP G* 2001, Act, n° 2, pp. 53-55; M.-C. ROUAULT, "La loi du 30 juin 2000 : un petit pas vers un traitement efficace de l'urgence par le juge administratif", *D.* 2001, pp. 398-403; S. DEYGAS, "Publications du décret d'application sur les référés administratifs", *Procédures* 2001, chron. n° 1; J.-R. ETCHEGARAY, "La réforme des procédures d'urgence : le nouveau juge des référés administratifs est-il arrivé ?", *Constr. urb.* 2001, chron. n° 1; I. MONTEILLET, "La réforme des pouvoirs du juge administratif face à l'urgence", *GP* 2000, 1, pp. 1517-1521; R. VANDERMEEREN, "La réforme des procédures d'urgence devant le juge administratif", *AJDA* 2000, pp. 706-721; C. MORLOT-DEHAN, "La réforme des procédures d'urgence devant le juge administratif", *LPA* 4 September 2000, n° 176, pp. 4-11; X. BRAUD, "Commentaire partiel de la loi n° 2000-597 du 30 juin 2000 relative au référé devant les juridictions administratives", *RJE* 2000, pp. 575-594; Y. MARCHAND, "Le nouveau référé administratif: un danger pour l'intérêt général", *RGCT* 2000, pp. 89-91; C. CLEMENT, "Le juge administratif des référés: un véritable juge de l'urgence après la loi du 30 juin 2000", *LPA* 10 August 2000, n° 159, pp. 6-11; P. BOULISSET, "Commentaire de la loi du 30 juin 2000 relative au référé devant les juridictions administratives", *Annales des loyers* 2000, pp. 12-27; J.-M. FAVRET, "Les procédures d'urgence devant le juge administratif après la loi du 30 juin 2000", *Dr. adm.* 2000, chron. n° 11.

4 Replacing the scattered texts that governed contentious administrative procedure before its adoption, the Code of Administrative Justice brings together in a clear and orderly whole the general rules of procedure applicable to the administrative courts under ordinary law. The legislative part of the code was enacted by Order No. 2000-387 of 4 May 2000 and the regulatory part by Decrees Nos. 2000-388 and 389 of the same date. This ordinance was ratified by Article 31 of Law No. 2003-591 of 2 July 2003 empowering the government to simplify the law (*JO* 3 July 2003, p. 11192). For a presentation of the new code, see R. CHAPUS, "Lecture du code de justice administrative", *RFDA* 2000, pp. 929-939, and J. ARRIGHI DE CASANOVA, "Le code de justice administrative", *AJDA* 2000, pp. 639-643.

5 See *infra*, § 34.

6 It was initially planned that the law on summary proceedings before the administrative courts would come into force with the implementing decree "and at the latest at the end of a period of six months from its publication" (Article 21 of Bill 269). The link with the code under preparation had not been envisaged. Following the publication on 4 May 2000 of the ordinance on the code of administrative justice, the question arose of coordination between the two texts. The joint committee, which met on 7 June 2000, decided to integrate the provisions of the bill into the new code. Consequently, it codified the provisions relating to summary proceedings and renumbered the Code of Administrative Justice. This choice logically led to a coincidence in the date of application of the two texts, which have become indissociable. Article 30 of the Act of 30 June 2000 therefore provided that it would come into force "on the same day as Order No. 2000-387 of 4 May 2000 on the legislative part of the Code of Administrative Justice", i.e. on 1^{er} January 2001.

I. The reasons for its adoption

2. "Why did we have a rapid procedure for the protection of freedoms at the end of the 20th century? Why was this procedure created at this time?"
3. First of all, it should be noted that the creation of the *référé-liberté* did not represent an *obligation* for the legislator. Indeed, no supra-legislative standard requires the French authorities to set up an emergency procedure specifically devoted to safeguarding freedoms. As Mr Andriantsimbazovina points out, "No text or principle of national law requires the establishment of a specific means to protect the fundamental rights guaranteed by international and European law. Similarly, in international and European law, neither the texts nor the case law of the protection bodies formulate such a requirement"⁷. Although the Constitutional Council has established the right to an effective judicial remedy as a norm of constitutional value⁸, it has in no way imposed the establishment of a specific remedy in the event of an infringement of a freedom. Moreover, as conceived in constitutional case law, the possibility of exercising an effective remedy before a court is not limited to constitutional rights and freedoms alone, but concerns all legal norms without making any distinction according to their nature or their legal value. The situation in international and European instruments is different in that the right to a remedy is expressly provided for in the event of a violation of the rights and freedoms protected by these texts. Modelled on Article 8 of the Universal Declaration of Human Rights⁹ and Article 2.3.a of the International Covenant on Civil and Political Rights¹⁰, Article 13 of the European Convention on Human Rights provides that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. The protective bodies of the International Covenant and the European Convention recognise that Contracting States have some discretion as to how to fulfil their obligations in this regard¹¹. In particular, the European Court of Human Rights has indicated that Article 13 of the European Convention "does not go so far as to require (...) a particular form of remedy"¹². The Council of Europe bodies have not added or advocated anything in this regard. The Committee of Ministers of the Council of Europe adopted on 13 September 1989 a resolution on provisional judicial protection against administrative acts. This text, which is non-binding, does not require the establishment of a procedure specifically devoted to the protection of freedoms¹³ as does, for example, Article 25 of the American Convention on Human Rights¹⁴. Finally, as far as Community law is concerned, neither the Treaties nor secondary legislation have required Member States to set up specific emergency procedures for the protection of rights and freedoms classified as fundamental by the Court of Justice.

Nor has Community and European law exerted any *pressure for the* creation of such a procedure¹⁵. Since the

7 J. ANDRIANTSIMBAZOVINA, "L'enrichissement mutuel de la protection des droits fondamentaux au niveau européen et au niveau national. Vers un contrôle de 'fondamentalité'", *RFDA* 2002, p. 133.

8 See *infra*, §18.

9 "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.

10 "The States Parties to the present Covenant undertake ...To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

11 see P. MERTENS, *Le droit de recours effectif devant les instances nationales en cas de violation d'un droit de l'homme*, Brussels, éditions de l'Université de Bruxelles, 1973, 161 p.

12 ECtHR, 27 September 1999, *Smith and Grady v. the United Kingdom*, Rec. 1999-6, §135. See also A. DRZEMCZEWSKI and C. GIAKOPOPOULOS, *La Convention européenne des droits de l'homme. Commentaire article par article* (L. PETITTI dir.), 2^{ème} ed, Economica, 1999, p. 467.

13 Resolution No. R (89) 8, of 13 September 1989. The text of the resolution can be consulted on the Council of Europe website (www.coe.int). It is also reproduced in full in M. LEROY, *Contentieux administratif*, 2^{ème} ed, Bruylant, 2000, pp. 675-676.

14 Article 25.1 of the American Convention on Human Rights states that "Everyone shall have the right to a simple and prompt remedy or other effective remedy by the competent courts and tribunals for acts violating his fundamental rights recognized by the Constitution, by law or by this Convention, even if such violations are committed by persons acting in an official capacity.

15 This is despite the fact that they had a decisive influence on the development of administrative litigation in the 1990s. As far as European law is concerned, the main procedural innovations are linked to the application of Article 6§1 of the Convention and, to a lesser extent, to Article 13 (see in particular S. GUINCHARD, "Les métamorphoses de la procédure à l'aube du troisième millénaire", in *Clés pour le siècle*, Dalloz, 2000, pp. 1135-1211; L. SERMET, *Convention européenne des droits de l'homme et contentieux administratif français*, Bruylant, 1996, 450 pp.) Community law has also encouraged the modernisation of administrative litigation, particularly in the field of emergency procedures. The "Remedies" Directives, by obliging Member States to organise "effective and rapid" remedies for the benefit of tenderers who consider themselves to have been unlawfully excluded from a public procurement procedure (Directive 89/665/EEC of 21 December 1989 *on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts*, 3^{ème} recital, OJEC L 395 of 30 December 1989, p. 33), are the origin of the modernization of administrative litigation. 33), are the direct origin of the creation, in French law, of the pre-contractual summary procedure. On the other hand, the Court of Justice of the European Communities has contributed to the development of the emergency powers of the administrative judge by affirming that the internal judge cannot be prevented by his national law from suspending the state act presumed to be incompatible with Community law (ECJ, 19 June 1990, *Factortame*, aff. C-213/89, ECR I-1990, p. 2494) and by allowing it to grant a stay of execution of a national act taken on the basis of a Community act whose validity is contested (ECJ, 21 February 1991, *Zuckerfabrik*, case C 143/88 and C-92/89, ECR I-1991, p. 415). See J. Cavallini, *Le juge national du provisoire face au droit communautaire*, Bruylant, 1995, 527 p.; J. Schwarze (ed.), *Le droit administratif sous l'influence de l'Europe. Une étude sur la convergence des ordres juridiques nationaux dans l'Union européenne*, Bruylant, 1996, in particular the French report by J.-F. FLAUSS, pp. 81-85; G. MARCOU, "Intégration juridique et logiques nationales", in *Les mutations du droit de l'administration en Europe. Pluralisme et convergences* (G. MARCOU dir.), L'Harmattan, coll. Logiques juridiques, 1995, pp. 11-62; C. DEBOUY, "Intégration communautaire et pratique procédurale

European Court of Human Rights does not take the existence of an emergency procedure into account when analysing the reasonableness of the time limit¹⁶, the convictions handed down on this basis¹⁷ did not call for the improvement of these procedures. Moreover, as the classic mechanisms of summary and suspended proceedings comply with the European Convention, the minimum standard¹⁸, no improvement was required on this point by the European Court. Indeed, as Professor Sermet pointed out, "the Convention is not likely to have any impact (...) when administrative litigation offers superior procedural guarantees"¹⁹. Finally, Community law has not encouraged, either through its texts or its case law, the creation of the *référé-liberté*.

It was therefore without any strictly legal constraints that the legislator decided to create this procedure. The report of the working group that prepared the reform of the summary procedure does not make the slightest reference to the influence that certain supralegisative sources might have had. They did not play a direct role in the creation of the summary procedure²⁰. The reasons that led to the establishment of this procedure are not strictly or even primarily legal.

4. If the Council of State and the legislator wanted this reform, it was above all with the aim of meeting a *need for* judicial protection expressed by litigants in cases where the public authorities seriously infringe freedoms. The need had been felt for a very long time but no solution had been found. The reason why this procedure came into being in 2000 and not before is that the conditions for its introduction had not been met until then. Developments in the 1980s and 1990s made the creation of an urgent procedure to safeguard freedoms both *possible* and *more urgent*. The creation of such a legal remedy corresponded to a need. "At the end of the 20th century, the conditions for its creation were met.

A. An unmet need for judicial protection

5. It is often claimed that the *référé-liberté* was created in order to put an end to the diversion of administrative litigation on freedoms by the judicial jurisdiction. In reality, this objective was only secondary for the authors of the reform of 30 June 2000. Indeed, the primary purpose of introducing this procedure was to meet the needs expressed by litigants for urgent protection of freedoms. Expectations were high and were reflected in the abnormally high number of cases referred to the court on the basis of assault. By remedying the shortcomings of the administrative litigation procedure in this respect, the *référé-liberté* was certainly intended to act on this phenomenon and contribute to putting an end to it. However, this was an *effect* of the reform and not its very *purpose*.

The inadequacies of administrative litigation in the area of urgent protection of freedoms had led litigants, for more than a century, to turn to the judicial judge on the distorted basis of the *de facto* nature of the proceedings. This was a dispute that the administrative court was unable to resolve and a major shortcoming that needed to be remedied.

1. The powerlessness of administrative justice

6. Litigation concerning freedoms is particularly sensitive to the passage of time. Very often, the act or action of the public authority will, in a very short space of time, exhaust its effects or affect the applicant's situation in a lasting and irreversible manner. This type of litigation therefore requires an immediate jurisdictional reaction which the judge on the merits, no matter how hard he tries and how much he wants to, is obviously unable to

du juge administratif français", *JCP G* 1992, I, 3616; J.-F. FLAUSS, "L'influence du droit communautaire sur le droit administratif français", *LPA* 9 January 1995, No. 4, pp. 4-16 (1^{ère} part), and 16 January 1995, No. 7, pp. 4-17 (2nd part); B. LE BAUT-FERRARESE, "Le droit communautaire à la recherche d'un juge administratif français de l'urgence", in *Référé et droit communautaire*, Les cahiers du CRDE n° 1, April 1999, Université Jean Moulin Lyon III, pp. 39-72.

¹⁶ Delays in proceedings on the merits will be penalised on the basis of Article 6§1, notwithstanding the granting of an advance payment (ECHR, 19 March 2002, *Goubert and Labbe v/ France*, No. 49622/99) or a stay of execution (ECHR, 16 April 2002, *Onendeno v/ France*, No. 49622/99).

¹⁷ The slowness of administrative justice has led to numerous condemnations of France by the European Court for exceeding the reasonable time limit for judgment. The first condemnation dates back to the judgment of 24 October 1989, *H. v. France*, series A, n° 162. See J.-M. LEMOYNE DE FORGES, "La lenteur de la justice administrative et les droits de l'homme", *Administration* 1990, No. 46, pp. 120-122.

¹⁸ These mechanisms even went beyond the minimum standard resulting from the Convention. Cf. S. PERDU, *Le déroulement du procès administratif à l'épreuve des droits européen, constitutionnel et judiciaire*, thèse Pau, 2002, pp. 57-72.

¹⁹ L. SERMET, *L'incidence de la Convention européenne des droits de l'homme sur le contentieux administratif français*, thèse Aix-en-Provence 1994, p. 477.

²⁰ They have nevertheless played an *indirect role* in promoting the spread of the ideas of the rule of law, the effectiveness of judicial sanction and the concrete and effective guarantee of freedoms. See *below*, §18.

provide. Not only does the appeal to the administrative court have no suspensive effect²¹ but also the procedural rules governing the investigation and judgment of applications make it impossible for a court to rule on the merits within a period of less than one year²². Despite the historical work of the Council of State in subjecting the administration to respect for the law²³ and despite its determination to censure decisions that unlawfully infringe liberties²⁴, the intervention of the judge of the merits in this area is almost always late and therefore ineffective²⁵. The slowness of administrative justice itself, which has been analysed and denounced many times²⁶, is not at issue in these situations. Indeed, even if decisions were rendered more quickly, immediate judicial intervention would still be necessary in cases of serious infringement of freedoms. Even if the judge could rule within reasonable time limits, these would still be too long in such situations. The need for intervention is measured in days, not years or even months. When a freedom is seriously infringed, "it is with extreme urgency that, like the emergency services, administrative justice must be able to intervene (...)"²⁷. In such a case, the judge must have emergency procedures that allow him to come to the aid of the litigants very quickly.

7. In this respect, the situation of the administrative litigation procedure was particularly unsatisfactory, as the administrative judge had neither the procedure adapted to rapid intervention nor the powers to react energetically to an infringement. In the absence of a specific mechanism for the urgent protection of freedoms by the administrative court, this had to be done by means of the classic mechanisms of the stay of execution and summary proceedings. These two procedures, which were the "Achilles heel of administrative litigation"²⁸, were not likely to provide a satisfactory result for the citizen who was the victim of an infringement of his or her freedoms.

21 As Professor Rivero pointed out to his famous Huron, "the wisdom of the legislator did not want to grant the appeal a suspensive character; it is therefore not up to the judge to stop the Administration's arm at the moment it executes; it is afterwards that his dreaded censure intervenes" (J. RIVERO, "Le Huron au Palais-Royal, ou réflexions naïves sur le recours pour excès de pouvoir", *D.* 1962, chron., p. 37). Indeed, in order to give the administration the legal security essential to its action, the judge recognizes a fundamental privilege: the privilege of the preliminary, which makes presume the legality of its decisions. Apart from certain specific cases, referral to the court does not suspend the effects of the contested decision. Despite the lodging of an appeal, the latter continues to produce its effects on the situation of the constituent. This rule can then, in certain cases, become "formidable for the citizens" (R.-G. SCHWARTZENBERG, *L'autorité de chose décidée*, LGDJ, 1969, p. 91) and "deprive him of his essential rights if the contested decision produces all its effects before being annulled" (O. DUGRIP, *L'urgence contentieuse devant les juridictions administratives*, PUF, coll. Les grandes thèses du droit français, 1991, p. 14).

22 Nevertheless, we must mention cases, which have remained exceptional, in which the administrative judge intervened very quickly when freedoms were at stake. Thus, during the election campaign for the 1993 legislative elections, the Conseil d'Etat examined in two days the legality of a decision by the Conseil supérieur de l'audiovisuel prohibiting a political party from broadcasting a televised message (CE, Sect., 26 March 1993, *Parti des travailleurs*, *Lebon* p. 87; see also, for an intervention in 48 hours in electoral litigation: CE, 28 May 1979, *Ministre de l'Intérieur c/ R.U.C.*, *Lebon* p. 243). In the *Galdéano* decision, the Council ruled on 26 September 1984, after an adversarial hearing and exchange of briefs by the parties, on the request made by a Spanish national against a decree of 23 August 1984 granting his extradition to the Spanish authorities (CE, Ass., 26 September 1984, *Galdéano*, *Lebon* p. 308). President Genevois stated, with regard to the *Galdéano* decision, that "We have here a good example of what could be a procedure of 'référé-liberté' in matters of public liberties" (B. GENEVOIS, Intervention au débat, in *Conseil constitutionnel et Conseil d'Etat*, colloque des 21 et 22 janvier 1988, LGDJ Montchrestien, 1988, p. 451).

23 As Prosper Weil pointed out, "the administrative judge has used his freedom of action in relation to civil law, not to restrict the individual in favour of administrative action, but to limit and control the latter with a view to protecting the citizen against power" (P. WEIL, "Les techniques de protection des libertés publiques en droit français", in *Mélanges Marcel Bridel*, Imprimeries réunies S.A., 1968, p. 622). By dint of calculated daring and measured progress, the Conseil d'Etat has managed to ensure that the administration is subject to the law and that freedoms are respected.

24 Its history is punctuated by major rulings in which the administrative judge lays down the principles protecting freedoms and annuls administrative acts that contravene them. The famous *Benjamin* decision remains without question one of the most emblematic illustrations of this jurisprudence. In it, the Council laid down the requirement that the infringement of freedoms must be as minor as possible in relation to the objective of safeguarding public order. The case concerned a decision by which the mayor of Nevers had prohibited René Benjamin from holding a conference in his municipality. The controversial political opinions of the speaker had led the municipal executive, frightened by the announcement of the demonstrations it would provoke, to prohibit the conference. This decision was annulled as an excessive infringement of the freedom of assembly. For the Council, the possibility of disturbances alleged by the mayor of Nevers "did not present a degree of seriousness such that he could not, without prohibiting the conference, maintain order by enacting the police measures that it was his responsibility to take" (CE, 19 May 1933, *Benjamin*, *Lebon* p. 541, *GAJA* n° 49).

25 In the above-mentioned *Benjamin* case, the applicant did indeed obtain the annulment of the decision by which the mayor of Nevers had unlawfully prohibited him from holding a conference in his commune. However, he only obtained this favourable decision on 19 May 1933, whereas the planned conference was to have taken place on 11 March 1930, i.e. three years earlier. In addition to the moral and purely platonic satisfaction that the prevented speaker must have felt, he was only granted financial compensation by a Conseil d'Etat decision of 3 April 1936 (CE, Sect., 3 April 1936, *Syndicat d'initiative de Nevers et Benjamin*, *Lebon* p. 453). The violation of the freedom of assembly was sanctioned and the damage compensated, but the freedom was not exercised.

26 The phenomenon is so old that it almost merges with the history of administrative justice. At the beginning of the last century, Gaston Jèze denounced its unbearable "locomotor ataxia" (G. JEZE, note under CE, 2 June 1911, *De Pressensé*, RDP 1911, p. 695). Because of this slowness of the administrative lawsuit, "the contentious sanction of arbitrariness comes too late to be effective" (C. GABOLDE, "Les nouveaux pouvoirs d'urgence du juge administratif et le sursis à exécution", *D.* 1953, chron., p. 189). The appeal becomes a sort of "baroud d'honneur", the annulment a sanction of principle and the judge's job an admission of impotence (O. VALLET, "La fin du droit public?", *RA* 1992, n° 265, p. 6). Authors have constantly denounced this slowness. See in particular G. LIET-VEAUX, "La justice administrative au ralenti", *D.* 1948, chron. p. 133-136; J. RIVERO, "Sur la réforme du contentieux administratif", *D.* 1951, chron, pp. 163-168, special p. 163; H. OBERDORFF, *L'exécution par l'administration des décisions du juge administratif*, thesis Paris II, 1981, pp. 135-155; M. JOLIOT, *Les insuffisances du contrôle des actes de l'administration par le juge administratif*, thesis Paris II, 1975, pp. 152-165; G. BRAIBANT, "Remarques sur l'efficacité des annulations pour excès de pouvoir", *EDCE* 1961, pp. 53-65; J. GEORGEL, "Le juge et la montre", *Etudes en l'honneur de Georges Dupuis*, LGDJ, 1997, pp. 115-124; D. LOCHAK, "Le droit administratif, rempart contre l'arbitraire?", *Pouvoirs* n° 46, 1988, p. 53.

27 D. CHABANOL, *Le juge administratif*, LGDJ, coll. Systèmes, 1993, p. 74-75.

28 P. DELVOLLE, *Le droit administratif*, 3^{ème} ed, Dalloz, coll. Connaissance du droit, 2002, p. 127.

First of all, the stay of execution gave the judge the power to suspend the execution of a decision against which an appeal on the merits had been lodged, pending a decision on the appeal by the court of first instance. As conceived by the legislator and applied by the court, this procedure had three limitations. Firstly, the application for a stay could only be made against an enforceable administrative decision, which excluded from its scope applications against negative decisions²⁹ and material actions of the administration³⁰. Secondly, the judge adopted a restrictive reading of the two conditions for granting the stay, reducing to the extreme the possibilities of using this procedure. In the words of President Gazier, the stay was nothing more than a 'pardon'³¹. The notion of a "serious plea of such a nature as to justify the annulment of the contested act" was assimilated to that of a well-founded plea, which meant that the granting of a stay was reserved for cases where annulment appeared certain and after a thorough examination of the application. The concept of damage that is difficult to repair was assimilated to that of consequences that are difficult to reverse in practice and are not susceptible to monetary compensation. As Ms Lochak pointed out, 'neither the dismissal of a public official who finds himself without any means of existence, nor the banning of a meeting whose cancellation several years later will no longer be of any interest are, in the eyes of the Council of State, of such a nature as to "entail consequences that are difficult to repair" justifying a stay of execution'³². Thirdly, the procedural rules lacked specificity compared to the ordinary law procedure. Indeed, the stay could only be granted by a panel after a written instruction and a hearing held under ordinary conditions, which brought the average duration of proceedings to six months. "If there is a real emergency, the damage will have been done long ago. And if, in the meantime, the decision has already produced all its effects, there will no longer be any reason to issue a stay, which obviously represents a strong incentive for the administration to practice a policy of *fait accompli* by rapidly pursuing the execution of its decisions that have been appealed"³³. In view of this threefold inadequacy, the stay was not capable of providing effective protection of freedoms against the administration. As Ms Joliot pointed out, "whether because of the rarity of its use or because of the ineffectiveness that can mark its implementation, the stay of execution proves to be perfectly unsuited to the genuine protection of citizens' rights and freedoms"³⁴.

As for the summary procedure, it allowed a single judge to pronounce conservatory and provisional measures at the end of a simplified procedure³⁵. Article R. 130 of the Code of Administrative Tribunals and Administrative Courts of Appeal empowered the president of the tribunal or his delegate to take "all useful measures" in case of urgency; but he could neither "prejudice the main issue" nor, above all, "obstruct the execution of any administrative decision". These two restrictive conditions have limited the scope of the interim relief judge's power of injunction, which has only had notable applications with regard to the communication of administrative decisions or the expulsion of unauthorised occupants of the public domain. His meagre powers did not allow him to suspend the execution of an administrative decision or "to issue injunctions in exceptional situations where his actions seriously infringe the fundamental freedoms of citizens"³⁶.

8. The administrative court was thus incapable of reacting promptly to conduct by the public authorities that was flagrantly irregular and seriously infringed freedoms. The shortcomings affecting the stay of execution and summary proceedings irretrievably compromised the practical effectiveness of these procedures and condemned the administrative judge to impotence in cases of serious infringement of freedoms. To remedy the chronic inadequacy of the administrative judge in the field of emergency procedures, the legislator therefore introduced, from 1976 onwards, numerous single-judge, ad hoc and juxtaposed procedures, which derogated from the ordinary law on stays of execution in order to facilitate and accelerate their delivery. Two of these procedures could have constituted instruments for the rapid and effective protection of freedoms: on the one hand, the "délégation-liberté", whose very purpose was³⁷, and on the other hand, the procedure for

29 CE, Ass., 23 January 1970, *Minister of State for Social Affairs v. Amoros, Lebon* p. 51, RDP 1970, pp. 1036-1042, note M. WALINE.

30 See, for example, declaring inadmissible the request for a stay of execution of construction works: CE, 1^{er} March 1972, *Sieur Lorenzi c/ SCI Saint-François, Lebon* T. p. 1192.

31 Quoted by O. DUGRIP, "Les procédures d'urgence : l'économie générale de la réforme", *RFDA* 2002, p. 246.

32 D. LOCHAK, *La justice administrative*, 3^{ème} éd, Montchrestien, coll. Clefs politiques, 1998, p. 107.

33 D. LOCHAK, "Le droit administratif, rempart contre l'arbitraire ?", *Pouvoirs* n° 46, 1988, p. 53.

34 M. JOLIOT, *Les insuffisances du contrôle des actes de l'administration par le juge administratif*, thesis Paris II, 1975, p. 151. In a non-anecdotal way, the Council of State refused to see the stay of execution as a "guarantee for the exercise of public freedoms" within the meaning of Article 34 of the Constitution. It ruled that the provisions governing the stay "do not affect either the rules concerning the fundamental guarantees granted to citizens for the exercise of public freedoms or any of the fundamental rules and principles falling within the domain of the law by virtue of Article 34 of the Constitution" (CE, 8 October 1971, *SA Librairie François Maspero, Lebon* p. 589). In his conclusions - contrary - on this judgment, the government commissioner Vught stated that "there is no better example of these guarantees granted to citizens for the exercise of public freedoms than the power given to the judge of excess of power to order that the execution of decisions referred to him be suspended. Whatever the effects of an annulment decision handed down on an appeal for excess of power and however important the preventive or normative virtues of your case law may be in practice, nothing can replace a stay of execution on this point, and for the day-to-day exercise of public freedoms. (...) For these freedoms to have real content in certain cases, it is not enough to be able to obtain a possible annulment. It is also necessary for the judge to be able, when the conditions laid down by the law are met, to immediately paralyse administrative action" (unpublished conclusions, cited *in chron.* D. LABETOUILLE and P. CABANES *AJDA* 1971, I, p. 647). Unfazed by this argument, the Conseil d'Etat refused to consider the stay as an instrument for protecting freedoms.

35 See P.-L. FRIER, "Un inconnu: le vrai référé administratif", *AJDA* 1980, pp. 67-76.

36 E. GUIGOU, *JO déb. Sénat*, CR séance 8 juin 1999, p. 3737.

37 Article 3 of the Act of 2 March 1982 allowed the prefect to request a stay of execution of local authority acts 'likely to compromise the exercise of a public or individual freedom', with the president of the administrative court or his or her delegate having to give a ruling within 48 hours. To qualify this procedure, the doctrine usually spoke of "accelerated stay", "high-speed stay" or "forty-eight-hour stay", thus

provisional suspension which, without pursuing this objective alone, was nevertheless likely to contribute to it³⁸. These provisions were able to serve as a basis for extremely rapid interventions by the administrative judge³⁹. However, they had characteristics that considerably limited the possibility of ensuring satisfactory protection of freedoms through them. Not only did two shortcomings of the stay of execution - the prohibition on issuing injunctions and the impossibility of challenging the administration's mere conduct - transfer to these procedures. Moreover, the *déféré-liberté* was not open to individuals and could only be exercised by the prefect against acts of local authorities, to the exclusion of decisions taken by state bodies⁴⁰.

9. With a limited jurisdictional arsenal at its disposal to oppose the acts and actions of public authorities that seriously infringe liberties, the administrative judge was unable to offer litigants the rapid and effective protection they aspired to. In these conditions, declared Professor Mathiot, "One is almost reduced to wishing to suffer, on the part of the administrative authority, one of these serious attacks on property or public liberties (...)" giving jurisdiction to the judicial judge on the basis of the *de facto* nature of the act⁴¹. Undermining the principle of separation of the administrative and judicial authorities, which prohibits the judicial judge from intervening in a dispute involving the public authorities, *de facto* conduct exceptionally allows the civil courts to deal with the administration's actions and to issue injunctions to prevent or put an end to the infringement of a fundamental freedom or property right⁴². However, as Mr Benoît pointed out, "In such a case, there is no doubt that recourse to the judicial judge provides individuals with greater advantages than recourse to the administrative judge"⁴³. Also, litigants have not waited to actually suffer such infringements before turning to the civil courts on the basis of *de facto* assault. Faced with the administrative judge's inability to ensure rapid and effective protection of their freedoms, the victims of abuse of public authority have turned, in ever greater numbers, to the civil judge for interim relief on the misused basis of assault⁴⁴. The flight of administrative litigation towards the judicial courts appeared to be the consequence of the powerlessness of the administrative judge, and the sign of a deficiency of its procedures in the matter.

2. The attractiveness of summary proceedings

10. For the litigant in search of rapid and efficient justice, the civil summary procedure was undoubtedly attractive.

emphasising the nature of this procedure and the speed of the judge's intervention (on the different names, see R. ETIEN, "Le sursis de quarante-huit heures", *RDJ* 1988, pp. 743-761, special p. 747). The law of 30 June 2000 having abolished the regime of the stay of execution by breaking down the partition which separated it until then from the summary proceedings, these expressions can no longer be used insofar as they refer to a nature which the procedure no longer has. It should therefore be replaced by the expression "*déféré-liberté*", which highlights the holder of the remedy and the object of the procedure. This expression was used during the parliamentary proceedings and after the adoption of the Act of 30 June 2000. See in particular S. SUTOUR, *JO déb. Sénat*, CR séance 22 février 2000, p. 865; D. LABETOUILLE, "La genèse de la loi du 30 juin 2000", in *Le nouveau juge administratif des référés. Réflexions sur la réforme opérée par la loi du 30 juin 2000*, colloquium of 6 December 2000 (P. WACHSMANN dir.), Strasbourg, PUS, 2002, p. 24; J.-M. MAILLOT, note sous TA Montpellier, ord. 25 April 2003, *Préfet des Pyrénées-Orientales*, *LPA* 5 April 2004, n° 68, pp. 3-5.

³⁸ Instituted by the law of 8 February 1995, this procedure aimed, according to M. Gohin, "to protect citizens from the temptation that public authorities may have to exploit their prerogatives: the non-suspensive effect of the jurisdictional appeal and therefore the enforceable nature of the administrative decision against fundamental freedoms in particular" (O. GOHIN, *Contentieux administratif*, 3^{ème} éd., Litec, coll. Manuels, 2002, p. 311). This "pre-suspension" procedure, codified in Article L. 10 of the Code of Administrative Courts and Administrative Courts of Appeal, allowed the president of the administrative court, when an administrative decision was the subject of a request for suspension, to pronounce by order the provisional suspension of the execution of this decision. The law required that the application contain a serious plea and that the execution of the decision could lead to "irreversible consequences". The suspension order was effective until the court had ruled on the stay or, at the latest, until the expiry of a three-month period. On this procedure, see N. NGUYEN, "L'article L. 10 du Code des tribunaux administratifs et des cours administratives d'appel : redondance ou nouveauté par rapport au sursis à exécution ?", *Procédures* 1996, chron. n° 3; J.-P. MARTIN, "La suspension provisoire : premières réflexions sur un presque rien", *Dr. adm.* 1996, chron. n° 8; J. GOURDOU, "La nouvelle procédure de suspension provisoire des actes susceptibles de sursis à exécution. Premières applications de l'article L. 10 du code des tribunaux administratifs et des cours administratives d'appel", *RFDJ* 1996, pp. 991-1011.

³⁹ The *déféré-liberté* procedure, which allows a decision to be taken very quickly, has proved effective on the rare occasions when prefects have referred such applications to the administrative judge (see §§ 270 and 535 *below*). As for the *pré-sursis*, it has given rise to certain noteworthy applications because of the speed with which the judge intervenes. Thus, in a case concerning the reversal of the Olympique de Marseille - Lille Olympique Sporting Club football match, the president of the Marseille administrative court suspended a match that was to have taken place that very afternoon at 11 a.m., following a request submitted on a Saturday (TA Marseille, ord. 18 January 1997, *RFDJ* 1998, pp. 759-766, note by J.-P. NEGRIN; *LPA* 13 August 1997, No. 97, note by J.-P. BARALLE: provisional suspension of the decision by which the central committee of the French Cup had fixed the date and venue of the sports match). On the other hand, it has not given rise to any significant application in the area of freedoms.

⁴⁰ In fact, the *déféré-liberté* was a very little used procedure since there were on average about ten requests per year for all the administrative courts (see R. ETIEN, *op. cit.*, p. 760).

⁴¹ A. MATHIOT, Note under CE, 28 December 1949, *Société des automobiles Berliet*, S. 1951, 3, p. 6.

⁴² See *infra*, §§ 324-325.

⁴³ F.-P. BENOIT, *Le droit administratif français*, Dalloz, 1968, p. 432.

⁴⁴ The judge of conflicts very early on recognised the right of the judicial authority to prevent an assault by a summary decision (TC, 28 January 1899, *Maire de Périgueux*, cited by M. HAURIOU, *Précis de droit administratif*, 4^{ème} éd., Larose, 1901, p. 253).

For a long time, extensive prerogatives and a procedure organised to take account of the urgency of the case have enabled the court to intervene effectively to protect the interests of the plaintiff. In the words of M. Lacabarats, the civil summary procedure embodies, 'for the parties as well as for the judge, the ideal of rapid, efficient justice, stripped of its formalism and the complexity of its mechanisms'⁴⁵. In particular, in the case of assault, he has the most extensive powers with regard to the administration. Under these conditions, the efficiency of the civil judge of summary proceedings contrasted with the powerlessness of the administrative judge in this matter⁴⁶. The distortion that existed between the administrative litigation procedure and private judicial law could not remain without influence on the behaviour of litigants. In the event of an administrative infringement of freedoms, "the promptness with which the civil interim relief judge is able to respond has led the litigant to sometimes attempt a sort of procedural diversion (...)"⁴⁷. Seduced by the extent of the powers of the civil judge of summary proceedings and the speed of his intervention, the litigants in search of efficiency endeavoured, by sheltering behind the theory of the way of fact, to make judge the administrative disputes by the judicial judge. In defiance of the rule of the separation of the orders of jurisdiction, litigants thus got into the habit of "lodging their appeal where the law has not placed them"⁴⁸. With the sole aim of having their claims judged quickly, litigants sued public bodies on the basis of de facto action even though the required conditions were obviously not met⁴⁹. "As a result of the 'knock-on effect, the trivialisation of assault and battery, and above all the desire to put an immediate end to the most serious irregularities, all factors combined, the summary jurisdiction judges were pressed to intervene in the most diverse sectors'⁵⁰.

11. The civil judge in summary proceedings did not hesitate to lend a sympathetic ear to these recriminations and to declare himself competent to satisfy them, even if this meant going beyond the framework usually set for assault. It retained cases that clearly did not fall within its jurisdiction, calling for the occasion 'assault' behaviour that was relatively far from the definition given by the Court of Conflicts and the Court of Cassation itself⁵¹. On this basis, judicial magistrates have indeed ventured to censure measures enacted by the administration in the exercise of its powers, such as the dismissal of a municipal attaché in the absence of any consultation of the disciplinary board⁵², a transfer in the interest of the service pronounced against a police inspector who had contravened his obligation of reserve⁵³, the decision to cut down trees within the legal framework of forest fire prevention⁵⁴, the measure deciding on the expulsion of a foreign national⁵⁵ or the suspension of the telephone subscription of a company that has not paid its bills⁵⁶. The judicial judge has also accepted jurisdiction in the absence of an infringement of a fundamental freedom, accepting, for example, to hear cases concerning the continuation of work on the Ile de Ré bridge⁵⁷, the relegation of a football club to the lower division⁵⁸ or the refusal to return a hunting licence to its holder⁵⁹. This excessively broad conception of the field of de facto remedies led the civil judge of summary proceedings to 'progressively invest all the matters reserved for the administrative judge'⁶⁰. At the cost of an excessively flexible and distended interpretation of the scope of de facto remedies, the civil courts ultimately agreed to hear any illegal infringement of the rights and freedoms of citizens.
12. However, it was wrong for the courts of first instance to declare themselves competent, as shown by the large number of cases in which the positive conflict of attribution was successfully raised. In fact, when the

45 A. LACABARATS, 'Le référé', in *Le nouveau code de procédure civile : vingt ans après*, colloque des 11 et 12 décembre 1997, La documentation française, 1998, p. 214. Paragraph 1^{er} of Article 485 of the new Code of Civil Procedure provides that the applicant summons his opponent to appear 'at a hearing held for this purpose on the usual days and times for summary proceedings'. If the application is so urgent that it cannot wait for the next summary proceedings hearing, the second paragraph organises an accelerated summary proceedings procedure known as 'hour-to-hour', whereby the judge may allow his opponent to be summoned at the specified time, even on public holidays, either at the hearing or at his open-door home.

46 See F. HAMON and H. MAISL, "L'urgence et la protection des libertés contre l'administration", *D.* 1982, chron. n° VII, pp. 49-54; J. RIVERO, "Dualité de juridictions et protection des libertés", *RFDA* 1990, pp. 734-738, special p. 737.

47 H. LE FOYER DE COSTIL, "Le vol d'aigle du juge des référés", in *Etudes offertes à Pierre Bellet*, Litec, 1991, p. 344.

48 J.-H. STAHL, "Le juge administratif, garantie de l'administration?", *AJDA* 1999, special issue Puissance publique ou impuissance publique?

49 As M. Abraham pointed out, the abusive invocation of the de facto right of appeal by litigants was explained by a simple reason: "By preferring (and wrongly so) to turn to the civil summary judgment judge, the applicant does not show any particular distrust for the administrative judge: he is looking for the judge of urgency, and finds him only in the judicial order" (R. ABRAHAM, "L'avenir de la voie de fait et le référé administratif", in *L'Etat de droit. Mélanges en l'honneur de Guy Braibant*, Dalloz, 1996, p. 12).

50 J. NORMAND, "Le juge judiciaire, gardien non exclusif des libertés. Le cas des étrangers", *RTDciv* 1996, p. 238.

51 In this respect, Professor Chapus denounced the "judicial aberrations", the "disorderly drifts" and "the easily abusive use made of it by many judicial magistrates, whom the Court of Conflicts, too often solicited, hardly succeeds in bringing back to the right path" (R. CHAPUS, *Droit administratif général*, t. 1, 14^{ème} éd., Montchrestien, 2000, n° 1087).

52 CA Aix-en-Provence, 1^{er} December 1987, *Piselli*, *AJDA* 1988, p. 550.

53 TC, 4 July 1991, *Gaudino*, *Lebon* p. 468, *AJDA* 1991, p. 697, chron. C. MAUGÛE AND R. SCHWARTZ.

54 TC, 25 January 1993, *SCI Oasis*, *Lebon* p. 389; *D.* 1994, SC. p. 109, obs. D. MAILLARD DESGREES DU LOU.

55 TC, 20 June 1994, *Madaci and Youbi*, *Lebon* p. 603, *D.* 1995, p. 193, note P. DIDIER; *LP.A* 20 May 1996, n° 61, pp. 7-11, note L. GROS.

56 TC, 15 April 1991, Préfet de la région Lorraine, *Lebon* p. 463.

57 TC, 25 January 1988, *Préfet de la Charente-Maritime*, *RFDA* 1990, p. 191, note M. LAROQUE.

58 TC, 13 January 1992, Association nouvelle des Girondins de Bordeaux, *Lebon* p. 473.

59 TC, 24 February 1992, *Préfet de la Gironde*, *Lebon* p. 477.

60 J.-Y. PLOUVIN, "Au secours, le juge civil des référés arrive! (or of the reduction of the administrative judge by the judicial judge of summary proceedings)", *GP* 4 March 1989, 1, p. 105.

prefectural authority was referred to the judicial court, it requested the arbitration of the Court of Conflicts and, almost always, the conflict order was confirmed by the distributing judge, revealing a distorted conception of the de facto right of action on the part of the civil court. Since its origins, the *voie de fait* has been considered as an exception of strict interpretation. The Court of Conflicts has consistently ensured that judicial officers cannot escape the limits imposed on them in this area⁶¹. However, despite a firm line of jurisprudence (and rigorously in line with the classic definition of the concept), the Court of Conflicts has never really managed to put an end to abusive invocations of de facto conduct by litigants, nor to the untimely incursions of the judicial authority into the administrative sphere. The need for judicial protection was too great for these strong reminders to be sufficient to change behaviour without remedying the shortcomings of the administrative litigation procedure. The phenomenon was very old and had never really stopped.

3. An old problem

13. ^eAlready at the beginning of the 20th century, litigants appealed to the civil courts in administrative disputes in order to put an end to the abuses of the institutions of the III^e Republic in their fight against religious congregations. In the 1902 decision of the Tribunal des conflits, *Société immobilière de Saint-Just*, the administrative authority had sealed a private building after ordering its evacuation. The company owning the building asked the civil judge of the summary proceedings to order the lifting of the seal on the basis of an act of God. When the conflict arose, the judge in charge of distribution relinquished jurisdiction to the courts and assigned the dispute to the administrative court. As the administration had acted "within the scope of its powers", the judicial court could not validly hear these actions⁶². Condemned to turn to the administrative court to put an end to the infringement of the right of ownership, the applicant company saw all hope of a rapid end to the litigious situation disappear with this decision. In his conclusions, the government commissioner Romieu himself deplored the inadequacy of the powers of the administrative judge and the unsuitability of his procedures. The illustrious State Councillor declared that 'the administrative court is not equipped to usefully protect private rights that would be flagrantly violated by the abuses of the executive acts of public power; it does not have local judges of the first degree in this matter; it does not have the summary procedure, and the slowness of its intervention can often make its effectiveness illusory'⁶³. The administrative judge did not have the powers to intervene quickly and effectively to protect individual rights⁶⁴. Commenting on this same decision, Hauriou stated: "The misfortune is not that there is an administrative court, nor that it is competent in these matters; the misfortune is that this court (...) is insufficiently equipped, and that, in particular, there is no summary procedure before it on such occasions"⁶⁵. Based on the abuses committed by the administration in the fight against the clergy, particularly with regard to the expulsion of Congregation members, the Master of Toulouse recommended in 1903 "the institution of a sort of summary procedure"⁶⁶: "There must be a summary procedure judge who, within 48 hours, or at least within 8 days, can issue an order"⁶⁷. The use of summary proceedings would be limited "to cases of temporary dispossession of property and violation of a home"⁶⁸.
14. In the middle of the 20th century^e, the question arose in strictly identical terms. In the context of the immediate post-war period, it concerned requisitions carried out under seriously irregular conditions by the Liberation authorities. Since administrative justice remained incapable of helping the victims of arbitrary dispossession, the litigants once again turned to the courts. As M. Liet-Veaux points out, "Deprived of the administrative summary procedure, citizens have, by necessity, appealed to the judicial courts, in the name of the de facto right"⁶⁹. Indeed, the referral to the judicial judge on this basis "allows the service provider to act

61 In law, in the absence of legal norms that could support it, the heterodox practice of the courts could not be seriously defended insofar as it disregarded the principle of separation, which has a legislative basis and a constitutional foundation (see *infra*, § 538). The attitude of the courts, which was at the root of disorders in the division of jurisdiction, could not be justified by the convenience afforded to litigants by the intervention of the civil interim relief judge. Considerations of pure expediency cannot prevail over legal norms and lead on this basis alone to their application being ruled out. The principles governing the division of jurisdiction between the two orders of court justified the perseverance with which the Tribunal des conflits sanctioned the excesses of jurisdiction of the judicial judge.

62 TC, 2 December 1902, *Lebon* p. 713, concl. ROMIEU; *GAJA* n° 11; *D.* 1903, 3, p. 41, concl. ROMIEU; *J.* 1904, 3, p. 17, concl. ROMIEU, note M. HAURIOU, published in *Notes d'arrêts sur décisions du Conseil d'Etat et du Tribunal des conflits* vol. 1, published by La Mémoire du Droit, 2000, pp. 84-109.

63 ROMIEU, *op. cit.*, *D.* 1903, p. 41.

64 By the expression individual rights, Hauriou means, from the point of view of positive legislation, "the essential faculties whose free exercise is guaranteed to the individual, both vis-à-vis the State and vis-à-vis other men" (M. HAURIOU, *Précis de droit administratif*, 3^{ème} ed., Larose, 1897, p. 163).

65 M. HAURIOU, note cited above, p. 108.

66 M. HAURIOU, *Précis de droit administratif*, 5^{ème} ed, Larose, 1903, p. XIX. Jacquelin expressed reservations about this proposal, pointing out the lack of independence and impartiality of the administrative court (R. JACQUELIN, "L'évolution de la procédure administrative" (2^{ème} part), *RDJ* 1903, t. XX, p. 17).

67 M. HAURIOU, *Précis de droit administratif*, 5^{ème} ed, Larose, 1903, p. XX.

68 M. HAURIOU, *Précis de droit administratif*, 5^{ème} ed., 1903, Larose, p. XXI.

69 G. LIET-VEAUX, *RA* 1954, p. 613.

through the summary procedure, unfortunately almost unknown in administrative law and which achieves a rapid and practical protection of the fundamental rights of the individual"⁷⁰. In other words, 'If individuals have willingly turned to the judicial jurisdiction, it is because the latter has ultra-rapid means of giving them satisfaction'⁷¹. Here again, the same ills lead to the recommendation of the same remedies. The authors propose to provide the administrative judge with means of speed and efficiency comparable to those available to the judicial judge in cases of assault. In the event of an infringement of freedoms, the administrative judge must 'be able to implement accelerated procedures of the type available to litigants before the judicial courts', declared Dean Vedel⁷².

15. Faced with the persistent shortcomings of administrative justice in this area, from the mid-1980s onwards litigants turned once again to the civil courts. Abusive invocations of de facto remedies, particularly in cases involving foreigners, once again highlighted the need for a rapid and effective procedure in cases of serious infringement of freedoms. The introduction of a mechanism modelled on the civil summary procedure is once again the ideal solution. Mr Abraham states that "It is a summary procedure entirely reorganised on new bases that the administrative judge needs (...) today (because it is necessary for its litigants)"⁷³. "Are the administrative courts congenitally incapable of dealing with emergencies? We are convinced of the opposite. Are they less concerned about protecting fundamental freedoms than their judicial counterparts? They have proven that they are not. What remains is to give them the means to intervene effectively when time is short"⁷⁴. This reform has been called for for decades. Its implementation became possible, and even more urgent, in the 1980s.

B. Conditions for its creation

16. The problem of the administrative judge's ability to intervene quickly and effectively in cases of serious infringement of freedoms by public authorities is a long-standing one. The means to remedy it are known. However, nothing had been put in place. If the problem is so old and the *référé-liberté* procedure only came into being in 2000, it is necessarily because other factors played a role in the introduction of this procedure. In addition to the very strong expectation expressed by litigants to have such a procedure, a series of factors were added in the 1980s and 1990s which, to varying degrees, justified, favoured or made possible its creation.

1. A favourable context

17. There was strong pressure on the administrative court to change. Increasingly out of step with social expectations and legal developments, the administrative judge was increasingly being challenged, making it necessary to introduce a rapid procedure for protecting freedoms.
18. As President Stirn has observed, "The requirements in terms of guarantees of fundamental rights are increasing, under the combined effect of constitutional jurisprudence, international law and, more broadly, the concerns of our time, which are oriented towards contentious debate and the protection of the individual"⁷⁵. This increased demand for the effectiveness of the law and of procedures⁷⁶ results, first and foremost, from a stronger social expectation. In all areas, and in particular that of freedoms, "the social demand for real and rapid effectiveness of the judge's decision is growing"⁷⁷. As Professor Melleray points out, "The Benjamin of the 21st century no longer accepts obtaining compensation six years later for not having been able to give a conference illegally banned by the mayor of Nevers. He wants a judge ruling in an emergency to allow him

70 A. MESTRE, note under CE, 17 February 1947, *Cons. Perrin*, S. 1948, 3, p. 2.

71 C. GABOLDE, "Pour un véritable référé administratif", *D.* 1949, chron. n° XLI, p. 174.

72 G. VEDEL, "De l'arrêt Septfonds à l'arrêt Barinstein (La légalité des actes administratifs devant les Tribunaux judiciaires)", *JCP G* 1948, I, 682, §17. See also F. GAZIER, "L'œuvre jurisprudentielle du Conseil d'Etat en matière de réquisitions", *EDCE* 1948, pp. 67-72; and A. MATHIOT, *supra* note.

73 R. ABRAHAM, above-mentioned article, p. 12.

74 R. ABRAHAM, above-mentioned article, p. 13.

75 B. STIRN, "Le Conseil d'Etat et les libertés", in *La liberté dans tous ses états. Liber amicorum in honour of Jacques Georget*, Apogée, 1998, p. 222.

76 The effectiveness of the latter being conditioned by the effectiveness of the former. See *Procedure(s) and Effectiveness of Rights* (D. D'AMBRA, F. BENOIT-ROHMER and C. GREWE eds.), Bruylant Nemesis, coll. Droit et justice, No. 49, 2003, in particular M.-A. FRISON-ROCHE, "La procédure et l'effectivité des droits substantiels", pp. 1-23. See also W. BARANES and M.-A. FRISON-ROCHE, "Le souci de l'effectivité du droit", *D.* 1996, chron. pp. 301-303.

77 M.-A. LATOURNERIE, "Réflexions sur l'évolution de la juridiction administrative française", *RFDA* 2000, p. 926.

to express himself (...)'.⁷⁸ Secondly, individualism - or the 'exaltation of the individual'⁷⁹ - leads to a refocusing of the law on the subject, and gives a new dimension to the relationship between the public authorities and individuals⁸⁰. All the major reforms of administrative law and contentious administrative procedure at the end of the 20th century^e are part of this movement to individualise the law and rebalance the relationship between the administration and citizens⁸¹. The emphasis is on the protection of the rights and legitimate interests of the individual. Thirdly, the consecration of the right to a judge, at the highest level of the hierarchy of norms, entails for the individuals subject to the law the right to an effective judicial decision. This recognition implies that the judge can intervene in due time and has the necessary powers to guarantee the rule of law and the protection of litigants⁸².

These developments reflect an enrichment of the concept of the rule of law⁸³. In its formal sense, the rule of law referred to a certain structuring of the legal order involving respect for the hierarchy of norms by the organs of public authority⁸⁴. In contrast, the material meaning of the rule of law emphasises its content. It "no longer refers only to the existence of a hierarchical legal order, but also to a set of rights and freedoms; presupposing a certain 'state of law', it tends to acquire a 'substantive' character, which brings it closer to the British protection of the *rule of law*"⁸⁵. Thus, in all legal systems, the function of judging is changing. This development is reflected in particular in "the development of procedures that make it possible to establish within society a place that effectively ensures the control of acts of power, whether public or private, with regard to the values that the group feels constitute a democratic life"⁸⁶. It leads to providing the judge with powers and procedures that should enable him not only to oppose the illegal acts of the administration, but also to effectively defend freedoms against the arbitrariness of power. In this perspective, "the judge appears as the keystone and the condition for the realisation of the rule of law: the hierarchy of norms only becomes effective if it is jurisdictionally sanctioned; and fundamental

78 F. MELLERAY, "L'exorbitance du droit du contentieux administratif", in *L'exorbitance du droit administratif en question*, colloquium of 11 and 12 December 2003, Poitiers, LGDJ, 2004, pp. 308-309.

79 M. WALINE, *L'individualisme et le droit*, Domat Montchrestien, 1945, p. 15.

80 See Y. MADIOT, "De l'évolution sociale à l'évolution individualiste du droit contemporain", in *Les orientations sociales du droit contemporain. Ecrits en l'honneur de Jean Savatier*, PUF, 1992, pp. 353-365; C. RAUX, *La construction du sujet de droit : recherches sur la nature et les formes de l'individualisme juridique*, thesis University of Bourgogne, 2004, 447 p.

81 See C. DEBOUY, "Le droit administratif: tendances récentes", *LPA* 5 December 1997, n° 146, pp. 4-12.

82 See S. GUINCHARD et al, *Droit processuel. Droit commun et droit comparé du procès*, 3rd edition, Dalloz, coll. Précis, 2005, pp. 391-482; *Le droit au juge dans l'Union européenne* (J. RIDEAU dir.), LGDJ, 1998, especially J. RIDEAU, "Le droit au juge : conquête et instrument de l'Etat de droit", pp. 3-7, J.-F. RENUCCI, "Le droit au juge dans la Convention européenne des droits de l'homme", pp. 131-140, T.-S. RENOUX, "La constitutionnalisation du droit au juge en France", pp. 109-118 and F. CHEVALLIER, "Le droit au juge devant les juridictions administratives", pp. 181-190; G. COHEN-JONATHAN, "Le droit au juge", in *Gouverner, administrer, juger. Liber amicorum Jean Waline*, Dalloz, 2002, pp. 471-504; P. TERNEYRE, "Le droit constitutionnel au juge et ses limites", *LPA* 4 December 1991, n° 145, pp. 4-14; T.-S. RENOUX, "Le droit au recours juridictionnel en droit constitutionnel français", in *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu*, t. 1, Bruylant, 1992, pp. 307-324; *ID.*, "Le droit au recours juridictionnel", *JCP G* 1993, I, 3675; M. BRANDAC, "L'action en justice, droit fondamental", *Nouveaux juges, nouveaux pouvoirs ? Mélanges en l'honneur de Roger Perrot*, Dalloz, 1995, pp. 1-17; R. VANDERMEEREN, "Permanence et actualité du droit au juge", *AJDA* 2005, pp. 1102-1107.

83 On the theme of the rule of law, see, among the abundant literature E.-W. BOCKENFORDE, "Naissance et développement de la notion d'Etat de droit", in *Le droit, l'Etat et la Constitution démocratique*, Bruylant, LGDJ, coll. La pensée juridique, 2000, pp. 127-147; L. HEUSCHLING, *Etat de droit, Rechtsstaat, Rule of law*, Dalloz, coll. NBT, 2002, 739 p.; A. VIALA, "La notion d'Etat de droit : l'histoire d'un défi à la science juridique", *REDP* Spring 2000, vol. 13, No. 1, pp. 673-693; J. CHEVALLIER, "L'Etat de droit", *RDP* 1988, pp. 313-380; *ID.*, *L'Etat de droit*, 3^{ème} ed, Montchrestien, coll. Clefs, 1999, 160 p.; O. PFERSMANN, "Prolégomènes pour une théorie normativiste de l'Etat de droit", in *Figures de l'Etat de droit* (O. JOUANJAN ed.), PUS, 2001, pp. 53-78; S. GOYARD-FABRE, "L'Etat de droit. Problématiques et problèmes", *Cahiers de philosophie politique et juridique* 1993, n° 24, L'Etat de droit (M. TROPER ed.), pp. 9-21.

84 Subject to the law, the latter must act in accordance with pre-established rules. In terms of principles, the administration's submission to the law was based not on extra-legal considerations - as such unenforceable against the public authority - but on positive law itself, through the theory of self-limitation. As developed by Carré de Malberg, this theory claimed to be effective because it was consubstantial with the legal personality of the state. In his *Contribution à la théorie générale de l'Etat*, the author stated that "the modern theory of the State is permeated by the idea that the power of State domination, being a power of a legal nature, is by that very fact a power subject to law, and therefore also necessarily a limited power" (R. CARRE DE MALBERG, *Contribution à la théorie générale de l'Etat (1920-1922)*, t. 1, Bibliothèque Dalloz, republished 2003, p. 229). It is true that "the essential idea underlying this doctrine is that the State can only be obliged, bound or limited by virtue of its own will" (*op. cit.*, p. 231). But as soon as the state has a constitution and legal personality, it becomes institutional, because all its organs are subject to the constitutional organisation of the state. The hierarchy of organs and norms completes this limitation and encloses the executive power in the legal system: the administration has no autonomous power likely to weaken its submission to positive law (*op. cit.*, pp. 232-233). The sovereign State is then presented as a power subject and subjugated to the law, to the point that one could speak of the "miracle" of administrative law. Indeed, M. Weil states that "Born of a miracle, administrative law only survives by a prodigy that is renewed every day. Not only can no force materially compel the government to submit to the rule of law and the judge's sentence, but the State can, in theory at least, put an end, when it wishes, to the self-limitation it has agreed to" (P. WEIL and D. POUYAUD, *Le droit administratif*, 20^{ème} éd., PUF, QSJ, 2003, p. 5).

85 J. CHEVALLIER, above-mentioned work, p. 71. This development is particularly clear in Germany, where the explicit enshrinement of the concept of "rule of law" in the Basic Law of 23 May 1949 (Article 28) was accompanied by a broadening of perspectives. "From now on, the concept is both formal and material: formal insofar as the rule of law remains a state whose organs have well-defined competences, material insofar as these competences must be exercised in compliance with higher standards. Indeed, for the law not to be flouted by the rulers, it is not enough for them to apply the rules relating to the organisation of powers; their decisions must not contradict the essential rules of a liberal and democratic state. Among these rules, the most important are undoubtedly the fundamental rights (Grundrechte)" (M. FROMONT, "Les droits fondamentaux dans l'ordre juridique de la République fédérale d'Allemagne", in *Recueil d'études en hommage à Charles Eisenmann*, éditions Cujas, 1975, p. 49; see also, by the same author, "République fédérale d'Allemagne : l'Etat de droit", *RDP* 1984, pp. 1203-1226).

86 J. LENOBLE, "Crise du juge et transformation nécessaire du droit", in *La crise du juge* (J. LENOBLE dir.), LGDJ, coll. La pensée juridique moderne, 1990, p. 145.

rights are only really guaranteed if a judge is there to ensure their protection"⁸⁷. As Ms Zoller also points out, "a state governed by the rule of law (...) calls for a strong and independent judiciary, capable of confronting the other powers and opposing their abuses with respect for human rights and fundamental freedoms"⁸⁸. This development leads to a redefined role for the administrative judge. The latter is no longer only the controller of the administration and the guardian of objective law; it must also become the protector of the individual and the defender of subjective legal situations. This is a general phenomenon in Europe. As Mr Fromont observed, "the main European countries increasingly consider that administrative justice must be primarily an instrument for defending citizens against the actions of administrative authorities"⁸⁹.

19. The position of the administrative judge appeared to be increasingly out of step with these requirements, to the point where its legitimacy was strongly contested: "the moderate image that French administrative law, strengthened by its singular history and the great jurisprudential work carried out by the Conseil d'Etat, did not disdain to give of itself to the outside world, was quite tarnished by the notorious inadequacy of its emergency procedures likely to effectively support citizens in their permanent struggle against the abuses of power"⁹⁰. Administrative justice was marginalised in the field of the protection of freedoms; its very usefulness was called into question by the lessons of effectiveness given to it by the civil judge of summary proceedings in its own field. As Professor Gaudemet stated, "This offensive by the civil judge of summary proceedings in a certain number of cases contributes to giving credence to the feeling of the artificial nature, or even the uselessness, of the administrative trial; the administrative judge is implicitly condemned because he is deprived of the attributes of a judge, such as those exercised by the judicial judge"⁹¹. It was becoming urgent for the administrative court to provide itself with a rapid procedure for safeguarding freedoms. The latter could be all the more encouraged by the fact that the Constitutional Council had recognised the equal ability of the two levels of jurisdiction to effectively guarantee the rights of individuals⁹².

To enable the administrative judge to react effectively in the event of an infringement of freedoms, it remained "to provide him with the means to remedy the situation effectively by empowering him to do, in this area, what he refrains from doing in other areas"⁹³. Proposals for the introduction of an emergency procedure specifically designed to protect freedoms multiplied from the second half of the 1980s. Two approaches were envisaged. The first solution was to build on the existing procedure - the *déféré-liberté* procedure - and to make the necessary improvements by broadening the sphere of petitioners and the scope of acts that could be appealed. Sylvie Hubac and Yves Robineau thus affirmed that "A judge who protects public liberties must (...) be able to rule, through a provisional measure, within a maximum period of a few days"⁹⁴. Recalling that the law of 2 March 1982 "introduced a procedure for a stay of execution within forty-eight hours which has given full satisfaction", they suggested "extending this legal remedy, where public liberties are at stake, to applicants other than the prefect and to cases other than those of decentralised authorities"⁹⁵. The second option was to institute an entirely new procedure for protecting freedoms. In this sense, Mr Lachaume suggested "setting up a summary procedure enabling the administrative judge, faced with an illegal administrative decision that infringes the implementation of a fundamental right, to suspend it, or to prevent its application, as a matter of urgency and if possible 'on a fixed date'"⁹⁶. Mr Costa indicated, without further clarification, that "a 'référé liberté' should be instituted before all courts called upon to rule (...) "⁹⁷.

87 J. CHEVALLIER, above-mentioned work, p. 134.

88 E. ZOLLER, "La justice comme contre-pouvoir: regards croisés sur les pratiques américaines et française", *RIDC* 2001/3, p. 560.

89 M. FROMONT, "La justice administrative en Europe: Convergences", in *Mélanges René Chapus*, Montchrestien, 1992, p. 207.

90 F. MODERNE, "Vers une culture de l'urgence dans le contentieux administratif? For a presentation of the causes and manifestations of the erosion of the legitimacy of the administrative jurisdiction, see D. LOCHAK, "Quelle légitimité pour le juge administratif?", in *Droit et politique* (CURAPP dir.), PUF, 1993, pp. 141-151, special pp. 142-146.

91 Y. GAUDEMET, "Crise du juge et contentieux administratif en droit français", in *La crise du juge* (J. LENOBLE ed.), LGDJ, coll. La pensée juridique, 1990, p. 100. See also P.-L. FRIER, *L'urgence*, LGDJ, coll. BDP, t. 150, 1987, p. 324.

92 See CC, No. 89-261 DC, 28 July 1989, *Rec.* p. 81. In order to give effective jurisdictional guarantees to foreigners without a residence permit, the legislator wanted to set up a specific emergency procedure before the judicial judge. It was provided that the person subject to a deportation order could refer the matter to the president of the tribunal de grande instance within 24 hours, with the obligation for the latter to rule in the form applicable to summary proceedings within 48 hours. The Constitutional Council declared the transfer to the judicial jurisdiction of a dispute relating to the annulment of decisions taken by an administrative authority in the exercise of its prerogatives of public power to be contrary to the Constitution. To justify the derogation from the fundamental principle recognised by the laws of the Republic, the government argued in particular that the proper administration of justice requires that "the exercise of an appropriate remedy ensures the effective guarantee of the rights of the persons concerned". The Constitutional Council dismissed the argument, stating that this requirement "can be met by both the judicial and the administrative courts" (para. 29).

93 J. RIVERO, "Dualité de juridictions et protection des libertés", *RFDA* 1990, p. 737.

94 S. HUBAC and Y. ROBINEAU, "Droit administratif: vues de l'intérieur", *Pouvoirs* n° 46, 1988, p. 124.

95 *Ibid.* See in the same sense J.-Y. PLOUVIN, "Au secours, le juge civil des référés arrive! (or of the reduction of the administrative judge by the judicial judge of summary proceedings)", *GP* 4 March 1989, 1, p. 106; B. DELAUNEY, *L'amélioration des rapports entre l'administration et les administrés. Contribution à l'étude des réformes administratives entreprises depuis 1945*, LGDJ, coll. BDP, t. 172, 1993, p. 804; M. CAZO, *Le juge des référés dans le contentieux administratif*, thèse Rennes I, 1998, p. 324.

96 J.-F. LACHAUME, "Droits fondamentaux et droit administratif", *AJDA* 1998, special issue, p. 104.

97 J.-P. COSTA, "Le juge et les libertés", *Pouvoirs* n° 84, 1998, p. 86.

2. A possible creation

20. Two series of innovations prepared and made possible the advent of the *référé-liberté*. Without the introduction into administrative litigation law of these highly innovative procedures, the procedure under Article L. 521-2 could not have been created in this form or conceived as it has been.
21. The first set of innovations concerns the introduction, in the early 1990s, of two entirely new single-judge emergency procedures: firstly, the procedure for challenging deportation orders under the Act of 10 January 1990⁹⁸, and secondly, the procedure for summary proceedings under the Act of 4 January 1992⁹⁹. In the case of deportation, the judge must give a ruling within 48 hours of the application being registered. In this massive case, which involved all the members of the administrative court, "it became clear that a judge ruling alone could work; that the introduction of oral hearings could work; that the introduction of adversarial proceedings through oral hearings could work; and that very short deadlines for delicate matters could be met by the judge"¹⁰⁰. The *référé-précontractuel* has also profoundly changed the administrative litigation procedure because of the speed of the judge's intervention and, above all, the scope of his powers. According to the terms of the law, the judge can "order", "suspend", "cancel", "remove"¹⁰¹. These prerogatives are considerable and sometimes greater than those that our law recognises for the judge of the principal. As Roland Drago stated, "It would never have been conceivable that such powers would one day be conferred on the administrative judge"¹⁰². The author specified that "In the other States of the Union, the contracts in question come under the jurisdiction of the judicial judge and, for this judge, the powers conferred on him in application of the directives are not abnormal. In France, these contracts fall under the jurisdiction of the administrative judge and this is why the theoretical scope of the reform is so important with unsuspected consequences"¹⁰³. Each in its own way, these two procedures have contributed to the emergence of a culture of urgency in the administrative jurisdiction and demonstrated its capacity to assume powers that are sometimes very important within extremely short time limits. In so doing, these procedures have removed two obstacles to the establishment of an autonomous extreme urgency procedure, granting extensive powers to a single judge.
22. The second major innovation that led to the creation of Article L. 521-2 resulted from the Act of 8 February 1995, which gave the administrative court a power of injunction to enforce its decisions. With this unprecedented power of command, the administrative judge was given the possibility of restoring the rights of an applicant who had been the victim of an illegality. For the first time in its history, the judge could directly address orders to the administrative authority, prescribing the consequences that it must draw from a contentious annulment. For President Labetoulle, it is in this "fundamental innovation" that the *référé-liberté* "finds its direct inspiration"¹⁰⁴. Without this text, he said, "the summary judgment would probably not have been possible"¹⁰⁵. With this important innovation, the last obstacle to the creation of a *référé-liberté* was removed.
23. However, neither the alarms linked to the flight of administrative litigation towards the judicial jurisdiction nor the context favourable to the creation of this procedure had led the public authorities to rethink the existing system. In order for there to be a real desire to set up a rapid procedure to protect freedoms, an electroshock was needed. By crystallising the tensions around the implementation of the assault, a stowaway case was the triggering event.

II. The stages of its adoption

98 Procedure now codified in Article L. 776-1 of the Code of Administrative Justice, taking over Article 22 bis of the Ordinance of 2 November 1945 on the entry and residence of foreigners in France.

99 Procedure codified in Article L. 551-1 of the Code of Administrative Justice.

100 D. LABETOUILLE, "La genèse de la loi du 30 juin 2000", *op. cit.* p. 16. According to M. Denizet, "Les reconduites à la frontière have upset the traditional culture of the administrative judge while demonstrating that the latter, provided he is given sufficient means, knew how to adapt to change" (J.-P. DENIZET, "Les reconduites à la frontière", *LPA* n° 52, special issue L'urgence, mode d'emploi, colloquium of the Conférence nationale des présidents de juridictions administratives, Poitiers, 15 September 2000, p. 14).

101 The judge may order the offender to comply with his obligations. It may suspend the award of the contract or the execution of decisions relating to it. He can also annul these decisions. Finally, the law authorises him to directly modify the contract by "deleting the clauses or prescriptions intended to appear in the contract". For illustrations, see C. BERGEAL, "Référé en matière de passation des contrats et marchés", *Jel. Justice administrative*, fasc. 55 (11, 2001), n° 66-74; R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd, Montchrestien, 2006, n° 1664.

102 R. DRAGO, "Un nouveau juge administratif", in *Jean Foyer, auteur et législateur. Ecrits en hommage à Jean Foyer*, PUF, 1997, p. 460.

103 Ibid.

104 D. LABETOUILLE, "Le projet de réforme des procédures d'urgence devant le juge administratif", *AJDA* 1999, special issue Puissance publique ou impuissance publique?

105 Ibid.

A. The triggering event: the judgment of 12 May 1997

24. On the night of 8 to 9 August 1996, the cargo ship *Félix* called at the port of Honfleur in Normandy. The ship's captain reported to the police authorities the presence on board of two stowaways of Moroccan nationality, Mr Ben Salem and Mr Taznaret, who did not have the documents required for entry into France. On the morning of 9 August, the immigration control services took decisions to refuse entry to these two people, in accordance with the provisions of the Order of 2 November 1945 on the conditions of entry and residence of foreigners in France. However, they then deviate from the provisions of this text, Article 35c of which stipulates that a foreigner who arrives in France by rail, sea or air and who is not authorised to enter French territory is kept, for the time strictly necessary for his or her departure, in a waiting area designated by the prefect within the confines of the station, port or airport. Apparently for practical reasons, the administration chose - obviously irregularly - to detain the two stowaways on board the *Félix*¹⁰⁶. A surveillance system was set up on the quay to prevent any attempt to disembark until the ship's departure scheduled for the evening of 10 August. The shipowner, joined by Mr Ben Salem and Mr Taznaret, then referred the matter to the interim relief judge of the Paris Court of First Instance by way of an hourly summons, asking him to order the administration to put an end to the detention on board and to place the persons concerned in a waiting area. The police prefect lodges a declination of jurisdiction. The interim relief judge ruled the same day, recognising the existence of an assault. He based his intervention on Article 136 of the Code of Criminal Procedure, which grants the judicial courts exclusive jurisdiction "in all cases of infringement of individual freedom"¹⁰⁷. The judge therefore rejected the declination of jurisdiction sent by the prefect and stayed the proceedings until the decision of the Tribunal des conflits. Nine months later, the Court of Conflicts settled the question of jurisdiction in favour of the administrative court¹⁰⁸.

In order to affirm that it was only up to the courts of the administrative order to hear the dispute, the distributing judge successively dismissed two grounds of judicial jurisdiction. The Tribunal des conflits indicated, firstly, that the provisions of Article 136 of the Code of Criminal Procedure "cannot be interpreted as authorising the judicial courts to obstruct the execution of decisions taken by the administration outside cases of assault"¹⁰⁹. Secondly, he points out that the measures challenged here are not of this nature; they "are not insusceptible of being linked to the power to enforce decisions refusing entry to French territory that the legislator has conferred on the administration". In fact, the judge in charge of distribution stated that "it is clear from the provisions of Article 5 of the Ordinance (...) of 2 November 1945 that the legislator has in principle given the administration the power to enforce decisions on expulsion and those refusing entry that it is required to take under the Aliens Police Act'. Under these conditions, and "even if they were illegal, the measures taken in this case against Mr Ben Salem and Mr Taznaret were not manifestly insusceptible of being linked to a power belonging to the administration". The solution adopted by the Court of Conflicts was not in itself innovative: it was in line with the case law of the

¹⁰⁶ Such a measure is illegal as it deprives the foreigner of the guarantees granted to him when he is placed in a waiting zone. When enforcing a decision to refuse entry to a foreigner arriving by air, rail or sea, the administration is obliged to place him or her in a waiting zone to the exclusion of all other methods.

¹⁰⁷ TGI Paris, order 9 August 1996, *GP* 1997, 2, pp. 395-396. The judge stated that by refusing to comply with the requirements of Article 35 *quater* instituting a specific procedure for the control of foreigners arriving by sea, "the administrative authority (...) committed an act that cannot be linked to the exercise of a power belonging to it". On many occasions, both before and after the law of 6 July 1992 imposed the institution of waiting zones, the judges of summary proceedings in the Paris region had ruled in the same way. See TGI Paris, 25 March 1992, *Level* (D. 1993, p. 47, note M. DESGREES DU LOU; *GP* 1992, 1, p. 438, note P. BERTIN), TGI Créteil, ord. 31 March 1992 (*GP* 1992, 1, p. 441) and, maintaining this solution under the new state of the law, TGI Paris, order 29 June 1994, *Mwinyi* (*GP* 1994, 2, p. 587, note S. PETIT), TGI Paris, order. 15 February 1995, *Osas and Ojo* (*GP* 1995, 2, p. 489).

¹⁰⁸ TC, 12 May 1997, *Préfet de police de Paris c/ Tribunal de grande instance de Paris*, affaire Ben Salem et Taznaret, dite "des Marocains d'Honfleur", *Lebon* p. 528. This decision has given rise to a large number of comments. See *AJDA* 1997, pp. 575-584, chron. D. CHAUVAUX and T. GIRARDOT; *RFD* 1997, pp. 512-524, concl. J. ARRIGHI DE CASANOVA; *GP* 1997, 2, pp. 737-745, report P. SARGOS, obs. S. PETIT; *JCP G* 1997, II, 22861, report P. SARGOS; *D.* 1997, pp. 567-571, note A. LEGRAND; *JCP G* 1997, I, 4066, esp. 499-500, chron. B. MATHIEU and M. VERPEAUX; *JCP G* 1997, I, 4072, chron. J. PETIT; *LPA* 24 December 1997, n° 154, pp. 19-25, note C. MAMONTOFF; *LPA* 19 January 1998, n° 8, pp. 15-19, note J.-P. MARKUS; *GP* 1997, 1, pp. 386-396, concl. J. ARRIGHI DE CASANOVA, note S. PETIT. See also J.-C. RICCI, "Feu sur la voie de fait?", *RRJ* 1998/1, pp. 9-11; J. NORMAND, "Le juge judiciaire, juridiction d'exception des atteintes portées par les autorités administratives à la liberté individuelle [The judicial judge, exceptional jurisdiction for infringements of individual liberty by administrative authorities]", *RTD* 1998, pp. 181-191; S. GUERARD, "L'article 136 du code de procédure pénale: réflexions à partir de deux décisions récentes du Tribunal des conflits [Article 136 of the code of criminal procedure: reflections based on two recent decisions of the Court of Conflicts]", *RRJ* 1999/1, pp. 219-235.

¹⁰⁹ For the Court, "the power to issue injunctions to the administration, which makes it possible to deprive its decisions of their enforceability, is (...) of the same nature as that consisting in annulling or reforming the decisions taken by it in the exercise of its prerogatives of public power". However, by virtue of a constitutional principle, this power falls "within the sole competence of the administrative court, with the exception of matters reserved by nature to the judicial authority". Thus, a decision falling within the scope of Article 136 of the Code of Criminal Procedure - i.e. infringing on individual freedom - nevertheless falls within the jurisdiction of the administrative court when it has been taken by an administrative authority acting in the exercise of public power. This provision does not authorise the courts to issue injunctions to the administration and thus to obstruct the execution of its decisions outside cases of assault.

Court which, since 1994¹¹⁰, has made the characterisation of an act of violence conditional on the administration having clearly acted without any legal authorisation¹¹¹.

25. However, this decision did not go unnoticed. Rendered under the presidency of the Minister of Justice, it was followed by the resignation of a member of the Tribunal des conflits and provoked a crisis of legitimacy in the administrative jurisdiction.

The first reason for the unusual echo given to this case, including in the mainstream press¹¹² is that it took the intervention of the Minister of Justice in person to break the tie. The question of jurisdiction was first submitted to the Tribunal des conflits at its sitting of 13 January 1997, "which resulted in a tie and the need to have recourse to the presidency of the Garde des Sceaux, Minister of Justice"¹¹³. Although provided for in the texts in the event of a tie, such intervention is nonetheless exceptional¹¹⁴.

Secondly, in an unprecedented move, the decision was followed by the resignation of a member of the Tribunal, Councillor-Rapporteur Sargos, a magistrate at the Cour de cassation. The latter had concluded in his report that the courts had jurisdiction and intended to resign because of a rule of allocation that was deemed excessively favourable to the jurisdiction of the administrative courts, or even to the preservation of the interests of the administration.

Last but not least, the judgment "stirred up legal circles by ostensibly casting doubt on the ability of the administrative judge to deal properly with emergency litigation when the fundamental rights of the individual were at stake"¹¹⁵. In principle, the resolution of a jurisdictional issue should not affect the guarantee of the litigant's rights. But in this case, recognising the jurisdiction of the administrative court was at the same time admitting the total ineffectiveness of the procedural avenues available to the applicants and the absence of judicial protection of their rights and freedoms. Indeed, without a prior decision, the applicants were not entitled to act directly before the administrative court. To be able to lodge an appeal, they had to first obtain a decision from the administration and, if necessary, wait for an implicit decision of rejection at the end of a four-month period¹¹⁶. In addition, only an appeal for misuse of power could be validly lodged against the refusal decision. Indeed, an application for a stay of execution or provisional suspension would, under the *Amors* case law, have been declared inadmissible. As for the summary procedure, it certainly gave the administrative judge a power of injunction, but this could not be used to prevent the execution of an administrative decision. The only way to challenge this decision was therefore through an appeal for misuse of power. However, the deadlines involved in respecting the adversarial process and the obligation to rule in a collegial formation ruled out the possibility of the court annulling the measure in the near future. In the absence of an adequate procedure, "the administration was thus able to evade with impunity the law imposing detention in a waiting zone for foreigners who are forbidden to enter French territory. The existing legal vacuum regarding emergency procedures then became apparent and threatened the very credibility of administrative justice in such a sensitive area of freedoms"¹¹⁷.

26. The decision provoked a crisis of legitimacy of the administrative jurisdiction because of its inability to ensure an effective defence of freedoms. Through the criticism of its effectiveness, and therefore its usefulness for litigants, it was the very existence of administrative justice that was targeted. The day after the decision of the Court of Conflicts, judges from the judicial system were calling for its disappearance¹¹⁸. At the Palais-Royal, people were aware of the "risk of destabilisation"¹¹⁹ that the crisis opened up by the decision of 12 May 1997¹²⁰ entailed for administrative justice. If the crisis was not to escalate and threaten the very existence of

110 TC, 20 June 1994, *Madaci and Youbi*, op. cit.

111 Traditionally, this requirement only concerned assault due to a lack of law, and not assault due to a lack of procedure. Nevertheless, the Court of Conflicts quickly returned to its previous case law by limiting the requirement of an infringement committed by the administration outside the exercise of its powers to acts committed for lack of procedure (see *infra*, § 325).

112 See the editions of the newspaper *Le Monde* of 14, 16 and 24 May 1997.

113 P. SARGOS, above-mentioned report, *GP* 1997, p. 737.

114 Only ten or so cases have led the latter to exercise his functions as a dispatching judge. The decision of 12 May 1997 also raises the question of the presidency of the Tribunal des conflits by a political authority. The Tribunal des conflits is a genuine judicial institution and must therefore include all the guarantees attached to this status. As M. Braconnier stated, "it is hard to imagine that decisions with direct implications for the rights of individuals can still be taken through the preponderant voice of the Keeper of the Seals, a member of the Government" (S. BRACONNIER, *Jurisprudence de la Cour européenne des droits de l'homme et droit administratif français*, Bruylant, 1997, p. 192). In the *Bulut v. Austria* judgment, the European Court developed the concept of "objective ally", which is likely to violate the principle of equality of arms and which characterises the Minister of Justice when he presides over the Court of Conflicts (ECHR, 22 February 1996, *Bulut v. Austria*, RTDH 1996, p. 627, note by MARTENS, quoted by S. BRACONNIER, *op. cit.*, p. 192).

115 F. MODERNE, "Le référé-liberté devant le juge administratif", in *Le nouveau juge administratif des référés. Réflexions sur la réforme opérée par la loi du 30 juin 2000*, colloquium cited above, p. 133.

116 At the time of the facts, the law set at four months the time limit for the intervention of an implicit decision of rejection (rule resulting from article 3 of the law of 17 July 1900, reaffirmed and generalised by the law of 7 June 1956 and the decree of 11 January 1965). This period was reduced to two months by the law of 12 April 2000 (see Article R. 421-2 of the Code of Administrative Justice).

117 P. WACHSMANN, "Une révolution dans les rapports entre le juge et l'administration?", in *Le nouveau juge administratif des référés. Réflexions sur la réforme opérée par la loi du 30 juin 2000*, colloquium cited above, p. 97.

118 The Professional Association of Magistrates asked that thought be given to "the disappearance of the two orders of jurisdiction, a curiosity in the European judicial landscape" (*Le Monde* 16 May 1997).

119 P. WACHSMANN, "Une révolution dans les rapports entre le juge et l'administration?"

120 At the time the controversy arose, the ethnologist Bruno Latour had been authorised to carry out an ethnography of the Council of State. Exceptionally, for several months, he was granted a pass allowing him to move freely within the institution. This work of observation and analysis resulted in a book entitled *La fabrique du droit*, published by La Découverte. In it, Bruno Latour recounts the events of May 1997,

administrative justice, it was becoming urgent to remedy the problem of the administrative judge's inability to put a rapid end to administrative actions that seriously infringed liberties. The crisis could only be contained by legislative intervention giving the administrative judge prerogatives enabling him to vigorously guarantee the freedoms of individuals threatened by the public authority.

Proposals to this effect were formulated in the days following the decision of the Tribunal des conflits. Responding to the attacks of the judicial magistrates, Solon - a pseudonym concealing the identity of a State Councillor - intends to redefine the terms of the debate. While for the latter, the issue concerns the very existence of administrative justice, Solon states that "The real question is to know whether the administrative judge is equipped with tools as powerful as the judicial judge to come to the rescue of a freedom illegally threatened by the administration". He affirms that "Much has been done in recent years in this direction", but that "We must go further"¹²¹. Mr Arrighi de Casanova had called the attention of the legislator in his conclusions on the judgment of 12 May 1997, stating that "If the procedures applicable by the competent judge by virtue of the fundamental principles governing the duality of jurisdiction are insufficiently convenient, it is up to the public authorities to reflect on adapting them"¹²². Some judicial magistrates agreed with the analysis of the members of the Council of State regarding the need to establish a rapid and efficient procedure in this area¹²³.

In the absence of any reaction from the public authorities, the Council of State took the initiative of a reform which it will supervise until its completion. A working group set up within the Council, at the initiative of its vice-president, was tasked with considering possible improvements¹²⁴.

B. The working group's proposal: the alternative between two variants of summary judgment

27. The référé-liberté and, more generally, the reform of 30 June 2000 are above all the work of the Council of State and its working group. It is true that the summary judgement falls within the scope of the law¹²⁵ and it is by a formal legislative text that it was introduced into positive law after discussion, parliamentary amendments and adoption by the two assemblies. However, the law on summary proceedings constitutes, like the previous reforms in contentious administrative procedure, a return to the law in the form of a trompe l'oeil¹²⁶. As Mr Pacteau states, "The Act of 30 June 2000 is the prototype of the major reforms of administrative litigation for which the Council of State had as much the idea as the initiative, which it prepared

describing in great detail the way in which the crisis triggered by the decision of the Tribunal des conflits was experienced from the inside, as well as the strategy put in place by the Council of State to contain it (see B. LATOUR, *La fabrique du droit. Une ethnographie du Conseil d'Etat*, La Découverte, 2002, pp. 44-55).

¹²¹ SOLON, "Un émoi à côté de la plaque", *Le Monde*, 24 May 1997, p. 19.

¹²² J. ARRIGHI DE CASANOVA, *concl. cited above*, *RFDA* 1997, p. 523.

¹²³ See, in this sense, S. PETIT, *aforementioned obs.* *GP* 1997, 1, p. 745: "Let us hope that the wish often expressed by the magistrates of the administrative order to take on the defence of individual liberties in their field of competence is accompanied by legal, technical and procedural means that are equal to the demand expressed. The constitutional guarantee of the citizen's fundamental rights is at stake".

¹²⁴ While the crisis of 12 May essentially concerned the administrative judge's failure to protect freedoms urgently, the Council of State decided to undertake a more far-reaching reform aimed at remedying all the shortcomings of its emergency procedures. In a letter dated 31 October 1997 (see *RFDA* 2000, p. 954), the vice-president of the Council of State asked a working group to "identify the cases in which, as the law and case law stand, the administrative judge is not able to respond satisfactorily to the needs of litigants". It then had to propose reform measures to make this law simpler and more effective. The working group, set up by order of 7 November 1997 (see *RFDA* 2000, pp. 954-955), was composed of eight members of the Council of State, four judges from the courts of first instance and two university professors (René Chapus and Bernard Pacteau). At the end of its work, the working group drew up a report and prepared preliminary draft texts reflecting its proposals and the variants examined (see *RFDA* 2000, pp. 941-958).

¹²⁵ Two bases have been put forward by commentators to justify Parliament's competence. The first is based on Article 34 of the Constitution, which places the determination of fundamental guarantees for the exercise of public freedoms under the protection of the legislator. While the concept of fundamental freedom does not coincide exactly with that of public freedom, there are nevertheless many areas of coincidence between the two concepts. Consequently, the référé-liberté is at least partly concerned with the guarantee of public liberties. Professor Chapus has added a second basis for legislative competence: respect for the rights of the defence as they result from the fundamental principles recognised by the laws of the Republic (R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd., Montchrestien, 2006, n° 1536).

¹²⁶ As M. Gaudemet has pointed out, "at the origin of most of the major texts that have transformed administrative litigation in recent years, we find the will and initiative of the Council of State" (Y. GAUDEMET, "Remarques sur l'évolution des sources du droit du contentieux administratif", in *Le juge entre deux millénaires. Mélanges offerts à Pierre Drui*, Dalloz, 2000, p. 338). Remarkably, 'it is always in fact the Council of State, on the basis of its practice and knowledge of litigation and because it has constructed the law of litigation, which is at the origin of new solutions and which is, for the most part at least, the drafter' (*op. cit.*, p. 339). His position within the public authorities, his experience of litigation and also the authority that he now has give him a broad formal mastery of all normativity in this area. As Melleray sums up, "it is always the Council of State that decides and behind formally legislative texts, one must generally see the hand of the Palais-Royal" (F. MELLERAY, "L'exorbitance du droit du contentieux administratif", in *L'exorbitance du droit administratif en question*, colloquium of 11 and 12 December 2003, Poitiers, LGDJ, 2004, p. 294). See also B. PACTEAU, "Procédure administrative contentieuse, retour à la loi, et après?"

and led until its proper adoption by Parliament (...)'¹²⁷. Although it denies being the originator of the law¹²⁸, there is no doubt that the Council of State is 'both the inspiration and the architect'¹²⁹. Taking advantage of the proposal function conferred on it by Article L. 112-3 of the Code of Administrative Justice¹³⁰, the Council of State has drafted a "preliminary draft law"¹³¹ which it will propose to the legislator for adoption.

28. Within the working group, it was from the point of view of the power of injunction that the summary judgment appeared. The absence of such a power was presented as a shortcoming; its recognition in favour of the emergency judge as a solution. Thus, it is from the idea of injunction that the summary application for interim relief was born.

The working group starts from the observation that the limitation of the injunction powers of the summary jurisdiction judge represents a serious gap in the protection that the administrative court provides to the litigants. "In cases of material conduct, irregular administrative behaviour, failure to act, or even purely negative decisions - all cases for which the mechanism of a stay of execution proves unsuitable - the absence of adequate powers of injunction deprives litigants of a useful and effective intervention, as a matter of urgency, by the administrative court"¹³². In order to remedy these shortcomings, it appeared essential "to accompany the renovation of the stay of execution by an increase in the injunctive powers entrusted to the administrative judge of the urgency"¹³³. The aim is to enable the administrative judge "to intervene effectively in situations where easily identifiable administrative decisions are not at issue, i.e. in situations where the simple suspension of the execution of an administrative decision is not sufficient to guarantee the rights of the parties to the proceedings. This "summary order" would allow the administrative judge to order all parties involved, including the administrative authorities, to take all necessary precautionary measures"¹³⁴. Because of the extent of these prerogatives, it "appeared necessary to frame this power of injunction and to confine it to the hypotheses of serious and manifestly illegal administrative actions: for the judge, ruling in summary proceedings, i.e. alone and in an emergency, to intervene by making use of powers exorbitant to the common law, it is necessary that the illegality committed is characterised by its seriousness and its obviousness"¹³⁵.

29. The question of the scope of application of this procedure was the subject of considerable debate within the Working Group. In accordance with the method defined by the working group when it was set up, which consists not in deciding but in clarifying choices and presenting options, two variants of the summary procedure were envisaged: on the one hand, the protection of fundamental freedoms, and on the other, the "very great urgency". The preliminary draft law, based on an extensive conception of the field of law, thus envisages two alternative systems in its Article 31³⁶:

Variant 1: "In the event that a fundamental freedom is seriously and manifestly illegally infringed by the Administration, the interim relief judge, on receipt of a request justified by the urgency of the matter, may order all necessary safeguard measures.

¹²⁷ B. PACTEAU, *Contentieux administratif*, 6^{ème} éd, PUF, coll. Droit fondamental, 2002, n° 262.

¹²⁸ President Labetoulle was keen to point out the institutional dissociation between the Council of State and the working group that operated within it: "contrary to what has sometimes been said or written, there was no organic intervention by the Council of State as such. The working group functioned within the Council of State with external figures. The work of the working group went directly from the working group to Madame Guigou's desk. There was no deliberation by the Council of State; there was no position taken by the Council of State. The Council of State, as such, only became aware of the text when the government submitted a draft law to it in its consultative capacity" (D. Labetoulle, "La genèse de la loi du 30 juin 2000", in *Le nouveau juge administratif des référés. Réflexions sur la réforme opérée par la loi du 30 juin 2000*, colloquium cited above, p. 17). This dissociation is certainly not artificial. However, it must be put into perspective since the working group was essentially composed of members of the Council of State.

¹²⁹ I. LEGRAND and L. JANICOT, Note under CE, Sect. 28 February 2001, *Casanovas*, *AJDA* 2001, p. 973. As President Vandermeeren points out, "According to a practice that has concerned, over the last few years, all regulatory or legislative texts modifying the law of administrative litigation, the reform of emergency procedures was initiated by the Council of State, which proposed and prepared it before it was adopted by the government and voted by Parliament" (R. VANDERMEEREN, "La réforme des procédures d'urgence devant le juge administratif", *AJDA* 2000, p. 708).

¹³⁰ "The Council of State may, on its own initiative, draw the attention of the public authorities to legislative, regulatory or administrative reforms which it considers to be in the general interest" (former Article 24 of Ordinance No. 45-1708 of 31 July 1945).

¹³¹ The expression is used by the working group itself (see in particular appendix 8 of the report, *RFDA* 2000, p. 958). It was subsequently used again (see for example L. TOUVET, concl. on CE, Sect. 18 January 2001, *Commune de Venelles*, *RFDA* 2001, p. 383). This preliminary draft law corresponds to what M. Henry describes as 'pre-drafts' in legal form' (O. HENRY, *La fonction de proposition du Conseil d'Etat*, thesis Montpellier I, 2000, p. 249). As the author points out, 'In principle, the Council of State is careful not to draft a law article by article itself, so as not to encroach in a way that would be deemed excessive on the mission devolved to Parliament. But the incursion into the legislative function can sometimes take this turn when, at the end of a study, the working group responsible for carrying it out finds it appropriate to propose a source text (bringing together all the proposals in a preliminary draft law, which can - and is intended to - be taken up as it stands)' (*ibid.*; see the examples cited on pp. 249-251).

¹³² Report, p. 944.

¹³³ Report, p. 947.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ Annex No. 4 to the Working Group Report, *RFDA* 2000, p. 955.

Variant 2: "Subject to the provisions of the preceding article [relating to the procedure for interim relief], the interim relief judge may, in cases of urgency and on a simple application which will be admissible even in the absence of a prior administrative decision, order any measure which is not seriously contested and which is justified by the need to protect the exercise of a right or freedom challenged by an act or behaviour of the administrative authority. At the request of any interested party, it may be terminated at any time.

According to President Labetoulle, the alternative was "either a very broad scope of application, but one in which the powers of the interim relief judge would perhaps have been less marked, or, on the contrary, a more restricted scope of application and stronger powers"¹³⁷. The first formula, limited to the protection of fundamental freedoms, would allow the judge to pronounce any safeguard measure. The second, concerning all rights and freedoms, would only allow the judge to order a measure in the absence of a serious challenge. The majority of the working group showed a clear preference for the first solution. Four considerations were decisive in this choice¹³⁸. Firstly, the hypothesis of an infringement of a fundamental freedom seemed to correspond to situations in which the urgent intervention of the interim relief judge, with very extensive powers, was the most justified. Secondly, in most cases, the intervention of the interim relief judge will correspond to situations arising from administrative decisions, in respect of which the interim suspension, possibly accompanied by the implementation of the power of injunction resulting from the Act of 8 February 1995, will suffice to restore the rights of the parties. Moreover, assigning this procedure a wider scope risked attracting the greater part of administrative litigation into the orbit of the summary procedure, to the detriment of the guarantees of quality offered by judgments handed down on the merits by a panel after a written investigation. Lastly, the working group feared that an overly broad extension of the powers of the interim relief judge would lead to an excessive number of referrals that would overwhelm the administrative court's processing capacity.

The report of the working group was submitted to the Minister of Justice in May 1998. The two forms of summary proceedings were presented.

C. The Government's decision: the choice of summary judgment

30. The government first consulted professional organisations of judges and lawyers. It then organised interministerial meetings to harmonise the points of view of all the central administrations. Of the two variants of summary proceedings proposed by the working group, the government chose the strict formula: that of a summary proceeding "broadened in its potential but circumscribed in its scope"¹³⁹. Article 4 of the bill takes up the formula proposed by the working group with an editorial change. The government also adds a second paragraph, which recognises the prefect's interest in acting in the context of this procedure:

"When a serious and manifestly illegal infringement of a fundamental freedom is caused by the administration, the interim relief judge, on receipt of a request justified by the urgency of the matter, may order all measures necessary to safeguard this freedom.

This request may be made by the State representative if the infringement mentioned in the previous paragraph is committed by a local authority or a local public institution.

Bill No. 269 *on summary proceedings before the administrative courts* was adopted by the Council of Ministers on 17 March 1999 and deposited on the Senate's desk the same day.

D. Parliamentary improvements

31. In general, the legislative phase was characterised by a broad parliamentary consensus across the political divide. Although adopted after the joint committee meeting, the text generally gave rise to only relatively minor disagreements between the Senate and the National Assembly, which left the economy of the government's

137 D. LABETOULLE, "La genèse de la loi du 30 juin 2000", *op. cit.*, p. 20.

138 Cf. Report of the above-mentioned working group, *RFD.A* 2000, p. 948.

139 B. PACTEAU, *Contentieux administratif*, 7^{ème} éd, PUF, coll. Droit fondamental, 2005, n° 278. See V. TARDY, "Le projet de réforme de la procédure de référé", *LPA* 11 December 1998, n° 148, pp. 7-13.

plan intact. On the project as a whole, "only the regime of the new *référé-liberté* raised real difficulties"¹⁴⁰. These related to the question of the means of appeal, the prefect's standing to act and the competence of the judicial judge in matters of de facto intervention.

Finally, the text was adopted by Parliament in fifteen months. "This lengthy drafting process seems interminable for a text on the principle of which there was a consensus, and whose content appeared at first sight to be essentially technical"¹⁴¹. However, this is "a *reasonable* timeframe, especially if one remembers (in addition to the congestion of the Assemblies) the difficulty of adopting several other major administrative and, above all, contentious legal reforms in the last twenty years (...)"¹⁴².

The final text was adopted by a large majority by both assemblies, by the Senate on 21 June 2000¹⁴³, by the National Assembly on 22 June 2000¹⁴⁴. The law was promulgated by the President of the Republic on 30 June 2000, without any referral to the Constitutional Council: "it is hard to imagine by whom, on what grounds or with what chance of success it could have been brought"¹⁴⁵. Few authors have considered this question. Reservations were nevertheless expressed by Ms Rouault. The author expressed doubts about the constitutionality of the *référé-liberté*, on the grounds that "the Constitution makes the judicial judge the guardian of individual freedom and the right to property, which justifies his or her jurisdiction in the event of an infringement of these freedoms. If the Constitutional Council has recognised the legislator's ability to create blocks of jurisdiction, it is questionable whether it is consistent with constitutional principles to transfer this specific jurisdiction to the administrative judge"¹⁴⁶. But in reality, the claim of unconstitutionality was unfounded. On the one hand, the administrative judge benefits from a constitutional reservation of jurisdiction to hear acts taken by the administrative authorities in the exercise of public power. While this principle must be reconciled with the principle, of equal value, placing individual freedom and private property under the protection of the judicial authority, the Constitutional Council considers that this is a *privileged* competence for the judicial judge, and in no case an exclusive competence¹⁴⁷. On the other hand, the law does not in any way "transfer" litigation from the judicial to the administrative jurisdiction. Its purpose is only to reinforce the emergency powers of the administrative judge without modifying the distribution of competences between the two orders of jurisdiction. In any event, the drafters of the preliminary draft law had guarded against any risk by avoiding any express reference to individual freedom and the right of ownership in the text presented to the assemblies.

III. Research areas

32. This procedure, the general characteristics of which will first be outlined by addressing the question of its name, has been acclaimed by legal scholars and litigants. A reflection must be carried out on the contribution, the place and the characteristics of this legal route.

A. The chosen formula and the name of the procedure

33. As Professor Pacteau points out, the *référé-liberté* was included in Article L. 521-2 of the Code of Administrative Justice "in terms that are both strong and channelled": "each word weighs heavily and was intended to channel and finalise precisely" the jurisdiction of the juge des référés¹⁴⁸. Formally, Article L. 521-2 unites in a single formula the judge's powers and the conditions for granting them. The terms used are deliberately broad and in some respects indeterminate, in order to give this legal remedy great flexibility. The formula is a synthesis of several procedures that existed before it in administrative litigation law and in private judicial law¹⁴⁹.

¹⁴⁰ R. VANDERMEEREN, "La réforme des procédures d'urgence devant le juge administratif", *AJDA* 2000, p. 708 (underlined). At the second reading, half of the amendments proposed by the Senate's Law Commission, i.e. five amendments out of ten, concerned only the *référé-liberté* (R. GARREC, Senate Report No. 210, pp. 12-13). In the joint committee, two of the points still under discussion related specifically to this procedure (AN Report No. 2460, and Senate Report No. 396).

¹⁴¹ M. FOULETIER, "La loi du 30 juin 2000 relative au référé devant les juridictions administratives", *RFDA* 2000, p. 964.

¹⁴² B. PACTEAU, "Vu de l'intérieur : loi du 30 juin 2000, une réforme exemplaire", *RFDA* 2000, p. 959 (underlined).

¹⁴³ *OJ Senate Debate*, CR session 21 June 2000, p. 4226.

¹⁴⁴ *OJ deb. AN*, CR session 22 June 2000, p. 5808.

¹⁴⁵ B. PACTEAU, "Vu de l'intérieur : loi du 30 juin 2000, une réforme exemplaire", *RFDA* 2000, p. 959.

¹⁴⁶ M.-C. ROUAULT, "Le projet de loi relatif au référé devant les juridictions administratives : un pas vers l'institution d'un véritable juge administratif de l'urgence", *LPA* 3 August 1999, n° 153, p. 15.

¹⁴⁷ See *infra*, § 119.

¹⁴⁸ B. PACTEAU, *Contentieux administratif*, 7^{ème} éd, PUF, coll. Droit fondamental, 2005, n° 278.

¹⁴⁹ Article L. 521-2 borrows some of its expressions from these procedures. Its opening words ("Seized of a request to this effect") are a word-for-word reproduction of Article L. 10 of the Code of Administrative Tribunals and Administrative Courts of Appeal. The

34. As is customary, the legislator has refrained from giving this procedure a name. In the absence of an official name, several formulas have been proposed by the doctrine. There are no less than five expressions: *référé-liberté*, *référé-liberté fondamentale*, *référé-injonction*, *référé-sauvegarde* and, finally, *référé-sauvegarde d'une liberté fondamentale*. While all these terms have in common that they place in the foreground the nature of the procedure - i.e. a summary procedure - each of them then highlights a different aspect of it. The first two terms emphasise *the subject matter* of the procedure: (fundamental) freedoms. The third emphasises *the power of the judge* in the event of an infringement of a freedom or, rather, one of his powers - the most emblematic one: the power of injunction. The last two terms emphasise *the purpose of this procedure*: the protection and safeguarding of freedoms. While the first term is not open to discussion, as its use in all the proposed formulas tends to demonstrate, the second term must be discussed, particularly in view of the divergences expressed on this subject.

In view of its nature, the procedure under Article L. 521-2 of the Code of Administrative Justice constitutes a *summary procedure*. "Generally speaking, an interim injunction is a recourse to the judge to obtain an immediate and provisional ruling"¹⁵⁰. In private judicial law as in administrative litigation, these procedures meet the need to deal quickly with a question that the normal jurisdictional procedure would take too long to consider. In a very concrete way for the litigant, summary proceedings "offer the advantage of saving time"¹⁵¹; they "provide an immediate response to a crisis situation"¹⁵². Speed is therefore the essence of summary proceedings¹⁵³. With regard to the conditions under which the administrative judge intervenes on the basis of this provision, the procedure instituted by Article L. 521-2 unquestionably falls into the category of summary proceedings. More precisely, it is an *emergency summary procedure*¹⁵⁴ and, to use the title of the Act of 30 June 2000, a summary procedure 'before the administrative courts'¹⁵⁵.

Apart from its nature, what is the most significant feature of the procedure under Article L. 521-2? Is it its object or purpose? Is it the power of injunction given to the administrative judge?

Formulas referring to the purpose of the procedure have not flourished. The expression "*référé-sauvegarde*", proposed by Professor Chapus in the first instance¹⁵⁶, has been little used. This can be explained by the

requirement of a serious and manifestly unlawful infringement of a fundamental freedom is reminiscent of the case law formulation of *de facto* assault. The reference to "a legal person under public law or a body under private law responsible for the management of a public service" is immediately borrowed from the Act of 8 February 1995. As for the judge's powers - 'to order all necessary measures' - one can only emphasise the closeness of this formula to that of Article 484 of the new Code of Civil Procedure, which gives the civil judge of summary proceedings 'the power to order immediately the necessary measures'.

150 R. JACQUELIN, "L'évolution de la procédure administrative", *RDJ* 1903, 2nd part p. 14. In France, the first institution that can be likened to a real summary procedure was established by a royal edict of 22 January 1865 organising the Châtelet procedure. Inspired by the practice of the civil lieutenant of the Châtelet of Paris, this procedure combined two of the essential characteristics that are the very essence of summary proceedings: a simplified procedure, implemented in cases of emergency. It was subsequently codified in articles 806 to 811 of the 1806 Code of Civil Procedure. The summary procedure was transposed into administrative litigation thanks to the practice of the Seine Prefecture Council. The procedure was then enshrined in the Act of 22 July 1889, but only for the benefit of the Prefecture Councils. It was not until Article 34 of the Ordinance of 31 July 1945, which went unnoticed at the time, that the Council of State was given this same prerogative; until then, it had only had the right to suspend enforcement by virtue of Article 3 of the Decree of 22 July 1806. On the historical origin of the summary procedure before the judicial and administrative courts, see respectively Y. STRICKLER, *Le juge des référés, juge du provisoire*, Strasbourg thesis, 1993, pp. XIII-XXV; C. GABOLDE, "Pour un véritable référé administratif", *D.* 1949, chron. p. 172, and J. GOURDOU, "Juge des référés. Organisation. Dispositions générales", *Jcl. Justice administrative*, fasc. 50 (5, 2002), p. 2. See also O. GERARD, *Des origines des référés et des principes de compétence en cas d'urgence en droit français*, thesis Paris, 1886, 232 p.

151 F. COURIVAUD, *Des référés. Principes de compétence et de procédure*, Imprimerie Blais et Roy, 1900, p. 11.

152 A. LACABARATS, "Le référé", in *Le nouveau code de procédure civile : vingt ans après*, colloque des 11 et 12 décembre 1997, La documentation française, 1998, p. 213.

153 The First President Estoup indicates that the classic doctrine, "with good reason, has seen in the rapidity of the procedure a distinctive character of the summary proceedings" (P. ESTOUP, *La pratique des procédures rapides. Référés, ordonnances sur requête, procédures d'injonction, procédures à jour fixe et abrégées*, 2^{ème} éd., Litec, 1998, p. 28). If this criterion has faded, because of the existence in modern procedural law of many procedures also characterised by rapidity, "it remains nevertheless of the essence of the summary procedure, having justified its creation and ordered its organisation" (*ibid.*).

154 The implementation of Article L. 521-2 is conditioned by urgency. Following the example of the summary suspension of Article L. 521-1, which replaces the procedure of suspension of execution, and of the summary conservatory of Article L. 521-3, which is in line with the former summary procedure of Article 130 of the Code of Administrative Courts and Administrative Courts of Appeal, the pronouncement of a measure is subordinated to the urgency of the judicial intervention.

155 At first glance, this expression may seem preferable to the commonly accepted term "administrative summary proceedings". Indeed, as Professor Drago pointed out in 1953, there are purely administrative summary proceedings whose purpose is to have the administrative authority take provisional measures in an emergency (R. DRAGO, "La procédure de référé devant le Conseil d'Etat", *RDJ* 1953, pp. 297-316, esp. p. 304-305). Such procedures still exist today in French law, in particular Article 79 of the Mining Code, amended by the Act of 15 July 1994, which gives the administrative authority the power to prescribe any measure necessary to ensure environmental protection, even during the duration of the work. These procedures are clearly distinct from the summary proceedings applicable 'before the administrative courts', the latter constituting, both before and after the reform of 30 June 2000, genuine jurisdictional procedures. As a result, Professor Drago considered it "highly debatable" to use the expression "administrative" summary proceedings to designate the procedures in force before the Council of State and the prefecture councils (*op. cit.*, p. 305). Today, however, there is no longer any risk of confusion between the summary proceedings organised before the administrative authority and those that exist before the administrative courts. No one today thinks of a purely administrative procedure before a public person when one speaks of administrative summary proceedings. As the expression is commonly used in the doctrine without the slightest ambiguity, we must admit the validity of its use in connection with summary proceedings organised before the administrative court.

156 R. CHAPUS, *Droit du contentieux administratif*, 9^{ème} éd., Montchrestien, 2001, n° 1534-1535; *ID*, *Droit administratif général*, t. 1, 14^{ème}

insufficiently evocative nature of the term. It does not indicate what is safeguarded. However, as Professor Gohin has pointed out, "it seems preferable to specify what is safeguarded, especially when it is the essential thing"¹⁵⁷. Moreover, this expression is sometimes used by specialists in private judicial law to designate the summary proceedings procedure under Article 809(1) of the new Code of Civil Procedure, on the basis of which the victims of an assault sue the administration before the civil judge for summary proceedings¹⁵⁸. Professor Pacteau, also relying on the purpose of the procedure, has proposed the more complete formula of 'summary proceedings to safeguard a fundamental freedom'¹⁵⁹. This formula has the merit of indicating both the object and the purpose of the procedure. However, its lack of conciseness has prevented it from becoming a common expression.

The term "summary order" emphasises one of the powers granted to the judge in this procedure. This expression prevailed during the preparatory work and remains in fairly common use in the practice of administrative courts. The choice of this expression was perfectly conceivable during the preparatory phase of the reform. When the working group envisaged two variants as to the scope of application of this procedure, the main characteristic of the latter lay in the power of injunction granted to the judge. As soon as the government and, subsequently, the Parliament opted for the formula with a strict scope of application, the use of this formula is no longer justified and must be abandoned. Indeed, not only is the judge under Article L. 521-2 not the only judge in summary proceedings with the power to issue injunctions¹⁶⁰, but he may also issue measures other than injunctions¹⁶¹. The judge of Article L. 521-2 is not only a judge of injunction and he is not the only judge of injunction. In the absence of a strict and exclusive correspondence between the power of injunction granted to the judge and the procedure of Article L. 521-2, the term "summary order" must be excluded¹⁶².

Without question, the most satisfactory expressions to describe this procedure are those that emphasise its *purpose*, namely fundamental freedoms. It is therefore preferable to refer to the procedure under Article L. 521-2 as "référé-liberté(s) fondamentale(s)" or the more concise "référé-liberté(s)" used in the explanatory memorandum to the bill¹⁶³. These two expressions have become widely used within the Council of State¹⁶⁴ and in academic circles¹⁶⁵. The term 'référé liberté' has been enshrined in the texts relating to the organisation of legal aid¹⁶⁶ and in the administrative case law itself¹⁶⁷.

ed., Montchrestien, 2000, n° 1087.

157 O. GOHIN, *Contentieux administratif*, 3^{ème} éd, Litec, 2002, p. 311, note n° 145.

158 Cf. for example A. CROZIO, "Décisions récentes en matière de mesures conservatoires et voies d'exécution", *LP A* 13 April 1988, n° 40, p. 5.

159 B. PACTEAU, *Contentieux administratif*, 7^{ème} éd, PUF, coll. Droit fondamental, 2005, n° 278.

160 On the basis of Article L. 521-3, the judge of the summary judgment may, for example, order the public authority to communicate administrative documents. The judge of the summary suspension of Article L. 521-1 can accompany the suspension measure with an injunction of execution (see *infra*, § 480). Under Article L. 551-1 of the Code of Administrative Justice, the judge responsible for summary proceedings may order a public authority to comply with its obligations (see *infra*, § 487). Similarly, the president of the Administrative Jurisdiction Division may issue injunctions in the context of audiovisual summary proceedings (see *infra*, § 529).

161 Instead of issuing an injunction, it may in some cases prefer to issue a suspension order (see *below*, §§ 479-480).

162 It should also be noted that this is already commonly used in the language of the Palais to describe the procedure of Article 809 para. 2 of the new Code of Civil Procedure.

163 One could object, with René Chapus (R. CHAPUS, *Droit du contentieux administratif*, 9^{ème} éd., Montchrestien, 2001, n° 1534), that the name "référé-liberté" is already assigned by the criminal doctrine to the procedure of suspension of provisional detention (article 187-1 of the code of criminal procedure). However, if it can happen that an administrative jurisdictional procedure is confused with a civil procedure, such a risk is on the other hand excluded with regard to a procedure of provisional detention which, by hypothesis, does not concern the legal persons nor, consequently, the public persons.

164 See B. STIRN, "Conseil constitutionnel et Conseil d'Etat: concurrence ou complémentarité?", in *Mélanges Paul Sabourin*, Bruylant, 2001, p. 377; G. BACHELIER, "Le référé-liberté", *RFDA* 2002, pp. 261-268; M. GUYOMAR and P. COLLIN, *AJDA* 2001, chron. p. 153, pp. 1054-1059; R. DENOIX DE SAINT MARC, "opening speech" of the colloquium *Le juge administratif et les libertés publiques*, *RFDA* 2003, p. 1048; D. CHAUVAU, concl. on CE, Sect. 28 February 2001, *Philippart et Lesage*, *RFDA* 2001, pp. 390-398; F. LAMY, concl. on CE, Sect. 25 April 2001, *Association des habitants du littoral du Morbihan c/ Commune de Baden*, *RFDA* 2001, pp. 849-854; I. DE SILVA, concl. on CE, Sect. 30 October 2001, *Ministre de l'Intérieur c/ Tliba*, *RFDA* 2002, pp. 324-335; P. FOMBEUR, concl. on CE, Sect. 28 February 2001, *Casanovas*, *RFDA* 2001, pp. 399-406; L. TOUVET, concl. on CE, Sect. 19 January 2001, *Commune de Venelles*, *RFDA* 2001, pp. 378-388.

165 See for example L. FAVOREU, "La notion de liberté fondamentale devant le juge administratif des référés", *D.* 2001, pp. 1739-1744; B. FAURE, "Juge administratif statuant urgence. FAURE, "Juge administratif statuant en urgence. Référé-liberté", *Jcl. Justice administrative*, fasc. 51 (11, 2002); J. TREMEAU, "Le référé-liberté, instrument de protection du droit de propriété", *AJDA* 2003, pp. 653-658; N. JACQUINOT, "La liberté d'entreprendre dans le cadre du référé-liberté : un cas à part ?", *AJDA* 2003, pp. 658-666; A. BOURREL and J. GOURDOU, *Les référés d'urgence devant le juge administratif*, L'Harmattan, coll. La justice au quotidien, 2003, 112 p.; M.-C. ROUAULT, "La loi du 30 juin 2000 : un petit pas vers un traitement efficace de l'urgence par le juge administratif", *D.* 2001, pp. 398-403; F. MODERNE, "Vers une culture de l'urgence dans le contentieux administratif ?", *D.* 2001, Point de vue, pp. 3283-3285; P. CASSIA, *Les référés administratifs d'urgence*, LGDJ, coll. systèmes Droit, 2003, 198 p.; O. DUGRIP, "Les procédures d'urgence : l'économie générale de la réforme", *RFDA* 2002, pp. 245-249; C. DEBOUY, "La suspension des décisions en matière d'urbanisme par la procédure du référé administratif", *CJEG* n° 584, 2002, pp. 65-83; O. GOHIN, *Contentieux administratif*, 3^{ème} éd., Litec, coll. Manuels, 2002, 479 p.; H. MOUTOUH, "La voie de fait dans le projet de loi relatif au juge administratif des référés : la "folle du logis" enfin domestiquée ? pp. 1-2; L. BURGORGUE-LARSEN, *Libertés fondamentales*, Montchrestien, coll. Pages d'amphi, 2003, 347 p.; G. DRAGO, "Les droits fondamentaux entre juge administratif et juges constitutionnels et européens", *Dr. adm.* 2004, Etude n° 11, pp. 7-11; B. MATHIEU and M. VERPEAUX, *Contentieux constitutionnel des droits fondamentaux*, LGDJ, 2002, p. 121; L. GAY, "Propriété et logement. Réflexions à partir de la mise en œuvre du référé-liberté", *RFDC* 2003, pp. 309-333 (1^{ère} part) and 527-546 (2^{ème} part). After initially rejecting this formula (see *above*), M. Chapus subsequently stated that Article L. 521-2 deserved "its usual name of 'référé-liberté' (...)" (R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd., Montchrestien, 2006, n° 1534).

166 See Article 1^{er}, IV, 2° of Decree No. 2004-1025 of 29 September 2004 amending Decree No. 91-1266 of 19 December 1991 implementing Law No. 91-647 of 10 July 1991 on legal aid (*OJ* 30 September 2004, p. 16809).

167 See CE, ord. 18 October 2006, *Djabrailova, Lebon* p. 431, *AJDA* 2006, pp. 2352-2356, note M. GAUTIER. The interim relief judge of the Council of State, ruling on the basis of Article L. 521-2 of the Code of Administrative Justice, presents himself as 'the administrative

B. A popular procedure

35. Many parliamentarians, administrative magistrates and academics have emphasised the innovative, even revolutionary, nature of the summary procedure¹⁶⁸. Academic writers have also highlighted the originality of the procedure¹⁶⁹ while seeing it as "the major contribution (both the most innovative and the most promising) of the Act of 30 June 2000"¹⁷⁰, "one of the major elements of the reform of administrative summary proceedings"¹⁷¹, "the most important and already the most famous innovation introduced by the Act of 30 June 2000"¹⁷². It was presented by a Minister of Justice as "the most emblematic"¹⁷³ of the procedures instituted by the law of 30 June 2000. Thus, the *référé-liberté* is hailed as "the real 'star' of this reform"¹⁷⁴. It represents "a super-procedure that grants super-protection to the fundamental freedoms concerned"¹⁷⁵. All the superlatives have been used to describe it. "If one considers that the legislator establishes a gradation of jurisdictional powers according to the extent of the urgency and the quality of the rights to be protected, the summary procedure for liberty embodies the ultimate point of protection of the rights of the applicants"¹⁷⁶. It has received the highest honours, including being crowned by Professor Chapus as the 'king of summary proceedings'¹⁷⁷.

However, the greatest tribute to this procedure came from the applicants themselves. As President Vandermeeren had announced, litigants have promoted the summary judgment procedure "to the rank of litigation 'star', destined to occupy a privileged place"¹⁷⁸. It is true that the *référé-liberté* is a particularly attractive procedure. Its advantages stem, first of all, from the flexibility of its triggering since it is not subordinated to the existence of an administrative decision or to the exercise of an appeal on the merits. It is also interesting because of the short period of time allowed to the judge to decide - 48 hours - and the extent of his powers, since he can order "all" necessary measures. Finally, its attractiveness stems from the field concerned, that of "fundamental freedoms", an expression whose invocation is sufficient in itself to give the appeal scope. The applicant, who is sensitive to the moral character of a conviction handed down on this basis, and "may be seduced by the magic of words"¹⁷⁹, may seek what appears to him to be a somewhat solemn or exemplary sanction for administrative behaviour. For these reasons, the appeal of the *référé-liberté* is real. Litigants have in turn succumbed to the charms of this procedure and pressed the judge to intervene in the most diverse circumstances. They have appealed to the judge for interim relief frequently and on many occasions¹⁸⁰.

judge of interim relief.

168 "The innovation is the "*référé-liberté*", declared Jean-Jacques Hyst in the Senate (*JO déb. Sénat*, CR séance 8 juin 1999, p. 3742), while the rapporteur of the bill presented this procedure as "a major innovation" of the reform (R. GARREC, Rapport Sénat n° 380, p. 22, 29 et 49). At the hearing of the Senate Law Commission, President Labetoulle stated that this was "the most innovative provision" of the bill ("Audition of Mr Daniel Labetoulle by the Senate Law Commission", 26 May 1999, p. 2, www.senat.fr). Members of the academic community also saw the *référé-liberté* as an "absolute innovation" (J. GOURDOU, "Juge des référés. Organisation. Dispositions générales", *Jel. Justice administrative*, fasc. 50 (5, 2002), p. 3), "a spectacular innovation" (G. COHEN-JONATHAN, "Le droit au juge", in *Gouverner, administrer, juger. Liber amicorum Jean Wéline*, Dalloz, 2002, p. 490) or "an absolute innovation" (R. CHAPUS, *op. cit.*, n° 1534). This procedure was presented as the "great innovation" of the law of 30 June 2000 (J. VUITTON and X. VUITTON, *Les référés*, Litec, Pratique professionnelle, 2003, p. 312), "its most remarkable innovation" (B. FAURE, *op. cit.*, no. 2), the "most innovative procedure of the reform" (A. BOURREL and J. GOURDOU, *op. cit.*, p. 55), "the major innovation" in the field of urgent summary proceedings (J.-L. PISSALOUX, "Quelques réflexions dubitatives sur les nouvelles procédures de *référé administratif*", *Dr. adm.* 2001, chron. n° 18, 1^{ère} part, p. 7). One went so far as to speak of "the revolution of the summary proceedings for freedom" (M. FOULETIER, "The law of 30 June 2000 relating to summary proceedings before the administrative courts", *RFDA* 2000, p. 971).

169 "It is undoubtedly here that the law of 30 June 2000 (...) achieves the most original work", declared President Vandermeeren (R. VANDERMEEREN, "La réforme des procédures d'urgence devant le juge administratif", *AJDA* 2000, p. 712). Messrs Debbasch and Ricci affirmed that of all the summary proceedings, that of article L. 521-2 is incontestably "the most original" (C. DEBBASCH and J.-C. RICCI, *Contentieux administratif*, 8^{ème} éd., Dalloz, coll. Précis, 2001, n° 556).

170 B. PACTEAU, *Contentieux administratif*, 7^{ème} éd., PUF, coll. Droit fondamental, 2005, n° 278.

171 R. VANDERMEEREN, *D.* 2002, SC *contentieux administratif*, p. 2227.

172 J.-C. RICCI, "Chronique du contentieux administratif", *RGCT* 2001, p. 965.

173 D. PERBEN, Closing of the colloquium Le juge administratif et les libertés publiques, *RFDA* 2003, p. 1123.

174 J.-R. ETCHEGARAY, "La réforme des procédures d'urgence : le nouveau juge des référés administratifs est-il arrivé ?", *Contr-urb* 2001, chron. n° 1, p. 6.

175 L. BURGOGUE-LARSEN, *Libertés fondamentales*, Montchrestien, coll. Pages d'amphi, 2003, p. 30.

176 M. FOULETIER, "La loi du 30 juin 2000 relative au *référé* devant les juridictions administratives", *RFDA* 2000, p. 971.

177 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd., Montchrestien, 2006, n° 1514.

178 R. VANDERMEEREN, "La réforme des procédures d'urgence devant le juge administratif", *AJDA* 2000, p. 712.

179 G. BACHELIER, "Le *référé-liberté*", *RFDA* 2002, p. 268.

180 Generally speaking, attractiveness is the lot of all procedures aimed at protecting freedoms. In Germany, for example, "The initial idea that constitutional appeal should be an extraordinary legal remedy that should be used only as a last resort to protect fundamental rights was immediately overtaken by events. (...) From 1951 to 1999: 127,171 appeals registered (...)" (A. DITTMANN, "Le recours constitutionnel en droit allemand", *CCC* no. 10, 2001, p. 77). As Mr Dittmann observes, "this instrument is not only used in the case of a serious violation of fundamental rights requiring a remedy from the constitutional court as a last resort (...)" (*op. cit.*, pp. 77-78). In Colombia, several thousand *acción de tutela* are exercised each year, nearly 4,000 in 1998 alone (A.-C. SEPULVEDA, "La protection des droits fondamentaux en Amérique latine", V^e AFDC Congress, Toulouse, 6, 7 and 8 June 2002, Workshop No. 6, p. 4).

C. The philosophy of the fundamental summary judgment

36. Is the craze, both doctrinal and contentious, for the référé-liberté perfectly justified? Firstly, applications submitted on the basis of Article L. 521-2 almost always end in rejection. On average, only one out of ten applications for interim relief is successful. In nine cases out of ten, the conditions justifying the judge's intervention are not met, which reflects a frequent use of this procedure outside the hypotheses for which it was designed. Secondly, the honours now bestowed on the référé-liberté procedure are reminiscent of those accorded to the recours pour excès de pouvoir in another era, which, from the point of view of the practical protection afforded to the litigant, were not at all justified. Indeed, in 1929, Gaston Jèze did not hesitate to present the recours pour excès de pouvoir as 'the most marvellous creation of jurists, the most effective, practical and economical weapon in the world for defending freedoms'¹⁸¹. In the same vein, Pierre-Henri Teitgen emphasised in 1958 that "In the unanimous opinion of jurists and politicians throughout the world, there is no better system for guaranteeing individual freedoms than the recourse for excess of power before the French Council of State"¹⁸². However, we know the serious shortcomings and inadequacies of the recours pour excès at that time, due in particular to the slowness of the judge and his lack of power of injunction. In the area of freedoms, the intervention of the juge de l'excès de pouvoir was very often late and, from a *practical point of view*, completely useless for the applicant¹⁸³.

In the light of these elements, how can we understand the real contribution of the référé-liberté procedure? Beyond the symbolism of its introduction¹⁸⁴, what does this procedure really bring in terms of protection of litigants?

37. With an average of 150 decisions per year handed down by the Council of State under Article L. 521-2, the body of case law concerning interim relief is considerable and provides an appreciable working basis for a study of this procedure. The analysis of the case law will be based on all the decisions rendered by the supreme administrative court between 1^{er} January 2001 and 31 July 2007: in collegial or single-judge formation, as judge of first and last resort, of appeal or of cassation. Decisions at the level of the administrative courts will in principle be excluded from the scope of investigation, since they do not express the state of the case law and are always subject to possible disallowance by the Council of State.

Furthermore, in order to put the results obtained into perspective, the approach will be turned towards foreign legal systems. In response to the invitation of President René Cassin¹⁸⁵, the study will be enriched by comparative elements drawn from beyond our borders¹⁸⁶. With Jürgen Schwarze, "comparative law can be described as a comparison of different legal systems, a process which may involve both complete legal systems in their spirit and style ("macro-comparison") and certain solutions proposed by the legal systems under consideration ("micro-comparison")"¹⁸⁷. With regard to the study of Article L. 521-2 of the Code of Administrative Justice, the

181 G. JEZE, "Rapport à l'Institut international de droit public", *Annuaire de l'Institut*, 1929, p. 162.

182 P.-H. TEITGEN, "Intervention au débat", in *Travaux préparatoires de la Constitution du 4 octobre 1958. Avis et débats du Comité consultatif constitutionnel*, La documentation française, 1960, p. 77.

183 See in particular J. RIVERO, "Le Huron au Palais-Royal, ou réflexions naïves sur le recours pour excès de pouvoir", *D.* 1962, chron. pp. 37-40, esp. pp. 38-39; *ID.*, "Le système français de protection des citoyens contre l'arbitraire administratif à l'épreuve des faits", in *Mélanges en l'honneur de Jean Dabin*, Sirey, 1963, t. II, pp. 813-836.

184 As Ms Fombeur observed, the Council of State wanted this procedure to "show that the judicial judge did not have a monopoly on the rapid and effective defence of freedoms" (P. FOMBEUR, concl. on CE, Sect., 28 February 2001, *Casanovas*, *RFDA* 2001, p. 403).

185 "Let all those who can do so make human rights benefit from the advantages of emulation that the comparison of institutions contains" (R. CASSIN, "Droits de l'homme et méthode comparative", *RIDC* 1968/3, p. 492).

186 The benefits of the comparative approach are no longer in question in the field of legal research. Presented as "the method of legal science of the future" by R. von Iehring (quoted in P. MOUZOURAKI, *L'efficacité des décisions du juge de la légalité administrative dans le droit français et allemand*, LGDJ, coll. BDP, t. 205, 1999, p. 1), the comparison is according to M. Muir Watt "a source of interrogation, reflection and openness" (H. MUIR-WATT, "La fonction subversive du droit comparé", *RIDC* 2000/3, p. 503). It offers "the advantage of a better knowledge of national law, thanks to the reflections that the rules in force in foreign laws give rise to: the play of mirrors makes it possible to see certain particular aspects of an object that a direct look would not have made it possible to discover" (R. CASSIN, *op. cit.*, p. 543). As if by a kind of reflex effect, linked to the comparative return on oneself, the knowledge of foreign law favours a better understanding of the solutions of national law. In this respect, "comparative law is (...) the most powerful instrument for describing national law" (O. PFERSMANN, "Le droit comparé comme interprétation et comme théorie du droit", in *Variations autour d'un droit commun. Travaux préparatoires*, Société de législation comparée, 2001, p. 133). On the advantages and techniques of comparative law, see also A.-J. VAN DER HELM and V.-M. MEYER, *Comparer en droit*, CERDIC, 1991, 213 p.; R. SACCO, *La comparaison juridique au service de la connaissance du droit*, Economica, 1991, 175 p.; P. HASSENTEUFEL, "Deux ou trois choses que je sais d'elle. Remarque à propos d'expériences de comparaisons européennes", in *Les méthodes au concret. Démarches, formes de l'expérience et terrains d'investigation en science politique* (CURAPP dir.), PUF, 2000, pp. 105-124; K. ZWEIGERT, "Méthodologie du droit comparé", in *Mélanges offerts à Jacques Maury*, t. 1, Librairie Dalloz & Sirey, 1960, pp. 579-596; J. BELL, "La comparaison en droit public", *Mélanges en l'honneur de Denis Tallon*, Société de législation comparée, 1999, pp. 33-44; I. SZABO, "Le droit comparé et les droits de l'homme", in *Miscellanea W.J. Ganshof Van der Meersch*, t. 2, LGDJ, 1972, pp. 925-941; G. MARTY, "Droits de l'homme et droit comparé", in *René Cassin. Amicorum discipulorumque liber*, t. 4 *Méthodologie des droits de l'homme*, Pédone, 1972, pp. 259-270.

187 J. SCHWARZE, *Droit administratif européen*, t. 1, Bruylant, 1994, p. 90.

undertaking will be limited to a micro-comparison focusing on the concept of fundamental freedom and on emergency procedures whose exclusive purpose is to protect these freedoms.

From a strictly positivist perspective, this research work will make positive law the primary and ultimate object of the study undertaken. Doctrinal assertions will be systematically screened by critical analysis and, above all, confronted with the reality of positive law. This precaution seems all the more necessary as it often happens in this field, and it seems more so than in other legal disciplines, that authors give a distorted vision of the applicable rules, a distorted view of the reality of the law, describing it not as it is but as they would like it to be¹⁸⁸.

38. The Council of State considers that in the architecture of actions open to individuals against acts and actions of public authorities, the place of the procedure of Article L. 521-2 should not be defined in isolation but should be considered in relation to that of Article L. 521-1 of the Code of Administrative Justice. The Council of State was determined to mark the specificity of the procedure of the *référé-liberté* compared to that of the *référé-suspension*. It enshrines the idea that the two summary proceedings are intended to respond to different situations and in different ways¹⁸⁹. The procedure under Article L. 521-2 gives the judge broad powers to remedy unacceptable situations very quickly; the procedure under Article L. 521-1 gives him or her the power to suspend the execution of a decision whose legality is in doubt and which is likely to cause harm. A clear distinction is thus made, within the emergency summary proceedings, between the 'ordinary law' procedure¹⁹⁰ of Article L. 521-1 and the 'exceptional'¹⁹¹ or 'special'¹⁹² procedure of Article L. 521-2.

This qualification as an exceptional or special legal remedy is due to the seriousness of the situations to which its triggering is subject and to the originality of its procedural mechanism. On the one hand, the summary judgment is designed for situations that can be described as serious. Not only must a fundamental freedom be at stake - which excludes recourse to this procedure to sanction simple illegalities. But, in addition, the law requires that the infringement is serious, manifestly illegal, and that the applicant justifies the urgency of obtaining a safeguard measure within a very short time. On the other hand, the exceptional nature of the *référé-liberté* is due to the singularity of the procedural mechanism instituted. Indeed, with a view to offering users of this procedure rapid and effective jurisdictional protection, the legislator has departed widely from the usual rules of contentious administrative procedure. These two dimensions of the exceptional nature of the *référé-liberté* procedure are closely linked: the seriousness of the situation justifies the extent of the protection offered to the litigant and, thus, the derogation from the traditional rules; conversely, the derogatory nature of this procedure justifies strictly confining its implementation to particular situations that obviously require it¹⁹³.

These two aspects are combined in the purpose of this legal remedy, which is to *put an end to the most serious situations very quickly*. The concern to deal only with the most exceptional situations explains and justifies the

188 See F. SUDRE, "Droits intangibles et/ou droits fondamentaux : y a-t-il des droits prééminents dans la Convention européenne des droits de l'homme ?", in *Liber amicorum Marc-André Eissen*, LGDJ Bruylant, 1995, pp. 381-398, esp. pp. 381-382.

189 Very explicitly, it affirms "that by distinguishing the two procedures thus provided for by Articles L. 521-1 and L. 521-2, the legislator intended to respond to different situations; that the conditions to which the application of these provisions is subject are not the same, nor are the powers available to the interim relief judge" (CE, ord. 28 February 2003, *Commune de Pertuis*, *Lebon* p. 68; CE, 16 June 2003, *Hug-Kalinkova and others*, *Lebon* T. p. 931; CE, ord. 29 October 2003, *Société EURL "Il était une fouace"*, n° 261304; CE, ord. 4 February 2004, *Commune d'Yvrac*, *Lebon* T. p. 828; CE, ord. 6 February 2004, *Société Yacht club international de Saint-Laurent-du-Var*, n° 264169; CE, ord. 9 August 2004, *Yılmaz*, *Lebon* T. p. 816; CE, 23 January 2004, *Koffi*, *Lebon* T. p. 827; CE, ord. 9 March 2007, *Guiot et Section française de l'observatoire international des prisons*, n° 302182, mentioned in the recueil *Lebon*, CE, ord. 6 April 2007, *Commune de Saint Gaudens*, n° 304361, mentioned in the recueil *Lebon*).

190 R. GARREC, Senate Report n° 380, p. 22. The expression is also used by Isabelle de Silva (I. DE SILVA, concl. on CE, Sect., 30 October 2001, *Minister of the Interior c/ Tliba*, RFDJ 2002, p. 325).

191 CE, ord. 15 March 2002, *Delaplace*, *Lebon* p. 105; CE, ord. 29 March 2002, *Bonny*, *Lebon* p. 119.

192 The judge of summary proceedings evokes "the particular jurisdictional protection provided by Article L. 521-2 of the Code of Administrative Justice" (CE, ord. 23 March 2001, *Société Lidl*, *Lebon* p. 154; CE, ord. 27 March 2001, *Ministre de l'Intérieur c/ Djalout*, *Lebon* p. 158; CE, ord. 23 July 2003, *Ducastel et autres*, n° 258678; CE, ord. 29 April 2004, *Département de Var*, n° 266902; CE, ord. 23 July 2003, *Ducastel et autres*, n° 258678; CE, ord. 29 April 2004, *Département du Var*, n° 266902); "the particular procedure of article L. 521-2 of the administrative justice code" (CE, Sect., 30 October 2001, *Minister of the Interior v. Tliba*, *Lebon* p. 523; CE, ord. 5 March 2002, *Fikry*, *Lebon* T. p. 872; CE, ord. 10 February 2003, *Société d'exploitation AOM-Air-liberté*, n° 254029; CE, ord. 21 March 2003, *Société le grand café Thomas*, n° 255248); "the particular procedure of protection instituted by article L. 521-2 of the code of administrative justice" (CE, ord. 9 August 2001, *Medrinal*, *Lebon* T. p. 1127; CE, ord. 27 January 2003, *Amraoui*, n° 253601; CE, ord. 13 July 2005, *Société Combé Chavat 2*, n° 282220); "the procedure of particular protection instituted by article L. 521-2" (CE, 21 November 2001, *Zhary*, *Lebon* T. p. 1125); "the procedure of particular protection instituted by article L. 521-2 of the code of administrative justice" (CE, ord. 20 January 2005, *Commune de Saint-Cyprien*, *Lebon* T. p. 1022; CE, ord. 1^{er} mars 2006, *Ministre délégué aux collectivités territoriales c/ Commune de Salies-du-Salat*, n° 290417, mentioned in the Recueil *Lebon*); "the particular procedure of article L. 521-2" (CE, ord. 19 November 2001, *Commune de Escueillens et Saint-Just de Bellengard*, no. 240174); "the particular procedure organised by Article L. 521-2 of the Code of Administrative Justice" (CE, ord. 10 January 2002, *Massal*, no. 241746); "the particular summary procedure organised by Article L. 521-2 of the Code of Administrative Justice" (CE, ord. 25 April 2002, *Société Saria Industries*, *Lebon* p. 155); "the particular procedure provided for by the aforementioned Article L. 521-2" (CE, order. 4 December 2002, *Lagbouri*, n° 252164); "this particular summary procedure" (CE, order. 13 May 2002, *Centre hospitalier de Valence c/ Nouri*, n° 246551); "the particular protection instituted by Article L. 521-2 of the Code of Administrative Justice" (CE, order. 9 August 2001, *Aït-Taleb*, *Lebon* T. p. 1128; CE, order. 12 November 2001, *Commune de Montreuil-Bellay*, *Lebon* p. 551); "the procedure of particular protection of fundamental freedoms" (CE, ord. 29 October 2004, *Ben Habbab*, n° 273612); "the particular procedure of summary proceedings provided for by article L. 521-2 of the code of administrative justice" (CE, ord. 21 February 2003, *Maillet*, *Lebon* T. p. 914)

193 For Messrs Guyomar and Collin, "the counterpart of the extent of the protection conferred by this procedure lies in the strict nature of the conditions to which its access is subordinated" (M. GUYOMAR and P. COLLIN, chron. under CE, Sect., 30 October 2001, *Ministre de l'Intérieur c/ Mme Tliba*, AJDA 2001, p. 1056).

draconian nature of the conditions to which its use is subject. The desire to punish these violations very quickly is the basis for the derogatory nature of the procedural rules. The procedural rules are thus characterised by great flexibility, while the substantive rules are characterised by great rigour. It is in this subtle balance between the rigour of the conditions of engagement and the liberalism of its procedure that the philosophy of the *référé-liberté* is summarised. The legal remedy instituted by Article L. 521-2 of the Code of Administrative Justice is designed to apply to exceptional situations. Through a derogatory procedural mechanism, it guarantees the victim of an infringement rapid and effective judicial protection of his or her fundamental freedoms.

Part I: A procedure designed for exceptional situations

Part Two: Prompt and effective judicial protection

Part I

*A procedure designed for
exceptional situations*

39. In the words of President Vandermeeren, the conditions of implementation of the référé-liberté "characterise a particular situation"¹⁹⁴. Under the provisions of Article L. 521-2 of the Code of Administrative Justice, this procedure is designed to apply to emergency situations in which the administration, in the exercise of its powers, seriously and manifestly unlawfully infringes a fundamental freedom. The terms of the law make the référé-liberté a demanding procedure, designed to respond to "extreme situations"¹⁹⁵. The cases in which the judge of référé-liberté can intervene are strictly limited by this provision. Subject to restrictive conditions, the summary procedure under Article L. 521-2 is "designed for fortunately unusual cases where the exercise of a fundamental freedom is challenged, in a manner that is both serious and manifestly illegal, by an administrative measure or by an action of the administration"¹⁹⁶.

During the presentation of the mechanism to parliamentarians, the Minister of Justice noted the traditional shortcomings of emergency procedures, as the interim relief judge could not issue injunctions to the administration "in *exceptional situations* where its actions seriously infringe the fundamental freedoms of citizens"¹⁹⁷. In the words of Mr Colcombet, this procedure can only be implemented in the presence of "serious acts requiring a particularly rapid response"¹⁹⁸. Therefore, as Mr Guyomar and Mr Collin have stated in the field of foreigners' law - but the remark has a more general scope - the use of the référé-liberté procedure must be reserved for "the most unacceptable situations"¹⁹⁹.

40. The restriction of this procedure to exceptional situations is reflected in the rigour of the conditions for its use. In fact, the interim relief procedure involves a high level of requirement, which some applicants may find difficult to understand, but which results from the very text of Article L. 521-2. The conditions relating to the existence of a fundamental freedom, a serious and manifestly unlawful infringement of such a freedom and urgency are demanding and cannot be trivialised. The exceptional nature of the text itself is not due to any rigour shown by the Conseil d'Etat in its application.

The implementation of Article L. 521-2 is subject to cumulative conditions "each of which is intended to make the interim relief procedure subsidiary (...) because it is more difficult to implement than the interim suspension procedure"²⁰⁰. The fundamental interim relief procedure is in fact a subsidiary procedure, not in the sense that it requires the prior unsuccessful exhaustion of the other legal remedies available to the applicant, but in that this procedure can only be validly initiated in the presence of rare and exceptional circumstances. The interim relief judge emphasises at leisure the more demanding nature of the interim relief procedure compared to the interim suspension procedure by putting into perspective the conditions of implementation of each of the procedures. In the *Tliba* judgment of 30 October 2001, the Conseil d'Etat solemnly affirmed, after citing the provisions of Article L. 521-1 and those of Article L. 521-2 of the Code of Administrative Justice, that "unlike a request for suspension presented on the basis of Article L. 521-1 of this Code, in the case of a request for suspension, the Council of State is not obliged 521-1 of this code, which can be granted if there is evidence of urgency and the existence of a serious doubt as to the legality of the contested decision, a request submitted under the special procedure of Article L. 521-2 of the Code of Administrative Justice implies, in order to be granted, that there is evidence not only of urgency but also of serious infringement of the fundamental freedom invoked as well as the manifest illegality of this infringement"²⁰¹. The decisions of the interim relief judge have subsequently regularly emphasised the greater rigour of interim relief compared with interim suspension, by quoting the text of each of the two articles in turn²⁰², or by repeating the formula used by the Council of State in the *Tliba* judgment of 30 October 2001²⁰³. Putting the two procedures into perspective serves a specific purpose: to show that only the référé-liberté procedure is subject to a requirement of serious infringement of a fundamental freedom²⁰⁴, and that the assessment of

194 R. VANDERMEEREN, "La réforme des procédures d'urgence devant le juge administratif", *AJDA* 2000, p. 712.
 195 F. THIRIEZ, "Le projet de loi relatif aux procédures d'urgence devant le juge administratif des référés", *LPA* 21 April 1999, n° 79, p. 4.
 196 D. CHAUVAUX, concl. on CE, Sect. 28 February 2001, *Philippart and Lesage*, p. 391.
 197 E. GUIGOU, *JO déb. Sénat*, CR séance 8 juin 1999, p. 3737. Underscored.
 198 F. COLCOMBET, Rapport AN n° 2002, p. 42.
 199 M. GUYOMAR and P. COLLIN, above, p. 1058.
 200 P. CASSIA, *Les référés administratifs d'urgence*, LGDJ, coll. Systèmes droit, 2003, p. 110.
 201 CE, Sect. 30 October 2001, *Ministre de l'Intérieur c/ Tliba*, *Lebon* p. 523.
 202 CE, ord. 15 March 2002, *Delaplace, Lebon* p. 105; CE, 16 June 2003, *Hug-Kalinkova and others, Lebon* T. p. 931; CE, ord. 4 February 2004, *Commune d'Yvrac, Lebon* T. p. 828; CE, ord. 6 February 2004, *Société Yacht club international de Saint-Laurent-du-Var*, n° 264169; CE, ord. 9 August 2004, *Yılmaz*, n° 270860; CE, 23 January 2004, *Koffi, Lebon* T. p. 827.
 203 See CE, ord. 5 March 2002, *Fikry, Lebon* T. p. 872; CE, ord. 27 January 2003, *Kartboub*, n° 253603; CE, ord. 25 April 2002, *Labbini*, n° 245547; CE, ord. 6 June 2003, *Benmessaoud*, n° 257429. In the aforementioned *Labbini* order, the interim relief judge of the Conseil d'Etat stated, after reaffirming the wording of the *Tliba* judgment, "that *the appeal lodged by Mr Labbini*, who has moreover brought a separate case before the administrative court based on Article L. 521-1 of the Code of Administrative Justice, *should be assessed in the light of these principles*".
 204 CE, ord. 5 March 2002, *Fikry, Lebon* T. p. 872; CE, ord. 15 March 2002, *Delaplace, Lebon* p. 105; CE, ord. 27 January 2003, *Kartboub*, n° 253603; CE, ord. 6 June 2003, *Benmessaoud*, n° 257429; CE, ord. 28 June 2004, *Bernat*, n° 269141. The wording of the *Kartboub* and *Bernat* decisions is particularly explicit on this point. In the first order, the interim relief judge states that "if a decision rejecting an application for family reunification, which does not directly prevent the members of a family from continuing to live together, *may be the subject of a request for suspension* by the interim relief judge under *the conditions*, relating in particular to urgency, *provided for in Article L. 521-1* of the Administrative Justice Code, it does not constitute a serious infringement by the administrative authority of the freedom to live with one's family within the

legality²⁰⁵ and urgency²⁰⁶ is stricter. Not only are the conditions of Article L. 521-2, which have their counterpart in Article L. 521-1, conceived in a restrictive manner, but this procedure is also subject to requirements - presence of a fundamental freedom, serious infringement of that freedom - from which the summary suspension procedure is exempt. The applicant is therefore expressly invited to appeal on the basis of Article L. 521-1 of the Code of Administrative Justice when he or she does not meet the conditions set out in Article L. 521-2, failing to justify a serious infringement of a fundamental freedom²⁰⁷, a situation of extreme urgency²⁰⁸ or a manifest illegality²⁰⁹.

41. It is thus very clearly stated that litigants can only resort to this procedure in exceptional situations. On the one hand, Article L. 521-2 can only be usefully applied if a fundamental freedom is at issue in the dispute between the applicant and the public authority. On the other hand, the law requires, in addition to urgency, that a serious and manifestly unlawful infringement of a fundamental freedom be made by the administration in the exercise of its powers. These last conditions are strict and applied with all their rigour by the administrative judge of summary proceedings.

meaning and for the application of Article L. 521-2 of the same code. In the *Bernat* decision, the judge indicated "that the possibility for the interim relief judge to implement the powers provided for by the *exceptional procedure - distinct from that of Article L. 521-1* - of Article L. 521-2 is subject in particular to the condition that a manifestly illegal infringement is made of a fundamental freedom".

205 CE, Sect. 30 October 2001, *Ministre de l'Intérieur c/ Tliba, Lebon* p. 523; CE, ord. 25 April 2002, *Labhini*, n° 245547.

206 CE, ord. 28 February 2003, *Commune de Pertuis, Lebon* p. 68.

207 In the aforementioned *Fikry* order, the interim relief judge, having concluded that the infringement of a fundamental freedom was not serious, invited the applicant to submit an application on the basis of Article L. 521-1, which is not subject to such a requirement: the applicant "may, if he or she believes he or she has grounds for doing so, apply to the juge de l'excès de pouvoir for the annulment of a refusal to issue him or her with a receipt for his or her application or an implicit refusal to issue him or her with this residence permit; (...) he or she is also entitled to use the summary proceedings procedure organised by Article L. 521-1 of the Code of Administrative Justice, which allows, if the conditions are met, to suspend the execution of these decisions and to order the administrative authority to take appropriate provisional measures. See also, inviting the applicant to initiate a summary suspension in the absence of justification of an infringement of a fundamental freedom: CE, Sect. 18 January 2001, *Morbelli, maire de la Commune de Venelles, Lebon* p. 18; CE, ord. 15 March 2002, *Delaplace, Lebon* p. 105; CE, ord. 27 June 2002, *Centre hospitalier général de Troyes, Lebon* p. 228; CE, ord. 6 June 2003, *Benmessaoud*, n° 257429; CE, ord. 28 June 2004, *Bernat*, n° 269141. In this last decision, the judge specified that the rejection of the conclusions presented "on the basis, *inappropriate* in the case in point, of Article L. 521-2 of the Code of Administrative Justice" due to the fact that a fundamental freedom was at stake, "does not prevent [the applicant] from presenting a new application for interim relief before the administrative court, this time based on the provisions of Article L. 521-1 of the Code of Administrative Justice".

208 See *infra*, § 294, and the decisions cited.

209 CE, ord. 29 October 2004, *Ben Habbab*, n° 273612. In this decision, the judge noted that there was no need to rule on the case since the administration had issued the applicant with the requested visa during the proceedings. Nevertheless, he wishes to point out to the applicant that his action was not initiated on a basis appropriate to his situation. In the absence of manifest illegality, he should have challenged the visa refusal by way of summary suspension. If the administration had not given him satisfaction before the judge's decision, his application under Article L. 521-2 would have been rejected.

Title I

The challenge to a "fundamental freedom"

42. The procedure of Article L. 521-2 of the Code of Administrative Justice is exclusively intended to safeguard "fundamental freedoms". Consequently, the presence of such a freedom is an indispensable prerequisite for the judge's intervention. Rejection is necessary when the decision challenged in this way "does not call into question any fundamental freedom and thus does not fall within the scope of Article L. 521-2 of the Code of Administrative Justice"²¹⁰. As was emphasised during the preparatory work, the notion of fundamental freedom is at the heart of²¹¹ the *référé-liberté*. As a central notion of Article L. 521-2, it delimits its scope of application and constitutes, as such, a means of public order²¹².
43. The choice of this notion of fundamental freedom caused a lot of ink to flow when the Act of 30 June 2000 was adopted, and even more so after its implementation. The infatuation with it may be surprising if one compares it with the relative indifference surrounding the concepts used in other procedures for protecting freedoms in France²¹³.
44. In other countries, procedures for the protection of freedoms are generally clearly delimited by the provisions governing them. In practice, there are three situations. In the first case, the benefit of protection is expressly reserved for certain constitutional rights and freedoms²¹⁴. In some legal systems, the procedure concerns all

210 CE, ord. 9 February 2001, *Philippart et Lesage*, n° 230112. The same requirement is found, naturally, in the procedure of the assault: the intervention of the judicial judge is subordinated to the presence of a fundamental freedom of which it must be expressly mentioned in the decision (TC, 25 January 1988, *Fondation Cousteau, Lebon*, p. 484; TC, 15 April 1991, *Préfet région Moselle*, AJDA 1991, p. 463; Civ 1 484; TC, 15 April 1991, *Préfet de la région Moselle*, AJDA 1991, p. 463; Civ 1^{ère}, 5 February 1991, *Bull. civ. I*, n° 56; Civ 1^{ère}, 22 October 1991, *Bull. civ. I*, n° 281).

211 S. SUTOUR, *JO déb. Sénat*, CR séance 22 février 2000, p. 865.

212 As a result, on the one hand, the question of the existence of a fundamental freedom may be discussed at any stage of the proceedings, including for the first time before the appeal judge. Thus, in *Tüba*, the devolved administration had apparently not contested the nature of the right to respect for family life as a fundamental freedom in the first instance. Before the appeal judge, the Minister was able to usefully express reservations on the eligibility of this right to the procedure of Article L. 521-2 (see I. DE SILVA, concl. on CE, Sect. 30 October 2001, *Minister of the Interior v Tüba*, RFD-A 2002, p. 326). Insofar as this plea is related to the scope of the law, it follows, on the other hand, that the administrative judge of summary proceedings is obliged, if necessary, to raise ex officio the question of the existence of a fundamental freedom. Thus, in the *Bunel* order of 8 September 2005, the applicant invoked the infringement of the right to health alone. The interim relief judge refused to see this as a fundamental freedom within the meaning of Article L. 521-2, but stated "that, however, the free and informed consent of the patient to the medical care he or she receives and the right of each person to respect for his or her personal freedom (...) fall within the scope of the provisions of this article" (CE, order of 8 September 2005, *Minister of Justice v Bunel, Lebon* p. 388). As these freedoms had not been invoked by the applicant at any stage of the proceedings, the judge raised their existence ex officio.

213 No major research has been carried out on the notion of fundamental freedom in the context of assault, nor on the notion of public or individual freedom in the context of *déféré-liberté*. The authors are content, at best, to give an indicative list of the freedoms concerned. This can easily be understood for the *déféré-liberté*, a relatively confidential procedure whose use is limited to a few decisions per year. The case of assault, on the other hand, is more disconcerting insofar as its scope of application is defined using an expression that is strictly identical to that used for Article L. 521-2. Why does a concept arouse curiosity, reflection and enthusiasm in one case, and total indifference in the other? How can we explain the difference in treatment between the notion of fundamental freedom in the sense of the *référé-liberté* and the notion of fundamental freedom in the sense of the *voie de fait*? It is difficult to give a categorical or even somewhat certain answer to this question. Nevertheless, it would seem that two elements are likely to explain this disparity.

The first reason seems to be the prominence given to the concept of fundamental freedom at the time of its appearance in each of these two proceedings. When the concept of fundamental freedom was enshrined in the context of the assault, it was not yet widely used. Its meaning, therefore, could not really be defined or discussed in relation to other references. By the time the legislator adopted this concept in 2000, however, it had become so widely known in the legal field - and even outside it - that it justified a reform of the teaching of the law of freedoms at university. As of the 1999-2000 academic year, the Public Liberties course, which had been compulsorily taught in the third year of law school since 1962, officially became a 'fundamental liberties law' course by ministerial decree (decree of 13 February 1993, whose entry into force was deferred, but which was confirmed by the decree of 30 April 1997, published in the *Official Journal of the French Republic* on 4 May 1997, p. 6766). The use of this name was also retained for the presentation-discussion test of the examination for access to the regional professional training centres for lawyers, the programme of which is set by order of the Minister of Justice dated 29 January 1998 (*OJ* 21 January 1998, p. 1553).

The second explanation is specific to the *référé-liberté* procedure. It lies in the very high expectations raised by the advent of this procedure in French law: expectations of litigants looking for a truly effective administrative judge of urgency in cases of infringement of freedoms; expectations of an administrative court seeking legitimacy in such a sensitive area; and finally, expectations of an enthusiastic doctrine, which sees in summary proceedings the possibility of a refined knowledge of its subject matter. All these expectations have contributed to focusing observers' attention on the procedure of Article L. 521-2. As it attracts all eyes, it was natural that this procedure should raise questions about its conditions of implementation and, in particular, about the notion of fundamental freedom that determines its scope of application.

214 In Spain, Article 53-2 of the Constitution provides that the remedy of *amparo* (remedy of protection) ensures the protection of only those rights and freedoms set out in Articles 14 to 30 of the Constitution. In Germany, Article 93 (1) no. 4 a of the Basic Law states that the *Verfassungsbeschwerde* (constitutional remedy) may be used for the protection of the *Grundrechte* (fundamental rights) set out in its Title 1st and for the protection of the rights set out in six other provisions of this text. In Chile, Article 20 of the Constitution provides that the remedy of

the rights and freedoms recognised by the Constitution²¹⁵. Finally, in the third case, the scope of protection extends beyond the constitutionally guaranteed rights and freedoms²¹⁶.

45. French law, on the other hand, does not contain a "catalogue"²¹⁷ of rights and freedoms at any level of the hierarchy of norms. Attempts to define freedoms "in the form of codification or constitutional law, initiated on several occasions under the V^e Republic, have come to nothing"²¹⁸. French positive law does not define the notion of fundamental freedom referred to in Article L. 521-2 of the Code of Administrative Justice. As the scope of application of this procedure is not defined *a priori*, it is up to the judge to define its contours. Opting for a broad scope of protection, the interim relief judge has adopted a broad interpretation of the concept of fundamental freedom and developed an approach to enrich the determination of the content of each of the freedoms recognised.

protection may be used only in respect of a limited number of constitutional rights and freedoms, which it lists in a restrictive manner. In Colombia, the *acción de tutela* (tutela action) is aimed, under Article 86 of the Constitution, at protecting the 'fundamental constitutional rights' set out in Chapter I (Articles 11 to 41).

215 In Venezuela, the *amparo* instituted by article 49 of the Constitution is presented as an instrument for the protection of absolutely all the rights and guarantees that the Constitution establishes. This provision is found in Chapter I, containing the "General Provisions" of Title III, which refers to "Duties, Rights and Institutional Guarantees". In addition, article 1^{er} of the Organic Law on *Amparo* expressly opens up this legal avenue for the protection of constitutional rights and 'guarantees' (see R.A. BREWER CARIAS, 'La justice constitutionnelle et le pouvoir judiciaire', in *Etudes de droit public comparé*, Bruylant, 2001, pp. 1074-1075). In other countries, the protection of all constitutional rights and guarantees can be ensured by means of several procedures. Thus, in Costa Rica, Argentina, Uruguay, Peru and Guatemala, the *amparo* ensures the protection of all constitutional rights and guarantees, with the exception of individual freedom, which is protected by a specific *habeas corpus* procedure (see R.A. BREWER CARIAS, *op. cit.*, pp. 1075-1079). In Brazil, the protection of all constitutional rights and guarantees is particularly segmented, since it is achieved by means of four specific procedures (see R.A. BREWER CARIAS, *op. cit.*, p. 1079).

216 In Venezuela, *amparo* is also granted to fundamental rights not mentioned in the constitutional text, since, according to Article 50 of the Constitution, "The enunciation of the rights and guarantees contained in the Constitution shall not be considered as a negation of other rights which, although inherent to the human person, are not expressly mentioned therein". Article 1^{er} of the 1988 Organic Law states that the right of *amparo* concerns "the enjoyment and exercise of constitutional rights and guarantees, and even fundamental human rights that are not included in the Constitution". In other Latin American countries, *amparo* also covers, in addition to constitutional rights, rights contained in international treaties (Argentina, Costa Rica, Ecuador) and rights recognised by law, as in Argentina or Ecuador (see A. C. SEPULVEDA, "La protection des droits fondamentaux en Amérique latine", *V^e Congrès de l'AFDC*, Toulouse, 6, 7 and 8 June 2002, Workshop No. 6, p. 5). In Switzerland, the public law remedy covers a wide range of rights, principles and freedoms: the rights guaranteed by the Federal Constitution and by the cantonal constitutions; four unwritten constitutional rights (personal freedom, freedom of opinion, freedom of assembly and freedom of languages); the rights and freedoms enshrined in the European Convention on Human Rights; a series of guarantees that have been derived by the Federal Court from the guarantee of equality (right to be heard, right to legal aid, right to be treated in good faith, etc.) as well as certain constitutional principles aimed at protecting the rights and freedoms guaranteed by the Constitution.) as well as certain constitutional principles relating to the organisation of the State but recognised as having an individual protection aspect, such as the principle of the separation of powers and that of the autonomy of the communes (see P. SALADIN, "Rapport suisse", *AJJC* 1991/VII, *Cours constitutionnelles et droits fondamentaux*, colloquium Aix-en-Provence, 12-13 July 1991, p. 150).

217 The term "catalogue" of fundamental rights or freedoms comes from the German Federal Constitutional Court. The expression is understood in its original sense, i.e. as designating an enumerative and methodical list of objects with common characteristics. This term has spread in French doctrine and has been used in particular in the context of the *référé-liberté*. For example, Professor Chapus noted, with regard to fundamental freedoms, that "there will probably never be a catalogue that is authoritative" (R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd., Montchrestien, 2006, n° 1596). Similarly, Mrs de Silva indicated, in her conclusions on the *Tliba* judgment, that the first months of application of the reform made it possible to "draw up an initial catalogue of the freedoms subject to summary proceedings (...)" (I. DE SILVA, concl. on CE, Sect., 30 October 2001, *Minister of the Interior v. Tliba*, RFD 2002, p. 325).

218 A. HEYMANN-DOAT, *Libertés publiques et droits de l'homme*, 7^{ème} ed, LGDJ, coll. Systèmes, 2002, p. 102. A commission, created by decree no. 74-937 of 8 November 1974, was tasked with proposing a code of fundamental freedoms of the individual (JO 13 November 1974, p. 11404); no draft was produced. In the following years, several constitutional bills aimed at codifying and supplementing constitutional rights and freedoms were tabled by the parliamentary majority and the opposition (see in particular constitutional bill no. 2128 of 20 December 1975 "on the declaration of freedoms" and, registered on the same day, bill no. 2131 "aimed at supplementing the preamble of the Constitution of 4 October 1958 by a 'Charter of Fundamental Rights and Freedoms'"). For lack of real political will, none of these initiatives was adopted. See J. MORANGE, "Vers une codification des libertés en France?", *RDP* 1977, pp. 259-281.

Chapter 1
A scope
not defined a priori:
the open and malleable nature
of the concept of fundamental freedom

46. The scope of application of the *référé-liberté* was not limited *a priori* by an exhaustive list of protected rights and freedoms or by a conceptual definition of its content. On the contrary, the text of Article L. 521-2 defines its scope of application by reference to the generic notion of "fundamental freedom". In so doing, the legislator has retained, without defining it, a notion with a relatively indeterminate content. As Professor Chapus has pointed out, "It is not easy either to define the notion of fundamental freedom in a general way, or even to establish a list of fundamental freedoms, of which there will probably never be an authoritative catalogue. Beyond a "hard core" (the Declaration of 1989), the fruit is soft and each person can shape it as he or she wishes, according to his or her convictions and under the influence of his or her subjectivity"²¹⁹. Since the concept of fundamental freedom is open and malleable, it is up to the judge to define its contours.

Section 1: An undefined legal concept

47. The working group of the Council of State adopted the notion of fundamental freedom with the sole aim of limiting the judge's intervention to situations involving particularly essential rights and freedoms. Without any conceptual *preconceptions* or preconceived ideas about the meaning of this notion, the working group made this choice with the sole aim of marking the exceptional nature of the procedure, its vocation to serve and be implemented only to ensure the protection of a limited number of rights and freedoms - those that are among the most important in our legal order²²⁰. In the mind of the drafters of the preliminary draft law, the aim was to limit the judge's intervention to freedoms whose importance justifies special attention. To this end, the working group could also have adopted - the expressions were considered during the discussions - the notions of essential freedom, important freedom or public freedom.
48. Obviously, the working group was aware that this concept was affected by a high degree of indeterminacy. While basically any concept used in law "involves a degree of non-definition"²²¹, this character is more marked for some of them and in particular for the concept of fundamental freedom. However, its relatively imprecise nature was not seen as an obstacle by the drafters of the preliminary draft law. On the contrary, this indefinite character appeared to be an advantage for the summary procedure in that it introduces a certain flexibility in determining its scope of application. By retaining an indefinite legal concept, the Council of State was thus able to allow itself, without being thwarted by Parliament, a significant margin of freedom in defining the scope of application of this procedure.
49. As Kelsen pointed out, the vagueness of a legal concept - and consequently the choice of a jurisprudential definition of its content - can result from a deliberate will of the author of a normative text. The Master of Vienna calls this hypothesis that of intentional indeterminacy: "It may be that the indeterminacy was perfectly intentional, that is to say that it was in the intentions of the body that established the norm to be applied"²²². On the other hand, "sometimes it is simply for the sake of convenience that it willingly transfers to another

219 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1597.

220 The same reason was given for the choice of the notion of public or individual liberty when the *déféré-liberté* was introduced. As the rapporteur of the bill in the National Assembly had emphasised, 'If an exceptional procedure of suspension of execution is to be introduced, it must be only in those particularly serious cases, those which could be assimilated, in the old case law, to assault, that is to say those where a public freedom is infringed' (A. RICHARD, *JO déb. AN*, CR séance 22 janvier 1982, p. 396).

221 T. FORTSAKIS, *Conceptualisme et empirisme en droit administratif français*, LGDJ, coll. BDP, t. 152, 1987, p. 314.

222 H. KELSEN, *Pure Theory of Law* (1960), 2nd ed. C. EISENMANN, LGDJ Bruylant, coll. La pensée juridique, 1999, p. 336. See also M. DELMAS-MARTY and J.-F. COSTE, "L'imprécis et l'incertain. Esquisse d'une recherche sur Logiques et droit", in *Lire le droit. Langue, texte, cognition* (D. BOURCIER and E. MACKAAY eds.), LGDJ, coll. Droit et société, 1992, p. 117: the authors indicate that imprecision may be intended "as such, as it appears (...) whenever a legal concept or category is imprecise by nature". This drafting method is commonly used by the Council of State when it is called upon to prepare texts governing administrative law and litigation. For example, President Chabanol has indicated that, "as a member of one or another working group tasked with preparing a text, he has sometimes heard members of the Council of State express their hostility to excessively precise drafting, arguing that not everything can be foreseen and that the judge will provide for the text's imprecision" (D. CHABANOL, *Le juge administratif*, LGDJ, coll. Systèmes, 1993, p. 106). This flexibility of terminology is sought for the appreciable margin of freedom it gives the judge. On this point, see D. Lochak, *Le rôle politique du juge administratif français*, LGDJ, coll. BDP, t. 107, 1972, pp. 138-150; ID, "L'agencement des catégories juridiques: la structure du droit administratif", in *L'administration dans son droit. Genèse et mutation du droit administratif français*, Publisud, 1985, pp. 89-106.

authority the task of defining the term or expression concerned"²²³. With regard to the concept of fundamental freedom, the Law of 30 June 2000 is unusual in that it combines the two approaches: the Council of State's working group intentionally chose a vague concept, while Parliament retained it without defining it for convenience.

I. A high coefficient of indeterminacy

50. The concept of fundamental freedom has a relatively undefined content. If we start from positive law - as we must do²²⁴ - by focusing on the norms that the law qualifies as "fundamental freedom"²²⁵ through a lexicographical approach²²⁶, we cannot but be struck by the largely undefined nature of this concept.

223 A. BALDOUS and J.-P. NEGRIN, "L'étendue du recours aux définitions dans les textes de droit administratif", *RRJ* 1987/4, p. 1049.

224 Legal research does not aim at change, but at knowledge. The purpose of legal science is to describe and observe, not to act or create. The lawyer's task is to describe and analyse "a given reality, existing outside him, which imposes itself on him, which he does not have at his disposal any more than the physicist has at his disposal nature. This reality, the object of the science of law, is positive law" (C. EISENMANN, *La justice constitutionnelle et la Haute cour constitutionnelle d'Autriche*, thesis Paris 1928, republished by Economica PUAM, coll. DPP, 1986, p. 86). Positivism posits "as the supreme rule of legal science the strict submission to legal reality" (*op. cit.*, p. 90). "In particular, it affirms the fundamental distinction between value judgments and reality judgments, assessments and observations, and, consequently, that the jurist's criticisms never affect a reality that he has not made and therefore cannot undo. Legal positivism is not an attitude of narrow and limited exclusivism, but of logic and intellectual clarity; it does not condemn this or that form of thought - it understands and accepts them all - but only their confusion or mixture, which would be the negation of any method" (*op. cit.*, p. 91). As he is not a legislator, it is his sole responsibility to give the most accurate account possible of the reality of positive law.

225 In particular, this method requires that the study of the concept of fundamental freedom be free of preconceived or pre-established ideas that are not based on the study of positive law. In particular, it is necessary to do away with doctrinal assertions that only obscure the concept and to focus, at this stage, solely on the study of the law. In this respect, Eisenmann warned against the "capital methodological sin" to which many authors succumb: that of substituting for the answer given by positive law "the answer which seems to them to be the best, logically and pragmatically, or one of the two. Or at least to make a cocktail of elements of both answers". Such an approach leads to "a kind of disfigurement of positive law, of its immediate data, which results in obscuring research and eternalizing stalemated controversies" (C. EISENMANN, Preface to M. DEBARY's thesis, *La voie de fait en droit administratif*, LGDJ, 1960, p. II). This requirement is not always met with regard to the concept of fundamental freedom. Many authors develop a conception of fundamental freedoms that is detached from positive law; a conception that does not result from the observation of textual and jurisprudential norms but from a personal feeling about what, in their opinion, deserves this qualification. Far from describing a legal object, they place their discourse from the outset - and indeed without always being aware of it - at an extra or meta-legal level, privileging the aestheticism and coherence of their construction over the description of the reality of law. This approach is very widespread and this explains why the meaning of the same *legal* concept sometimes differs considerably from one author to another. They do not present the concept as it is but as they conceive it. However, "a legally useful definition must not correspond to the personal aspirations of the person who forges it, but above all to the state of positive law" (G. LEBRETON, *Libertés publiques et droits de l'homme*, 5^{ème} éd., Armand Collin, 2001, p. 15). The jurist is not free to give this notion the meaning he or she intends, or to proclaim with authority that its meaning is clear and univocal. Admittedly, such an approach can be envisaged for defining notions that do not have a strictly legal existence, i.e. *doctrinal* notions that authors use to account for or describe the law, such as the notion of subjective right. This is no longer the case when the notion has or acquires a legal character. From the moment when it is legally enshrined, the jurist must, in order to be useful, describe the concept as it exists in positive law and not propose a *personal* definition.

The attitude towards the concept of fundamental freedom would be perfectly justified if the concept were purely doctrinal. However, this is not the case. As was emphasised during the preparatory work, the concept of fundamental freedom is "a legal concept" (J.-J. HYEST, *JO déb. Sénat*, CR séance 8 juin 1999, p. 3743). It cannot be said, as some authors do, that it is "only a doctrinal notion" (C. DEBBASCH and J.-C. RICCI, *Contentieux administratif*, 8^{ème} éd., Dalloz, coll. Précis, 2001, No. 556). To define the notion of public service delegation, leasing or administrative contract, the lawyer turns to positive law. There is no reason why the concept of fundamental freedom should be studied any differently. The same method of observation, analysis and description of the law must be used. This is how fundamental rights are defined in Germany, with the authors presenting the concept of the *Grundrecht* as it exists in positive law and not as they themselves see it. There is no reason why it should be any different in France, where the concept is strictly legal in nature. Methodological rigour precludes starting from a pre-established or presupposed definition of the concept of fundamental freedom, assimilating *a priori* fundamental right and fundamental freedom, limiting oneself to a given level of the hierarchy of norms, or authoritatively designating as fundamental freedom norms that are not qualified as such by a jurisdictional body or by a legal text. On the contrary, in order to describe as precisely as possible the object of "fundamental freedom" as it exists in law, it is necessary to take into account the elements that the French and foreign systems offer of this legal object. It is important to take account of positive law in text and case law without making value judgements or personal opinions. This is not to condemn in principle the use of theoretical definitions, but only to affirm that to define a legal concept, the lawyer's first reflex must be to turn to the object of his analysis and to gather the meaning given to it by positive law.

226 The analytical perspective adopted implies, logically, a lexicographical approach to the notion of fundamental freedom. This consists in identifying the meaning or multiple meanings of the expression "fundamental freedom" in order not to conclude authoritatively that it is the only valid meaning of the concept, but to test the different meanings given to it in positive law. It is a question of relying on the occurrences of invocation of the concept to examine each time the precise meaning attributed to it. Professor Scarpelli has highlighted three definitional modes of legal concepts (U. SCARPELLI, *Qu'est-ce que le positivisme juridique ?*, translated from Italian by C. CLAVREUL, Bruylant LGDJ, 1996, pp. 5-11). The *lexical* definition is "the mere reproduction of meanings of the kind found in the actual linguistic usage of persons or groups"; it is the one that corresponds to usage (*op. cit.*, p. 5). The *stipulative* definition has "the nature of an agreement between future users of language: it is accepted that from now on (...) a given expression (...) will be used in a given meaning" (*op. cit.*, p. 5). Stipulative definitions are based on a system of convention; "their relationship to pre-existing usages is of little importance" (*op. cit.*, p. 6). The *explanatory* definition lies halfway between the lexical and the stipulative definition. "Like the lexical definition, the explanatory definition seeks to correspond to usage, but unlike the lexical definition, it does not attempt to capture all the varieties and transformations of usage. On the contrary, it only takes what it wants to retain, in order to eventually adjust and re-elaborate the most important nodal point, the one that has the greatest operative value, in order to arrive at a precise and efficient semantic instrument, capable of enlightening and orienting the discipline in which it will be used" (*ibid.*). None of these approaches can in itself be condemned. None of these definitional modes can be privileged over another in principle. It is only the intended use of a concept that requires, depending on the case, the adoption of a lexical, stipulative or explanatory definition. In particular, recourse to a stipulative definition appears necessary when it comes to developing a *theory* of fundamental freedoms. See in this sense the position adopted - and defended - by Professor Pfersmann who, in order to construct a theory of "fundamental rights" (designated as "FR"),

Contrary to a widespread opinion, the concept of fundamental freedom does not have a clear, single and precise meaning in law, which would come from foreign systems, legal tradition or positive law itself²²⁷.

The concept of fundamental freedom, while not obscure, "is nonetheless shrouded in a certain vagueness"²²⁸. It is a legal category that is "fraught with ambiguity"²²⁹. In the same vein, some authors have emphasised the "imprecision of this notion"²³⁰ or the fact that "it contains a very large degree of indeterminacy"²³¹. Indeed, it is an "indefinable and fluctuating notion by nature"²³², "difficult to define"²³³. Theodore Fortsakis had already noted the indefiniteness, imprecision and elasticity of the concept of fundamental freedom in the context of the jurisprudential theory of *de facto* assault²³⁴. The same observation applies to the concept of fundamental right, which is *a priori* similar. At the close of the colloquium on *Constitutional Courts and Fundamental Law*, held on 19, 20 and 21 February 1981, Jean Rivero ranked the very notion of fundamental right among the problems not resolved by the colloquium's work. He added that 'the formula, in most of our countries and in legal thought as a whole, does not have an absolutely precise outline. The concept remains vague'²³⁵. In the end, he said, "A kind of vagueness surrounds the very notion, the key notion, of fundamental rights"²³⁶.

51. Obviously, this equivocity or lack of clarity of the concept was not sought. It is simply the result of an unordered use of the concept in positive law. Since its inception, the concept of fundamental freedom has been used by different legal actors, in different contexts and to designate different legal objects²³⁷. This lack of co-ordination, which is only natural, has led to a non-harmonised development of the concept. French and foreign law do not provide a precise definition of fundamental freedoms. The standards, principles or requirements described as such by the legislator or the courts come from a variety of normative sources. There is not and has never been any unity in the normative rank occupied by fundamental freedoms. In pure law, fundamental freedoms cannot be characterised according to a single criterion based on the legal value of the texts that contain them. The only common denominator in all the uses of the concept is that the norms thus qualified are considered particularly important and that they often have a constitutional basis.

A. In the French legal order

52. There is no official definition or catalogue of fundamental freedoms in French positive law²³⁸. The concept of fundamental freedom does not have a clearly and abstractly defined meaning; nor does it have any formal unity. The concept is sometimes used by the judge when there are legal consequences attached to this qualification. It is also sometimes used simply to emphasise the importance of the freedom thus qualified and

adopts a stipulative definition of the concept for the purposes of this theory and consequently rejects a lexicographical approach: "the inventory of the uses of "fundamental" and "fundamental right" does not make it possible to construct a theory of FRs, but only a theory of the multiple meanings/uses of these expressions in multiple contexts. Indeed, it is necessary to distinguish the construction of a determined object <DF> from the analysis of the object <meanings/uses of the expression "fundamental rights" in multiple contexts>. In the first case, a single usage is fixed by convention, in the second case, one identifies the multiple regularities of multiple usages" (L. FAVOREU *et alii*, *Droit des libertés fondamentales*, 3^{ème} éd., Dalloz, coll. Précis, 2005, n° 81. Emphasis added). Retaining a theoretical definition of the term "fundamental right" is essential for certain comparative law research, as the meaning of this term varies from one legal order to another. To compare what is qualified as a fundamental right in one legal system and a fundamental right in another would lead to the study of two different legal objects. In order to overcome the plurality of meanings of a term in different legal orders, or even within the same legal order, it may be necessary to give a stipulative definition. See in this sense D. RIBES, *L'Etat protecteur des droits fondamentaux. Recherche en droit comparé sur les effets des droits fondamentaux entre personnes privées*, thesis Aix-en-Provence, 2005, special issue p. 37 and p. 47 et seq.

227 Nor is there any standard of reference in the literature. The latter is divided into several very heterogeneous currents, with authors agreeing neither on a single definition of fundamental freedoms, nor on a single position regarding the concept. As Mr. Israël points out, "the notions of public freedoms and fundamental freedoms do not have a precise textual definition. The authors themselves do not agree on a single title or definition" (J.-J. ISRAËL, *Droit des libertés fondamentales*, LGDJ, 1998, p. 5). See *infra*, §§ 91-97.

228 R. MARTIN, "Les nouveaux référés administratifs", *Annales des loyers* 2002, p. 1113.

229 J.-M. FEVRIER, "Un projet de loi sur les procédures d'urgence", *Dr. adm.* 1999, comm. n° 203, p. 25.

230 N. JACQUINOT, "La liberté d'entreprendre dans le cadre du référé-liberté: un cas à part?"

231 P. WACHSMANN, *Libertés publiques*, 4^{ème} éd., Dalloz, coll. Cours, 2002, n° 7.

232 P. CASSIA and A. BEAL, "Les nouveaux pouvoirs du juge administratif des référés. Bilan de jurisprudence (1^{er} January 2001-28 February 2001)", *JCP G* 2001, I, 319, p. 985.

233 I. LEGRAND and L. JANICOT, Note under CE, Sect, 28 February 2001, *Casanovas*, *AJDA* 2001, p. 977.

234 T. FORTSAKIS, *op. cit.* pp. 318-319. M. Sandevor had also noted the "vague and imprecise" nature of this qualifier (P. SANDEVOIR, note under Civ. 1^{ère}, 1^{er} February 1965, *Echternier v/ Ville de Thonon-les-Bains*, *JCP G* 1965, II, 14252).

235 J. RIVERO, "Rapport de synthèse", in *Cours constitutionnelles européennes et droits fondamentaux*, colloquium Aix-en-Provence, 19-21 February 1981, *Economica PUAM*, coll. DPP, 1982, reed. 1987, p. 521.

236 J. RIVERO, *op. cit.*, p. 522. Cf. J. FAVARD, "Le labyrinthe des droits fondamentaux", *Dr. soc.* 1999, pp. 215-219, reaching the same conclusion and expressing his concern about the proliferation of texts using this concept.

237 See D. Dreyer, "La fonction des droits fondamentaux dans l'ordre juridique", *D.* 2006, pp. 748-753, esp. p. 749: "The adjective fundamental was, most often, held as a synonym for essential. It introduced a dose of subjectivity into legal language to emphasise the importance of certain rights. The multiplication of sources is undoubtedly responsible for this phenomenon: competing sources have asserted the importance of their respective rights in order to justify their existence.

238 We can therefore express certain reservations about Professor Moderne's assertion that there is an "official catalogue of fundamental freedoms (because they are recognised and protected by constitutional law or by international treaty law)" (F. Moderne, "Vers une culture de l'urgence dans le contentieux administratif", *D.* 2001, p. 3285). The "catalogue" mentioned by the author is not recognised by the law. Corresponding to a purely doctrinal construction, it cannot claim any official character.

thus justify a choice made by a judge or a normative authority.

1. *The contentious use of the concept*

53. In some cases, specific legal consequences follow from the use of the concept of fundamental freedom.
54. It is, first of all, a condition for the intervention of the judge in the litigation of the administrative assault. It was the 1961 *Dame Klein* judgment that first used the expression "fundamental freedom"²³⁹. To qualify the existence of such a freedom, the judge does not focus on the legal value of the norm in question - which can be very diverse - but on the extent of the guarantees attached to its exercise. "Fundamental or essential freedom means either bodily freedom and its corollary, the inviolability of the home (...), or a freedom that benefits from a specially organised guarantee"²⁴⁰. The judge of the assault thus grants the qualification of fundamental freedom to the freedoms that the legislator intended to protect in particular. M. Goyard affirmed that "by fundamental rights, we must understand the rights to which the case law admits that the legislator has expressly recognised the character of an eminently protected right"²⁴¹. While the judge takes into account the degree of protection granted by the legislator, the method of identification is nevertheless marked by a great deal of flexibility²⁴². There is no precise criterion for defining fundamental freedoms within the meaning of the *de facto* right.
55. In extradition cases, the concept of fundamental freedom is used to assess the guarantees offered by the judicial system of the requesting State. In three judgments of 26 September 1984, the Council of State established the general principle of law that the judicial system of the requesting State must respect "the fundamental rights and freedoms of the human person"²⁴³. However, no definition is given of these "fundamental human rights and freedoms" in the judgments of the Council of State. In view of the information provided in the conclusions of the government commissioners in the above-mentioned decisions, this concept is essentially limited to the guarantees offered by the applicant State's criminal justice system, particularly with regard to the right to a judge, the presumption of innocence and respect for the rights of the defence.
56. It should be noted that the concept of fundamental or essential freedom is sometimes used by the government commissioners in the context of reviewing the legality of administrative police measures. When the police authority challenges such a freedom, the administration's power is more restricted and the judge's control more rigorous. The government commissioners use the term "fundamental freedom" to describe freedoms that enjoy a high degree of legal protection. In his conclusions on the *Société Nouvelle Imprimerie* judgment, M. Letourneur stated that "Since an essential freedom strictly regulated by law is at issue, the powers of the police authorities are particularly restricted, i.e. not only may they be exercised, in accordance with the general rule, only in cases where public order is threatened, which rules out absolute regulation without time limits, but you must also be strict in defining public order in this case and in assessing cases where there is a threat to public order (...)"²⁴⁴. In the same vein, Government Commissioner Galmot stated that "For a fundamental or specially protected freedom such as freedom of assembly or worship, you are particularly strict"²⁴⁵.
57. In the above-mentioned cases, legal consequences are attached to the qualification of fundamental freedom. It also happens that this concept is used by the normative and jurisdictional authorities in a symbolic manner, i.e. without any legal consequences resulting from this use.

2. *The symbolic use of the concept*

239 CE, 8 April 1961, *Dame Klein*, *Lebon* p. 216; D. 1961, p. 587, concl. HENRY; S. 1961, note LASSALE. Prior to this decision, the judge had already limited the use of assault to a limited number of rights and freedoms but had not opted for a generic expression. While the Tribunal des conflits had for a time opted for the term "essential freedom" (TC, 10 December 1956, *Randon c/ Brunel, Préfet de l'Yonne, Lebon* p. 592, concl. GUIONIN; *AJDA* 1957, p. 94, chron. J. FOURNIER and G. BRAIBANT; *RDP* 1957, note M. WALINE; *Rev. Adm.* 1958, p. 29, note LIET-VEAUX), it is nevertheless the qualifier of fundamental freedom that will be used following the *Dame Klein* judgment. See, in particular, for a revival of the term the following year: TA Lille, 3 November 1961, *Consorts Vassal*, *AJDA* 1962, II, pp. 298-301, concl. QUANDALLE.

240 R. ODENT, *Contentieux administratif*, Les cours de droit, IEP Paris, fasc. I, 1981, p. 543.

241 C. GOYARD, *La compétence des tribunaux judiciaires en matière administrative*, Montchrestien, 1962, p. 444.

242 See S. GUILLON-COUDRAY, *La voie de fait administrative et le juge judiciaire*, thesis Paris II, 2002, p. 102 ff.

243 CE, Ass., 26 September 1984, *Lujambio Galdeano, Garcia Ramirez, Martinez Boiztegui* (3 species), *Lebon* p. 308; *JCP G* 1985, II, 20346, concl. B. GENEVOIS; *AJDA* 1984, pp. 669-675, chron. J.-E. SCHOETTL and S. HUBAC; *AJDA* 1985, pp. 158-163, note R. ERRERA. See also, using this formula: CE, 14 December 1987, *M. Urizar Murgoitio*, *RFD* 1989, pp. 54-56, concl. O. SCHRAMECK; CE, 27 October 1989, *Picabea-Burunza*, *Lebon* p. 218.

244 Concl. LETOURNEUR on CE, 23 November 1951, *Société Nouvelle Imprimerie*, *RDP* 1951, p. 1098.

245 GALMOT on CE, 21 January 1966, *Legastelois*, *JCP G* 1966, II, 15303, p. 435. See P. BERNARD, *La notion d'ordre public en droit administratif*, LGDJ, coll. BDP, t. 42, 1962, pp. 112-115. See also the observations of the authors of the Grands arrêts under the *Benjamin* judgment of 19 May 1933 (*G.A.J.A* no. 49).

58. Frequently, the use of the concept of freedom is purely argumentative. The use of this term becomes a rhetorical means of justifying the solution adopted by the authority that uses it.
59. This approach explains the reference to the notion of fundamental freedom or fundamental right in certain legislative texts. Indeed, recourse to this concept makes it possible to enhance the objective pursued by the law and thus to justify its adoption. A number of rights, principles or freedoms have been qualified as such by the law, most often in Article 1^{er}, including the protection of health²⁴⁶, security²⁴⁷, the right to housing²⁴⁸ and the right to housing²⁴⁹. There are no legal consequences of this qualification for the course of the legislative process or at the stage of implementation of the law. By using this concept, the legislator simply intends to highlight the importance, or even the imperative nature, of a right or freedom which it intends to promote.
60. Ordinary courts may also use the concept of fundamental freedom or fundamental right for this purpose.

As regards the judicial courts, courts of appeal have enshrined the notion of "fundamental right of co-owners"²⁵⁰ or qualified the right to marry as a "fundamental right of the personality"²⁵¹. The Court of Cassation has described defence as a "fundamental right of a constitutional nature"²⁵² and the right to property as a "fundamental right of constitutional value"²⁵³. The norms thus designated by the courts are of different nature and value. Moreover, these qualifications are perfectly superfluous. Since they have no legal consequences, their use has no other logic than to emphasise the importance of the right or freedom thus qualified.

In some of its decisions, the administrative judge will also use the expression fundamental freedom without it being legally necessary or even useful. For example, the juge de l'excès de pouvoir affirmed that the decree authorising the mention in pupils' school files of the observations of medical and educational staff 'does not in any way affect the fundamental freedom that constitutes, in accordance with the prescriptions of Article 9 of the Civil Code, in the wording given to it by the law of 17 July 1970, respect for private life and its intimacy'²⁵⁴. The expression was used in an equally abundant manner in a judgment concerning a deliberation by which the Territorial Assembly of French Polynesia had instituted "an exit tax on travellers residing in French Polynesia", a tax for which any resident of the territory making a trip outside the territory was liable. The Conseil d'Etat stated that "by instituting a levy on travellers leaving the territory of French Polynesia, these provisions have the effect of infringing on the freedom to come and go, which constitutes a fundamental freedom; they are therefore vitiated by a misuse of power"²⁵⁵. In these two decisions, the qualification of fundamental freedom has no legal meaning. The expression is used excessively by the administrative judge²⁵⁶. Moreover, these two freedoms are derived from legal sources with different values. Respect for private life, which is linked to Article 9 of the Civil Code, has a legislative or rather sub-legislative value insofar as it is applied here as a general principle of law. Freedom of movement, on the other hand, has a constitutional basis. Consequently, there is no formal unity between these two norms, which are qualified as fundamental freedoms by the judge of excess of power.

61. The notion of fundamental freedom is also considered in this perspective by the Constitutional Council. Contrary to what is sometimes asserted, the Constitutional Council does not have a "conception" of fundamental freedoms in the sense that this notion would have a given meaning in its case law. For the Council, this notion is merely a word, which it uses to justify choices and legitimise arbitrations.

246 Article 3 of Law No. 2002-303 of 4 March 2002, *OJ* 5 March 2002, codified in Article L. 1110-1 of the Public Health Code.

247 Article 1^{er} of Law No. 95-73 of 21 January 1995, *OJ* 24 January 1995.

248 Article 1^{er} of Law No. 88-156 of 22 June 1982, *OJ* 23 June 1982.

249 Article 1^{er} of law n° 89-462 of 6 July 1989, *OJ* 8 July 1989.

250 CA Aix-en-Provence, 4^{ème} ch., 15 February 1996, *Faguet, Coppolani, Tertian c/ Syndicat des copropriétaires du 33 rue de l'Épée*. On this judgment, see C. ATIAS, "L'autorisation d'installer un ascenseur aux frais des copropriétaires demandeurs", *RRJ* 1996, p. 1027.

251 CA Paris, 30 April 1963, *Eoux Barbier c/ Compagnie Air France*, *D.* 1963, pp. 428-430, note A. ROUAST.

252 Cass. plenary session, 30 June 1995, *X v. Conseil de l'Ordre des avocats au Conseil d'Etat et à la Cour de cassation*, *Bull. civ. A.P.*, n° 4, *JCP G* 1995, II, 22478, concl. M. JEOL, note A. PERDRIAU.

253 Civ. 1^{ère}, 4 January 1995, *Mrs X v. Mr Y and others*, *Bull. civ. I*, n° 4.

254 CE, 6 February 1980, Confédération syndicale des familles et Fédération nationale Ecole et familles, *Lebon T.* p. 727.

255 CE, 9 November 1992, President of the Government of the Territory of French Polynesia, President of the Territorial Assembly of French Polynesia, concl. S. LASVIGNES, *RFDA* 1993, pp. 570-572.

256 This explains why, in subsequent cases, it was not generally used to designate freedom of movement (see for example CE, Ass., 17 February 1995, *Hardouin, Lebon* p. 82, concl. P. FRYDMAN, *GAJA* n° 107) or respect for private life resulting from Article 9 of the Civil Code (see for example CE, Ass., 10 July 1981, *Conseil national du patronat français, Lebon* p. 305).

In constitutional case law²⁵⁷, the concepts of fundamental freedom or fundamental right²⁵⁸ do not refer to all constitutional rights and freedoms²⁵⁹, or even to some of them that are distinguished from others by certain common characteristics²⁶⁰. Fundamental is not a quality or property that attaches to certain norms and which norms not described as fundamental lack. The word constitutes an argument in the hands of the judge. It is used by the Constitutional Council in certain decisions to emphasise the importance of the freedom in question over a norm or requirement that is opposed to it and thus to justify its prevalence.

The Council uses this expression symbolically to justify the way in which it resolves a conflict of norms in a specific case. The use of this concept is largely rhetorical. It serves to emphasise the consideration given to a particular right in a given decision. As Ms Champeil-Desplats has pointed out, the expression serves to justify the decisions in which it is used²⁶¹. The qualification will depend on the terms and, above all, the results of the arbitration conducted. Only if it feels the need to justify its decision by means of a meta-argument will the Council qualify the norm in question as fundamental. Otherwise, it will not qualify it as fundamental, even if it has given it this qualification in a previous decision²⁶². Thus, there is not strictly speaking a list of fundamental rights and freedoms within the meaning of the case law of the Constitutional Council. The qualification is fluctuating and depends on the specific data of each case. As M. Wachsmann points out, "we are dealing here with a rhetorical

257 The constitutional text mentions the term fundamental freedom only once, and in the specific context of the right of asylum. Under the terms of Article 53-1, "the Republic may conclude with European States which are bound by commitments identical to its own in the field of asylum and the protection of human rights and *fundamental freedoms*, agreements determining their respective competences for the examination of applications for asylum submitted to them".

258 Several expressions have been used that are considered synonymous: "fundamental rights and freedoms", "fundamental rights and freedoms of a constitutional nature", "fundamental rights of a constitutional nature", rights of a "fundamental character", "fundamental freedom". Only thirteen constitutional rights, freedoms and principles have been qualified as fundamental by the Constitutional Council: the principle of equality, individual freedom, security, the right to lead a normal family life, the right to asylum, the right to employment, trade union freedom, the right to participation, freedom to come and go, freedom of marriage, the rights of defence, freedom of enterprise, and free communication of thoughts and opinions. "The use of the concept of fundamental rights by the Constitutional Council must therefore be described as marginal" (T. MEINDL, *La notion de droit fondamental dans les jurisprudences et doctrines constitutionnelles françaises et allemandes*, LGDJ, coll. BSCP, t. 112, 2003, p. 13). For an exhaustive presentation of the decisions that used these expressions for the thirteen rights, freedoms and principles mentioned above, see T. MEINDL, *op. cit.* pp. 13-62.

259 In no way can it be inferred from the Council's decisions that it considers the two concepts to be synonymous. Not only has the Council never asserted or implied that the terms fundamental right or fundamental freedom cover all constitutional rights and freedoms, but the correspondence thesis would not explain why a particular constitutional right or freedom is only qualified as fundamental on certain occasions, nor why the number of constitutional rights and freedoms qualified as fundamental remains particularly low and has not been extended to all of them.

260 Constitutional norms described as fundamental rights or freedoms are not a sub-category or subset of constitutional rights and freedoms. Some authors have developed the idea that, in constitutional jurisprudence, fundamental rights and freedoms are those constitutional rights and freedoms that enjoy a protective legal regime. Thus, Professors Louis Favoreu and Loïc Philip have argued that in the case law of the Constitutional Council, fundamental rights and freedoms are characterised by three cumulative criteria which together represent the "first elements of a general theory" of fundamental rights and freedoms: firstly the prohibition of prior authorisation, secondly the so-called "ratchet" jurisprudence (prohibition of calling into question the guarantees instituted for the exercise of these rights and freedoms), and thirdly the requirement of uniform application throughout the territory (see *GDCC* No. 36, § 9-12). This presentation does not correspond to constitutional jurisprudence (as attested by its refutation by an authorised commentator: see G. VEDEL, "Propos d'ouverture", in *La constitutionnalisation des branches du droit*, actes de l'atelier du III^e Congrès de l'Association française des constitutionnalistes, Dijon, 14-16 June 1996, *Economica* PUAM, coll.) On the one hand, one of the three criteria on the basis of which this theory was built has been abandoned by the constitutional judge. The formula, used in relation to the freedom of the press but also the right of asylum, according to which the law can only intervene to make its exercise more effective, does not reappear in the most recent decisions. The Council only requires that the law does not deprive requirements or principles of constitutional value of a legal guarantee, i.e. that it does not remove the guarantees that are essential for the effective exercise of the right (see J.-E. SCHOETTL, note under CC, no. 2003-485 DC, 4 December 2003, *LPA* 4-5 February 2004, p. 12). On the other hand, there is no correspondence between the category of constitutional rights benefiting from this protective regime and the rights described as fundamental by the Council. Fundamental rights and freedoms are therefore in no way characterised by their submission to a common legal regime.

261 V. CHAMPEIL-DESPLATS, "La notion de droit 'fondamental' et le droit constitutionnel français", *D.* 1995, pp. 323-329. "When two norms have the same legal value, the authority that must reconcile them or give priority to the application of one of them is obliged to justify its choice. In the absence of a formal or material hierarchy between the norms belonging to the different categories of constitutional rights and principles, as is the case in France, it is necessary to have recourse to arguments that make it possible to establish a priority *in the case in question*" (*op. cit.*, p. 327. Underlined). The author specifies that "In conflict situations, actors are forced to resort to increasingly general formulations or, more precisely, to formulas or labels that refer to higher orders of magnitude. The challenge then becomes to find ever more persuasive logical meta-arguments without leaving the field of argumentation acceptable to the other actors in the legal system" (*ibid.*). The best way for the Council to prove the importance of a right is to find a symbolically strong expression, as it did in 1982 when it opposed the nationalisations to the fundamental character of the right of ownership (see CC, no. 81-132 DC, 16 January 1982, *Rec.* p. 18, *GDCC* no. 31). Similarly, in the *Maîtrise de l'immigration* decision, in order to safeguard the right of foreigners to remain on French territory until the administrative decision on their application for refugee status, the Council affirmed that the effective exercise of the rights of defence is a fundamental right of constitutional value for all, citizens as well as foreigners. These rights must therefore be reconciled with public order and not simply bow to it (see CC, no. 93-325 DC, 12-13 August 1993, *Rec.* p. 224, *GDCC* no. 46). See, in the same sense: J. MEUNIER, *Le pouvoir du Conseil constitutionnel. Essai d'analyse stratégique*, Bruylant, coll. La pensée juridique moderne, 1994, p. 151; J. FAVRE and B. TARDIVEL, "Recherches sur la catégorie jurisprudentielle des 'libertés et droits fondamentaux de valeur constitutionnelle'", *RDP* 2000, pp. 1412-1440.

262 A particularly significant illustration can be given concerning individual freedom and freedom of movement, included among the "fundamental rights and freedoms" in Decision 325 DC. In 1995, to challenge the constitutionality of the Loi d'orientation et de programmation relative à la sécurité, the applicants invoked the violation of individual freedom and freedom of movement, which they qualified as "fundamental rights and freedoms" in accordance with Decision 325 DC. However, the Council rejected this classification in the case in point and reclassified these freedoms as "constitutionally guaranteed public freedoms" (CC, 94-352 DC, 18 January 1995, cons. 2, *Rec.* p. 140). In Decision 97-389 DC (CC, 22 April 1997, *Rec.* p. 45), the Council again stated that the freedom to come and go was a "fundamental right" (rec. 10). This intermittent qualification is explained by the fact that the Council uses the expression according to the particular circumstances of the case. In the 1993 and 1997 decisions, the way in which the conflict of norms arose and the way in which the Council resolved it justified the use of a meta-argument. Since this was not necessary in the decision of 18 January 1995, the Constitutional Court rejected the qualification.

emphasis, the purpose of which is simply to underline the importance of the freedom in question, without any well-defined consequence being attached to it"²⁶³.

62. It follows from the above that the concept of fundamental freedom does not have a precise meaning in French law. Outside our legal system, the situation appears to be contrasted and does not present any real homogeneity.

B. Outside the French legal system

63. As Mr Gautron has pointed out, "the designation of fundamental rights as all constitutionally protected rights and freedoms is probably not entirely satisfactory in comparative law"²⁶⁴. Indeed, although in certain legal systems there is a strict correspondence between constitutionality and fundamentality, this exclusive relationship does not apply to all national orders.

1. Correspondence between constitutionality and fundamentality

64. In some legal systems, the notion of fundamental right or fundamental freedom refers to rights and freedoms at the top of the legal order. Fundamentality is then limited to legality.
65. In Germany, the concept of fundamental rights is limited to rights of constitutional rank²⁶⁵. These rights are grouped together in Chapter 1 of the Basic Law of 1949, entitled "Basic Rights", which comprises 19 articles. To this should be added the "related fundamental rights" or "rights similar to fundamental rights" (*grundrechtsgleiche Rechte*). These are rights which, although they are not covered by Chapter 1^{er} of the Basic Law, may nevertheless be invoked in support of an individual constitutional appeal to the Federal Constitutional Court²⁶⁶. The constituent has precisely determined the list of fundamental rights, which explains why the question of the definition of a fundamental right is 'hardly dealt with directly by German doctrine'²⁶⁷. In Spain, the drafters of the Constitution of 27 December 1978 also drew up a precise list of protected rights and freedoms²⁶⁸. The section devoted to these rights does not refer to fundamental rights alone, but also uses the expression "public freedom" without making a distinction, within this section, between fundamental rights on the one hand and public freedoms on the other. These rights are grouped together in the first section ('Fundamental rights and public freedoms') of Chapter 1^{er} ('Rights and freedoms') of Title 1^{er} ('Fundamental rights and duties') of the Constitution. Finally, it should be noted that in the Community legal order, the norms described as "fundamental freedoms"²⁶⁹ or "fundamental rights"²⁷⁰ have the status of primary Community

263 P. WACHSMANN, "L'importation en France de la notion de 'droits fondamentaux'", *RUDH* 2004, p. 46.

264 J.-C. GAUTRON, "Des droits fondamentaux communs dans la jurisprudence de la Cour de justice des Communautés européennes", in *Le patrimoine constitutionnel européen*, colloquium Montpellier, 22-23 November 1996, Council of Europe Publishing, 1997, p. 148.

265 D. CAPITANT, *Les effets juridiques des droits fondamentaux en Allemagne*, LGDJ, coll. BSCP, t. 87, 2001, special p. 57. See also H. GOERLICH, "Les droits constitutionnels fondamentaux: essence, signification et doctrines générales", in *La Constitution de la République fédérale d'Allemagne*, Nomos Verlagsgesellschaft, 1996, pp. 49-69.

266 Article 93 paragraph 1^{er} (4a^o) of the Basic Law provides that the Constitutional Court shall decide on constitutional complaints that may be lodged by anyone who considers that one of his fundamental rights or one of his rights guaranteed by Article 20 paragraph 4 (right to resist oppression), 33 (equal access to public office and protection of traditional status and civil service), 38 (direct universal elections to the Bundestag and right to vote), 101 (right to vote) and 102 (right to vote) have been infringed by the public authorities. 4 (right of resistance to oppression), 33 (equal access to public office and protection of traditional status and public office), 38 (direct universal elections to the Bundestag and the right to vote), 101 (prohibition of special courts), 103 (rights of persons prosecuted) and 104 (safeguards in cases of deprivation of liberty). The rights enshrined in Articles 20 (4), 33, 38, 101, 103 and 104 of the Basic Law are thus 'related' to fundamental rights. On this category of constitutional rights, see D. CAPITANT, thesis cited above, pp. 2-3 and p. 102; T. MEINDL, thesis cited above, pp. 125-146.

267 D. CAPITANT, thesis cited above, p. 2.

268 See P. BON, "Les droits et libertés en Espagne. Eléments pour une théorie générale", in *Dix ans de démocratie constitutionnelle en Espagne*, éditions du CNRS, 1991, pp. 35-69; P. BON, F. MODERNE, Y. RODRIGUEZ, *La justice constitutionnelle en Espagne*, Economica PUAM, coll.

269 "The Union is founded on the principles of liberty, democracy, respect for human rights and *fundamental freedoms*" (Article 6.1 of the Treaty on European Union).

270 "The Union shall respect *fundamental rights* as guaranteed by the European Convention on Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law" (Article 6.2 of the Treaty on European Union). A Charter of Fundamental Rights of the European Union was solemnly proclaimed at the Nice European Council on 7 December 2001 by the Presidents of the European Parliament, the Council and the

law and are therefore placed at the top of the hierarchy of norms²⁷¹ .

66. In the United States, fundamental rights and freedoms are written and unwritten constitutional rights and freedoms that enjoy a heightened degree of control²⁷² . The concept corresponds on the one hand to the written constitutional rights of the first eight Amendments to the Constitution, and on the other hand to the unwritten constitutional rights that the Supreme Court establishes under the *due process* clause. These written and unwritten constitutional rights enjoy a more favourable judicial review than the other constitutional rights and freedoms.

By providing for the non-exhaustive nature of the list of constitutional rights and freedoms that the Constitution enumerates, the IX^e Amendment implicitly empowers the judge to discover new guarantees for the benefit of citizens²⁷³ . This discovery of new rights, because of their importance, is done through the *due process of law* clause of the V^e and XIV^e Amendments to the US Federal Constitution²⁷⁴ . These two provisions respectively prohibit Congress and the States from depriving anyone of life, liberty or property without "*due process of law*", i.e., focusing more on the general idea than on a literal translation, "without the benefit of the guarantees or protections due by law". Originally conceived as involving only *procedural due process*²⁷⁵ , the *due process* clause has come to involve substantive *due process*²⁷⁶ . On the basis of these provisions, the Supreme Court recognises the existence of unwritten rights and freedoms²⁷⁷ , in an approach reminiscent of the technique of discovery of general principles of law by the French administrative judge²⁷⁸ . A number of unwritten rights and freedoms have been recognised and qualified as fundamental on the basis of the *due process of law* clause, including the right to marry²⁷⁹

European Commission. It was subsequently incorporated into the Treaty establishing a Constitution for Europe, of which it forms Part II.

271 See, among an abundant literature: L. MARCOUX, "Le concept de droits fondamentaux dans le droit de la Communauté économique européenne", *RIDC* 1983, pp. 691-733; *Droit communautaire et protection des droits fondamentaux dans les Etats membres* (J. BOULOUIS dir.), Economica, 1995, 187 p.; *Réalités et perspectives du droit communautaire des droits fondamentaux* (F. SUDRE and H. LABAYLE dir.), study day of 4 and 5 November 1999, Bruylant, coll. Droit et justice n° 27, 2000, 534 p.

272 See R.-M. KONVITZ, *Fundamental rights. History of a constitutional doctrine*, Transaction publishers/Rutgers University, 2001, 182 p.; H.J. ABRAHAM and B.A. PERRY, *Freedom and the Court. Civil rights and Liberties in the United States*, 7^{me} ed., Oxford University Press, 1998, p. 28 et seq. and p. 92 et seq.; G. MARTIN, *Le due process of law in the United States*, thesis Paris II, 1997, 565 p.; P. JUILLARD, "Les orientations de la jurisprudence constitutionnelle de la Cour suprême: établissement du marché unique et renforcement des libertés publiques", *Pouvoirs* n° 59, 1991, pp. 59-75.

273 The IX^e Amendment provides that "The enumeration in the Constitution of certain rights shall not be construed to deny or diminish other rights retained by the people". As Justice Goldberg pointed out in his separate opinion on *Griswold v. Connecticut* of 7 June 1965 (381 US 479 (1965), opinion reproduced in E. ZOLLER, *Grands arrêts de la Cour suprême des Etats-Unis*, PUF, coll. Droit fondamental, 2000, pp. 684-689), "The very text and history of the IX^e Amendment reveal that the Founding Fathers of the Constitution believed in the existence of other fundamental rights, protected against governmental interference and related to the fundamental liberties expressly enshrined in the first eight amendments of the Constitution" (*op. cit.*, p. 686). For Justice Goldberg, 'the Founding Fathers did not intend the First Eight Amendments to be interpreted as a limiting list of the essential and fundamental rights that the Constitution guaranteed to the people' (*op. cit.*, p. 687).

274 See supra opinion of Justice Goldberg, at 689: "As anyone who has reviewed the Court's decisions knows, the Court has held, often unanimously, that the V^e and XIV^e Amendments protect certain fundamental personal liberties from federal or state restriction. See, for example, *Bolling v. Sharpe*, 347 U.S. 497; *Aptheker v. Secretary of State*, 378 U.S. 500; *Kent v. Dulles*, 357 U.S. 116; *Cantwell v. Connecticut*, 310 U.S. 296; *NAACP v. Alabama*, 357 U.S. 449; *Gideon v. Wainwright*, 372 U.S. 335; *New-York Times Co. v. Sullivan*, 376 U.S. 254. The XIV^e Amendment simply shows that the purpose of the framers of the Constitution was to prevent other fundamental personal liberties from being denied the same protection or being diminished in any way, simply because they were not expressly included in the first eight amendments of the Constitution. The V^e Amendment was included in the constitutional text as early as its adoption in 1787. The XIV^e Amendment was added in 1868. The *due process* clause actually dates back to English law. In 1354, an Act of the English Parliament reconfirmed Article 29 of the *Magna Carta* of 1215 in the following terms: "No man shall be dispossessed of his land or tenure, nor arrested, nor imprisoned, nor disinherited, nor put to death, without being made to answer for it according to the *due process of law*" (see E. ZOLLER, "*Due process of law* and general principles of law", in *Mélanges en l'honneur de Benoît Jeanneau. Les mutations contemporaines du droit public*, Dalloz, 2002, pp. 235-247, special p. 235).

275 In its formal and procedural sense, the *due process* postulates an ideal in the exercise of governmental powers. As Zoller points out, "It implies decisions, 1/ which are not arbitrary but in conformity with the values recognised by society, 2/ which are not authoritarian but decided in concert with those they are aimed at, 3/ which are not oppressive but respectful of the interests and values of those they reach" (E. ZOLLER, "*Due process of law*", in *Dictionnaire de la culture juridique* (D. ALLAND and S. RIALS dir.), PUF, Quadrige, Lamy, 2003, p. 556-557).

276 See the Supreme Court's decision and opinion in *Planned Parenthood of southeastern Pennsylvania v. Casey*, 505 US 833 (1992), reproduced in E. ZOLLER, *Great Cases*, p. 1123: "Although a first-order reading of the Clause might suggest that it has authority only over the procedures by which a State may deprive persons of liberty, it has been held for at least one hundred and five years, beginning with *Mugler v. Kansas*, 123 U.S. 660-661 (1887), that it also has substantive law reach, in that it 'prohibits certain governmental actions regardless of the legitimacy of the procedures used to deprive persons. *Kansas*, 123 U.S. 660-661 (1887), it has also been held to have substantive reach, in that it 'prohibits certain governmental actions regardless of the legitimacy of the procedures used to implement them' (*Daniels v. Williams*, 474 U.S. 327, 331 (1986)). See also the opinion of Justice Goldberg, supra, at 685: "Many years ago, the Court established that the *Due Process* Clause protects those freedoms that are 'so rooted in the traditions and conscience of our people that they are considered fundamental,' *Snyder v. Massachusetts*, 291 U.S. 97, 105.

277 The XIV^e Amendment also allows the rights - written - in the first eight Amendments to the Federal Constitution, which were originally enforceable only against the federal authorities, to be enforced against the states. For example, the Supreme Court has held that "freedom of speech and freedom of the press - which are protected by the 1st Amendment against congressional restraint - are among the fundamental personal rights and liberties protected by the *Due Process* Clause of the XIV^e Amendment against infringement by the States" (*Gitlow v. New York*, 268 US 652 (1925)).

278 See in this sense E. ZOLLER, "*Due process of law* and general principles of law", above-mentioned article, p. 243: "Without being identical, the constitutional case law of the Supreme Court on the *due process of law* clause and the administrative case law of the Council of State on the general principles of law are very similar. In both cases, they involve judges who 'find' or 'discover' (some would say 'create') in their respective legal systems fundamental guarantees for citizens, let us say, protections that are due to them in the form of principles that are sufficiently important in their eyes for them to impose respect for them on the legislature.

279 *Loving v. Virginia*, 388 US 1 (1967).

, the right to have children²⁸⁰, the right to have a private conjugal life²⁸¹, the right to use contraceptives²⁸², the right to maintain one's physical integrity²⁸³, the right to have an abortion²⁸⁴ or the right to refuse unwanted life-sustaining medical treatment²⁸⁵. The criteria for the fundamentality of a right or freedom lie primarily in its historical consistency and in the attachment of citizens to it²⁸⁶.

As Mark Janis argues, fundamental rights and freedoms "receive greater jurisdictional protection against legislative or executive infringement"²⁸⁷. Rights that are not considered fundamental may be restricted if the government has a legitimate and rational basis for doing so. The Supreme Court exercises 'ordinary scrutiny' over them²⁸⁸. In the case of a fundamental right or freedom, however, the Supreme Court exercises 'strict scrutiny'²⁸⁹. Instead of merely requiring the government to have a legitimate basis for interfering with a right, the judge requires the government to show that the end it seeks requires the restriction. Moreover, rather than merely establishing that the interference is a rational or reasonable means of achieving its aim, the government must show that the interference is the necessary means of achieving that aim. Thus, with respect to state law, the XIV^e Amendment "absolutely prohibits the government from interfering with ... 'fundamental' liberties by any procedure unless the interference is closely related to a compelling state need"²⁹⁰.

67. The strict correspondence that exists in these countries between constitutionality and fundamentality is not found in all legal orders.

2. Lack of correspondence between constitutionality and fundamentality

68. Firstly, some legal systems do not qualify their constitutional rights as fundamental rights. While in many countries the constituent power has sought to put a number of rights beyond the reach of the constituted powers after the Second World War²⁹¹, by no means all of them are described as fundamental rights or fundamental freedoms²⁹². Some constitutions ignore the term, preferring to refer to constitutionally based rights and freedoms as 'rights'²⁹³, 'public liberties and social rights'²⁹⁴ or 'rights and duties of citizens'²⁹⁵.

69. Secondly, constitutional and international normative texts expressly provide for the existence of sub-

280 Skinner v. Oklahoma ex rel. Williamson, 316 US 535 (1942).

281 Griswold v. Connecticut, 381 US 479 (1965).

282 Griswold v. Connecticut, 381 US 479 (1965); Eisenstadt v. Baird, 405 US 438 (1972).

283 Rochin v. California, 342 US 165 (1952).

284 Planned Parenthood of southeastern Pennsylvania v. Casey, 505 US 833 (1992).

285 Cruzan, 497 US 278-279 (1990).

286 See Opinion of the Court on *Washington v. Glucksberg*, 521 US 702 (1997), reproduced in E. ZOLLER, *Grands arrêts précités*, p. 1262. 1262: "Our usual method of analysing fundamental rights has two essential features: first, we have repeatedly made clear that the *Due Process* Clause affords special protection to those fundamental rights and freedoms that are objectively 'deeply rooted in our Nation's tradition and history' (*Opinion of the Court in Moore*, 431 US 503); *Snyder v. Massachussets*, 291 US 97 (1934) ("so deeply rooted in the traditions and spirit of our people that they qualify as fundamental"), and "implicit in the concept of liberty organized by law", so that "neither liberty nor justice would exist if they were sacrificed" (*Palko v. Connecticut*, 302 US 319, 325, 326 (1937)). Second, in the fundamental rights and freedoms cases before us, we have required a "careful explanation" of the fundamental character of the alleged freedom (...). The history, legal traditions, and customs of our Nation, therefore, provide the 'guideposts for thoughtful choices', *Colins v. Harker Heights*, 503 US 125, and guide and limit our approach to the *Due Process* Clause. The Supreme Court's technique of identifying fundamental rights and freedoms has led to the exclusion of this qualification for the practice of sodomy between consenting adults (*Bowers v. Hardwick*, 478 US 186 (1986)) or the right to physician-assisted suicide (*Washington v. Glucksberg* cited above). After reviewing the regulations on the issue, the Court states that "The history of assisted suicide legislation in this country has been and continues to be one of constant and consistent rejection of all efforts to permit it. On this basis, our decisions compel us to conclude that the assertion of a 'right' to third-party assisted suicide is not a fundamental freedom protected by the *Due Process* Clause" (Opinion of the Court, *op. cit.*, p. 1267).

287 M. JANIS, "La notion de droits fondamentaux aux Etats-Unis d'Amérique", *AJDA* 1998, special issue, p. 54.

288 For example, since 1937, the Supreme Court has allowed federal and state authorities to regulate working hours and conditions, even if such regulations infringe on the freedom of workers and employers to determine the terms and conditions of employment by contract (*West Coast Hotel v. Parrish*, 300 US 379 (1937)).

289 Heightened scrutiny first appeared in Supreme Court jurisprudence with the famous footnote 4 of *United-States v. Carolene Products Company*, 304 US 144 (1938). As Zoller points out, the *Carolene Products* case inaugurated "the so-called *preferred-freedoms* doctrine, according to which the judge must exercise a more vigilant control when the legislature infringes rights that are supposed to be of higher moral value than others" (E. ZOLLER, *Great Cases*, p. 500).

290 *Reno v. Flores*, 507 US 302 (1993). Otherwise, the law is unconstitutional. For a famous application, see *Roe v. Wade*, 410 US 113 (1973): the Court held that criminal laws criminalising abortion unduly infringed the right to privacy.

291 See L. FAVOREU, "La protection constitutionnelle des droits fondamentaux", in *Vers une nouvelle Europe*, Editions de l'Université de Bruxelles Etudes européennes, 1992, pp. 365-378, special p. 365.

292 See F. MODERNE, "La notion de droit fondamental dans les traditions constitutionnelles des Etats membres de l'Union européenne", in *Réalités et perspectives du droit communautaire des droits fondamentaux*, *op. cit.*

293 The Constitution of the Kingdom of Belgium contains a Title 2 entitled "Belgians and their rights" (Articles 8 to 32).

294 2^{ème} part of the Hellenic Constitution of 9 June 1975 (Articles 4 to 25).

295 1^{ère} part of the Italian Constitution of 27 December 1947 (Articles 13 to 54). The term "fundamental right" is used only once, with Article 32 stating that "The Republic ensures the protection of health as a fundamental right of the individual and an interest of the community".

constitutional fundamental rights and freedoms.

Many international and regional instruments use the term fundamental freedom or fundamental right²⁹⁶. Some texts incidentally specify the normative source when dealing with the issue of the right to a judicial remedy. For example, Article 25.1 of the American Convention on Human Rights states that every person has the right to a simple and rapid remedy designed to protect him or her "against any acts violating his or her fundamental rights recognised by the Constitution, by law or by this Convention. Similarly, Article 8 of the Universal Declaration of Human Rights provides that everyone has the right to an effective remedy by the competent national tribunals "against acts violating the fundamental rights granted him by the Constitution or by law". Both texts thus recognise the existence of fundamental rights not only in the Constitution but also in conventions and legislation²⁹⁷.

Similarly, the existence of sub-constitutional fundamental rights is expressly provided for in law by constitutions that enshrine the principle of the "open list" of fundamental rights²⁹⁸. By hypothesis, adopting the principle of the open list amounts, for the constituent, to admitting the existence of fundamental rights and freedoms outside the constitutional text. In Portugal, for example, the Constitution of 2 April 1976 contains a first part entitled "Fundamental Rights and Duties" (Articles 12 to 79) and provides, in Article 16.1, that "the fundamental rights set out in the Constitution do not exclude any others deriving from the laws and applicable rules of international law". Thus, the enumeration drawn up by the constituent does not claim to be exhaustive. On the contrary, as pointed out by Mr. Cardoso da Costa, then President of the Constitutional Court, the principle of the open list "denotes not only a conception of the category of 'fundamental rights' as something broader than the category of constitutional rights (i.e., rights formally enshrined in the text of the Constitution), but also implies a 'material' characterisation of this first category - which seems to be able to reside solely in the 'essential' character that the collective legal conscience attributes to certain specific rights, as a requirement of the very dignity of the person"²⁹⁹. A similar understanding of the concept prevails in some Latin American countries³⁰⁰.

70. Neither in France nor in comparative law is there a clear, unique and univocal definition of fundamental freedoms. To delimit the scope of application of the *référé-liberté*, the Council of State's working group chose, without defining it, a concept with a relatively indeterminate content. This concept will be taken up by the Government without modification in the text submitted for parliamentary discussion. During the examination of the bill, parliamentarians will experience a certain perplexity with regard to this notion. Not being able or even really trying to control it, they chose to leave it to the judge to define.

II. A concept not defined by the legislator

71. The legislator has not defined the concept of fundamental freedom or given any real indication of its content. Some authors have deplored the absence of a legislative definition of the concept, considering it to be a loophole or "deficiency"³⁰¹ in Article L. 521-2 of the Code of Administrative Justice. However, it must be considered that the absence of a legislative definition does not represent a weakness for the *référé-liberté* procedure. In fact, by avoiding *a priori* closing its field of application, it contributes to the flexibility that the drafters of the text wanted to give this procedure. On the other hand, the total lack of commitment of parliamentarians to this concept is questionable. Indeed, if the national representation has refrained from defining fundamental freedoms or giving indications on this notion, it is not by strategic choice but by ease. It was simply because the notion embarrassed parliamentarians and even overwhelmed them, inspiring only

296 The Charter of the United Nations mentions in Article 1^{er} respect for human rights and fundamental freedoms. The same formula is found in the Preamble, then in Article 13 on the powers of the General Assembly, as well as in Article 55 on international economic and social cooperation, in Article 62 on the Economic and Social Council, and in Article 76 on trusteeship. The Vienna Convention of 23 May 1969 on the Law of Treaties refers in its preamble to the principles of international law incorporated in the Charter, including "universal respect for, and observance of, human rights and fundamental freedoms by all". The concept of fundamental freedom is also included in the title of the Rome Convention of 4 November 1950: European Convention for the Protection of Human Rights and Fundamental Freedoms ("*fundamental freedoms*" in the official English version).

297 In the case of the Universal Declaration of Human Rights, the reference to statutory freedoms was justified by the fact that some states - most notably Great Britain - did not have a rigid constitution. On the origin of this provision and the preparatory work, see D. WEISSBRODT, *The right to a fair trial under the Universal declaration of human rights and the international covenant on civil and political rights*, Martinus Nijhoff publishers, 2001, pp. 30-31; P. MERTENS, *Le droit de recours effectif devant les instances nationales en cas de violation d'un droit de l'homme*, Brussels University Publishing, 1973, pp. 18-25. On the other hand, the American states all have a rigid constitution and have nevertheless admitted, without this being linked, as in the case of the Universal Declaration of Human Rights, to the particularism of one of the High Contracting Parties, the existence of purely legislative fundamental rights.

298 H. MOTA, "Le principe de la 'liste ouverte' en matière de droits fondamentaux", in *La justice constitutionnelle au Portugal*, Economica PUAM, 1989, pp. 177-210.

299 J.-M. CARDOSO DA COSTA, "Portuguese Report", *AJIC* 1990/VI, VIII^e *Conférence of European Constitutional Courts*, Ankara 7-10 May 1990, p. 180.

300 See *supra*, § 44.

301 See, using this expression: M. CLEMENT, note under CE, ord. 8 September 2005, *Ministre de la justice c/ Banel*, LPA 16 November 2005, n° 228, p. 8. Marjolaine Fouletier has stated that it is regrettable that, "in view of the judge's powers, the concept of fundamental freedoms is not very precise" (M. FOULETIER, "La loi du 30 juin 2000 relative au référé devant les juridictions administratives", *RFD.A* 2000, p. 971).

doubts and circumspection, that they decided to leave it to the judge. Paradoxically, reflections on the meaning of the expression fundamental freedom were conducted more after the vote on the law than during its discussion³⁰².

A. An absent legislator

72. The attitude of parliamentarians to the concept of fundamental freedom is doubly open to criticism.
73. First of all, parliamentarians have not shown any real interest in this concept. Even though it determines the scope of application of the new procedure, the concept of fundamental freedom has curiously not given rise to any debate in Parliament³⁰³. The parliamentarians merely *noted* that the concept exists in the context of the assault³⁰⁴ and that the adjective "fundamental" is present in the Constitution³⁰⁵. They also state that *they question* the concept³⁰⁶. However, the legislator does not seek information that would provide answers to these questions. During the preparatory work on the law, "not only was no account taken of what had been published on the subject, but also of the debate that had taken place in Parliament in 1990, when an attempt was made to introduce a referral by the ordinary courts of preliminary questions of constitutionality to the Constitutional Council in the event of an infringement of 'fundamental rights'"³⁰⁷.
74. It is also disconcerting how Parliament has conceived of the exercise of its legislative function in relation to this concept. While parliamentarians had every opportunity to modify, clarify or replace the concept proposed by the working group, they seemed to consider from the outset that they were not entitled to do so. In the course of the work, they noted that the concept was imprecise and that it had not been defined before the legislative process. Thus, Mr Garrec states that "The notion of 'fundamental freedom' conditions the scope of application of the summary procedure. However, neither in the enacting terms of the bill, nor in the explanatory memorandum, nor in the impact assessment, is there a definition of the fundamental freedoms that the judge could invoke to justify an injunction addressed to the administration"³⁰⁸. The rapporteur stresses that the Council of State's working group hesitated between two formulas for summary injunctions: the protection of fundamental freedoms or the protection of all rights and freedoms. He notes that "the first solution was chosen without the working group clarifying what it meant by '*fundamental freedom*'"³⁰⁹. Some parliamentarians deplore this and state that they do not appreciate this notion precisely because of its imprecision³¹⁰. However, they do not go any further. In a role comparable to that of a recording chamber, Parliament is content to observe and criticise but refuses to act and decide. While the draft bill and the draft law are only a starting point for discussion, parliamentarians seem to regard the working group's report and the government's initiative as definitive and unchangeable texts that cannot be clarified or amended, at least on this point. They feel dissatisfied with this concept, but no one thinks for a moment, even if only to discuss the principle, of clarifying the text, of replacing the concept of fundamental freedom with a concept that would suit them better³¹¹ or of giving the judge indications that will guide him in its implementation.

302 The absence of parliamentary debate partly explains the importance of the doctrinal controversies that have arisen around this notion. As the legislator had not taken up the field of reflection, the debate had to take place outside the parliamentary arena. By refraining from participating in the debate and by not giving the slightest indication of the concept, parliamentarians opened up a space for controversy into which the authors did not fail to fall. This phenomenon is relatively common. As Chaim Perelman observed, "most of the time, the issues that are the subject of legal controversy have not been debated in Parliament, or have given rise to a compromise that leaves the most delicate problems unresolved" (C. PERELMAN, *Logique juridique. Nouvelle rhétorique* (1979), republished in Bibliothèque Dalloz, 1999, p. 54).

303 This attitude of withdrawal is only observed with regard to the notion of fundamental freedom, as the other provisions of the bill have given rise to intense debate within the assemblies.

304 M. Sutour thus noted that "This concept is certainly not new in our law, since the infringement of a fundamental freedom constitutes one of the elements characterising an assault" (*JO déb. Sénat*, CR séance 22 février 2000, p. 865). The rapporteur for the bill at the National Assembly made an identical remark: "It should be noted that the notion of fundamental freedom appears on several occasions in the case law of the Council of State and the Court of Conflicts in relation to acts constituting assault" (F. COLCOMBET, Rapport AN n° 2002, p. 41).

305 Mr Garrec "observed that the term 'fundamental' was rarely used in French public law, even though it appeared in the Constitution" (Commission des Lois du Sénat, "Examen du rapport de M. René Garrec sur le projet de loi n° 269 relatif au référé devant les juridictions administratives", 12 May 1999, www.senat.fr, p. 2).

306 "This expression raises a real question in my mind", declared Jean-Jacques Hiest during the session (*JO déb. Sénat*, CR séance 8 juin 1999, p. 3742). Similarly, Simon Sutour considers that "one can question the notion of fundamental freedoms" (*JO déb. Sénat*, CR séance 8 juin 1999, p. 3749). For his part, François Colombat states that "The use of the concept of 'fundamental freedom' is not without raising questions" (F. COLCOMBET, Rapport AN n° 2002, p. 41).

307 L. FAVOREU, "La notion de liberté fondamentale devant le juge administratif des référés", *D.* 2001, p. 1739. On this reform project, see J. ROBERT, "La protection des droits fondamentaux et le juge constitutionnel français. Bilan et réformes", *RDP* 1989, pp. 1255-1285; file of the *Revue française de droit constitutionnel* n° 4, 1990, "L'exception d'inconstitutionnalité", pp. 579-671.

308 R. GARREC, Senate Report No. 380, p. 54.

309 R. GARREC, Senate Report No. 380, p. 53. Underlined.

310 Mr Hiest thus declared: "Personally, I do not like this new legal concept of 'fundamental freedoms' very much, as it is imprecise" (*JO déb. Sénat*, CR séance 8 juin 1999, p. 3743).

311 Admittedly, the rapporteur for the bill in the National Assembly did raise the issue on first reading: "Why not use the same terms as those used for the extreme emergency stay, which allows the State representative to request a stay of execution of an act by a local authority that is likely to 'compromise the exercise of an individual or public freedom'" (F. COLCOMBET, Rapport AN n° 2002, p. 41). However, this question is

B. Piecemeal indications

75. During the preparatory work, there was never any question of introducing a definition of fundamental freedoms into the law³¹². It is true that this procedure is not customary for French legislators³¹³. While it has undeniable advantages in terms of clarity and predictability of the law³¹⁴, a legal definition tends to freeze the meaning of a concept and, if used improperly, can become a real straitjacket that prevents any possibility of the law evolving. In the case of the concept of fundamental freedom, providing a conceptual definition or attempting to establish an exhaustive nomenclature would have been a delicate undertaking, risking the loss of the flexibility and malleability that characterise the concept³¹⁵.
76. By not defining the concept, the legislator also refused to guide the judge in its implementation³¹⁶. No precise indication was given on this subject by the parliamentarians³¹⁷. The preparatory works contain unanswered questions, very general remarks and sometimes even contradictory statements. In particular, diametrically opposed assertions were made concerning the existence of a difference between, on the one hand, public liberties within the meaning of Article 34 of the Constitution and public and individual liberties within the meaning of the *référé-liberté*, and on the other hand, fundamental liberties within the meaning of the *référé-liberté*. While the Minister of Justice defended the identity or assimilation of the concepts³¹⁸, several members of parliament clearly wished to differentiate them³¹⁹.

In the session, no real clarification was given on the concept of fundamental freedom. Among the few statements devoted to this notion, two must be mentioned. On the one hand, Mr Sutour seems to refer to the Constitution, stating optimistically that "our public law contains all the elements needed to define them in accordance with the foundations of our Republic"³²⁰. On the other hand, Robert Bret calls for a broad definition of the scope of application of the *référé-liberté*, stating that this procedure "will be all the more effective if the judges interpret the notion of fundamental freedom in an extensive manner"³²¹.

not followed by an answer. Nor is it accompanied by an alternative proposal to replace the concept of fundamental freedom with that of "public or individual freedom".

312 At most, it is noted that Mr Hiest "almost tabled an amendment" on this notion (*JO déb. Sénat*, CR séance du 8 juin 1999, p. 3742). In the absence of information provided by the person concerned, it is not possible to determine whether his intention was to clarify the concept or to replace it.

313 Generally speaking, it has been observed that "in relation to the multitude of concepts and terms they use, French texts contain few definitions" (J.-L. Bergel, "Importance, opportunity and role of legislative definitions in legislative and regulatory texts", *RRJ* 1987/4, p. 1134). Outside the criminal field, no constitutional provision requires the legislature to define the concepts it uses. In principle, "the appropriateness and extent of the definition is left to the discretion of the legislator, who has complete freedom" (S. BALIAN, *Essai sur la définition dans la loi*, thesis Paris II, 1986, p. 14). While Parliament is not averse to using this power in private law (see G. CORNU, "Les définitions dans la loi", *Mélanges dédiés à Jean Vincent*, Dalloz, 1981, pp. 77-92), it does so only rarely in public law and most often for secondary concepts (see A. BALDOUS and J.-P. NEGRIN, "L'étendue du recours aux définitions dans les textes de droit administratif", *RRJ* 1987/4, pp. 1045-1050, esp. 1047-1048).

314 "On the part of the sovereign legislator, it is a choice of clarification" (G. CORNU, *op. cit.*, p. 78). It makes it possible "to provide legal terms with simple and reliable implementation criteria; it is on this condition that the application of the law is guaranteed: the legal definition combats ambiguity" (S. BALIAN, *op. cit.*, p. 201).

315 As M. Bergel has pointed out, "a concept defined by law is less malleable than an undefined concept" (J.-L. BERGEL, *op. cit.*, p. 1125).

316 This contrasts with the extreme precision shown by parliamentarians on other provisions of the draft, going so far as to address the law enforcement agencies directly. For example, Mr Montebourg stated that the *référé-liberté* procedure "must not prejudice - I say this for the benefit of the readers of our work and the users of this text - the notion of assault" (*JO déb. AN*, CR séance 14 décembre 1999, p. 10941).

317 However, in 1990, the constitutional legislator had indicated precisely what was covered by the notion of "fundamental right recognised to all persons by the Constitution" and established an indicative list of rights falling into this category (see M. SAPIN, Report No. 1288 on the draft constitutional law instituting a constitutionality review by way of exception, pp. 61-63; see also the intervention of the Minister of Justice Pierre Arpaillange: *JO déb. AN*, CR session 24 April 1990, p. 595).

318 The Minister of Justice indicated to the senators, during the presentation of the bill, that "The notion of fundamental freedom refers (...) to Article 34 of the Constitution, which entrusts the legislator with the task of setting the rules concerning the fundamental guarantees granted to citizens for the exercise of public freedoms" (E. GUIGOU, *JO déb. Sénat*, CR séance 8 juin 1999, p. 3738). Furthermore, and this time with regard to the expression public or individual freedom, Ms Guigou stated that the *référé-liberté* protects "the same freedoms" as the *déféré-liberté* (*op. cit.*, p. 3739). An identical presentation was made before the National Assembly (*JO déb. AN*, CR séance 14 décembre 1999, p. 10931).

319 Mr Hiest thus wanted to mark the difference between the notion of fundamental freedom and the notion of public freedom: "You recalled, Madam Minister, Article 34 of the Constitution: it concerns fundamental guarantees in the area of public freedoms. Fundamental guarantees and fundamental freedoms are not the same thing" (*JO déb. Sénat*, CR séance 8 juin 1999, p. 3742). Similarly, Mr Sutour was keen to differentiate between fundamental freedoms and public or individual freedoms, stating that the notion of fundamental freedom was "apparently different from that of public freedom or individual freedom" (*JO déb. Sénat*, CR séance 22 février 2000, *JO déb. Sénat*, CR, p. 865). In the same vein, Mr Colcombet stated that "These are two very similar areas, but which do not exactly overlap, that of public freedoms and that of fundamental freedoms" (*JO déb. AN*, CR séance 6 avril 2000, p. 3161).

320 S. SUTOUR, *JO déb. Sénat*, CR séance 8 juin 1999, p. 3749.

321 R. BRET, *JO déb. Sénat*, CR séance 8 juin 1999, p. 3751.

77. But, for the most part, the few indications given during the parliamentary proceedings must be sought in the often hesitant writings of the rapporteurs of the bill.

In the Senate report, Mr Garrec begins with a negative definition of fundamental freedoms or, more precisely, gives two examples of rights and freedoms that do not fall into this category. He states that "The summary injunction will be limited to situations of infringement of a fundamental freedom, which excludes disputes relating to various citizens' rights (e.g. the right to obtain a licence for a public house or the right to compete in an examination, provided that the conditions are met)"³²². Thus, rights of secondary importance do not fall within the scope of this procedure. M. Garrec then recalls the stages in the formation of the constitutionality block and its content. He mentions "the movement to constitutionalise fundamental rights and freedoms" - an expression that suggests that fundamental rights and freedoms existed before this movement began and were necessarily at an infra-constitutional level. As a result of this movement, there is "a list, which is not exhaustive, of the freedoms to which the Council has conferred constitutional value"³²³. This enumeration, he said, "demonstrates that the notion of freedom is inseparable from the notion of right. The established expression "*fundamental rights and freedoms*" cannot be divided into fundamental freedoms on the one hand and fundamental rights on the other. So what position will the judge take when economic and social rights are infringed? Does the fact that the Constitutional Council has recognised their constitutional value justify *a priori* considering them as fundamental freedoms that can be protected by means of injunctions addressed to the administration by the provisional judge?"³²⁴. The rapporteur will not provide an answer to this question, merely asking what attitude the judge would adopt in such a case. In this respect, one may wonder whether the role of the legislator really consists in outlining problems without providing any answers, in wondering about the solutions that the law's implementing bodies will adopt without guiding them in its implementation. As a deliberative body, Parliament is also a decision-making body.

The same observation can be made when reading François Colcombet's report. Questioning what "precisely" the notion of fundamental freedom covers, the rapporteur begins by drawing up a list of constitutional freedoms: "It would seem that the notion of fundamental freedom encompasses individual freedom, but also public freedoms, many of which have constitutional value according to the case law developed by the Constitutional Council since its decision of principle of 16 July 1971 on the freedom of association". It then recalls that "individual freedom, respect for the human person, freedom of movement, freedom of conscience and opinion, freedom of education, freedom of audiovisual communication, freedom of the press, freedom of association, freedom of political parties and groups, trade union freedom and freedom of enterprise are constitutionally recognised"³²⁵. He concludes his analysis with questions about the attitude that the Council of State will adopt: "It is easy to imagine that the administrative judge will consider all of these constitutional freedoms as 'fundamental'. Similarly, it will probably take into account the concept of freedoms that it has developed in its case law on the general principles of law"³²⁶. In a purely prospective approach, Mr Colcombet endeavours to identify the features of future case law. Far from guiding the judge in the implementation of the law, he merely wonders what the judge will do with the concept of fundamental freedom.

It is highly questionable that the legislator considered from the outset that the concept of fundamental freedom did not belong to him. Parliament did not *entrust* the concept to the judge; it immediately *abandoned it to* him. Here again, it should be pointed out that the result - namely the referral of the concept to the judge and the definition of its content by the courts - is not open to dispute. Only the way in which the legislator achieved it is. Curiously, the members of parliament considered that the concept was already in the hands of the Council of State and that they could, at most, only wonder about its future fate in administrative case law. This solution, which was adopted more out of spite than out of strategic choice, reflects a lack of interest in the concept.

78. In the end, the Parliament did not provide any guidance on the meaning of the term. As Eric Sales points out, "the legislator did not bother to provide any clarification on the matter"³²⁷. Helpless in the face of a notion that escaped it and that it did not want to appropriate, the national representation referred the task of determining its contours to the judge. The judge is thus involved in drafting the law and is responsible for determining the content of the concept of fundamental freedom.

322 R. GARREC, Senate Report No. 380, p. 53.

323 For René Garrec, "The classic freedoms enshrined in the Constitution are : freedom of association, the right to life and the freedom to dispose of one's body, individual freedom, protection of privacy, freedom of education, freedom of conscience, freedom to come and go, a corollary of individual freedom, the right of asylum, the rights of defence in non-criminal matters, the right to take legal action, freedom of expression, the right to property, freedom of communication, freedom of the press, the right to vote and to stand for election, the principle of non-retroactivity of laws providing for sanctions, even non-criminal ones" (Senate Report No. 380, p. 54).

324 R. GARREC, Senate Report No. 380, p. 54.

325 F. COLCOMBET, Rapport AN n° 2002, p. 41.

326 F. COLCOMBET, Rapport AN n° 2002, p. 41.

327 E. SALES, "Vers l'émergence d'un droit administratif des libertés fondamentales?", RDP 2004, p. 220. The least uncertain elements are the following. Firstly, fundamental freedom is not just any norm - it does not include *a priori* non-essential rights such as the right to obtain a liquor licence or the right to compete in an examination - and it must be defined in accordance with the foundations of our Republic. Secondly, there is a very strong link between fundamental freedoms and the Constitution, without the latter appearing to be the exclusive source of freedoms. Moreover, "rights" can be assimilated to "freedoms". Finally, the judge is invited to interpret this notion broadly.

C. A concept entrusted to the judge

79. In the absence of details provided by parliamentarians on the notion of fundamental freedoms, the chairman of the Senate's Law Commission "noted that case law would have to define them, just as it had to define public order, the good father of the family or the minor capable of discernment"³²⁸. But, most often, the reference to the judge was implicit: the absence of indications on the notion implicitly but necessarily requires a jurisprudential definition of its content³²⁹. It should be noted that there is nothing unusual about referring an embarrassing concept to the judge. It is even common for Parliament to use a singularly imprecise and indeterminate concept contained in a text prepared by a government administration or a group of experts, and to expressly call on the judge to clarify its meaning³³⁰. When in 1982 the legislator instituted the *déféré-liberté* procedure, he left it to the judge to define the notion of "public or individual freedom". In the absence of a definition of the concept, "the role of the judge then becomes predominant"³³¹.
80. By making this choice in the context of Article L. 521-2 of the Code of Administrative Justice, the legislator has abandoned the notion of fundamental freedom to the judge, and this in a definitive manner. Since the law of 1^{er} April 1837, which abolished the legislative summary procedure, "the author of a law is like the testator: as soon as it is put into force, he can say nothing more: he is as good as dead"³³². Since the legislator did not restrict the notion by a definition - which is to be welcomed - the courts are responsible for giving the text its meaning and the notion of fundamental freedom its consistency. In fact, in general, "it is up to the judge to define the terms of the law, particularly those contained in the legal hypothesis, when the legislator has not done so himself"³³³. With regard to the *référé-liberté*, "As the legislator has been cautious in not defining the concept, the entire task falls to the administrative judge who must, in the course of each case, weave the web of 'fundamental freedoms'"³³⁴.

Section 2. A legal concept in the hands of the judge

81. As the legislator had not defined the concept of fundamental freedom, the judge necessarily had to do so. This operation constitutes a step for the application of Article L. 521-2 of the Code of Administrative Justice, which he could not avoid. To be able to implement the summary procedure, it was first necessary to interpret the notion of fundamental freedom, i.e. to determine the meaning or significance of this expression. As Kelsen pointed out, interpretation "is an intellectual process which necessarily accompanies the process of applying the law"³³⁵. It is an indispensable prerequisite for the application of any legal concept, whether its meaning is obscure or allegedly 'clear'³³⁶. Interpretation 'is, in legal experience, the necessary precondition for the

328 J. LARCHE, "Compte-rendu de l'examen du rapport", 26 May 1999, www.senat.fr, p. 7.

329 The issue was also raised incidentally with regard to the determination of the competent court to hear appeals against summary judgments. The deputies defended the principle of an appeal before the administrative courts of appeal, while the senators wanted this remedy to be the responsibility of the Council of State. The latter position was defended in particular by Mr SUTOUR, who emphasised the interest of such a solution in terms of immediate unification of case law: "I actually think it preferable that appeals in the area of interim relief, the principle of which is now accepted, be brought before the president of the litigation section of the Council of State insofar as this should make it possible, at least initially, to unify case law in this area. In this respect, it should be noted that the concept of fundamental freedom, which is apparently different from that of public freedom or individual freedom, had been discussed. This concept is certainly not new in our law, since the infringement of a fundamental freedom is one of the elements characterising assault. However, it may seem more appropriate to leave it to the Conseil d'Etat to define in a harmonious manner this notion, which is now at the heart of the new procedure" (S. SUTOUR, *JO déb. Sénat*, CR séance 22 février 2000, p. 865).

330 See D. LOCHAK, *Le rôle politique du juge administratif français*, LGDJ, coll. BDP, t. 107, 1972, p. 139.

331 P.-J. BARALLE, *Les sursis à exécution devant les juridictions administratives*, thesis Lille 2, 1993, p. 70.

332 P. MALAURIE, "L'effet pervers des lois", in *Droit civil, procédure, linguistique juridique. Ecrits en hommage à Gérard Cornu*, PUF, 1994, p. 310.

333 F. RIGAUX, *La loi des juges*, Odile Jacob 1997, p. 52. See also J.-L. Bergel, *Méthodologie juridique*, PUF, coll. Thémis droit privé, 2001, p. 109: "When texts do not contain definitions or only give insufficient definitions, it is up to the judge, in the name of his power to interpret laws and regulations, to determine the meaning of words and to give concepts their definition".

334 L. BURGORGUE-LARSEN, *Libertés fondamentales*, Montchrestien, coll. Pages d'amphi, 2003, p. 19.

335 H. KELSEN, *Pure Theory of Law* (1960), 2nd ed. C. EISENMANN, LGDJ Bruylant, coll. La pensée juridique, 1999, p. 335. By itself, the legislative statement is only a "partially empty verbal envelope" (C. EISENMANN, "Jurisdiction et logique (selon les données du droit français)", in *Mélanges dédiés à Gabriel Marty*, Université des sciences sociales de Toulouse, 1978, p. 501). It requires, in order to flourish and take shape, the intervention of a judge. It is necessary for the texts to be "embroidered with a jurisprudential interpretation" (A. DE LAUBADERE, *Traité élémentaire de droit administratif*, t. 1, 1^{ère} ed., LGDJ, 1953, p. 29).

336 According to a commonly held view, interpretation is only necessary when a text is obscure or equivocal. In other words, it would be up to the judge to distinguish between statements that are immediately understandable and those whose meaning is not immediately perceptible. Only the latter would deserve to be interpreted, the former should simply be applied. *Interpretatio cessat in claris*, it is asserted, as if to

inner grasp - the understanding - of the legal norms expressed by the legislator and for their practice, their use³³⁷. In other words, "The text provided by the legislator is in a state of latency, it must be interpreted in order to be applied. The law cannot therefore be sufficient in itself; it always requires the intervention of a magistrate"³³⁸.

82. In order for Article L. 521-2 to apply, the concept of fundamental freedom first had to be interpreted. How much leeway does the Conseil d'Etat have in determining the meaning of this concept? Is there a concept that emerges from positive law or legal science and is binding on it - legally or logically? Or is it entirely free to determine the meaning of this concept?
83. The question is linked to a broader debate on the nature and constraints of the act of interpretation³³⁹. There are two main schools of thought on the nature of the act of interpretation. For some, interpretation is an act of knowledge; for others it is an act of will. Michel Troper summarises the terms of the debate as follows: "to interpret is to *indicate* the meaning of a thing or to *determine* the meaning of that thing"³⁴⁰. In the first case, it is a matter of revealing or clarifying the meaning intrinsically possessed by a proposition³⁴¹ and, in the second, of conferring or attributing a meaning to a proposition that lacks one³⁴². "The first definition is based on the presupposition that it is possible to know meaning, that interpretation is a function of knowledge, the second that it is a function of the will"³⁴³.

For a long time it was believed, especially under the influence of the School of Exegesis³⁴⁴, that interpretation was an act of pure knowledge, an activity of describing norms. According to this view, every word has an objective or intrinsic meaning. It is up to the courts to discover this meaning, while avoiding any creative role³⁴⁵. This approach is attractive because of its apparent objective rigour, but it is inaccurate. There is no true meaning (in

give greater force to the assertion, by a formula which is Latin only in its formulation but not in its origin (see Y. PACLOT, *Recherche sur l'interprétation juridique*, thesis Paris, 1988, p. 373). The doctrine has established this position under the name of the theory of the clear act. The Court of Cassation itself has stated that a clear and precise text must not be interpreted but simply applied (Civ. 22 November 1932, *D.H.* 1933, 2, cited by D. D'AMBRA, *L'objet de la fonction juridictionnelle: dire le droit et trancher les litiges*, LGDJ, coll. BDprivé, t. 236, 1994, p. 29).

The falsity of the theory of the clear act has been denounced. As Michel Troper points out, "The text must always be interpreted, and not only if it is obscure" (M. TROPER, "Une théorie réaliste de l'interprétation", in *La théorie du droit, le droit, l'Etat*, PUF, coll. Leviathan, 2001, p. 75). Indeed, "one cannot affirm that a text is clear without recognising that one knows its meaning, and therefore that one has already interpreted it. Consequently, even texts that are deemed clear have already been interpreted" (*ibid.*). In the same sense, Michel van de Kerchove states that "There are no clear texts whose meaning is 'in itself' manifest or obvious", because this thesis "suggests that there are texts that are clear 'in themselves', or because of their very terms. In the light of contemporary theories of language and interpretation, such a claim may seem naive and illusory" (M. VAN DE KERCHOVE, "La doctrine du sens clair des textes et la jurisprudence de la Cour de cassation de Belgique", in *L'interprétation en droit. Approche pluridisciplinaire* (M. VAN DE KERCHOVE ed.), Publications des facultés universitaires Saint-Louis, 1978, p. 19). Based on the dichotomy of clear/obscure act, this theory "overlooks the fact that clarity and obscurity do not exist 'in themselves', but are relative notions, which are assessed according to a given context" (Y. PACLOT, *op. cit.*, p. 373). In this way, any attempt to present the concept of fundamental freedom as a "clear" concept that would not, therefore, call for any interpretation is disqualified. Even if the concept of fundamental freedom were to be regarded as clear, it could not simply be applied but would have to be interpreted. As Professor Pacteau has pointed out, 'there is no text, even the apparently simplest and most precise one, which does not call for an interpretation by the judges responsible for its application, and on which case law is not therefore formed to determine its meaning' (B. PACTEAU, 'La jurisprudence, une chance du droit administratif?', *RA* 1999, special issue 6, pp. 71-72).

337 P. AMSELEK, "L'interprétation à tort et à travers", *Interprétation et droit*, Bruylant PUAM, 1995, p. 12.

338 D. d'AMBRA, *L'objet de la fonction juridictionnelle...*, *op. cit.* p. 33.

339 Questions of interpretation are central to the thinking of contemporary legal writers. As M. Amsleek has pointed out, "in recent decades there has been what has been called the 'interpretive turn'", from which interpretation in law "has moved to the very centre of research and reflection in legal theory (...)" (P. AMSELEK, "La teneur indéfinie du droit", *RDP* 1991, p. 1201). The number, importance and wealth of works devoted to the question attest to the extent of the phenomenon. Cf. among the most abundant literature: P. WACHSMANN, "La volonté de l'interprète", *Droits* 1999/28, pp. 29-45; *Interprétation et droit* (P. AMSELEK ed.), Bruylant, 1995, 245 p.; *L'interprétation en droit. Approche pluridisciplinaire* (M. VAN DE KERCHOVE ed.), Publications des facultés universitaires Saint-Louis, 1978, 558 p.; *APD* t. 17, *L'interprétation dans le droit*; L. PATRAS, *L'interprétation en droit public interne*, T. et A. Joannides, 1962, 380 p.; Association Henri Capitant, *L'interprétation par le juge des règles écrites*, Economica, 1980; *Lire le droit. Langue, texte, cognition* (D. BOURCIER and E. MACKAAY dir.), LGDJ, coll. Droit et société, 1992, 486 p.; *L'interprétation constitutionnelle* (F. MELIN-SOUCRAMANIEN dir.), Table ronde de l'Association internationale de droit constitutionnel, Bordeaux, 15-16 octobre 2004, Dalloz, 2005, 248 p.

340 M. TROPER, "A Realist Theory of Interpretation", *op. cit.* p. 69. Underlined.

341 M. de Béchillon indicates that "in its most classical, but also least debatable, sense, the action of interpreting refers to the fact of *discovering* a meaning in a proposition" (D. DE BECHILLON, *Hierarchie des normes et hiérarchie des fonctions normatives de l'Etat*, Economica PUAM, coll. Underlined).

342 For M. Guastini, "interpreting is not describing, but deciding the meaning of normative texts" (R. GUASTINI, "Interprétation et description de normes", in *Interprétation et droit*, Bruylant PUAM, 1995, p. 101).

343 M. TROPER, "A Realist Theory of Interpretation", *op. cit.* p. 69.

344 See H. RABAULT, *L'interprétation des normes: l'objectivité de la méthode herméneutique*, L'Harmattan, coll. Logiques juridiques, 1997, 371 p.

345 In Montesquieu's words, "the judges of the nation are only the mouth that speaks the words of the law" (*De l'esprit des lois*, 1748, Book XI, chapter 6). The interpreter's activity is purely descriptive. It consists in establishing the meaning of a statement by applying *methods of* interpretation. The meaning of a proposition pre-exists interpretation; it is objective, immanent to the text, and external to the reader who merely observes it. It is therefore possible to make a legal judgment on the value of an interpretation. If the interpretative rules are binding on the judge, his decisions can be measured against objective criteria. An interpretation is then assessed in terms of its validity: it is either "true" or "false".

logic)³⁴⁶ nor rules of interpretation (in law)³⁴⁷. Interpretation cannot therefore be equated with an act of strict knowledge. However, interpretation is not an arbitrary act. In fact, "there are always creation and constraints; we understand nothing about interpretation if we think of it as pure creation (the fantasy of the 'government of judges'), or if we reduce it to a network of constraints (the opposite fantasy, but ultimately linked to the first one, of the 'judge-as-lawyer')"³⁴⁸.

As Kelsen stated, "in the application of law by a legal body, the interpretation of the law to be applied, through an operation of knowledge, is united with an act of will by which the body applying the law makes a choice between the possibilities revealed by the knowledge-based interpretation"³⁴⁹. The act of interpreting involves both knowledge (which allows the interpreter to draw up a framework within which to make choices) and the will (which allows the interpreter to choose between the different options offered by the statement to be interpreted). The judge's *choice* is exercised within the framework outlined by the knowledge-based interpretation. The act of will follows an act of knowledge, which has gathered and highlighted the different possible meanings for a given text in the light of the applicable legal and logical constraints³⁵⁰. The first constraint lies in the very terms used by the legislator: "the interpreted text imposes restrictions on its interpreters"³⁵¹. Legal concepts have a number of meanings which may be high but which is not infinite. The judge cannot give a concept a meaning that is not related to the terms used. From a systemic perspective, the judge will also be sensitive to the coherence of the legal system in which he intervenes³⁵². Thus, the judge gathers and updates the different possible meanings. The act of interpreting is, in this respect, a matter of knowledge. It "is also an act of will. The plurality of the elements taken into account by the interpreter leads him to make choices or to adjust the proportions. In this respect, he has a greater or lesser margin of appreciation"³⁵³. The choice between the different possibilities resulting from knowledge-based interpretation is then a matter of legal policy. For Kelsen, "The question of which of the possibilities given in the framework of the law to be applied is 'correct' is, by hypothesis, not at all a question of

346 "There is no objective meaning; 'interpretative statements are not statements of descriptive language: they can be neither true nor false" (R. GUASTINI, *op. cit.*, p. 98). To assert that there is one and only one meaning, which would be contained in the text itself, is "a false belief, quite discredited among specialists in linguistics, philosophy of language, philosophy of science, etc., and, indeed, among the general public. - and, indeed, among lawyers as well. Meaning (significance) is not something embedded in words. The meaning of each linguistic expression is a variable that depends precisely on usage and interpretation. Changes in the meaning of a word or controversies between interpreters cannot be explained otherwise. This means that there is not one, and only one, meaning that is susceptible to simple empirical verification" (R. GUASTINI, *op. cit.*, p. 97). Legal notions do not have a predetermined content or meaning that can be simply retrieved. As Michel Troper argues, it is absurd to call an authentic interpretation "false" or "inaccurate", because "there is no 'true' interpretation to compare it to. Such a statement only expresses the claim of its author to set up his own interpretation as a standard of reference, and is clearly linked to a Natural Law ideology insofar as it aims at creating extra-legal norms to found or deny the validity of legal norms" (M. TROPER, "Le problème de l'interprétation et la théorie de la supralégalité constitutionnelle", *Recueil d'études en hommage à Charles Eisenmann*, Cujas Editions, 1975, p. 135). It is not uncommon to see such a pitfall concerning the concept of fundamental freedom within the meaning of Article L. 521-2, with authors disqualifying the position of the administrative judge or criticising it on the sole ground that it does not correspond to their own - doctrinal - definition of fundamental freedoms.

347 Strictly speaking, there are no real 'rules' of interpretation. To the question of whether the methods of interpretation constitute for the judge 'simple advice based on reason' or, on the contrary, 'legally sanctioned prescriptions', Mr Paclot provides an answer that definitively closes the debate. After an exhaustive analysis of all the sources of law, he points out that, outside the criminal field, 'the interpretative activity of the judge is not subject to any mandatory rule' (Y. PACLOT, above-mentioned thesis, p. 170). Strictly speaking, there are no criteria obliging the judge to adopt a single or privileged interpretation of a given text. At most, there are interpretative *guidelines*, a set of prescriptions, advice and recommendations that simply claim to influence interpretative activity. These guidelines are persuasive and not binding (see F. OST and M. VAN DE KERCHOVE, "Les colonnes d'Hermès : à propos des directives d'interprétation en droit", in *Interprétation et droit*, Bruylant PUAM, 1995, pp. 135-153). These guidelines play "with regard to the law the role of the compass with regard to the pole" (P. FABREGUETTES, *La logique judiciaire et l'art de juger*, LGDJ, 1926, quoted by C. CHARLES, *Le juge administratif, juge administrateur*, thèse Toulouse I, 2003, p. 163), indicating to the judge the direction to follow but not obliging him to do so.

348 F. OST and M. VAN DE KERCHOVE, *op. cit.*, p. 136.

349 H. KELSEN, *op. cit.*, p. 340: "If by 'interpretation' is meant the determination by means of knowledge of the meaning of the object to be interpreted, the result of a legal interpretation can only be the determination of the framework that the law to be interpreted represents, and thereby the recognition of several possibilities that exist within this framework. So the interpretation of a law does not necessarily have to lead to a single decision that is held to be the only correct one; it is possible that it leads to several decisions that are all of equal value - insofar as the law to be applied is taken as the only standard of value -, although only one of them becomes positive law by the act of the body applying the law, in particular the court" (H. KELSEN, *op. cit.*, p. 338).

350 P.-A. COTE, "L'interprétation de la loi, une création sujette à des contraintes", in *Lire le droit. Langue, texte cognition* (D. BOURCIER and E. MACKAAY dir.), LGDJ, coll. Droit et société, 1992, p. 133 f ; G. KALINOWSKI, "L'interprétation du droit : ses règles juridiques et logiques", *APD* t. 30 La jurisprudence, 1985, pp. 171-180. Logical rules are "the rules for performing discursive intellectual tasks, in particular the tasks of dividing, defining and inferring, required by the work of the interpreter of law" (G. KALINOWSKI, *op. cit.*, p. 171).

351 U. ECO, *Les limites de l'interprétation*, Le livre de poche, coll. Biblio/Essais, 1992, p. 17, quoted by P. WACHSMANN, "La volonté de l'interprète", *Droits* 1999/28, p. 45.

352 As Michel van de Kerchove points out, "interpretation is still limited by the meaning or direction of the 'work' to which the statement belongs, i.e. the construction of a coherent legal system" (M. VAN DE KERCHOVE, "La théorie des actes de langage et la théorie de l'interprétation juridique", in *Théorie des actes de langage, éthique et droit* (P. AMSELEK dir.), PUF, 1986, p. 246). In this respect, "In the choice of a decision, in particular an interpretative decision, an authority takes into account the decisions that other organs of the system might take, if its reasoning fits into a set of concepts that it has already used or that are used by others" (M. TROPER, *op. cit.*, p. 84). President Latournerie presented in these terms, but without limiting the scope of his reflection to the sole problem of interpretation, 'the golden rule of legal reasoning'. According to the illustrious author, "At the final moment when, in the inner self, the symbolic balance still swings, a golden rule will, more often than not, be the decisive factor in the balance. It is the rule according to which, whatever intrinsic merit, whatever internal attraction one of the solutions considered may have, it must, in principle, only determine the choice if it satisfies a condition. Firstly, it must be logically linked to the general principles and theories that make up public law. Secondly, it must be adapted as closely and as widely as possible to all the other data" (R. Latournerie, "Essai sur les méthodes juridictionnelles du Conseil d'Etat", *Livre jubilaire du Conseil d'Etat*, Sirey, 1952, p. 239).

353 B. GENEVOIS, "Le Conseil d'Etat et l'interprétation de la loi", *RFDA* 2002, p. 885.

knowledge about the positive law; it is not a problem of legal theory, but a problem of legal policy'³⁵⁴. Once the framework has been drawn up, the judge regains his irreducible freedom. He chooses, in an expedient manner, between the various legally conceivable meanings. In this respect, interpretation is "the result of a choice between several possible meanings"³⁵⁵.

84. It follows from the above, and this must be emphasised, that there is no "true meaning" of the concept of fundamental freedom which the wording of Article L. 521-2 of the Code of Administrative Justice would itself convey. The meaning of the concept of fundamental freedom has not been explained by the legislator. In the absence of a pre-determination of the concept, the role of legal research is to propose the various legally admissible meanings of the concept in the light of the legal and logical constraints that define the framework within which the judge will make a choice. It is not the role of the lawyer to conclude authoritatively that there is a single and supposedly only valid interpretation of the fundamental freedoms³⁵⁶. This appears all the more justified as the different legal and logical constraints leave the administrative judge a considerable margin of freedom in the interpretation of this notion.

I. The terms of the law

85. From the point of view of the *spirit of the text*, Article L. 521-2 of the Code of Administrative Justice was designed as an exceptional procedure. It aims to enable the administrative judge to provide a rapid and effective response to specific situations, and thus put an end to abusive invocations of *de facto* conduct.

The exceptional nature of this procedure has two consequences. Firstly, the interim injunction is intended to sanction the violation of certain freedoms only and not of all the norms in force in our legal system. Of the two variants of summary proceedings initially envisaged by the working group, only the procedure with a strict scope of application was retained. The purpose of Article L. 521-2 is therefore not to protect all the rules of our legal system but only those that are fundamental and constitute freedoms, two specific characteristics intended by the legislator to differentiate them from the mass of other rules. Secondly, the procedure of *référé-liberté* should only be used sparingly and in exceptional cases. An overly broad definition of the concept of fundamental freedom would lead to a misunderstanding of the *spirit of the procedure* and to the bringing of claims that it is not intended to deal with. As the authors of the *leading cases* state, "Too broad an interpretation would risk distorting, or even clogging up, the new procedure"³⁵⁷.

Moreover, the desire to put an end to the misuse of *de facto* remedies and to bring administrative litigation concerning freedoms back into the fold of the administrative judge implies that the latter should adopt a conception of fundamental freedoms that is at least as broad as that of the courts of the judicial order. This is possible in the light of the lessons of legal linguistics³⁵⁸. It is also desirable for the administrative judge of summary proceedings to achieve the objective that the legislator has assigned to this procedure. In view of the purpose of the summary proceedings, it is difficult to imagine the administrative judge declining jurisdiction on the grounds that he or she would be dealing with a fundamental freedom in the sense of a *de facto* case and not in the sense of Article L. 521-2 of the Code of Administrative Justice. It is therefore in the interest of the administrative judge to define the notion broadly. A strict interpretation "would thereby limit the access of litigants to this procedure, who would

354 H. KELSEN, *op. cit.* pp. 339-340. Interpretation is thus a selective operation and never imposes itself on its author; it is the result of a choice between several possible meanings of the concept considered. As Kelsen stated, 'From a point of view which considers only positive law, there is no criterion on the basis of which one of the possibilities given in the framework of the law to be applied could be preferred to the others. There is simply no method that can be said to be of positive law that would make it possible to distinguish between several linguistic meanings of a norm, only one, which would be the true meaning (...)'^(op. cit., p. 338). The different methods of interpretation "never lead to anything other than a possible result, never to a result that is the only correct one"^(op. cit., p. 339).

355 R. GUASTINI, *op. cit.* p. 98.

356 Indeed, we should not forget the teachings of Kelsen. The Viennese master stated that scientific interpretation "consists in determining, by a purely intellectual operation, the meaning of legal norms. Unlike interpretation by the legal organs, it is not the creation of law" (H. KELSEN, *op. cit.*, p. 341). It "can do nothing more or less than identify the possible meanings of legal norms. As knowledge of its object, it cannot choose and decide between the possibilities it has brought to light; it must leave the choice and the decision to the legal body that is competent according to the legal order to apply the law"^(op. cit., p. 342). Above all, "Legal interpretation must avoid with the utmost care the fiction that a legal norm only ever allows one interpretation, the 'exact' or 'true' interpretation"^(ibid.).

357 The risk of denaturing the concept would come from opening it up too widely. Indeed, if we consider everything as fundamental, nothing has this quality any more. As Ms Ponthoreau pointed out, "to grant the status of fundamental right to all rights is to run the risk of devaluing all fundamental rights" (M.-C. PONTTHOREAU, *La reconnaissance des droits non-écrits par les cours constitutionnelles italienne et française. Essai sur le pouvoir créateur du juge constitutionnel*, Economica PUAM, coll. DPP, 1994, p. 217). Similarly, M. Picard has indicated that "not everything can be fundamental, otherwise nothing would be; the fundamental is only fundamental in relation to other references that are not fundamental or are less so" (E. Picard, "L'émergence des droits fondamentaux en France", *AJDA* 1998, special issue, p. 32).

358 Legal language is based on the principle of word economy. As the number of signifiers is limited, the language of law is forced to use the same term several times to name and designate different things, ideas and concepts. Legal monosemy, i.e. the fact that a term has only one meaning in a legal system, is a relatively rare phenomenon in law, since two-thirds of legal terms are polysemous (cf. *infra*, § 105). It is therefore perfectly conceivable, and even logical, that the concept of fundamental freedom should be given different meanings in the context of interim relief and in the context of enforcement. The common reference to fundamental freedoms in these two procedures "does not prohibit a specific interpretation of these freedoms in each case" (B. FAURE, "Juge administratif statuant en urgence. Référé-liberté", *Jd. Justice administrative*, fasc. 51 (11, 2002), n° 11).

naturally turn, as they have always done, to the judicial judge by invoking the *voie de fait*³⁵⁹.

In short, an overly broad interpretation of the concept would risk distorting the summary proceedings procedure and would lead to a dilution of the concept of fundamental freedom; an overly strict interpretation would not achieve the objective pursued by the legislator. The administrative judge for interim relief must therefore seek a fair balance between these two requirements. He must also give full meaning to the terms used by the legislator.

86. In the wording of Article L. 521-2 of the Code of Administrative Justice, the expression "fundamental freedom" is preceded by the indefinite article "a". Expressing generality, this article is the equivalent of "any", and means that fundamental freedoms are considered as a generic category. The expression does not group together a single and exclusive object but a plurality of objects united by common characteristics resulting from the terms used by the law to identify them, namely their nature of freedom and their fundamental character.

A. The qualifier "freedom"

87. Any attempt to define the term "freedom" comes up against a twofold obstacle. The first difficulty lies in the absence of a legal definition of the term. As Professor Verpeaux has pointed out, there is no "legal definition of freedom" in French public law³⁶⁰. On reading Articles 4 and 5 of the Declaration of the Rights of Man and of the Citizen, "freedom is not subject to a precise definition as to its content. At most, the texts provide for a legal regime, albeit a very summary one, consisting in affirming that freedom must be considered as the rule and restrictions as the exceptions"³⁶¹. The second difficulty stems from the plurality of meanings attributed to this expression. According to Montesquieu, "there is no word that has received more different meanings than liberty"³⁶². No less than 24 entries are devoted to it in *Le Littré*. The very important polysemy of the expression can be explained by the quantitative and qualitative richness of the debates, reflections and works that have been devoted to it. As M. Morange points out, "Few concepts have given rise to as much reflection as that of freedom. Theologians, philosophers, scientists, have tried to define it and to trace its contours"³⁶³. The wealth of work to which the notion of freedom has been subjected has contributed, paradoxically, to obscuring its contours. As Robert Alexy has pointed out, "The concept of freedom is simultaneously one of the most fundamental of practical concepts and one of the most obscure"³⁶⁴. It seems possible to overcome the difficulties experienced on this point by making a rigorous distinction between Liberty and freedoms. The term has two very different meanings depending on whether it is used in the singular or in the plural³⁶⁵. Nevertheless, there is a close relationship between these two dimensions, since it is in the legal liberties that philosophical freedom takes shape.

88. Etymologically, the word freedom comes from the Latin *libertas*, from *liber*, free. Freedom has two dimensions, respectively "the *freedom to do* and the *freedom to want*"³⁶⁶.

From the point of view of the subject, freedom (*of will* or free will) is the ability to respond to a certain situation not in a single, scientifically predictable way but by choosing, on one's own initiative, between two or more ways of reacting. In this sense, freedom is the ability to choose one's own behaviour by one's own will.

Secondly, from the point of view of the intersubjective or social relationship, freedom (*to do*) corresponds to the absence of external constraints, i.e. the power to do what one wants without being prevented from doing so.

359 S. GUILLON-COUDRAY, *La voie de fait administrative et le juge judiciaire*, thesis Paris II, 2002, p. 130.

360 M. VERPEAUX, "La liberté", *AJDA* 1998 special issue, p. 145.

361 M. VERPEAUX, *op. cit.* p. 146. The author also notes that "The word is often used in a loose sense and is often used as a synonym for the word law" (*op. cit.*, p. 144).

362 MONTESQUIEU, *L'esprit des lois*, 1748, Book XI, Chapter II.

363 J. MORANGE, "Liberté", in *Dictionnaire de la culture juridique* (D. ALLAND and S. RIALS dir.), PUF, Quadrige, Lamy, 2003, p. 945.

364 R. ALEXY, *A theory of constitutional rights* (translated from the German by J. RIVERS), Oxford University Press, 2003, p. 138. Hegel already noted that "There is no idea which is more generally admitted to be indeterminate, equivocal, liable to give rise to - and thus effectively giving rise to - the worst misunderstandings than the idea of *freedom* (...)" (HEGEL, *Encyclopaedia*, reproduced in *Ecrits sur la liberté*, Seghers, coll. 'écrits', Paris, 1963, pp. 96-97. Underlined).

365 See in this sense the *Vocabulaire juridique* de l'association Henri Capitant (G. CORNU dir., 7^{ème} éd, PUF, 2005, "Liberté", p. 513), distinguishing between freedom, "a situation guaranteed by law in which each person is master of himself and exercises all his faculties as he wishes" (e.g. the preamble and Article 2 of the 1958 Constitution) and a freedom, "the unhindered exercise guaranteed by law of a particular faculty or activity" (e.g. freedom of the press, freedom of association or freedom of conventions).

366 R.-M. MOSSE-BASTIDE, *La liberté*, 4^{ème} éd., PUF, coll. Le philosophe, 1983, p. 133 (underlined). These two dimensions of freedom are inseparable and are found together in the most common definitions. Thus, according to Lalande's *Vocabulaire technique et critique de la philosophie*, freedom, in a general sense, designates the "state of being that is not constrained, that acts in accordance with its will, its nature" (5^{ème} éd., 1947, vol. 1, Quadrige/PUF, 1999, v° "Liberté"). It is from their union that Liberty is formed. Cf. R. CAPITANT, *Cours de principes du droit public*, *DÉS de droit public 1956-1957*, Les cours de droit, p. 32: "What is a free being? It is a being whose action, whose conduct is not determined or constrained from outside, but which draws the elements of its determination from within itself. The freedom of a being is the self-determination of that being."

According to this understanding, freedom is defined negatively; it is the quality of one who is not subject to constraint. In the relationship between the individual and the government, conduct "decided outside the will of the state" is called free³⁶⁷. However, the freedom to do is only effective if it is legally enforceable. As M. Verpeaux has pointed out, "For freedom to be more than a mere idea, it must be concretised and associated with human or social activity"³⁶⁸. It is the passage from the singular to the plural: freedom is embodied and takes shape in *the freedoms*³⁶⁹.

89. The transition from philosophical freedom to legal freedom refers to a relatively precise period in our legal and political history corresponding to the entry into Modernity. The word 'liberties', which already existed in the plural but in a particular sense, acquired a new meaning with this change. Previously, it had been synonymous with "privileges", designating the corporate rights recognised by the authorities to trades, social orders and inhabitants of towns³⁷⁰. The recognition of these privileges to guilds, social classes and the bourgeoisie in the cities brought about the decisive element of limiting political power. Nevertheless, it was only later, from the transition to the modern era, that "the use of 'liberties' was extended to refer to individual rights"³⁷¹. Freedoms are no longer conceived as privileges granted to a limited number of people; they become individual rights of which all men are beneficiaries.

This evolution occurred as a result of and under the influence of the important changes brought about by the entry into Modernity³⁷². The changes that society underwent at that time gave rise to a new political consensus redefining the sources of power, its justification, its exercise and its ends. Contractualism, which brought the idea of the Constitution and human rights as objects of the social contract and limits to power, was the product of this consensus³⁷³. This movement made it possible to draw up the first declarations of rights, texts strongly impregnated with the anti-statist ideology of classical liberalism³⁷⁴. These freedoms will be called by various and changing names depending on the period and the legal system. But whether they are called individual rights, individual liberties, public liberties, human rights, fundamental rights, basic liberties, human rights, moral rights or other, and beyond the differences that may oppose them, these notions all have the same purpose, which is to recognise the rights of individuals to limit the power of the state, and thus to give them the possibility of "opposition to power based on law"³⁷⁵.

These notions were to be enriched in the 20th century, particularly under the influence of socialist thinkers. It became increasingly clear that state action was not always an obstacle to the exercise of freedom but could also

367 P. BRAUD, *La notion de liberté publique en droit français*, LGDJ, coll. BDP, t. 76, 1968, p. 166.

368 M. VERPEAUX, "La liberté", *op. cit.*, p. 146.

369 This corresponds to the approach of the men of 1789. It is in the singular that they refer to freedom as one of the natural and imprescriptible rights of man. Then, from the global notion of freedom thus established, the drafters of the Declaration focus on some sectors of human activity deemed particularly important or particularly threatened in order to explain, with regard to them, the application of the general principle of freedom. In this way, "liberty is concretised in the list of liberties" (J. RIVERO, "La jurisprudence du Conseil constitutionnel et le principe de liberté proclamé par la Déclaration de 1789", in *La déclaration des droits de l'homme et du citoyen et la jurisprudence*, PUF, coll. Recherches politiques, 1989, p. 76. Underlined).

370 The notion of "liberties" is thus found in the *Magna Carta* of John the Great in 1212, for all free men, for the men of London and all other cities, towns and ports; in the *Petition of rights* of 1628 and even in some texts of the XVII^e century entitled the *Body of Liberties*, such as that of Massachusetts Bay of 1641 (see G. PECES-BARBA MARTINEZ, *Théorie générale des droits fondamentaux*: (translated from Spanish by I.A. PELE), LGDJ, Law series, 2004, pp. 28-29, and pp. 105-106).

371 G. PECES-BARBA MARTINEZ, *op. cit.*, p. 28. One passes then "from the privilege (...) granted to a certain place or a certain person to do good and grace" (Alfonso X the Wise) to the fundamental right with a generic addressee, the "homo iuridicus", and with an abstract content, valid for every man" (*op. cit.*, p. 106).

372 Economic and social change, with the emergence of a new economic system and the gradual rise of an increasingly influential social class - the bourgeoisie. Intellectual and scientific change, with the process of secularisation and the progress of individualism, rationalism and humanism. Finally, political change, with the emergence of the modern state as a sovereign power recognising nothing superior to itself and claiming a monopoly on the use of legitimate force. See G. PECES-BARBA MARTINEZ, *op. cit.* p. 106 and following.

373 According to social contract theories, the individual enjoys absolute independence in the natural state, i.e. prior to any civil society. By joining together in society, men give up this absolute freedom in order to create, by a unanimous contract, the state and public sovereignty. Men were to be regarded as having abdicated only that part of their native independence which was absolutely incompatible with the notion of the State; they had made only those sacrifices which were strictly indispensable. What they had retained, on the contrary, this residue of their native liberty, constituted individual rights superior to those of the State, since they were prior to it and imposed upon its respect. Rousseau, it is true, added a restriction to the thesis that was likely to compromise it radically. After declaring: "Everything that each person alienates, by the social pact, of his power, his goods, his freedom, is only that part of it whose use is important to the community", he added: "But it must be agreed that the sovereign alone is the judge of this importance" (J.-J. ROUSSEAU, *The Social Contract*, 1762, Book II, Chapter IV). The other theories of the social contract did not contain this reservation, and their importance was decisive. As Adhémar Esmein pointed out, the theory of the social contract "was fruitful, since it introduced the principle of individual rights" (A. ESMEIN, *Éléments de droit constitutionnel français et comparé*, 6^{ème} éd., 1914, republished by Editions Panthéon-Assas, coll. Les introuvables, 2001, p. 542).

374 The state appears as an entity distinct from society and society as a group of individuals who normally live outside the control of the state. Liberties are defined by the abstention of the state, by the limitation of power. In this sense, the liberty of the Moderns differs from the liberty of the Ancients. This opposition between the two forms of freedom is attributed to Benjamin Constant. In the case of the Ancients, freedom is expressed through participation in power. For the Moderns, on the other hand, freedom means the limitation of power, the prohibitions on the state encroaching on the prerogatives of the individual. "It is therefore necessary to define a sphere that is forbidden to political power, wherever it may be: that of individual liberties" (P. WACHSMANN, *Libertés publiques*, 4^{ème} éd., Dalloz, coll. Cours, 2002, p. 22). According to Benjamin Constant, "The aim of moderns is security in private enjoyment; and they call freedom the guarantees granted by institutions to these enjoyments" (B. CONSTANT, *De la liberté des Anciens comparé à celle des Modernes*, 1819, in *De l'esprit de conquête et de l'usurpation*, Garnier-Flamarion, 1986, p. 276).

375 C. LEFORT, "Droits de l'homme et politique", *Libre*, n° 7, 1980, p. 25.

promote it, particularly by organising it. Whereas the liberal doctrine of the 19th century^e only envisaged the protection of a sphere of autonomy against the interference of public power as the sole purpose of freedoms, it was gradually considered that the state could not remain absent from the mechanisms for realising freedoms. Public authority is no longer understood solely as a threat to individuals; on the contrary, it is called upon to participate in the realisation of these freedoms and to allow the conditions for their exercise to be met. This approach gives way to a more voluntarist conception of the missions of public authority and expresses an enriched approach to the notion of freedoms.

However, the procedure of Article L. 521-2 does not aim to protect all freedoms, but only "fundamental" ones.

B. The adjective "fundamental"

90. Etymologically, the word "fundamental" comes from the Latin *fundamentalis*, from *fundamentum*, foundation. In its original meaning, the fundamental is, according to the *Littré*, "that which serves as a foundation". In this sense, it is synonymous with "basal" or "constitutive". A second meaning has developed in addition to the first, designating as fundamental that which has "an essential and determining character"³⁷⁶. Thus, the fundamental corresponds to that which is at the foundation and/or has an essential character. The determination of what is at the foundation does not raise any difficulties in law. The foundation of a legal order lies in its Constitution, its Basic Law. As Professor Drago points out, "The notion of fundamental right refers to the foundations of the legal order. The lawyer then naturally turns to the Constitution to find out what the fundamental rights are"³⁷⁷. Nevertheless, the legislator did not intend to limit fundamentality to a specific normative rank. If Parliament had wanted to restrict the scope of Article L. 521-2 of the Code of Administrative Justice to constitutional freedoms, it would have substituted the notion of fundamental freedom with that of constitutionally guaranteed rights and freedoms³⁷⁸. The second meaning of the adjective "fundamental" is more complex to understand. Indeed, in the absence of precise criteria, it remains relatively delicate to determine what is essential, since this requires an assessment of the "quality" of a given freedom.
91. The meaning of the adjective 'fundamental' can be clarified and refined by analysing doctrinal controversies. As a *theoretical* concept, the notions of fundamental freedom and fundamental right are subject to two quite distinct meanings. The division between the two meanings is based entirely on the meaning of the adjective 'fundamental' and on the question of what 'fundamentality' consists of. There are, as always³⁷⁹, two methods of identifying the notion: one formal, the other material. The formal approach identifies as fundamental any freedom protected by a norm at a supra-legislative level. The material approach measures the fundamentality of a freedom by the degree of its importance.

1. Unavailable freedoms

92. The formal, or strict, approach is to define fundamentality by reference to the - supra-legislative - legal value of the norm under consideration. According to this view, "Fundamental rights and freedoms are simply those rights and freedoms protected by constitutional or (and) European and international standards. No more, no less. Thus, all rights and freedoms that enjoy constitutional or (and) international (or European) protection are fundamental rights, regardless of their degree of "fundamentality". And not all rights and freedoms that are not constitutionally or internationally (or European) protected are fundamental rights"³⁸⁰. In this sense, fundamental rights and freedoms are characterised by their *unavailability*. "The adjective "fundamental" means (...) that the constituent power in each country, or the international community at European level, have decided to place a certain number of values and guarantees beyond the reach of the majorities and the executives they support"³⁸¹. These are freedoms placed beyond the reach of the constituted powers. This understanding of

376 Le grand Robert de la langue française.

377 G. DRAGO, "Les droits fondamentaux entre juge administratif et juges constitutionnel et européen", *Dr. adm.* 2004, Etudes n° 11, p. 7.

378 The expression is used in constitutional case law (CC, n° 85-198 DC, 13 December 1985, cons. 11, *Rec.* p. 78; n° 88-248 DC, 17 January 1988, cons. 28, *Rec.* p. 18; n° 89-260 DC, 28 July 1989, cons. 6, *Rec.* p. 71; n° 93-333 DC, 21 January 1994, cons. 19, *Rec.* p. 32; n° 96-378, 20 March 1997, cons. 15, *Rec.* 71; No. 93-333 DC, 21 January 1994, cons. 19, *ECR* p. 32; No. 96-378, 20 March 1997, cons. 15, *ECR* p. 99; No. 97-388 DC, 20 March 1997, cons. 48, *ECR* p. 31; No. 97-389 DC, 22 April 1997, cons. 30, *ECR* p. 45; No. 2000-430 DC, 27 July 2000, cons. 50, *ECR* p. 95). The Council also uses the expression "constitutionally guaranteed freedoms" (CC, no. 2000-441 DC, 28 December 2000, cons. 42, *ECR* p. 201). In addition, the expression "constitutionally guaranteed right" was introduced into Article 72(4) of the Constitution of 4 October 1958 following the constitutional revision of 28 March 2003.

379 Dean Vedel has shown that "any definition of a legal concept can be made either from the *material* or the *formal point of view*" (G. VEDEL, "Les bases constitutionnelles du droit administratif", *EDCE* 1954, p. 27. Underlined).

380 L. FAVOREU et alii, *Droit constitutionnel*, 9^{ème} éd, Dalloz, coll. Précis, 2006, n° 1218.

381 L. FAVOREU et al, *Droit constitutionnel*, op. cit, n° 1224.

the concept of fundamental rights and freedoms was explicitly built on the German concept of *Grundrecht*³⁸². The formal definition is presented as an import or transposition of the concept as it exists in German law. This conception is presented as the only one possible because, its supporters claim, "This is how the expression is understood in comparative law, and in particular in German law from which it originates"³⁸³.

This approach has been widely disseminated in the literature. Many authors unreservedly endorse this definition of fundamental rights and freedoms³⁸⁴. Other authors, while inspired by this definition, make certain adjustments deemed necessary in order to limit fundamentality, either to standards of constitutional value³⁸⁵ or to supralegislative standards meeting additional criteria³⁸⁶.

93. This conception of fundamentality has three main advantages. Firstly, it is in line with a certain tradition of public law, which has more often than not favoured formal definitions over material ones³⁸⁷. Secondly, this approach offers the advantage of predictability and legal certainty. The formal criterion is simple, clear and easy to implement. Finally, it guarantees the legal validity of the recognised fundamental freedoms. If the fundamental freedoms are limited to supra-legislative norms, the text supporting its recognition cannot in practice be challenged and is therefore safe from invalidation. Whereas a change in constitutional, international, European or Community norms may render a legislative norm invalid, this risk is excluded for supralegislative norms.

However, the strictly formal approach has two limitations. Firstly, it is not - contrary to the way it is sometimes presented - a *necessity*. It does not appear to be true that the notion of fundamental right is defined in comparative law by its place in the hierarchy of norms and that this is the case in all countries³⁸⁸. Moreover, seeking the fundamentality of freedoms on the basis of an exclusively formal criterion "overlooks their 'essentiality'"³⁸⁹. Indeed, this method does not take into account the importance of rights and freedoms. However essential they may be in the eyes of citizens, a freedom that is absent from any constitutional or international text will be denied the status of a fundamental norm. This criterion is therefore somewhat rigid, unlike the second approach, which consists of considering any freedom that is essential as fundamental.

382 A concept that Michel Fromont was one of the first to make known in France thanks to his article "Les droits fondamentaux dans l'ordre juridique de la République fédérale d'Allemagne", published in the *Recueil d'études en hommage à Charles Eisenmann*, éditions Cujas, 1975, pp. 49-64.

383 L. FAVOREU et al, *Droit constitutionnel*, op. cit, n° 1218.

384 See in particular: N. MOLFESSIS, *Le Conseil constitutionnel et le droit privé*, LGDJ, coll. BDprivé, t. 287, 1997, p. 8; P. AUVRET and J. AUVRET-FINCK, "La complémentarité des systèmes juridictionnels de protection des libertés publiques", in *Gouverner, administrer, juger. Liber amicorum Jean Waline*, Dalloz, 2002, p. 403; V. TCHEN, "Protection des droits fondamentaux", *Jcl. administratif*, fasc. 1440 (11, 2002), n° 1; O. DORD, "La notion de libertés publiques. Libertés publiques ou droits fondamentaux?", *Cahiers français* n° 296 *Les libertés publiques*, 2000, p. 12; M. BRANDAC, "L'action en justice, droit fondamental", in *Nouveaux juges, nouveaux pouvoirs? Mélanges en l'honneur de Roger Perrot*, Dalloz, 1995, p. 3; J. CHEVALLIER, *L'Etat de droit*, 3^{ème} éd, Montchrestien, coll. Clefs, 1999, pp. 105-111.

385 Cf. X. PHILIPPE, *Droit administratif des libertés*, Economica, 1998, p. 14; A. AUER, "Les droits fondamentaux et leur protection", *Pouvoirs* n° 43, 1987, p. 87. This was the definition initially developed by Dean Favoreu (L. FAVOREU, "Rapport général introductif" of the colloquium *Cours constitutionnelles européennes et droits fondamentaux*, colloque Aix-en-Provence, 19-21 February 1981, Economica PUAM, coll. DPP, 1982, reed. 1987, p. 41).

386 For Professor Lachaume, the value criterion is necessary but not sufficient; other criteria must be taken into account to identify fundamentality. Constitutional and international rights and freedoms can only have the status of fundamental rights if they meet additional conditions. M. Lachaume identifies fundamental rights "on the basis of the combination of three elements: the legal support, the addressee, the legal regime" (J.-F. LACHAUME, "Droits fondamentaux et droit administratif", *AJDA* 1998, special issue, p. 93). These are constitutional or international rights, addressed to a natural or legal person and "benefiting from a specific legal regime: prohibition of subjecting these rights to a system of prior authorisation; exclusive competence of the legislator to regulate them either to make their exercise more effective, or to reconcile these rights with other rules or principles or objectives of constitutional value (...); uniform application of these rights throughout the territory of the Republic" (*op. cit.*, p. 94).

387 As Dean Vedel stated, "The definitions of our public law are organic and formal, not material" (G. Vedel, note under TC, 27 November 1952, Préfet de la Guyane and CE, Ass. 17 April 1953, Falco and Vidallac, *JCP G* 1953, II, 7598). Similarly, M. Dupeyroux emphasised that the formal and organic point of view seems 'to remain the essential point of view of our public law' (O. DUPEYROUX, 'La jurisprudence, source abusive de droit', in *Mélanges offerts à Jacques Maury*, t. II, Dalloz Sirey, p. 365, note 55). See, in this sense, the analyses developed by the great masters of public law on the notion of law, showing the primacy of formal criteria (R. CARRE DE MALBERG, *Contribution à la théorie générale de l'Etat (1920-1922)*, Bibliothèque Dalloz, reed. 2003, t. 1, pp. 326-327; G. VEDEL, "Les bases constitutionnelles du droit administratif", *op. cit.*, p. 28, stating that "The concepts and criteria of our public law are mainly formal; the material concepts and criteria are subsidiary"). It should also be noted that Maurice Hauriou, arguing for a definition of administrative acts "by procedure" and not "by the nature of the act", added that "in general, moreover, *formal* theories are more reliable than *material* theories" (M. HAURIU, *Précis de droit administratif*, 4^{ème} éd., Larose, 1901, p. 253. Underlined).

388 It is essentially only in Germany that the concept is defined in this way. Dean Favoreu himself recognised in 1981 that the expression "fundamental rights" is "only really used as such in federal Germany, where it has a precise meaning provided for by the Constitution" (L. FAVOREU, above-mentioned article, p. 41). There is no single meaning of the concept in comparative law (see *supra*, §§ 68-70). Moreover, it has not been established that the concept has been "imported" into France. "Not only is the expression found in the writings of French authors at the beginning of the 20th century (see in particular M. HAURIU, *Précis de droit constitutionnel*, 1^{ère} éd., Sirey, 1923, p. 93), but German authors also assert that there was a French influence in the emergence of the German concept of *Grundrecht* (see T. MEINDL, above-mentioned thesis, pp. 97-101).

389 F. BRENÉT, "La notion de liberté fondamentale au sens de l'article L. 521-2 du CJA", *RDP* 2003, p. 1541.

2. Essential freedoms

94. The proponents of the substantive approach define fundamental freedoms as eminent, essential or primary freedoms, i.e. those characterised above all by their importance. Unlike the representatives of the formal approach, whose positions are relatively homogeneous, the supporters of the material approach belong to radically different and even opposing schools of thought. Thus, two forms of essentialism can be distinguished: jusnaturalist essentialism and juspositivist essentialism.
95. Etienne Picard is the main author to have presented a comprehensive conception of fundamental rights and freedoms from a jusnaturalist perspective³⁹⁰. His approach can be summarised in two propositions: on the one hand, fundamentality is a property that is indifferent to the criterion of legal value; on the other hand, this property calls for and justifies the prevalence of the norm thus qualified. To describe this conception, it is sometimes stated that Professor Picard refers to all the rights and freedoms that are essential in nature as fundamental rights. While this presentation is not entirely erroneous, it is nevertheless highly reductive and does not capture the essence of his theory or, consequently, its most controversial aspects.

Firstly, for Professor Picard, the fundamentality of a right does not lie in the legal norm that bears it but in its intrinsic content and, more precisely, in its correspondence to the value system that underpins the legal order. According to Etienne Picard, the rules of positive law do not express the entire reality of law. On their own, they cannot explain the meaning and dynamics of the legal phenomenon³⁹¹. In order to understand it in its entirety, it is necessary to include values in the legal analysis: "values cannot be rejected outside the law, because they give it its general meaning"³⁹². For the author, fundamentality is that which corresponds to the higher values of the legal order. In this sense, fundamentality constitutes a property external to the norm. The fundamentality of a right or freedom must be determined by appealing to extranormative considerations, i.e. by confronting the values³⁹³. Secondly, fundamentality is characterised by its effect, which is to prevail over any other consideration or claim that might oppose it. In this respect, fundamentality is not a constant property but varies according to the circumstances of each case. According to Etienne Picard, "the many instances of their invocation by texts or, above all, by the judge, show that these various rights have one thing in common: they are all marked by the effect of prevalence that attaches to this qualification. This effect is practically constant; and it may be independent of the formal normative source on which the right is based"³⁹⁴. A substantive logic, focusing on the content and importance of rights, would thus prevail over a formalist logic, concerned with the formal structuring of the legal order. Freedoms would be fundamental as such; positive law would merely attribute to them the most important place, or at least the place sufficient to ensure their prevalence³⁹⁵.

³⁹⁰ His position was presented in two written contributions: "L'émergence des droits fondamentaux en France", *AJDA* 1998, special issue, pp. 6-42; "Les rapports entre le Droit international public et la Constitution selon la jurisprudence du Conseil d'Etat", *RA* 1999, special issue *Evolutions et révolutions du contentieux administratif*, pp. 15-46. For a jusnaturalist approach to the concept of fundamental right, see also W. SABETE GHOBRIAL, *De l'obligation de la reconnaissance constitutionnelle des droits fondamentaux. A la recherche d'un fondement de l'obligation*, Bordeaux I thesis, 1994, 537 p. Developing the idea that the constituent process is not free, the author asserts the existence of an obligation of a legal nature imposing on the original constituent power the inclusion of specific rights and freedoms when drafting a new Constitution. This idea is clearly open to criticism, as it has no legal basis. While there is undoubtedly strong political pressure to include rights and freedoms in the drafting of a constitution, it is logically impossible to infer any legal obligation from this. The two sources of obligation (political and legal) are not on the same level. It is one thing to establish the existence of a political incentive, but quite another to deduce its legal nature.

³⁹¹ According to him, the legal cannot be reduced to the normative. It is therefore advisable "not to consider formal legal reality as the ultimate expression of legal reality" (E. Picard, "L'émergence des droits fondamentaux en France", *AJDA* 1998, special issue, p. 8). It appears, in this perspective, that "it is not so much the formal law that produces fundamental rights; rather, it is the fundamental rights that grasp the law and build it into its general structure: its various technical and formal categories tend to ensure this prevalence, but without any of them managing to exhaust the general and common background of these fundamental rights" (*op. cit.*, p. 8).

³⁹² E. PICARD, *op. cit.* p. 37. The author refuses to consider the legal and the axiological as two separate and antinomic worlds. He develops a conception of the legal order that is open to values, or even subject to values. This position is a break - assumed and claimed - with the Kelsenian representation of the legal order.

³⁹³ Thus, "fundamentality is not really to be found in the formal norm that bears the right under consideration. If, therefore, it is not in the norm, it is because it certainly resides in the value of the right itself, in relation to the terms of the concrete conflict in which it is involved (...)" (E. PICARD, *op. cit.*, p. 15). The author distinguishes, in this respect, between intranormative fundamentality (included in the norm) and extranormative fundamentality (external to the norm). "Fundamentality operates in an intranormative way when the only applicable norm, formally comprising only one and the same rank, does not establish a hierarchy between the rights or claims in conflict, and when the judge nevertheless identifies a right as fundamental. It is extranormative when the judge finds a right outside the formal norm and nevertheless applies it against another claim justifiable on the basis of the same norm, while imputing this prevalence to the latter. Recourse to the extranormative thus implies that it will override the normative - otherwise it would be pointless for the judge to go looking for a right that is not formally in the text" (*op. cit.*, p. 15).

³⁹⁴ E. PICARD, *op. cit.* p. 9.

³⁹⁵ In this respect, "fundamental rights are characterised by their role, which is itself based on the importance recognised to these rights: fundamental rights are all those which, appearing sufficiently essential to the legislator, are likely to prevail against any other claim which might oppose them. These claims may be powers, competences, or even other rights, other legal principles or various requirements such as those that may be derived from the general interest or public order (which, however, in this case are not qualified as such). In each case, however, these considerations must give way to the fundamental right, even though they could invoke, in their defence, the fact that they too rest on the same formal normative basis as that on which the fundamental right is expressed. The same is true, *a fortiori*, when the norm

This approach to fundamentality is questionable in some respects. First of all, it is based on the questionable presupposition that the legal is not strictly and exclusively identified with positive law³⁹⁶. In so doing, it breaks with the principles governing our legal system, which postulate the existence of a positive law made up of all the legal rules in force in a legal order at a given time. The law as a whole is identified with these norms laid down by the human will; there is no need to go beyond them to penetrate the legal phenomenon. On the other hand, this conception leaves room for complete arbitrariness in the determination of fundamentality. The assessment of fundamentality is entirely subordinated to the value judgment made by the courts. Moreover, since fundamentality is a property that depends on the circumstances of each case, it becomes a fluctuating property, as a right may be qualified as fundamental in a particular situation and lose this quality in a different factual configuration.

96. Other authors also develop a material conception of fundamental rights and freedoms, but this time from a juspositivist perspective. This position includes representatives of the positivist doctrine who consider the supra-legislative or constitutional as the main but not exclusive source of fundamental freedoms. For these authors, fundamentality is linked mainly - but not exclusively (this is what differentiates them from the partisans of the formal approach) - to the legal value of the norm that enshrines them. Refusing to confine the fundamental to the constitutional (or supra-legislative), these authors add to constitutional rights (or to constitutional and international rights) those rights and freedoms which, although situated at a lower normative level, are nonetheless essential. For example, Norbert Foulquier states that constitutional law and international law represent "the *principal* sources of fundamental rights"³⁹⁷, thus admitting the existence of secondary sources of a lower rank. Similarly, Dominique Turpin states that "While they may be set out in simple laws (...) and by 'ordinary' judges (...), fundamental rights are *above all* those that are protected against the legislative power itself, on the basis of a constitutional or international text (and by a judge)"³⁹⁸. For Mr Morange, the expression fundamental freedoms "highlights their link with a plurality of fundamental texts, constitutional, international and European, without neglecting other legislative and jurisprudential sources, the latter being themselves very varied"³⁹⁹. In the same vein, Marcou states that fundamental freedoms are "recognised by the Constitution, international conventions and the law"⁴⁰⁰.

The advantage of this approach is that it offers great flexibility in determining fundamental rights and freedoms. It also makes it possible to consider as such rights and freedoms that are not included in the constitutional text or in international instruments but are nevertheless essential⁴⁰¹. However, this approach relies on a material criterion - admittedly in a subsidiary capacity - to assess the essentiality of a lower-ranking norm. However, its handling is not free of subjectivity.

97. Thus, there are two approaches to fundamentality available to the administrative judge. The judge is free to choose between the formal and the substantive conception of the adjective "fundamental", and it is considerations of jurisprudential policy that should lead him to opt for one or the other of these two positions. If the administrative judge is encouraged to turn to supra-legislative norms, he or she is in no way obliged to limit himself or herself to them, as the proponents of the formal approach have admitted through the voice of their most prominent representative⁴⁰².

II. The indifference of legal and doctrinal qualifications

on which they can be based is established only at a lower level. But, very remarkably, it can also be the other way round: the fundamental nature of a right can be invoked to resist victoriously a claim that could have higher formal titles" (E. Picard, *op. cit.*, p. 9).

396 For a critique of the doctrine of natural law, see H. KELSEN, "Positivism juridique et doctrine du droit naturel", *Mélanges en l'honneur de Jean Dabin*, t. I, Bruylant Sirey, 1963, pp. 141-148.

397 N. FOULQUIER, Les droits publics subjectifs des administrés. Emergence d'un concept en droit administratif français du XIX^e au XX^e siècle, Dalloz, coll. NBT, 2003, p. 7. Not underlined.

398 D. TURPIN, *Libertés publiques et droits fondamentaux*, Seuil, 2004, p. 8. Underscored

399 J. MORANGE, "Liberté", in *Dictionnaire de la culture juridique* (D. ALLAND and S. RIALS dir.), PUF, Quadrige, Lamy, 2003, p. 950.

400 G. MARCOU, "Le référé administratif et les collectivités territoriales", *LPA* 14 May 2001, n° 95, p. 46-47.

401 It has been said that "the 'fundamental' nature of a freedom has never been a criterion for recognising the existence of a 'fundamental freedom' in German law or in other laws" (L. Favoreu et al, *Droit constitutionnel, op. cit.*, no. 1219). However, this assertion appears questionable in the light of foreign examples, particularly American and Portuguese, where fundamentality may result from the importance of a right (see *above*, § 44 and § 69).

402 Although Dean Favoreu considered this hypothesis unlikely from a practical point of view, he nevertheless admitted, *in principle*, the possibility of recognising fundamental freedoms of legislative origin in the context of Article L. 521-2 of the Code of Administrative Justice. See L. FAVOREU, "La notion de liberté fondamentale devant le juge administratif des référés", *D.* 2001, p. 1741: "It could be envisaged that an infringement of a fundamental freedom that does not appear on the list of freedoms protected at the constitutional and European levels could be invoked; given the number of such freedoms, it seems unlikely that this would occur. But it is reasonable to imagine that the Council of State, which is already largely filled with the list of constitutional and European freedoms, will limit the influx of interim relief cases by sticking to the said list; this will be a convenient way for it to dismiss a certain number of interim relief cases. While accepting the possibility of fundamental freedoms of legislative rank in the context of summary proceedings, Dean Favoreu considered that the administrative judge would be reluctant to do so for practical reasons.

98. In addition to the terms used by the law, a second series of constraints must be taken into account to determine the interpreter's margin of freedom: that of the normative texts and decisions of jurisdictional bodies designating a given right or freedom as "fundamental". Are the designations thus made likely to bind the administrative judge in the process of identifying fundamental freedoms? Is the Council of State obliged to adopt the legal and even doctrinal qualifications of the concept of fundamental freedom? Must it consider as fundamental freedoms the standards that have received this qualification?
99. What is, first of all, the scope of the textual qualifications resulting from domestic law or international conventions? As regards legislative statements qualifying a freedom as "fundamental", these are devoid of normative scope and, as such, are not enforceable against the administrative judge. These provisions fall under what has been called "poster texts, a soft law, a vague law, a law "in a gaseous state""⁴⁰³. From a point of view that considers only the law, the administrative judge of summary proceedings has no obligation to consider as eligible for the procedure of Article L. 521-2 the rights and freedoms qualified as such by the law⁴⁰⁴. With regard to international conventions whose title includes the expression "fundamental freedom", there is again no obligation for the judge to take these qualifications into account. Insofar as the titles of texts and subdivisions of normative texts are devoid of legal value, the rights and freedoms set out in a text bearing this title are not, by this very fact, freedoms subject to Article L. 521-2 of the Code of Administrative Justice. They may represent for the judge an indicator or a clue in the identification of fundamental freedoms but are in no way binding on him. As for the international instruments referring to the normative source of these rights and freedoms, it should be noted that they only use the expression "fundamental right" and have no legal value or direct effect in French law⁴⁰⁵.
100. What is the significance for the interim relief judge of the use of the concept of fundamental freedom by the ordinary courts in various disputes, including that of administrative assault? Here again, it should be noted that, from a legal point of view, there is no principle that obliges the interim relief judge to adopt the qualifications used by the ordinary courts. On the one hand, the disputes and procedures in question are in a situation of mutual autonomy. On the other hand, the case law of the ordinary courts cannot legally be imposed on the interim relief judge, who is himself an ordinary judge. Should a different fate be envisaged for the constitutional, Community and European courts, whose decisions are, with respect to the ordinary court in particular, given the authority of *res judicata*, or even the authority of *res judicata* interpreted⁴⁰⁶? The answer is no, insofar as neither of these two authorities extends to the reasons which, in a decision, qualify a given freedom as 'fundamental'. Under these conditions, the fact that a norm is qualified as a fundamental freedom by one of these jurisdictions does not oblige the administrative judge to adopt this qualification for the application of the summary judgment⁴⁰⁷. The use of the concept by the Constitutional Council, the Court of Justice of the European Communities and the European Court of Human Rights is not binding on the interim relief judge⁴⁰⁸.
101. Finally, the scope of doctrinal and foreign qualifications must be assessed. There is no doubt that doctrine and comparative law offer a particularly interesting perspective for clarifying and understanding the concept of fundamental freedom⁴⁰⁹. However, as enriching as they may be, these doctrinal analyses and foreign experiences do not impose themselves on the judge of the *référé-liberté* to retain a determined conception of

403 "De la sécurité juridique", *EDCE* 1991, no. 43, p. 32. The report noted that "in 1991, as in every year, the Council of State saw the passage of a significant number of laws whose Article 1^{er} is devoid of any normative content" (*op. cit.*, p. 33). The formulas indicating that a right or freedom has a fundamental character are undoubtedly part of this. These expressions have their place in the explanatory memorandum of a bill or draft law. However, they have no place in the text finally adopted by Parliament. It should be noted in this respect that the Constitutional Council does not regard provisions in this category as legal norms. As a result, introductory provisions (CC, no. 2000-435 DC, 7 December 2000, cons. 11, *Rec.* p. 164) or announcement texts (CC, no. 2001-455 DC, 12 January 2002, cons. 55, *Rec.* p. 49) cannot be argued to be unconstitutional if they have no legal scope.

404 This could only be different in one case: where the law qualifies a norm as a "fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice". It is only in this case that the freedom thus designated would be subject to the summary proceedings as of right.

405 By hypothesis, the American Convention on Human Rights does not concern the French authorities. As for the Universal Declaration of Human Rights, it represents only a resolution of the General Assembly of the United Nations without effect in domestic law (see notably CE, 23 November 1984, *Roujansky, Lebon* p. 383).

406 See *infra*, § 190.

407 It should also be noted that the Strasbourg and Luxembourg courts are not empowered to interpret the provisions of national law. Consequently, and whatever the approach developed by each of the two courts on the concept of fundamental freedom, neither is competent to dictate to the French judge how he should understand this expression in the context of Article L. 521-2 of the Code of Administrative Justice.

408 It is therefore not possible, as some authors do, to put forward these qualifications, even in excess, to explain the solutions adopted by the judge of the *référé-liberté*.

409 Doctrinal analyses provide conceptual and theoretical tools; comparative law is very useful in order to better understand the meaning of a concept used in several legal systems. As Jürgen Schwarze points out, "Even in the practice of legal development and interpretation of laws by the judge, both in national law and in international and supranational law, it is advisable to have recourse to comparative law studies when terminological or conceptual uncertainties need to be eliminated (...)" (J. SCHWARZE, *Droit administratif européen*, t. 1, Bruylant, 1994, p. 93).

fundamental freedoms. Although the Conseil d'Etat is not indifferent to doctrinal constructs⁴¹⁰, it is in no way bound by the analyses it develops. Moreover, the fact that a concept is used with a certain meaning in another legal system is not binding on the French judge, especially when the concept is subject to divergent assessments depending on the legal system in question.

Thus, in strict law, the various uses that legal actors make of the concept of fundamental freedom in French and foreign law are in no way binding on the interim relief judge. A third requirement must be highlighted to determine the interpreter's margin of freedom. It consists in the obligation of the judge to understand the notion of fundamental freedom conceptually.

III. The need for conceptual coherence

102. Fundamental freedoms were conceived by the legislator as a conceptual legal category. This implies that certain requirements, particularly in terms of coherence and consistency, must be met in determining which norms are eligible for enshrinement in the framework of Article L. 521-2.

103. Some authors have presented the notions of fundamental rights or fundamental freedoms as *standards*. Thus, Ms Champeil-Desplats has stated that in constitutional jurisprudence, "the notion of fundamental right, because it has no legal definition and refers to the dual register of morality and the foundation of law, plays (...) the role of a legal 'standard', i.e. a flexible notion with an indeterminate content that acts as a justification for a decision"⁴¹¹. However, neither in constitutional jurisprudence nor anywhere else can the notion of fundamental freedom or fundamental right be considered a standard.

Indeed, standards - also called, with certain nuances according to the authors, framework notions, fuzzy notions, flexible notions or notions with variable content - are legal concepts whose application requires "an appreciation, not an interpretation"⁴¹². Intentionally left vague, these concepts "have the natural vocation of being indeterminate, and therefore always determinable and redeterminable" according to circumstances and times⁴¹³. The judge verifies, on a case-by-case basis, that the data of the case fall within the framework of the directive criterion. For their implementation, "the judge's assessment is necessarily fluctuating, since their application criteria cannot be dissociated from the social context and a subjective perception of the facts"⁴¹⁴. Thus, "When the judge is asked to specify these vague notions, he draws on *extra-legal* considerations: he takes into account customs, morals, social or economic data, circumstances, etc."⁴¹⁵. The meaning of these notions "is fluid, and evolves in particular according to spatio-temporal factors"⁴¹⁶.

The concept of fundamental freedom does not correspond to this definition⁴¹⁷. The intellectual process of determining fundamental freedoms is not a matter of case-by-case assessment or legal qualification⁴¹⁸ but strictly one of interpretation. While the meaning of the concept of fundamental freedom is not predetermined and is relatively open-ended, this does not mean that it can vary according to the cases submitted to the judge. The meaning of the concept does not depend on the particular circumstances of each case. Factual data do not play a role in determining whether or not a fundamental freedom is present in a case. This concept is not susceptible to a renewed assessment in each case.

104. The term fundamental freedom is an abstract legal concept and, more precisely, a conceptual notion⁴¹⁹. It is

410 See "Le Conseil d'Etat et la doctrine. Célébration du 2^{ème} centenaire du Conseil d'Etat", *Journée d'étude du 25 novembre 1996*, RA n° 300, pp. 6-69; G. JEZE, "Collaboration du Conseil d'Etat et de la doctrine dans l'élaboration du droit administratif français", *Livre jubilaire du Conseil d'Etat*, Recueil Sirey, 1952, pp. 347-349.

411 V. CHAMPEIL-DESPLATS, "La notion de droit 'fondamental' et le droit constitutionnel français", *D.* 1995, p. 328.

412 G. CORNU, *Linguistique juridique*, Montchrestien, 1990, p. 91.

413 G. CORNU, *Droit civil. Introduction, les personnes, les biens*, Montchrestien, 9^{ème} éd., 1999, n° 188. Examples of standards are: public order, good morals, the interest of the child, the general interest, the good father of the family, fault, negligence, the normal, exceptional or particular character of a situation. By its structure, "the legal standard is a pure instrument for measuring behaviour and situations in terms of normality" (S. RIALS, *Le juge administratif français et la technique du standard (essai sur le traitement juridictionnel de l'idée de normalité)*, LGDJ, coll.)

414 J.-L. Bergel, *Méthodologie juridique*, PUF, coll. Thémis droit privé, 2001, p. 118.

415 V. FORTIER, "La fonction normative des notions floues", *RRJ* 1991/3, p. 759. Emphasis added.

416 V. FORTIER, *op. cit.* p. 756.

417 If there are standards in the wording of Article L. 521-2 of the Code of Administrative Justice, they are to be found not in the notion of fundamental freedom but in the expressions "urgent", "serious" and "manifestly".

418 Qualification necessarily presupposes a factual situation to be qualified. See D. Labetoulle, "La qualification et le juge administratif: quelques remarques", *Droits* 1993/18, p. 31: "For the administrative judge, legal qualification may be defined (...) as the process of bringing a *factual* datum (simple or complex) closer to a pre-existing legal concept, of seeking to what extent this datum falls within the scope of this concept and of drawing the first consequences of this identification" (emphasis added).

419 Certain concepts known as 'primary' or 'vulgar', such as animal, birth or death, are the representation of an extra-legal reality. Other concepts, known as 'reflexive' or constructed, such as the State, responsibility or contract, are properly legal and are often more particularly described as 'notions' (see C. DU PASQUIER, *Introduction à la théorie générale du droit et à la philosophie du droit*, 6^{ème} éd., Delachaux & Niestlé, 1979, No. 183). The notion of fundamental freedom falls into the second category, that of conceptual notions.

a legal category that is and can only be conceptual⁴²⁰. According to Dean Vedel's definition, conceptual notions "can be fully defined according to the usual logical criteria and their content is abstractly determined once and for all. No doubt they are not immutable, but the enrichments or subtractions they may undergo are attributable to the evolution of the data to which they are applied, and not to their very nature"⁴²¹. Unlike functional concepts⁴²², "The use of these concepts depends on their content; the content does not depend on the use"⁴²³. Therefore, conceptual notions "are susceptible to an abstract *a priori* definition, independent of the concrete situations they cover"⁴²⁴.

This nature implies a certain number of constraints for the administrative judge in determining the fundamental freedoms. The norms designated as such must all have the same attributes and present a real conceptual coherence. The judge cannot group together dissimilar things in a conceptual category. Their characteristics must be constant; they cannot vary from one fundamental freedom to another, and thus depend on a jurisprudential policy involving arbitrariness and subjectivity. While some things can be felt, the law must be understood. According to Jean Dabin, "rules which, because of the uncertainty of definition - especially in the field of qualitative values - rely too heavily on the discretionary power of the law's implementing bodies, are not without danger: intelligence, guided and even, if you like, restrained by categories, is less likely to go astray than judgement, which is always more or less subjective (...)"⁴²⁵. The coherence and predictability of the law are at stake. Fundamental freedoms must therefore have specific characteristics that differentiate them from the mass of other standards⁴²⁶. These characteristics must be constant, be found in all the norms included in the category of fundamental freedoms and be lacking, in whole or in part, in those that are excluded.

IV. A different meaning of related concepts

105. A fourth and final set of constraints must be highlighted. It concerns the way in which the notion of fundamental freedom must fit into the neighbourhood community in which it is situated.

As Professor Cornu has shown, the language of law operates on the principle of the economy of words. While linguistic signs are limited in number, the phenomena, things or ideas to be named are infinite and in constant development⁴²⁷. Consequently, legal language never uses two expressions to designate one and the same object⁴²⁸. Legal vocabulary does not waste available words; it never retains two signifiers to designate one and the same thing. It can be deduced from this that the concept of fundamental freedom has a different meaning from that of similar concepts⁴²⁹. This point was emphasised by parliamentarians in the course of the debate, showing that there are nuances and differences between the various expressions⁴³⁰.

106. Although concepts cannot have strictly identical meanings, they can have similar meanings. It is then possible to group these similar concepts within a community of neighbours in order to highlight their differences and the particular reality to which each of them corresponds. The community of neighbours in question here corresponds to the idea of *freedoms* as bequeathed to us by our legal and political history, the idea that individuals are recognised by positive law as having essential prerogatives that can be used against public authorities and must be protected from the attacks of power. Several notions coexist within this community of neighbours without the respective meaning of each of them always being clearly distinguished⁴³¹. These

420 As Marcel Waline stated, "legal categories themselves can only be concepts. A purely functional legal category cannot be justified. It is no more than a word (...) if it is without any definition" (M. WALINE, "Empirisme et conceptualisme dans la méthode juridique: faut-il tuer les catégories juridiques? 1, Bruylant Sirey, 1963, p. 367).

421 G. VEDEL, "La juridiction compétente pour prévenir, faire cesser ou réparer la voie de fait administrative", *JCP G* 1950, I, 851, §4.

422 Functional concepts are characterised by the function they perform, which alone gives them real unity (cf. G. VEDEL, *op. cit.*, §4).

423 G. VEDEL, *op. cit.*, §4.

424 D. LOCHAK, *La justice administrative*, 3^{ème} éd, Montchrestien, coll. Clefs politique, 1998, p. 132. See also M.-T. CALAIS-AULOY, "Du discours et des notions juridiques (notions fonctionnelles et notions conceptuelles)", *LPA* 9 August 1999, n° 157, pp. 4-6.

425 J. DABIN, *Théorie générale du droit*, Dalloz, coll. Philosophie du droit, 1969, p. 280.

426 If nothing distinguishes fundamental freedoms from other norms, they would not form a legal category. Cf. J. RIVERO, "Les droits de l'homme, catégorie juridique?", in *Perspectivas del Derecho Publico en la segunda mitad del siglo XX. Homenaje a Enrique Sayagues-Laso*, t. III, Instituto de estudios de Administracion local, 1969, pp. 23-40. The author refused to see human rights as a legal category, on the grounds that there was nothing to distinguish the rights so qualified from "the herd of all the rights that the law recognises and organises" (*op. cit.*, p. 27).

427 As M. Cornu points out, "in the language of law, as in everyday language, but probably even more so, the number of signifieds is immeasurably greater than that of signifiers. Legal concepts are much more numerous than the words to name them. The sum of linguistic supports is much less than that of legal categories" (G. CORNU, *Linguistique juridique*, Montchrestien, 1990, p. 103).

428 "It is exceptional that (...) two homonyms belong to the legal vocabulary" (*op. cit.*, p. 137). On the contrary, "The importance of polysemy within the legal vocabulary is crucial" (*op. cit.*, p. 93). According to the author's estimates, it accounts for more than two thirds of all legal terms. The language of law uses the same word several times to name different things. See, in the same sense: J.-L. SOURIOUX and P. LERAT, *Le langage du droit*, PUF, 1975, special p. 96.

429 These are understood, in the light of what has been said above, as standards conferring on individuals essential rights that can be enforced against the public authorities as a concrete expression of freedom.

430 See *supra*, §76.

431 As M. Martin has pointed out, the concept of fundamental freedom "suffers from its proximity to fundamental rights, fundamental principles and constitutionally protected rights. These neighbouring concepts are partly juxtaposed and legal science has not yet made a rigorous distinction between them" (R. MARTIN, "Les nouveaux référés administratifs", *Annales des loyers* 2002, p. 1113).

different concepts usually refer to the same norms but do not approach them from the same angle. They often cover the same rights and freedoms but from different perspectives. In France, there are four concepts that come close to the notion of fundamental freedom⁴³². The two most commonly used concepts are public liberties and human rights. Two concepts belonging to this neighbourhood - essential freedoms and individual rights and freedoms - are less commonly used. The concepts of human rights and individual rights and freedoms focus on the beneficiary of the norm; the concept of public freedom emphasises its vertical dimension; the concept of essential freedom focuses on its importance.

A. Human rights and individual rights and freedoms

107. A first category of expressions, grouping together the notions of human rights, individual freedom and individual rights, focuses on the beneficiary of the right or freedom in question.
108. Many authors characterise human rights by the - extra-legal - origin that is supposed to be theirs. For jusnaturalist authors, the extra-positive character of human rights is a vector of juridicity. According to these authors, the existence of these rights transcends their recognition in texts; it is through and thanks to natural law that human rights gain access to positive law⁴³³. Juspositivist authors also consider that human rights are external to positive law⁴³⁴. Unlike the previous trend, they consider that this circumstance is an obstacle to these claims acquiring legal effectiveness. Reduced to purely moral principles, human rights are, for these authors, devoid of any legal scope⁴³⁵.

However, it is not clear why norms labelled as "human rights" should be denied the status of rule of law. The two arguments put forward by juspositivist authors to deny these rights a legal character do not stand up to analysis. First, it is argued that the term is used in political and philosophical discourse to designate a moral claim or to claim the attribution of a right. This claim is undoubtedly true. However, it is difficult to see how the use of a legal expression outside the strictly legal domain should lead to its being stripped of its legal character. A concept does not lose its legal character merely because it is used by non-legal actors. The expressions fundamental freedoms or public liberties are frequently used in this way without anyone thinking, for this reason alone, of challenging their positivity. Secondly, the concept refers to natural law to the exclusion of any positive norm. It is true that the concept was initially used in a transcendental perspective. The invocation of higher principles was intended to limit the absolutism of power by placing an immanent right derived from moral principles above the state. From the point of view of the philosophy of law, such a presentation may once have been of interest, insofar as it made it possible to criticise political absolutism from the point of view of morality and then of universal reason. Today, however, human rights are set out in texts whose legality is not open to discussion; they are therefore legal norms in their own right. This is first of all the case for texts that do not contain the slightest reference to natural law, such as the European Convention on *Human Rights*. This is also true for the Declaration of the Rights of Man and of the Citizen, despite the very explicit references to the doctrine of natural law⁴³⁶. As Yann Aguila has pointed

432 And of fundamental right, most often understood as synonymous with fundamental freedom because of the adjective "fundamental" which is common to both.

433 Thus, according to Blandine Barret-Kriegel, human rights "do not in any way originate in subjective idealism and legal voluntarism (...) but in the works of modern law which maintain the reference to natural law (...)" (B. BARRET-KRIEGEL, *Les droits de l'homme et le droit naturel*, PUF, 1989, p. 98). Similarly, for Yves Madiot, human rights are "subjective rights that translate into the legal order the natural principles of justice that underpin the dignity of the human person" (Y. Madiot, *Droits de l'homme*, 2^{ème} éd., Masson, 1991, p. 26; definition taken up by the author in *Considérations sur les droits et les devoirs de l'homme*, Bruylant, 1998, p. 10). Among jusnaturalist authors, we should mention the particular position of Michel Villey, who refutes the very existence of human rights on the grounds that rights qualified as such are devoid of legal consistency and, consequently, do not correspond to the meaning of the word "right" as bequeathed to us by the Romans. In this sense, the expression "human rights" would be ill-founded (M. VILLEY, *Le droit et les droits de l'homme*, PUF, Questions series, 1990, 169 p.).

434 For Pierre Bon, "Human rights are the rights of the individual grasped in his abstract universal essence, they are conceived as prior to and superior to positive law in order to be the standard of its validity and the limit set to the legitimate power of the State" (P. BON, "Droits de l'homme", in *Dictionnaire constitutionnel* (Y. MENY et O. DUHAMEL dir.), PUF, 1992). For Mr Rivero and Mr Moutouh, "The notion of 'human rights' (...) is part of the conception of Natural Law. According to this conception, because he is human, man possesses a set of rights inherent to his nature, which cannot be disregarded without infringing it" (J. RIVERO and H. MOUTOUH, *Libertés publiques*, t. 1, 9^{ème} éd., PUF droit, coll. Thémis droit public, 2003, n° 10). Human rights are presented as "political and moral requirements, more or less inspired by political liberalism and its extensions, considered outside any strictly legal context" (L. FAVOREU et alii, *Droit des libertés fondamentales*, 3^{ème} éd., Dalloz, coll. Précis, 2005, n° 87). These rights 'are in fact more a matter of ideology or discourse than of law (...)' (F. BRENET, 'La notion de liberté fondamentale au sens de l'article L. 521-2 du CJA', *RDP* 2003, p. 1564).

435 As M. Ollero-Tassara has pointed out, "it is common to deny the legal character of *human rights* and to concede them only a 'moral' scope" (A. OLLERO-TASSARA, *Droit 'positif' et droits de l'homme*, Editions Bière, Bibliothèque de philosophie comparée, 1997, p. 75. Underlined).

436 The Declaration expressly refers to natural law in its Preamble: "The representatives of the French people (...) have resolved to set out, in a solemn Declaration, the natural, inalienable and sacred rights of Man (...)". Reference to natural law is also made in some articles of the Declaration, with Article 2 mentioning the "natural and imprescriptible rights of Man" and Article 4 "the exercise of the natural rights of

out, this text has "the character of a real *decision*, and is therefore a matter of positive law, not natural law"⁴³⁷. The rights and freedoms designated by the men of 1789 as "natural" rights are now norms of positive law. As Professor Wachsmann has stated, "The so-called natural law is absorbed into positive law, in a constitutive enunciation that gives it its only legal reality"⁴³⁸. The fact that a right or freedom is described as "natural" by a normative text does not affect its legal value. The eminently legal nature of human rights was confirmed in 1958, when the constituent solemnly reaffirmed its attachment to human rights in the preamble to the Constitution. The Constitutional Council drew the consequences in 1971 by attributing full legal value to the Declaration of 1789⁴³⁹. To determine the positivity of human rights, all that matters is that they are set out by a normative authority and included in a text of a genuinely legal nature. Thus, human rights, as set out in the Declaration of 1789 and the European Convention, constitute rules of positive law. The criterion that claims to characterise human rights by their lack of legal value or an allegedly jusnaturalistic essence must therefore be rejected.

In fact, the main and overriding feature of human rights lies in the subject of law to whom they are attributed, namely Man⁴⁴⁰. The main feature of human rights is that they are attributed to all men but only to men. On the one hand, these rights are conferred on every human being present on the national territory, i.e. on man in his universal essence, without distinction between nationals and foreigners, or between legal and illegal aliens. On the other hand, these rights are attached to the human person; they are attributed to natural persons only and cannot, by hypothesis, be invoked by legal persons. A right benefiting a legal person is not a human right. If certain rights, such as the right to property, have subsequently been extended to legal persons, it is not in their capacity as human rights.

109. The same criterion characterises the notions of individual freedoms and individual rights sometimes used by the legislator and the courts.

In the case of involuntary admission, Article L. 3211-3 of the Public Health Code states that "When a person suffering from mental disorders is hospitalised without his consent, restrictions on the exercise of his personal freedoms must be limited to those required by his state of health and the implementation of his treatment. The notion of individual freedom is also used by the law of 2 March 1982, alongside the notion of public freedom, to determine the scope of application of the *déféré-liberté*"⁴⁴¹.

In practice, it is the judge who most frequently uses these concepts, generally in cases of conflict between, on the one hand, the rights and freedoms recognised to an individual and, on the other, a reason of general interest, collective interest or, more broadly, any other interest put forward to justify a limitation on these rights and freedoms. The Strasbourg Court has thus considered as "inherent in the Convention system a certain form of reconciliation between the imperatives of the defence of democratic society and those of the safeguarding of individual rights"⁴⁴². Similarly, the Constitutional Council has stated that by excluding individual acts from the scope of the local referendum, the organic legislator, "by reason of both the special regime of such acts and the risk of infringement of individual rights that their adoption by referendum might entail, did not disregard the limits of the empowerment conferred by the Constitution"⁴⁴³. In a 1950 decision, the Conseil d'Etat, ruling on the legality of a decision by the *Ordre des experts-comptables* prohibiting its members from intervening through the press for any complaint or action relating to professional facts, declared that the powers of professional orders "are limited by the individual freedoms that belong to the members of the order as to the general public". It annulled the disputed measures, considering that they had exceeded the limits of the constraints that the Conseil supérieur de l'ordre could legally impose⁴⁴⁴. In the *Sieur Verllhiac* judgment of 1948, the Council of State had to deal with a

every man".

⁴³⁷ Y. AGUILA, *Le Conseil constitutionnel et la philosophie du droit*, LGDJ, coll. Travaux et recherches Panthéon-Assas Paris II, 1993, p. 39. Underlined.

⁴³⁸ P. WACHSMANN, "Déclaration ou constitution des droits?", in *1789 et l'invention de la Constitution* (M. TROPER and L. JAUME eds.), colloquium of 2, 3 and 4 March 1989, LGDJ Bruylant, 1994, p. 50. It is undoubtedly Article 2 of the Declaration that most clearly marks the eminently legal - and at the same time restrictive - character of the rights presented as natural. The homage paid to natural law by this provision "conceals its complete withdrawal into positive law. The break that splits the two sentences of the article is irreparable and seals the end of natural law: "the aim of all political association is the conservation of the natural and imprescriptible rights of man. These rights are: liberty, property, security and resistance to oppression". "These rights are": the enumeration is closed, the dynamic of natural law is broken, which allowed each person, or rather each enlightened mind, to discover, for their own sake as well as in the general interest, the principles and rights derived from human nature. The brutality of a text placed at the top of the positive legal order indicates the constraints of this new order: the so-called natural rights are those - and only those - that the Declaration sets out. The legal order is the sole master of determining which rights it enshrines" (*op. cit.*, p. 48. Emphasis added).

⁴³⁹ CC, No. 71-44 DC, 16 July 1971, *Rec.* p. 29, *GDCC* No. 19.

⁴⁴⁰ According to M. Peces-Barba Martínez, "The subject and its protection are both the central nucleus indispensable for understanding the problem and the ultimate unifying element, which relates to all the terms used as synonyms for human rights" (G. PECES-BARBA MARTINEZ, *op. cit.*, p. 22).

⁴⁴¹ The law refers to "acts likely to compromise the exercise of a public or individual freedom". In its application, the administrative judge does not distinguish between public freedoms on the one hand and individual freedoms on the other.

⁴⁴² ECHR, 6 September 1976, *Klass v. Federal Republic of Germany*, § 59, A28.

⁴⁴³ CC, No. 2003-482 DC, 30 July 2003, cons. 7, *Rec.* p. 414. See also, referring to the notion of "individual freedoms" to designate freedom of movement, personal freedom and inviolability of the home: CC, No. 94-352 DC, 18 January 1995, cons. 3, *ECR* p. 140.

⁴⁴⁴ CE, Ass., 29 July 1950, Comité de défense des libertés professionnelles des experts-comptables brevetés par l'Etat, *Lebon* p. 492, *GAJA* n° 69.

municipal decree that aimed, through various regulatory measures, to promote housing for homeless people. The administrative judge noted that "it was incumbent on the authorities responsible for this policy to reconcile, in accordance with general principles, the interests of good order with respect for individual freedoms"⁴⁴⁵. Similarly, judicial magistrates use this expression when they censure employers' decisions that excessively restrict the individual rights and freedoms of their employees. For example, a court of appeal described the right to marry as an "individual right" and censured a clause in an employment contract forbidding air hostesses to marry⁴⁴⁶. Still in the employer-employee relationship, the administrative judge has sanctioned measures by which the company reserves the right to open the staff's changing rooms at any time⁴⁴⁷. Thus, it appears that recourse to the expressions individual rights or individual freedoms most often expresses a conflict and a conciliation between the rights and freedoms recognised to individuals, and a reason whose purpose is to restrict their exercise. They concern the individual and his or her privacy, and are defined by reference to their beneficiary. The notion of public freedom highlights the vertical dimension of freedom.

B. Public liberties

110. The notion of public liberty is used in some foreign constitutions, notably those of Spain and Greece⁴⁴⁸. However, "it is undoubtedly in France that it has, conceptually and legally, occupied a place that is not only eminent, but for a long time exclusive"⁴⁴⁹. The expression first appeared in the singular in certain constitutional texts of the revolutionary and post-revolutionary period⁴⁵⁰. It was used in the plural in the Constitution of 14 January 1852, Article 25 of which makes the Senate "the guardian of the fundamental pact and public liberties". Article 72 of the 1946 Constitution states that "In the overseas territories, legislative power belongs to Parliament with regard to criminal legislation, the system of public liberties and political and administrative organisation". The government will ask the Conseil d'Etat, for the application of this provision, to specify the content of the term "public liberties". In its opinion of 13 August 1947, the Conseil d'Etat stated that "The term public liberties includes, independently of individual freedom, the major freedoms which, not being limited to the individual alone, are manifested externally and involve the action of co-participants or appeals to the public : Consequently, the following in particular fall into this category of public liberties: freedom of assembly, freedom of association and with it trade union freedom, freedom of the press and in a general way of dissemination of thought, freedom of conscience and worship, and freedom of education"⁴⁵¹. In practice, the IV^e Republic will make the field of public liberties "a sort of republican bastion escaping the empire of regulatory power and reserved for the sole competence of the sovereign legislative power"⁴⁵². Although the opinion of the Council of State of 6 February 1953 is not explicit in this respect⁴⁵³, the various laws attributing competence to the executive in various fields often contain the reservation 'without prejudice to matters reserved to the law (...) or to the protection of public property and liberties'⁴⁵⁴. The solution reserving to Parliament the field of public liberties is found under the V^e Republic in Article 34 of the Constitution of 4 October 1958. Several references to public liberties were also added following the constitutional revision of 28 March 2003⁴⁵⁵. The notion is also used by the law of 11 July 1979 (and the law

445 CE, 6 February 1948, *Sieur Verlhac*, *Lebon* p. 63.

446 CA Paris, 30 April 1963, *Epoix Barbier c/ Compagnie Air France*, *D.* 1963, pp. 428-430, note A. ROUAST.

447 CE, 12 June 1987, *Société Gantois*, *Lebon* p. 208. The internal regulations of a company stipulated that the management reserved the right to open at any time the changing rooms or individual cupboards made available to each employee. The Conseil d'Etat stated that this provision "exceeds the scope of the restrictions that the employer may legally impose on the rights of individuals and on individual freedoms in order to ensure hygiene and safety in the company".

448 See *supra*, § 65 and § 68.

449 L. FAVOREU et alii, *Droit des libertés fondamentales*, 3^{ème} éd, Dalloz, coll. Précis, 2005, n° 57.

450 The Constitution of 24 June 1793 declares in Article 9 that "the law must protect public and individual liberty against the oppression of those who govern". The Charter of 4 June 1814 proclaims, in its explanatory statement: "When violence wrings concessions from the weakness of government, public liberty is no less in danger than the throne itself". The term public liberty is also used in the singular in the preamble to the Additional Act to the Constitutions of the Empire of 22 April 1815.

451 CE, opinion, 13 August 1947, *EDCE* 1956, p. 64. Two observations can be made when reading this opinion. On the one hand, the adjective "public" means, negatively, that these freedoms are not limited to the individual alone and, positively, that they are manifested outside and involve the action of co-participants or the appeal to the public. On the other hand, the indicative list drawn up by the Council of State includes freedoms derived from the Declaration of the Rights of Man and of the Citizen (e.g. freedom of conscience), from the preamble to the 1946 Constitution (such as freedom of association and freedom of assembly) and from the law.

452 C.-A. COLLIARD, *Libertés publiques*, 7^{ème} éd, Dalloz, coll. Précis, 1989, p. 21.

453 Having to rule, with regard to the decree-laws, on the extent of the delegations to which the law could be subject, the Conseil d'Etat affirmed "that certain matters are reserved for the law, either by virtue of the provisions of the Constitution, or by the republican constitutional tradition resulting in particular from the Preamble to the Constitution and the Declaration of the Rights of Man of 1789, the principles of which were reaffirmed by the Preamble ; that the legislator cannot, therefore, extend to these matters the competence of the regulatory power" (CE, opinion, 6 February 1953, *RDP* 1953, p. 170-171. See also Y. GAUDEMET, B. STIRN, T. DAL FARRA, F. ROLIN, *Les grands avis du Conseil d'Etat*, 2^{ème} éd., Dalloz, 2002, avis n° 2, pp. 75-80).

454 See C.-A. COLLIARD, *op. cit.*, p. 21.

455 Under the terms of Article 72(4), the possibility for a territorial authority to be empowered to derogate provisionally from the legislative and regulatory provisions governing the exercise of its powers is excluded "when the essential conditions for the exercise of a public freedom or a constitutionally guaranteed right are at stake". Article 73(4) provides that in the overseas departments and regions, the possibility of adapting the law passed by Parliament is excluded in particular with regard to 'the guarantees of public freedoms'. Its sixth paragraph provides

of 12 April 2000, which refers to it) imposing the motivation of individual decisions restricting "the exercise of public liberties". The implementation of these provisions presupposes, on the part of the judge, the identification of norms corresponding to the notion of public liberties. In particular, the following have been considered as such, within the meaning of the Law of 11 July 1979: the freedom of trade and industry⁴⁵⁶, the right of the owner to dispose of his property⁴⁵⁷, and the right to receive an education during the period of compulsory schooling⁴⁵⁸. For the application of Article 34 of the Constitution, the freedom of communication⁴⁵⁹, the right to take legal action⁴⁶⁰ or, more recently, the right of access to administrative documents⁴⁶¹ and the free access of citizens to the exercise of a professional activity which has not been subject to any legal restriction⁴⁶² have been qualified as public freedoms.

What is the common feature of all these freedoms? Two criteria must first be excluded. The first criterion is based on the beneficiaries of public freedoms. It has sometimes been argued that only natural persons can be beneficiaries of public freedoms, to the exclusion of legal persons. This criterion is not relevant in positive law insofar as legal persons under private or public law are recognised as beneficiaries of public freedoms⁴⁶³. The second possible criterion is the normative rank occupied by these freedoms. This is a point on which there is great confusion in the literature, since almost all hypotheses have been supported. According to the authors, public freedoms are found at a constitutional level⁴⁶⁴, at a supra-legislative level⁴⁶⁵, at a maximum legislative level⁴⁶⁶, at a minimum legislative level⁴⁶⁷ or at all normative levels⁴⁶⁸. What is the reality of positive law? The first certainty is that there are constitutional public liberties⁴⁶⁹. And, if we go into more detail, we can see that in practice the vast majority of standards described as such by the courts are standards of constitutional value⁴⁷⁰. This situation is in accordance with the letter of Article 34 of the Constitution. This provision stipulates that the law lays down the rules concerning "the fundamental guarantees granted to citizens for the exercise of public freedoms". As a result, the law defines the *guarantees* of public freedoms; it does not define the public freedoms themselves. In application of this provision, "the law grants, not freedoms, but the guarantees necessary for their exercise"⁴⁷¹. However, by hypothesis, the law guarantees what is *above* it, i.e. the Constitution (international

that the powers provided for in the second and third paragraphs may not be used 'when the essential conditions for the exercise of a public freedom or a constitutionally guaranteed right are at stake'. Finally, Article 74 provides that the overseas collectivity may participate, under the control of the State, in the exercise of the competences that it retains "with due regard for the guarantees granted throughout the national territory for the exercise of public freedoms".

456 CE, 17 June 1985, *Dauberville, Lebon* p. 184.

457 CE, 23 October 1996, *Le Pelletier de Rosambo, Lebon* T. p. 681.

458 CE, Sect. 25 March 1983, *Ministre de l'Éducation c/ Epoux Mousset, Lebon* p. 135, *AJDA* 1983, pp. 296-297, chron. B. LASSERRE and J.-M. DELARUE. The columnists emphasise "that, as written, the decision admits that the right to receive school education (...) can be considered as a public freedom" (*op. cit.*, p. 297).

459 CC, No. 84-173 DC, 26 July 1984, *Rec.* p. 63.

460 CC, No. 80-119 L, 2 December 1980, *Rec.* p. 74.

461 CE, 29 April 2002, *Ulmann, Lebon* p. 157.

462 CE, Ass., 7 July 2004, *Ministre de l'Intérieur c/ M. X, Lebon* p. 297.

463 Thus, local authorities may invoke the right of ownership before the administrative judge (see P. BRAUD, *La notion de liberté publique en droit français*, LGDJ, coll. BDP, t. 76, 1968, pp. 205-206). The judge annuls decisions that infringe on the freedom of trade and industry of a private person (see P. BRAUD, *op. cit.*, pp. 209-211). The author also points out that the law of 21 March 1884 and the law of 1^{er} July 1901 expressly refer to trade unions and associations as beneficiaries of trade union freedom and freedom of association.

464 Philippe Braud refers to the "exclusive role of constitutional norms as sources of public liberties" (P. BRAUD, *op. cit.*, p. 332). M. Colliard states that these are freedoms "generally proclaimed by the constituent legislator and possibly organised by the ordinary legislator" (C.-A. COLLIARD, *op. cit.*, p. 141).

465 For Rivéro and Moutouh, public freedoms are rights that are elevated "to the constitutional level in domestic law, to the supra-legislative level in European law" (J. RIVERO and H. MOUTOUH, *op. cit.*, No. 21). According to M. Leclercq, "a public freedom is a circumscribed aspect of freedom, translated into law by constitutional and/or international texts and subject to a legal protection regime specified by these texts and other subsequent texts which aim, by means of appropriate procedures, to assert the freedom thus defined" (C. LECLERCQ, *Libertés publiques*, 5^{ème} éd., Litec, 2003, p. 5). In the same vein, M. Turpin states that "Under the V^e Republic, we have moved from a protection of public liberties by law to a protection against law" (D. TURPIN, "Les libertés publiques sous la V^e République", *RDP* 1998, p. 1833).

466 Their protection is based "on the law and the general principles of law" (L. FAVOREU *et al.*, *Droit constitutionnel*, *op. cit.*, no. 1222).

467 For Gilles Lebreton, public liberties are powers "recognised by norms of at least legislative value" (G. LEBRETON, *Libertés publiques et droits de l'homme*, 5^{ème} éd., Armand Collin, 2001, p. 15).

468 See P. AUVRET and J. AUVRET-FINCK, "La complémentarité des systèmes juridictionnels de protection des libertés publiques", in *Gouverner, administrer, juger. Liber amicorum Jean Waline*, Dalloz, 2002, p. 404: "Les libertés publiques sont tout à la fois législatives, *infra* législatives et *supra* législatives".

469 Standards qualified as public liberties by the constitutional judge or the administrative judge in the context of the above-mentioned provisions are at a constitutional level. Moreover, the Constitutional Council itself speaks of "constitutionally guaranteed public freedoms" (CC, No. 94-352 DC, 18 January 1995, cons. 3, *Rec.* p. 140; No. 96-377 DC, 16 July 1996, *Rec.* p. 87; No. 97-389 DC, 22 April 1997, *Rec.* p. 45; No. 99-411 DC, 16 June 1999, *Rec.* p. 75).

470 This was already the case in the past but, in the absence of direct applicability of the Declaration of Human Rights and the preamble to the 1946 Constitution, it was through the general principles of law, and where necessary through ordinary law, that public freedoms were protected. These freedoms had to wait for the intervention of Parliament, or the mediation of the judge, before they could be invoked. The Constitution represented the material source of public liberties, their formal source residing in lower-ranking norms that ensured their concretisation. As soon as the Declaration of 1789 and the Preamble of 1946 become legally binding texts, constitutional civil liberties can be directly invoked before the ordinary courts and, consequently, the definition of civil liberties based on their legislative value is no longer effective.

471 F. LUCHAIRE, *La protection constitutionnelle des droits et des libertés*, Economica, 1987, p. 109. The preparatory work also shows that the constituent clearly wanted to distinguish between the definition of freedoms and the definition of their guarantees, reserving only the latter to the legislator. The government's preliminary draft of the current Article 34, which was Article 31 at the time, proposed the formula that we

conventions do not use the expression public freedom). Public freedoms exist without the intervention of the legislator, simply because of their constitutional recognition.

With these two criteria excluded, the definition of civil liberties must in fact be clarified by determining the meaning of the adjective "public" within this expression. It is in this adjective that the key to identifying civil liberties lies. The epithet "public" could mean, first of all, that the freedoms in question are enacted by the public authority⁴⁷². However, this definition is too broad. Indeed, if all rules enacted by the State are described as public liberties, then all legal rules become *ipso facto* public liberties, and nothing distinguishes them from the mass of other norms. In reality, the adjective "public" must be understood as relating to relations with the public authorities. These are freedoms recognised against public persons and enforceable against the public authorities alone. The adjective "reflects above all the 'vertical' dimension of public liberties"⁴⁷³. As a logical consequence, the notion of public freedom is largely absent from judicial jurisprudence. Trade union freedom, which is a public freedom because it is enforceable against the State, will not be qualified as such before the judicial courts.

C. Essential freedoms

111. Finally, reference should be made to the notion of essential freedom, which emphasises the importance of the freedom thus qualified. This expression is rarely used in French law. Nor is it commonly used abroad. It may nevertheless be noted that the third paragraph of the preamble to the Portuguese Constitution of 2 April 1976 recalls that the 1974 Revolution "restored to the Portuguese the fundamental rights and essential freedoms".

In France, the constitutional law of 3 June 1958 included a fourth principle, which reads as follows "The judicial authority must remain independent in order to be able to ensure respect for essential freedoms as defined by the preamble to the 1946 Constitution and by the Declaration of Human Rights to which it refers. The preamble to the Constitution of 4 October 1958, which reaffirms the attachment to "human rights", has been presented as a translation of this principle⁴⁷⁴, which again shows the proximity between the different notions making up the community of neighbours. The concept may have been used in the context of assault and battery before the concept of fundamental freedom⁴⁷⁵ was finally established. The courts have also used the term in cases where no legal consequences follow from this qualification. In a case related to the therapeutic choice of a Jehovah's Witness, the Court of Cassation rejected an appeal against a Court of Appeal which considered that "by refusing the transfusion on religious grounds, the victim had exercised a choice deriving from an essential freedom"⁴⁷⁶.

Within the neighbourhood community, this expression emphasises the essentiality of freedom. Freedom is not essential in terms of its legal value - in the two examples cited, the freedoms in question are at a legislative level. It is essential because of its importance. Through this expression, it is the eminence of freedom that is put forward. In this sense, it is similar to the material meaning of the term "fundamental" but, unlike the latter, it does not have a properly founding role.

know today. Before the Constitutional Advisory Committee, Pierre-Henri Teitgen had wanted to extend the legislator's competence to the definition of public liberties themselves, and not just to their guarantee, i.e., in the words of his amendment, "to the definitions of public liberties and to the guarantees granted to citizens for their exercise" (*Documents pour servir à l'histoire de l'élaboration de la Constitution du 4 octobre 1958*, vol. 2, La documentation française, 1988, pp. 266-267). The Constitutional Advisory Committee was convinced and, taking into account the Teitgen amendment, drafted the text as follows: "Questions relating to (...) the definitions of public, civil and trade union freedoms, and the guarantees granted to citizens for their exercise, shall be regulated by law". The final text adopted by the government rejects this wording and reverts to the formula in the preliminary draft. Only the *guarantees* for the exercise of public freedoms, and not the definition of public freedoms themselves, are therefore within the scope of the law.

472 In this respect, the adjective introduces "a precision as to the origin of the social constraint", and refers "to a specific framework: that of the State, author (or, more or less directly, co-author in the case of the rules of international law) of the essential legal rules" (P. WACHSMANN, *Libertés publiques*, 4^{ème} éd., Dalloz, coll. Cours, 2002, n° 1). According to this understanding, "What makes a freedom 'public', whatever its object, is the intervention of the authorities to recognise and develop it" (J. RIVERO and H. MOUTOUH, *op. cit.*, No. 8).

473 L. FAVOREU et alii, *Droit des libertés fondamentales*, 3^{ème} éd., Dalloz, coll. Précis, 2005, n° 59. Duguit affirmed that "One qualifies as laws on public liberties all those which have the double aim of determining the obligations of the State and of fixing guarantees for their accomplishment (L. DUGUIT, *Traité de droit constitutionnel*, tome V Les libertés publiques, E. de Boccard, 1925, p. 2). In the same vein, Bonnard stated that "When an individual's freedom is opposable to the State, it is usually described as 'public freedom'" (R. BONNARD, "Les droits publics subjectifs des administrés", *RDP* 1932, p. 710, note 1). With some nuances, the same conception is accepted by Georges Morange (*Contribution à la théorie générale des libertés publiques*, Nancy thesis, 1940, p. 15) and Jacques Mourgeon (*Les libertés publiques*, Thémis, 1979, p. 21).

474 On the preamble to the Constitution of 4 October 1958, see R. PELLOUX, "Quelques réflexions sur le préambule de la Constitution française de 1958", in *Hommage d'une génération de juristes au Président Basdevant*, Pedone, 1960, pp. 389-401; J. GEORGEL, "Aspects du Préambule de la Constitution du 4 octobre 1958", *RDP* 1960, pp. 85-101; B. GENEVOIS, "Le préambule et les droits fondamentaux", in *L'écriture de la Constitution de 1958*, colloquium of 8-11 September 1988, Aix-en-Provence (L. FAVOREU, D. MAUS and J.-L. PARODI dir.), Economica, 1992, pp. 483-499.

475 See TC, 10 December 1956, *Sieurs Randon et autres*, *Lebon* p. 592, concl. GUIONIN. The Court of Conflicts affirmed "that the actions of which Sieurs Brunel and Cornevaux are accused constitute an infringement of the security of postal correspondence, an essential freedom guaranteed by Article 187 of the Criminal Code, and that, consequently, they have the character of an assault (...)". The concept did not disappear completely after the concept of fundamental freedom was established. Courts have continued to use it alongside and as a synonym for the concept of fundamental freedom (see, for example, Civ. 1^{ère}, 27 May 1975, *Légers v. Maire de Saint-Lunaire*, *Bull. cin.* 1, No. 178).

476 Crim. 30 June 1987, *Tetiarahi*, n° 86-91.014.

Conclusion of Chapter 1

112. The concept of fundamental freedom, which determines the scope of application of Article L. 521-2, is open and malleable. It is a legal category that is "indeterminate at the outset and therefore not limitatively fixed"⁴⁷⁷. The legislator has in no way limited the judge's margin of freedom. It did not restrict the concept or establish criteria. The parliamentary phase left the problem of its definition unresolved. It is therefore up to the judge alone, and as a last resort, to define the scope of protection of Article L. 521-2.
113. The legal and logical constraints imposed on the judge provide a flexible and welcoming framework in this respect. In determining what the fundamental freedoms are, the judge has a wide margin of freedom that gives him absolute control over the concept⁴⁷⁸. The text of Article L. 521-2 gives the judge a wide margin of freedom, which he has naturally exploited. Refusing to be bound, it defines the list of fundamental freedoms and the content and limits of each of them in a flexible and unformalistic manner. Above all, and with the aim of giving full effect to the procedure of Article L. 521-2, the Conseil d'Etat has opted for a broad definition of fundamental freedoms.

477 N. JACQUINOT, "La liberté d'entreprendre dans le cadre du référé-liberté: un cas à part?"

478 A number of authors have emphasised the freedom enjoyed by the judge on this point. For Eric Sales, Article L. 521-2 of the Code of Administrative Justice "leaves a great deal of latitude to the administrative judge not only to determine the reference texts likely to be used in the matter but also to identify among the existing rights and freedoms those that fall within the category of fundamental freedoms" (E. SALES, "Vers l'émergence d'un droit administratif des libertés fondamentales", *RDP* 2004, p. 212). Similarly, for M. Glénard, "the administrative judge has an almost unlimited margin of appreciation" (G. GLENARD, "Les critères d'identification d'une liberté fondamentale au sens de l'article L. 521-2 du code de justice administrative", *AJDA* 2003, p. 2009). Catherine Botoko-Claysen has stated that the notion "remains at the discretion of the judge in summary proceedings" (C. Botoko-Claysen, "Le référé-liberté vu par les juges du fond", *AJDA* 2002, p. 1050). In the same sense, see also G. DRAGO, "Les droits fondamentaux entre juge administratif et juges constitutionnels et européens", *Dr. adm.* 2004, Study No. 11, pp. 7-11, special p. 8. In general, Eisenmann had stated that "if a word expressing a concept has not been defined, i.e. if the concept has not been determined by the legislator himself, or if the meaning of the word is not certain (...), the authority responsible for individual decisions is necessarily called upon to fix the concept itself, to do so freely" (C. EISENMANN, "Quelques problèmes de méthodologie des définitions et des classifications en science juridique", *APD* 1966, t. XI, pp. 25-43, reproduced in *Ecrits de théorie du droit, de droit constitutionnel et d'idées politiques*, éd. Panthéon-Assas, coll. Les introuvables, 2002, p. 291). It should be noted that in the 1960s, legal scholars emphasised the wide margin of discretion enjoyed by the judge after the notion of fundamental freedom was enshrined by the Conseil d'Etat in the *Dame Klein* judgment. In the absence of precision on this point, declared M. Auby, 'the case law of the high court opens up new horizons for the notion of de facto assault, the limits of which it is currently impossible to determine' (note under TC, 25 November 1963, *Commune de Saint-Just Chaleyssin, époux Pelé (two species)*, *JCP G* 1964, II, 13492).

Chapter 2

A broad definition of the concept of fundamental freedom

114. The approach that governs the definition of the concept of fundamental freedom is at once broad, autonomous and casuistic. It leads us to question the identification criteria used by the administrative judge of summary proceedings.

A broad, autonomous and case-based approach

115. In the absence of legislative predetermination, it was up to the judge to decide the scope of application of Article L. 521-2 of the Code of Administrative Justice. With considerable latitude to do so, the Council of State clearly opted for a *broad* approach to fundamental freedoms⁴⁷⁹.

This inclusive meaning was justified, first of all, by the desire to give full effect to the summary proceedings procedure, so that the administrative judge could really ensure the protection of the persons for whose benefit it was instituted by this means. Its image and legitimacy were at stake. Indeed, finally equipped with an instrument allowing it to intervene quickly and effectively, the administrative judge did not want to appear to be on the back foot in the field of the protection of freedoms. After noting that "those subject to trial express a strong expectation: to have a judge with broad powers when a right or a fundamental freedom is at stake" and recalling the untimely incursions of the emergency judicial judge before the creation of the *référé-liberté*, the government commissioner Isabelle de Silva affirmed that "it is preferable not to *appear to be on the back foot* in terms of defending fundamental rights, and to leave it to the judge to intervene, when his office so requires"⁴⁸⁰. The *Commune de Venelles* decision is the symbol of the broad conception adopted by the administrative judge. As Collin and Guyomar pointed out, the Conseil d'Etat was certainly bold in establishing the principle of free administration of local authorities as a fundamental freedom, 'but it was the image of the administrative jurisdiction that was at stake and it would have been very unfortunate if the Administrative Jurisdiction Division had given the impression from the outset that it wanted to restrict the use of the tools that were supposed to reflect its modernisation'⁴⁸¹. The shadow of the judgment of the Tribunal des conflits of 12 May 1997 and the memory of abusive invocations of the *de facto* right were still very present. The administrative judge feared that a restrictive interpretation of the notion of fundamental freedom would destroy the usefulness of the summary procedure and its capacity to meet the need for jurisdictional protection of individuals that only the judicial judge had been able to provide up until then.

This broad conception was then justified by the existence of safeguards against the misuse and trivialisation of this procedure. Even if the applicant is within the scope of Article L. 521-2 of the Code of Administrative Justice - i.e. a fundamental freedom is present - he or she must still, in order to obtain the pronouncement of a safeguard measure, demonstrate that a serious infringement is being made of the freedom invoked, that this infringement is manifestly unlawful and that it makes it necessary for the interim relief judge to intervene immediately. These conditions are so demanding that the interim relief judge can, with complete peace of mind, allow himself a broad definition of fundamental freedoms. Opening up the scope of application does not mean that the court is clogged and does not expose it to an influx of appeals that would make it impossible to intervene within the 48-hour period allowed for ruling. Moreover, although the concept of fundamental freedoms is broad, it is not overly extensible. In any event, it is reduced to a limited number of rights and freedoms. As the Vice-President of the Council of State has pointed out, it is certain that "not every right enshrined in a text or general principle is a fundamental freedom"⁴⁸². The difference with the procedure of the interim suspension is thus preserved, and the specificity of the interim relief is respected. The inclusive meaning of the concept of fundamental freedom does not lead to the referral to the interim relief judge of disputes falling under the procedure of Article L. 521-1.

116. For the identification of fundamental freedoms, the administrative judge refuses to rely on a predefined doctrine or to delimit the notion by reference to the meaning attributed to it in other procedures. His approach is independent of any theoretical construction and any textual and jurisprudential qualification. In this respect,

479 This was announced by President Labetoulle even before the reform came into force. At a colloquium held on 6 December 2000, the current president of the Litigation Division stated that for the summary procedure, the choice had been made to have "a relatively limited scope of application (relatively only, because the concept of fundamental freedoms is quite extensive)" (D. LABETOUILLE, "La genèse de la loi du 30 juin 2000", *op. cit.*, p. 20).

480 I. DE SILVA, concl. on CE, Sect. 30 October 2001, *Minister of the Interior v. Tiba*, RFD-A 2002, p. 332. Emphasis added.

481 M. GUYOMAR and P. COLLIN, chron. under CE, Sect. 18 January 2001, *Commune de Venelles*, AJDA 2001, p. 155.

482 R. DENOIX DE SAINT MARC, "Les procédures d'urgence: premier bilan", AJDA 2002, p. 1.

his approach is *autonomous* insofar as the interim relief judge gives himself *his own*⁴⁸³ definition of fundamental freedoms. In his decisions, he specifies that the norm whose qualification is requested is or is not a fundamental freedom "within the meaning of" Article L. 521-2 of the Code of Administrative Justice⁴⁸⁴. By using this phrase, the interim relief judge intends to show, on the one hand, that he or she is not a "prisoner of the categories or definitions given here or there of this or that right"⁴⁸⁵, and on the other hand, that the qualification does not claim to have a general scope⁴⁸⁶. The judge gradually forges and develops a conception of fundamental freedoms that is specific to the *référé-liberté*. Faced with one of the "most delicate concepts resulting from the law of 30 June 2000"⁴⁸⁷, the Conseil d'Etat refused to lock itself into a predefined analysis scheme.

117. On the contrary, it is with flexibility and without dogmatism that it has chosen to apprehend this notion. Another jurisprudential orientation would have been most surprising on the part of the supreme administrative judge. After having succeeded in including in the heart of Article L. 521-2 a malleable concept that gave it full control over its field of application, the Conseil d'Etat would not then tie its hands by giving it a precise and fixed definition that would have made it lose its flexibility by condemning any possibility of evolution in the future⁴⁸⁸. As a result of this orientation, the interim relief judge opted for a *casuistic* approach to the concept. Refusing to be locked into a rigid and predefined framework, he determines in the course of his decisions the fundamental freedoms that he intends to protect under Article L. 521-2. "It is as if the High Assembly had decided to grope its way forward, without any pre-established doctrine, and to let the natural movement of things, the succession of decisions, gradually refine the contours of the concept"⁴⁸⁹. The method is not new; it is favoured by the Council of State. Thus, President Latournerie wrote that, "Distanced by an invincible mistrust of any imprudence of thought or action that might, if not alienate its freedom of movement in the future, at least impede it in some way, administrative jurisprudence has never bound itself in this respect, and it could not do so without deviating from the practice that has ensured it, until now, a significant part of its successes"⁴⁹⁰. The judge recognises or denies the existence of a fundamental freedom in the course of his decisions, depending on the applicants' requests for qualification. The list of justiciable norms in Article L. 521-2 is therefore closely linked to the vagaries of litigation and the chance of referrals. It is only when the question of the eligibility of a norm arises that the judge will decide on it.

However, the administrative judge's approach is not synonymous with pure empiricism or improvisation. The approach adopted is coherent and marked by real conceptual rigour. As Hauriou stated in another context, 'the Council of State does not only have a jurisprudential policy, it has a jurisprudence, i.e. a legal construction that only uses certain materials and only adjusts them according to a certain plan'⁴⁹¹. It is true that the latter cannot be

483 Etymologically, *autonomous* comes from the Greek *auto*, meaning "self", and *nomos*, "law". The term *autonomous* therefore means: "one who gives himself his own law".

484 The interim relief judge refers to the notion of "fundamental freedom within the meaning of the provisions of Article L. 521-2 of the Code of Administrative Justice" (CE, Sect., 30 October 2001, *Ministre de l'Intérieur c/ Tliba, Lebon* p. 523; CE, ord. 25 April 2002, *Société Saria Industries, Lebon* p. 155; CE, ord. 1^{er} March 2002, *Bonfils, Lebon* p. 69; CE, 29 March 2002, *SCI Stéphane et autres, Lebon* p. 117) or 'within the meaning of Article L. 521-2' (CE, ord. 3 May 2005, *Confédération française des travailleurs chrétiens, Lebon* T. p. 1034). There are also references to the "notion of 'fundamental freedom' as understood by the legislator when adopting Law no. 2000-597 of 30 June 2000 on summary proceedings before the administrative courts" (CE, ord. 12 January 2001, *Hyacinthe, Lebon* p. 12; CE, ord. 4 March 2002, *Tinor*, No. 243653; for a similar formulation, referring to "fundamental freedoms in the sense in which they were understood by the legislator when the law was adopted 12 November 2001, *Minister of the Interior v Farhoud, Lebon* T. p. 1126; CE, 15 February 2002, *Hadda, Lebon* p. 45). Insofar as it refers to the will of the legislator, this last formula may be surprising and questionable. Indeed, the analysis of the preparatory work has shown that the legislator did not have a conception of fundamental freedoms. Not having identified the contours of this notion, he left it entirely to the judge to define it. While the search for the legislator's will may be justified in certain cases (see L. PATRAS, *L'interprétation en droit public interne*, T. et A. Joannides, 1962, esp. pp. 226-229, citing judgments of the Conseil d'Etat explicitly referring to the will of the legislator to determine the meaning of a text), it is inappropriate in this case.

485 G. BACHELIER, "Le référé-liberté", *RFDA* 2002, p. 263. In the same vein, M. Chapus stresses that this formula "is indicative of a concern to ensure the autonomy of the concept of 'fundamental freedom' in summary proceedings. At the same time, it has the advantage of allowing the judge to extend (or possibly refuse) the protective procedure of Article L. 521-2 without having to ask himself, in terms of principles, the question of the justification (doctrinal, if one may say so) for his choice" (R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd., Montchrestien, 2006, n° 1597).

486 As M. Ricci notes, "the words 'fundamental freedoms' must be interpreted in the sense of and for the sole purpose of the *référé-liberté*" (J.-C. RICCI, "Quels référés pour quels pouvoirs? Le référé-liberté, la notion de libertés fondamentales, le référé-suspension", *RRJ* 2003/5 *L'actualité des procédures d'urgence*, p. 3095). Usually, in administrative jurisprudence, the formula or solution preceded by the locution *in the sense of* "does not claim a general scope" (Y. GAUDEMET, *Les méthodes du juge administratif*, LGDJ, coll. BDP, t. 108, 1972, p. 105). On the scope of this expression, see also R. LATOURNERIE, "Essai sur les méthodes juridictionnelles du Conseil d'Etat", *Livre jubilaire du Conseil d'Etat*, Sirey, 1952, p. 199; C. VIGOUROUX, "L'expression 'au sens de' ou le juge linguiste sans être encyclopédiste", in *Juger l'administration, administrer la justice. Mélanges en l'honneur de Daniel Labetoulle*, Dalloz, 2007, pp. 847-857.

487 L. TOUVET, concl. on CE, Sect. 18 January 2001, *Commune de Venelles, RFDA* 2001, p. 386.

488 The desire to preserve the initial flexibility of this concept is perfectly accepted by the government commissioners. When they propose criteria for defining the concept of fundamental freedom, they are careful not to give too precise a definition. Thus, Ms de Silva stated that the identification criteria developed in her conclusions were "sufficiently flexible" to allow the Conseil d'Etat "considerable room for manoeuvre" (I. DE SILVA, concl. above, p. 331).

489 G. GLENARD, "Les critères d'identification d'une liberté fondamentale au sens de l'article L. 521-2 du code de justice administrative", *AJDA* 2003, p. 2009.

490 R. LATOURNERIE, *op. cit.* p. 264.

491 M. HAURIOU, note to *S.* 1904, III, p. 4.

grasped immediately. To many observers, the approach of the interim relief judge appears disconcerting⁴⁹². The judge does not specify the criteria or the method that leads him to retain the qualification of fundamental freedom here, or to reject it there. He proceeds by way of affirmation and gives no indication of the approach adopted. "It is true that the Council of State, unlike the Court of Cassation, is not in the habit of setting out in its judgments all the legal deductions on which its decisions are based"⁴⁹³. As Ms Ponthoreau has stated, 'it wishes to retain control over the development of the law and therefore does not reveal all the terms of the assessments and choices made'⁴⁹⁴. When asked by certain authors to give a general definition of fundamental freedoms⁴⁹⁵, the Council of State did not venture to adopt a position in a recital of principle⁴⁹⁶. This caution is not surprising, since "it is rare for the Council of State to venture a definition"⁴⁹⁷. It is therefore not easy to understand the method used by the interim relief judge to identify fundamental freedoms. To assert, as some authors have proposed, that fundamental freedom corresponds to "what the interim relief judge has recognised as such"⁴⁹⁸ or "wishes to recognise as such"⁴⁹⁹ leaves unresolved the question of what this notion really corresponds to, if not a list of norms qualified as such by the judge in the course of his decisions. On the contrary, in the light of this list, but without limiting ourselves to it - for it is bound to evolve according to the chance of referrals - we must endeavour to highlight what brings these norms together in order to bring out their common characteristics⁵⁰⁰.

Systematisation attempt

118. What, precisely, are the characteristics common to all the norms recognised as justiciable in the summary proceedings? In what way and on the basis of what criteria do fundamental freedoms differ from the other norms that make up the legal order? What are the characteristics of the standard eligible for recognition under Article L. 521-2 of the Code of Administrative Justice?

In order to determine the criteria and elements constituting the concept of fundamental freedom, the method consists in starting from the object to be analysed and highlighting its specific characteristics. In order to measure the consistency of this legal category, it is first necessary to establish what it includes and what it excludes. The identification of norms that do not constitute fundamental freedoms makes it possible to specify the criteria that the norms in question must meet in order to be included in this category - and that precisely those that are excluded do not meet. It is on the basis of this double list that it will then be possible to analyse the characteristics common to all fundamental freedoms, the comparison between the two lists revealing the singularities of the concept and what forms its essence. The comparison between the two lists reveals the singularities of the concept and what forms its essence. The perspective allows to highlight the features common to all the norms eligible for the procedure of article L. 521-2, independently of the differences that they may contain.

In order to establish this inventory with certainty and exhaustiveness, it is advisable to first identify the formulas

492 See in particular the commentary by the editorial staff of the journal *Droit administratif* on the order of 8 September 2005, *Bunel (Dr. adm.* 2005, comm. no. 159, noting that "it is not easy to understand the logic underlying the administrative judge's consecration or non-recognition of a fundamental freedom within the meaning of Article L. 521-2 of the CJA").

493 E. LAFERRIERE, *Traité de la juridiction administrative et des recours contentieux*, Berger-Levrault, 1887, t. I, p. IX.

494 M.-C. PONTTHOREAU, "Réflexions sur la motivation des décisions juridictionnelles en droit administratif français", *RDP* 1997, p. 752.

495 Cf. Y. Claisse and J.-A. Cano, "Une loi peut faire le printemps! (first assessment of the application of the Act of 30 June 2000 on summary proceedings before the administrative courts)", *LPJA* 9 April 2001, no. 70, p. 11: "Let us hope that in the future the Council of State, playing its role as a regulatory court to the full, will risk a definition of what is meant by 'fundamental freedom'. For the litigant - even if he or she is well-informed or well advised - it should not all be a matter of precedent, tact, intuition or habit".

496 It also refused to indicate whether, as requested by certain applicants, the notion of fundamental freedom within the meaning of Article L. 521-2 "covers all constitutionally guaranteed rights and freedoms" (CE, ord. 10 April 2001, *Merzouk, Lebon T.* p. 1135; CE, ord. 9 July 2001, *Boc*, n° 235696).

497 R. LATOURNERIE, *op. cit.* p. 221. President Latournerie specifies that "He only resigns himself to this - and he does so only with extreme circumspection, and rather implicitly - when sufficient tests have reduced the risk always inherent in such a statement to the point of practically eliminating it (...)" (*ibid.*). The time of testing is not over for the notion of fundamental freedom and it will probably never be, so unlimited does the potential of this notion seem to be. Even with a considerable body of case law that is stable and homogeneous, having clearly and solidly defined the contours of the concept, the definition will remain a risky operation, which may condemn the judge's freedom of movement. Consequently, it is reasonable to assume that the Council of State will never go down this path. It should also be noted that neither the judge of the assault nor the judge of the *déféré-liberté* has ever ventured to define the notions of fundamental freedom and public or individual freedom. Faced with an imprecise text, the administrative judge "is reluctant to allow himself to be locked into a definition given once and for all and to alienate his freedom for the future" (D. LOCHAK, *Le rôle politique du juge administratif français*, LGDJ, coll. BDP, t. 107, 1972, p. 139).

498 G. BACHELIER, *op. cit.* p. 263.

499 E. SALES, *op. cit.* p. 220. The formula was used by Marcel Waline to describe the case law concerning the concept of public service in the post-war years. As the qualification of public service varied according to the decisions without apparent coherence and without it being possible to place these qualifications within an overall approach, Waline had reduced the doctrine of the Council of State to a formula that has remained famous: public service is an activity that the qualified jurisdictions "agree to qualify as a public service" (M. WALINE, "Empirisme et conceptualisme dans la méthode juridique: faut-il tuer les catégories juridiques?", in *Mélanges en l'honneur de Jean Dabin* vol. 1, Bruylant Sirey, 1963, p. 368).

500 In this respect, it should be remembered that Laferrière wanted the law to be systematised, "not only because it makes it possible to popularise doctrines, but also because it helps to ensure their fixity, which is one of the guarantees due to the litigant" (E. LAFERRIERE, *Traité de la juridiction administrative et des recours contentieux*, Berger-Levrault, 1887, t. I, p. VIII).

by which the judge recognises or denies, without any possible doubt, the existence of a fundamental freedom and to ignore the ambiguous formulas or those expressing a refusal of the administrative judge to take a position⁵⁰¹.

In order to recognise the existence of a fundamental freedom, the court uses various explicit formulas⁵⁰², all of which have strictly the same meaning and scope⁵⁰³. The existence of a fundamental freedom can also be established with certainty in the case of an admission decision. The judge grants the applicant's request but does not expressly designate the fundamental freedom that has been infringed by the administration. Since the judge can only grant the applicant's request when all the conditions required by Article L. 521-2 of the Code of Administrative Justice are met⁵⁰⁴, it can be deduced from such a decision that a fundamental freedom was present. Finally, the existence of a fundamental freedom can be deduced from the application of the *Casanovas* case law when the freedom in question is expressly mentioned in the decision⁵⁰⁵. Thus, in the *Casanovas* judgment, the Council of State affirms, in accordance with the conclusions of the government commissioner, that the contested decision "was taken not because of the *opinions* that the person concerned may have expressed outside the service but because of his professional inadequacy; that in these conditions it does not infringe any fundamental freedom"⁵⁰⁶. In so doing, it enshrined freedom of opinion as a fundamental freedom.

There is no other hypothesis that can establish with certainty the existence of a fundamental freedom. In particular, the presence of a fundamental freedom cannot be deduced from the fact that the judge examines

501 In order to establish these two lists with absolute certainty, only fundamental freedoms that have been expressly recognised or excluded from the category will be taken into account. Standards on which the judge of summary proceedings has not expressly ruled are not taken into consideration in determining the criteria for identifying a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice. This caution might seem excessive. It nevertheless seems justified to us. On the one hand, implicit formulas do not have the degree of certainty that a precise and rigorous systematisation work requires. On the other hand, these formulas are sometimes the subject of divergent assessments by the most authoritative commentators on administrative jurisprudence. To take just one example, Professor Cassia considered that the Commune de Mandelieu-la-Napoule order of 20 July 2001 (*Lebon* p. 388) had enshrined the right to security as a fundamental freedom (P. CASSIA, *Les référés administratifs d'urgence*, LGDJ, coll. Systèmes Droit, 2003, p. 114), while President Chabanol saw in the same decision an exclusion of this right from the field of fundamental freedoms (D. CHABANOL, *La Pratique du contentieux administratif*, 4^{ème} éd, Litec Jurisclasseur, 2002, No. 249). This example shows the caution that must govern the study of this notion, and the need to limit the investigation to norms for which all doubt is removed. Furthermore, it can be observed that when the interim relief judge intends to enshrine a fundamental freedom or, on the contrary, deny its existence, he does so explicitly. Thus, in the *Commune de Montreuil-Bellay* order of 12 November 2001 (*Lebon* p. 551), the interim relief judge expressly enshrines 'the fundamental freedom to undertake' but does not give this qualification to contractual freedom. Only the former must therefore be considered as recognised in this decision.

502 The decisions indicate that the invoked norm "has the character of a fundamental freedom" (CE, ord. 31 May 2001, *Commune d'Hyères-les-Palmiers*, *Lebon* p. 253; CE, 29 March 2002, *SCI Stéphane et autres*, *Lebon* p. 117; CE, 9 April 2004, *Vast*, *Lebon* p. 173; CE, ord. 3 April 2002, *Ministre de l'Intérieur c/ Kurtarici*, *Lebon* T. p. 871), "presents the character of a fundamental freedom" (CE, 9 December 2003, *Aguillon et autres*, *Lebon* p. 497; CE, ord. 16 February 2004, *Benaissa*, *Lebon* T. p. 826), "has the character of a fundamental freedom" (CE, ord. 16 July 2001, *Feuillatay*, *Lebon* p. 309); "constitutes a fundamental freedom" (CE, ord. 27 November 2002, *SCI Résidence du théâtre*, *Lebon* T. p. 874; CE, ord. 11 August 2005, *Maingueneau*, n° 283462); "is a fundamental freedom" (CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL)*, *Lebon* p. 311; CE, ord. 3 May 2005, *Confédération française des travailleurs chrétiens*, *Lebon* T. p. 1034); "figure" among the fundamental freedoms (CE, 15 February 2002, *Hadda*, *Lebon* p. 45); "is" among the fundamental freedoms (CE, ord. 15 October 2001, *Ministre de l'Intérieur c/ Hamani*, *Lebon* p. 466). It may also mention "the fundamental freedom of..." (see in particular the above-mentioned order of (see in particular the aforementioned order *Commune de Montreuil-Bellay* of 12 November 2001) or that "the notion of fundamental freedom (...) encompasses..." (CE, order of 12 January 2001, *Minister of the Interior v. Hamani*, *Lebon* p. 466). (CE, ord. 12 January 2001, *Hyacinthe*, *Lebon* p. 12). Certain formulas also make it possible to detect with certainty the existence of a fundamental freedom. This is the case when the judge indicates that the contested action "does not infringe the principle of free expression of suffrage or any other fundamental freedom" (CE, ord. 7 February 2001, *Commune de Pointe-à-Pitre*, *Lebon* T. p. 1129). This necessarily means that the principle of free expression of suffrage is a fundamental freedom. The same is true when the judge affirms that the administration infringes on the freedoms recognised to foreigners in a regular situation after having mentioned the impossibility of moving around and the impossibility of exercising a professional activity (CE, ord. 11 June 2002, *Aït Oubba*, *Lebon* T. p. 869). In so doing, it necessarily enshrines the two freedoms mentioned as fundamental freedoms.

503 The judge considers all of these terms to be synonymous. Some authors have argued that the formulas "has the character" or "has the character" of a fundamental freedom have a different meaning from the other formulas. They reflect the hesitation of the judge when he or she establishes as a fundamental freedom a norm for which this qualification is not obvious. In the above-mentioned *Feuillatay* order, the interim relief judge stated that the right to medical consent "has the character of a fundamental freedom". According to Mr Clément, "This is no doubt different from being a fundamental freedom. If the High Court had wanted to clearly qualify the right to care as a fundamental freedom, it would have done so. If, according to him, it did not do so, it is because this right is not, like the right to property, "contained in major texts". The author states that "One could (...) interpret the choice of words retained by the Conseil d'Etat as a hesitation on its part. Others, perhaps, will see in it a simple clumsiness of the pen" (C. CLEMENT, *LPA* 26 March 2003, n° 61, p. 6). A similar explanation was proposed by Thomas Pez. The latter notes that for the administrative judge, "The right to property has the character of a fundamental freedom, simply the character. It is not, in itself, a fundamental freedom, otherwise the Council of State would have said so. In other words, the term fundamental freedom covers the right to property but the right to property is not confused with it. The right to property is assimilated to a fundamental freedom" (T. PEZ, "Le droit de propriété devant le juge administratif du référé-liberté", *RFDA* 2003, p. 371-372. Underlined). Here again, the formula expresses a certain indecision on the part of the judge. But in reality, these explanations in no way correspond to the reality of the case law. These variations should not be seen as hesitations or pen errors, but only as syntactical differences between formulas whose meaning and scope are strictly identical. The judge does not attach any consequence to these differences in wording and uses them interchangeably. Thus, for example, he has stated that the right to property "has the character" (*Commune d'Hyères-les-Palmiers* and *Stéphane* decisions cited above) or "constitutes" (*S.C.I. Résidence du théâtre* order cited above) a fundamental freedom.

504 See *infra*, § 221.

505 See CE, Sect. 28 February 2001, *Casanovas*, *Lebon* p. 108. See *infra*, §§ 240-241.

506 On the other hand, when the judge does not mention the freedom in question, no conclusion can be drawn. This is the case when the judge affirms that the contested measure "does not in itself constitute an infringement of a fundamental freedom" (CE, ord. 27 June 2002, *Centre hospitalier général de Troyes*, *Lebon* p. 228) or that the contested act "cannot in itself be regarded as infringing a fundamental freedom" (CE, ord. 16 September 2002, *Société EURL La Cour des miracles*, *Lebon* T. p. 314) without having first referred to any defined right or freedom.

whether the condition of infringement, or seriousness of the infringement, is met⁵⁰⁷. Similarly, the phrase referring to "the fundamental freedoms invoked by the applicant"⁵⁰⁸ must be read not as an endorsement by the judge of the characterisation adopted by the applicant but as a simple restatement of the terms of his application, which in no way prejudices their eligibility for the procedure under Article L. 521-2.

Explicit exclusionary formulas are the opposite of those in which the Council of State expressly recognises the existence of a fundamental freedom⁵⁰⁹. It should be noted that the absence of a fundamental freedom cannot be inferred from the mere rejection of the application for interim relief⁵¹⁰ or from formulas in which the judge expressly refuses to rule on the question of whether the norm invoked constitutes a fundamental freedom⁵¹¹. On the other hand, the rejection of the qualification of fundamental freedom may result from the rejection of an appeal when the appellant puts forward a single ground of appeal based on the existence of a fundamental freedom that the first judge wrongly refused to recognise. In this case, the rejection of the appeal on the merits necessarily implies that the court of cassation excludes the qualification of fundamental freedom⁵¹².

From these formulas, it is possible to draw up a list of norms included and a list of norms excluded from the category of fundamental freedoms⁵¹³. In addition to this double list, two additional elements will be taken into consideration to establish the criteria for identifying a fundamental freedom: on the one hand, the indications resulting from the decisions themselves, in their reasons and citations, and on the other hand, the details and indications provided by the government commissioners in the rare cases where the judge of the *référé-liberté* rules as a panel.

119. In the light of all this data, what are the elements that differentiate fundamental freedoms from the mass of other norms that make up the legal order? What are the elements that give the category of fundamental freedoms its specificity and distinguish them from other legal rules? In order for the proposed criteria to have any operational value, it is essential that the following two requirements be met: firstly, that the norms qualified as fundamental freedoms meet all the criteria without exception; secondly, that the norms excluded from the category of fundamental freedoms do not meet at least one of the criteria. The criteria must be sufficiently precise to reflect the positive law as it exists today; however, in order to have a certain durability, they must be compatible with the judge's approach and the flexibility that he wishes to give to his case law. If the latter is flexible, the criteria can only be so.

It should first be noted that the fact that a right or freedom is placed under the privileged protection of the judicial authority is not an obstacle to its classification as a fundamental freedom. Thus, the right to property and personal freedom have been recognised as fundamental freedoms within the meaning of Article L. 521-2, even though the judicial authority has traditionally been considered their natural guardian⁵¹⁴.

Positively, fundamental freedoms must be defined on the basis of two main criteria, each corresponding to one

507 In this case, the court only checks whether the standard invoked by the applicant has been infringed but does not take a position on whether this standard constitutes a fundamental freedom. In other words, it is not necessary for a norm to be qualified as a fundamental freedom for the court to take a position on the condition of infringement. Thus, the judge examines whether the principle of equality is violated in a 2001 decision (CE, 27 July 2001, *Haddad*, n° 231889) and explicitly excludes it from the scope of fundamental freedoms in 2003 (CE, ord. 26 June 2003, *Conseil départemental de parents d'élève de Meurthe-et-Moselle*, n° 257938). Conversely, in a 2002 decision, the judge examined whether the presumption of innocence had been violated, specifying that there was no need to investigate whether this right actually fell "within the scope of the provisions of Article L. 521-2 of the Code of Administrative Justice" (CE, ord. 20 February 2002, *Ploquin*, no. 243234); this right was enshrined in 2003 (CE, ord. 14 March 2005, *Gollnisch, Lebon* p. 103).

508 See for example CE, ord. 4 February 2003, *Hilario*, no. 253742.

509 The judge thus affirms that the norm invoked: "does not constitute a fundamental freedom within the meaning of Article L. 521-2" (CE, ord. 24 January 2001, *Université Paris VIII Vincennes Saint-Denis, Lebon* p. 37), does not have "the character of a fundamental freedom" (CE, ord. 3 May 2002, *Association de réinsertion sociale du Limousin et autres, Lebon* p. 168), that the principle is "distinct from fundamental freedoms" (*Gollnisch* order cited above), etc.

510 Since the conditions for granting the application are cumulative, it is sufficient for the application to be rejected if any of the conditions other than that relating to the presence of a fundamental freedom is not met. If one of the conditions is not met, the interim relief judge does not have to decide whether the others are satisfied (see § 221 *below*).

511 See for example CE, 18 October 2002, *Caunes-Rey*, No. 249678, stating "even supposing that the right of any holder of the baccalaureate to choose, in accordance with the provisions of Articles L. 612-2 and L. 612-3 of the Education Code, the higher education establishment in which he wishes to pursue undergraduate studies constitutes a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice, such a freedom is not directly affected by a jury's decision to adjourn a baccalaureate candidate.

512 See CE, 28 May 2001, *Raut, Lebon T.* p. 1126.

513 See Annex 1.

514 For the Court of Conflicts, 'the safeguarding of individual freedom and the protection of private property essentially fall within the remit of the judicial authority' (TC, 18 December 1947, *Hilaire, Lebon* p. 516). This privileged role now has a constitutional basis, on the basis of Article 66 of the Constitution for individual freedom, and the fundamental principles recognised by the laws of the Republic for the right to property (CC, no. 89-256 DC, 25 July 1989, *Rec.* p. 53). In constitutional case law, the courts have a *privileged* jurisdiction when these rights are at stake, not an exclusive jurisdiction. In Decision 256 DC, the Council refers to the "importance" of the powers conferred on the judicial authority in matters of protection of property, meaning that there is no monopoly for its benefit, as confirmed by subsequent decisions (see J. TREMEAU, "Le référé-liberté, instrument de protection du droit de propriété", *AJDA* 2003, p. 653). With regard to individual freedom, the authors of the Constitutional Code noted that the Constitutional Council distinguishes between individual freedom within the meaning of Article 66 of the Constitution and individual freedom within the meaning of Article 2 of the Declaration of the Rights of Man and the Citizen. In the first case, the jurisdiction of the judicial judge is exclusive; in the second, it may be shared between the two orders of jurisdiction (see T. S. RENOUX and M. DE VILLIERS, *Code constitutionnel*, 3^{ème} éd., Litec, 2005, n° 1245).

of the terms used by the legislator. The standard concerned is, first of all, a freedom. This is analysed in the broadest possible way by the administrative judge since it goes beyond the sole category of defensive rights. It must be analysed as a subjective public right of particular configuration. Secondly, the norm in question must be fundamental in nature. The judge understands this adjective in a material sense, as a synonym for eminent or essential. Fundamentality takes shape mainly but not exclusively in constitutionality. It should be noted that these two criteria - subjective public law and fundamentality - are cumulative. In particular, it is not enough for a norm to be *fundamental* to be a *fundamental freedom*. It is therefore wrong to focus exclusively, as many authors do, on the essentiality of the norm without taking into account its structure and purpose.

Section 1. Freedom: a subjective public right

120. At first glance, it might seem questionable to try to define a vague legal concept on the basis of a doctrinal concept that is just as vague, if not more so⁵¹⁵. Indeed, although the question of subjective rights has been the subject of numerous studies⁵¹⁶, it remains the subject of eternal controversy. The very definition of subjective rights is uncertain, due to the considerable number of interpretations of the concept⁵¹⁷. Nevertheless, considered in a technical sense, the notion of subjective public right may prove to be a very useful tool to account for the object of "fundamental freedom" as it is conceived by the administrative judge of summary proceedings. If this concept can be used, it is only on the condition that the technical meaning of it is indicated⁵¹⁸.
121. In Germany, where the term public subjective right is more commonly used, the concept has a legal character⁵¹⁹ and is therefore precisely defined by the authors. According to Bühler's 1914 definition, which is still referred to today⁵²⁰, 'a public subjective right is the legal position of the legal subject vis-à-vis the state in which he can demand something from the state or do something against it on the basis of an agreement or a binding legal provision enacted for the protection of his individual interests and which he can invoke against the administration'⁵²¹. According to this "protective norm theory" (*Schutznormlehre*), two elements make it possible to establish the existence of a public subjective right: on the one hand, an objective norm imposing an obligation on the administration, and on the other hand, the fact that this norm is intended to protect the individual interest of certain citizens⁵²². As M. Autexier states, 'A subjective public right presupposes the existence of a peremptory rule which determines the conditions necessary for the recognition of the right, determines the holders of the right and designates the public authority which is liable for the obligation'⁵²³.
122. In France, the concept is purely doctrinal. A very complete definition, including the main elements of the definition prevailing in Germany, was given by Professor Foulquier. For this author, "A citizen is the holder of a subjective right when he fulfils the conditions allowing him to be considered as the beneficiary of the

515 See R. MASTPETIOL, "Ambiguïté du droit subjectif: métaphysique, technique juridique ou sociologie", *APD* 1964, t. IX, pp. 71-81.

516 See in particular *APD* 1964, t. IX, *Le droit subjectif en question*; J. DABIN, *Le droit subjectif*, Dalloz, 1952, 313 p. (and its critique by C. EISENMANN, "Une nouvelle conception du droit subjectif: la théorie de M. Jean Dabin", *RDP* 1954, pp. 753-774); P. ROUBIER, *Droits subjectifs et situations juridiques* (1963), republished in Bibliothèque Dalloz, 2005, 451 p.; J.-J. SUEUR, *Recherches sur le concept de droit subjectif. Essai de méthodologie juridique*, thesis Nice 1980, 603 p. See more specifically, on the concept of subjective public right: N. FOULQUIER, *Les droits publics subjectifs des administrés. Emergence d'un concept en droit administratif français du XIX^e au XX^e siècle*, Dalloz, coll. NBT, 2003, 805 p.; I. CHOUMENKOVITCH, *Les droits subjectifs publics des particuliers*, thesis Paris, 1912, 206 p.; J. BARTHELEMY, *Essai d'une théorie des droits subjectifs des administrés dans le droit administratif français*, Librairie de la société du recueil général des lois et arrêtés, 1899, 204 p.; R. BONNARD, "Les droits publics subjectifs des administrés", *RDP* 1932, pp. 695-728.

517 See in this respect the striking - though not exhaustive - graphic presentation of the 'theories of subjective law' by C. ATIAS, *Théorie contre arbitraire. Eléments pour une théorie des théories juridiques*, PUF, 1987, p. 70.

518 Charles Eisenmann had noted that "positive law does not provide an enumeration of rights or subjective rights any more than it provides a definition of subjective right; it is a notion that it ignores; it does not know the term. This term represents a creation of the science of law or 'doctrine' (...)" (C. EISENMANN, *op. cit.*, p. 773). Thus, "It is the doctrine that must establish its definition in correlation with the content it intends to assign to it" (*ibid.*). The authors do not always have this methodological rigour. They often use the concept without specifying in what sense they are using it. As Bonnard already stated in 1935, "most [authors] consider subjective law as a self-evident concept; they are therefore very surprised and even shocked when they are pressed to give it a precise meaning" (R. BONNARD, *Précis de droit administratif*, Sirey, 1935, p. VI).

519 In German litigation, the existence of a public subjective right is a prerequisite for bringing an action before the administrative court. See D. CAPITANT, *Les effets juridiques des droits fondamentaux en Allemagne*, LGDJ, coll. BSCP, t. 87, 2001, p. 41 ff.

520 See the authors cited by D. CAPITANT, above-mentioned thesis, p. 43, note 81.

521 O. BÜHLER, *Die subjektiven öffentlichen Rechte und ihr Schutz in der deutschen Verwaltungsprerchung*, 1914, p. 224, quoted by D. CAPITANT, *op. cit.*

522 This theory of the protective norm, developed in German administrative law, was received in the case law of the Federal Constitutional Court (BVerfGE 27, 297, 17 December 1969, p. 307, quoted by D. CAPITANT, *op. cit.*, p. 53).

523 C. AUTEXIER, *Introduction au droit public allemand*, PUF, 1997, n° 209. See also H. MAURER, *Droit administratif allemand. Allgemeines Verwaltungsrecht* (translated from German by M. FROMONT), LGDJ, coll. Manuels, 1992, p. 156: "This is understood to mean the legal power granted to a subject of law by a rule of law to require, with a view to the satisfaction of his own interests, that a third party perform, tolerate or refrain from performing a given act. Subjective rights can be based on both private and public law. The latter are the focus here. *The subjective public right* is therefore - from the citizen's point of view - *the legal power conferred by public law on an individual to demand from the state, in order to pursue the satisfaction of his own interests, a certain behaviour*" (emphasis added).

power to demand - recognised by a general or individual norm, without being obliged to use this power, for a socially legitimate personal purpose - a certain behaviour on the part of public persons - which constitutes the object of their obligation - in order to obtain a certain moral or material advantage which the legal order has, expressly or implicitly, considered to be lawful"⁵²⁴ .

123. On the basis of these elements, it is possible to define the theoretical notion of subjective public law, in the context of this study, as a legal obligation on the administration, aimed at the protection of a particular interest and involving an abstractly identified beneficiary.

I. A legal obligation on the part of the administration

124. Firstly, fundamental freedom is a rule of law requiring the administration to adopt a certain behaviour. It is a norm of direct effect enforceable against the public authority.

A. A legal norm

125. Fundamental freedom, understood here from the perspective of subjective law, has no separate or autonomous existence. The concept exists only through and thanks to objective law⁵²⁵ . Jean Dabin noted that "in the language commonly accepted today, both by legal technicians and legal theorists, the expression 'subjective right' (...) means a certain prerogative established or recognised by the objective law for the benefit of an individual (or a community)"⁵²⁶ . It is a species belonging to the genus of prerogatives recognised by objective law. It is merely an element of objective law imputed to a legal person⁵²⁷ . This meaning corresponds perfectly to that of fundamental freedom, which does not exist independently of the right.

126. Only *legal* norms can have the character of a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice. The reason for this is simple. The determination of fundamental freedoms depends on the legal grounds for the court decision⁵²⁸ . However, these can, by hypothesis, only come from the legal system itself: "the legal grounds for judgments must always and only be rules drawn from legislation, set out in articles of the law, codes and other officially established sources of law"⁵²⁹ . The normative basis of judicial decisions can only correspond to legislative rules or better "legislated, i.e. pre-established, pre-existing any intervention and action of the courts"⁵³⁰ . The judicial solution must be based on the law - in the broadest sense; it "can only be determined by its rules, deduced from its provisions alone, to the exclusion of all other possible categories, and above all to the exclusion of rules that would be created, even 'unofficially', by the judge himself; it is in the 'law' alone that he must look for - and that he will find - the normative bases for his judgments"⁵³¹ . The interim relief judge cannot, therefore, discover fundamental freedoms outside the sources of the law. The norm must pre-exist his intervention. Fundamental freedoms cannot therefore be sought outside positive law. Fundamental freedom is, and can only be, a norm of a legal nature. "There are no *rights*, in the legal sense of the term, except through *law*"⁵³² . According to the principles governing the mode

524 N. FOULQUIER, Les droits publics subjectifs des administrés. Emergence d'un concept en droit administratif français du XIX^e au XX^e siècle, Dalloz, coll. NBT, 2003, p. 405.

525 As M. Maurer writes, "*Objective and subjective law* must be strictly distinguished. Objective law is the sum of legal rules; it forms the basis of legal obligations and, where applicable, of subjective rights which are their counterpart" (H. MAURER, *op. cit.*, p. 157. Underlined).

526 J. DABIN, Le droit subjectif, *op. cit.*, p. 2.

527 According to Réglade, "the concept of subjective right is not an autonomous concept, independent of that of the legal norm or objective right"; it is "an aspect or, in a way, an emanation of the legal norm, known as objective right" (M. REGLADE, *Valeurs sociales et concepts juridiques (norme et technique)*, Sirey, 1950, p. 85). Similarly, for Kelsen, subjective law is only the 'reflex' of a legal obligation, i.e. the product of reflection, understood in the sense of physics. Reflex law merely reflects an obligation and therefore does not, in itself, exist: 'that fact which we call "right", or "subjective right" or "claim", of an individual is nothing other than the obligation of the other or others' (H. KELSEN, *Pure Theory*, *op. cit.*, p. 134). Thus, "a reflex right cannot exist without the corresponding legal obligation. It is only when one individual is legally obliged to a certain conduct towards another individual that the latter has a 'right' to that conduct towards the former. It must be said more: the 'reflex right' of the one consists solely and exclusively in the obligation of the other" (*op. cit.*, pp. 135-136).

528 As Charles Eisenmann reminds us, the grounds of law are, in court decisions, those which "refer to the legal order (in one way or another)" (C. EISENMANN, "Jurisdiction et logique (selon les données du droit français)", in *Mélanges dédiés à Gabriel Marty*, Université des sciences sociales de Toulouse, 1978, p. 480). These legal grounds include, alongside the elements of the case, general and abstract elements, i.e. 'all those which relate to the meaning of the rule of law, which contribute to fixing its substance' (*ibid.*).

529 C. EISENMANN, *op. cit.* p. 484.

530 C. EISENMANN, *op. cit.* p. 485.

531 C. EISENMANN, *op. cit.* p. 485.

532 S. GOYARD-FABRE, *Les principes philosophiques du droit politique moderne*, PUF, coll. Thémis philosophie, 1992, p. 282. Underlined. The principle is accepted by all authors for the expressions close to fundamental rights, public liberties and human rights. For M. Braud, "There are only public liberties 'named' by the law, i.e. explicitly laid down by a norm" (P. BRAUD, *La notion de liberté publique en droit français*, LGDJ, coll. BDP, t. 76, 1968, p. 271). Similarly, according to M. Colliard, "Les libertés publiques n'existent qu'en droit positif et que par le droit positif (...)" (C.-A. COLLIARD, *Libertés publiques*, 7^{ème} éd., Dalloz, coll. Précis, 1989, p. 16). According to Ms Lochak, "human rights have no real existence outside their consideration by positive law" (D. LOCHAK, "L'étranger et les droits de l'homme", in *Service public et libertés, Mélanges*

of production of norms in our legal system, the legal nature of a norm is defined by its inclusion in the state legal order, its belonging to the state legal system: "only the rule accepted and enacted by the state constitutes a rule of law in the strict sense of the term"⁵³³. It is the state, and the state alone, that decides to recognise the rights and freedoms of individuals⁵³⁴. Since positive law is limited to state law, fundamental freedoms cannot have an origin outside the legal order. As a result, individual or collective aspirations not recognised by law cannot be qualified as such. As Carré de Malberg stated, "a faculty, even a natural one, of the individual, as long as it has not been recognised, proclaimed and sanctioned by the law of the State, remains without value"⁵³⁵. There must be a norm of positive law, whether it is a textual norm as for the right of asylum or freedom of assembly, or a jurisprudential norm as for personal freedom. In the absence of such a legal obligation, no fundamental freedom can be characterised. Thus, if access to postgraduate training cannot be considered a fundamental freedom⁵³⁶, it is, as the government commissioner points out, because such access "is not guaranteed by any text"⁵³⁷. Since no legal source enshrines the existence of such a right, the administrative judge could not consider it a fundamental freedom.

Since, moreover, the norm must pre-exist the intervention of the judge, the latter cannot infer the existence of a fundamental freedom from the general concept of freedom. Indeed, a fundamental freedom is not freedom in general. When an activity has not been established as a legal freedom, this activity is lawful and tolerated but does not benefit from specific recognition. It corresponds, according to the established formula, to an "innominate" freedom, constituting one of the innumerable faces of freedom. Innominate freedoms "are not provided for by any text and (...) simply result from the general principle of freedom enshrined in Article 4 of the Declaration of the Rights of Man and of the Citizen"⁵³⁸. Innominate freedoms are opposed to "named" freedoms: those whose existence is specifically recognised by a legal norm. As M. Teitgen pointed out, "freedoms that are not named by positive law (...) have no other guarantees than the guarantee of principle attached, by the *Declaration of Human Rights*, to individual freedom in general"⁵³⁹. They can be exercised by virtue of the liberal principle according to which everything that is not forbidden by law cannot be prevented. But they cannot be regarded as fundamental freedoms. The solution has long been established in the context of assault. The judge refuses to recognise the status of fundamental freedom to unnamed freedoms, such as the right of every citizen to visit historical monuments⁵⁴⁰. Only named freedoms have legal substance and as such constitute genuine rules of law. The existence of a fundamental freedom cannot be deduced from the absence of a command and prohibition; direct protection of the beneficiary is required. Consequently, it would be questionable to seek to establish the existence of fundamental freedoms on the basis of the general freedom proclaimed in Articles 2 and 4 of the Declaration of the Rights of Man and of the Citizen. If the Constitutional Council has been able, through a constructive interpretation, to derive from these provisions rights and freedoms that are absent from the constitutional text⁵⁴¹, the interim relief judge could not, in view of his office, proceed in the same way. There is nothing to prevent him

offerts au professeur Robert-Edouard Charlier, éditions de l'Université et de l'enseignement moderne, 1981, p. 615). For M. Mourgeon, "The recognition of rights is the initial condition of their effectiveness and opposability since, without it, rights are neither invocable nor usable" (J. MOURGEON, *Les droits de l'homme*, PUF, coll. QSJ, 2003, p. 67). The same applies to the theoretical concept of "fundamental right" (see in particular S. DEFIX, *Le concept de droits fondamentaux. Contribution à la détermination d'un droit constitutionnel européen des droits fondamentaux*, thesis Clermont-Ferrand I, 1999, p. 72 et seq. MOREL, "Protection des droits fondamentaux et systèmes juridiques", in *L'effectivité des droits fondamentaux dans les pays de la communauté francophone*, AUPELF -UREF, 1994, p. 318). Jusnaturalist authors themselves admit that "the need to respect fundamental rights implies recognition of these rights in a legal instrument. This is the only condition that allows individuals to invoke their rights before the judge" (W. SABETE GHOBRIAL, *De l'obligation de la reconnaissance constitutionnelle des droits fondamentaux. A la recherche d'un fondement de l'obligation*, thesis Bordeaux I, 1994, p. 139). M. Picard recognises that there is no question of 'arguing that the ordinary courts should have the power to suddenly invent new fundamental rights that have never been enshrined anywhere (...)' (E. Picard, 'L'émergence des droits fondamentaux en France', *AJDA* 1998, special issue, p. 41).

533 R. CARRE DE MALBERG, *Contribution à la théorie générale de l'Etat* (1920-1922), Bibliothèque Dalloz, republished 2003, t. 1, p. 240: "In our modern societies, 'positive' law is that which is endorsed as such by the public authorities according to the criteria that they themselves establish for this purpose" (D. DE BECHILLON, *Qu'est-ce qu'une règle de Droit ?*, Odile Jacob, 1997, p. 163). In this way, "A norm is part of a legal order only because it has been established in accordance with the provisions of another norm of that order" (H. KELSEN, *Pure Theory*, *op. cit.*, p. 235). It follows that "a norm whose creation is not regulated at all by a higher norm cannot be considered as having been laid down within the framework of the legal order, and consequently cannot form part of that order" (*op. cit.*, p. 236).

534 The State "claims control over the process of recognising and codifying rights: it remains free, in the final analysis, to determine as it sees fit the nature and scope of the rights it recognises for persons living on its territory" (D. LOCHAK, "L'étranger et les droits de l'homme", *op. cit.*, pp. 615-616).

535 R. CARRE DE MALBERG, *Contribution...*, *op. cit.*, p. 240. As long as values, interests or requirements "are not integrated into positive law, they are not really fundamental rights; they are the expression of a spirit without force" (G. PECES-BARBA MARTINEZ, *op. cit.*, p. 40).

536 CE, 18 October 2002, *Caunes-Rey*, n° 249678.

537 Unpublished conclusions of R. Schwartz on CE, 18 October 2002, *Caunes-Rey*, n° 249678.

538 J.-M. Auby and R. Drago, *Traité de contentieux administratif*, t. 1, 3^{ème} ed, LGDJ, 1984, p. 687.

539 P.-H. TEITGEN, *La police municipale. Etude de l'interprétation jurisprudentielle des articles 91, 94 et 97 de la loi du 5 avril 1884*, Sirey, 1934, p. 132. Underlined.

540 See concl. GAZIER on CE, 18 November 1949, *Carlier*, RDP 1950, p. 172.

541 For example, Article 4 of the Declaration of 1789 served as a basis for the recognition of entrepreneurial freedom (CC, No. 81-132 DC, cons. 16, *Rec.* p. 18; CC, No. 98-401 DC, 10 June 1998, cons. 3, *Rec.* p. 258). It has been argued that in constitutional jurisprudence, this provision was to play a role comparable to the general freedom of action of Article 2.1 of the German Basic Law, that of an *Aufgangsgrundrecht* (not fundamental right) allowing the protection of certain rights and freedoms not included in the constitutional text but likely to be linked to the general idea of freedom (see in this sense T. MEINDL, *La notion de droit fondamental dans les jurisprudences et doctrines constitutionnelles françaises et allemandes*, LGDJ, coll. BSCP, t. 112, 2003, p. 146 et seq.)

from describing as a fundamental freedom a right or freedom extracted by the Constitutional Council from these provisions and which, as such, represents a standard pre-existing his intervention. On the other hand, it would be questionable for the interim relief judge, ruling within 48 hours, to recognize the power to create rights and freedoms from these provisions if they have never been recognized beforehand by the Constitutional Council - or by the Council of State ruling on the dispute - and, consequently, do not pre-exist his intervention.

127. However, the question arises as to whether, like the technique sometimes used to discover general principles of law, the interim relief judge can extract a fundamental freedom from a series of convergent provisions⁵⁴². During the preparatory work, the rapporteur for the bill in the National Assembly evasively referred to the technique of general principles of law in relation to fundamental freedoms⁵⁴³. This being the case, if a comparison with the theory of general principles of law is conceivable, it can only be partial because of the very important difference that exists, from the point of view of the mode of appearance, between the discovery of a general principle of law and the recognition of a fundamental freedom.

The general principles of law are created relatively freely, and the text from which they are derived does not have to be applicable to the administration. On the other hand, as previously established, a fundamental freedom can only be recognised if a legal standard exists and is opposable to the administration before the intervention of the judge of summary proceedings. In this respect, the enshrinement of a general principle of law will sometimes require the administrative judge to do a great deal of creative work, insofar as it makes an obligation that was not enforceable against the administration before the judge intervened⁵⁴⁴. The consecration of the principle creates a new legal obligation for the administration. If we take the example of the *Ville de Toulouse* ruling of 23 April 1982⁵⁴⁵, before being enshrined as a general principle of law, the right to a salary at least equal to the minimum interprofessional growth wage was only a provision of the Labour Code that could not be enforced, as such, against the administration. From this decision, a new legal obligation is imposed on the administration which did not exist before.

On the other hand, when he recognises a fundamental freedom, the judge does not create a new legal standard or obligation; it exists before his intervention and is already enforceable against the administration by virtue of a text or case law. The judge only qualifies it. He is not inspired by the spirit of legislative provisions, but by these provisions themselves. The obligation was enforceable against him; it only continues to be enforceable through the category of fundamental freedoms. While it is no longer disputed that the administrative court is the source of law⁵⁴⁶, it cannot, unless it sets itself up as the true source of fundamental freedoms, recognise this status for "rights", "freedoms" or "guarantees" that have never been declared enforceable against the administrative authority. Moreover, although it is conceivable that the Council of State could use its legal authority in the context of an

542 This process of recognition by synthesising constitutes one of the four modes of recognition of a general principle of law. On the different ways of creating general principles of law, see J.-M. MAILLOT, *La théorie administrativiste des principes généraux du droit. Continuité et modernité*, Dalloz, coll. NBT, 2003, p. 383 et seq.

543 See *supra*, § 77.

544 Certes, Pon affirme que « les principes non écrits ont toujours peu ou prou été dégagés à partir de normes écrites » (J.-M. BELORGEY, "La place des principes non écrits dans les avis et les décisions du Conseil d'Etat français", *RA* 1999, special issue 4, p. 79), that "the general principle of law is deduced by the judge from the existing law" (B. GENEVOIS, "Principes généraux du droit", *Répertoire Dalloz de contentieux administratif*, 2000, no. 36) or that the discovery of these principles is done "by crystallisation of latent elements in the existing law" (S. HUBAC and J.-E. SCHOETTL, chron. under CE, Ass. 11 July 1984, *Surbini*, *AJDA* 1984, p. 543). Nevertheless, it is certain that before their consecration by the judge, these principles do not as such have a legal existence. The formal source of the general principles of law can only be the administrative jurisdiction itself (R. CHAPUS, "De la valeur juridique des principes généraux du droit et des autres règles jurisprudentielles du droit administratif", *D.* 1966, chron. n° XX, pp. 99-106, special p. 104). As Professor Moderne points out, "It is by no means certain that these principles would be in a sort of latent state in a legal order before being identified and officially proclaimed by a qualified authority" (F. MODERNE, "Légitimité des principes généraux du droit", *RFD* 1999, p. 728). On the contrary, they represent a normative creation on the part of the judge: "before being stated by him, the general principles of law have no legal existence" (P. WACHSMANN, "La volonté de l'interprète", *Droits* 1999/28, p. 36). As M. Jeanneau stated, the judge makes "the raw data used undergo a real transformation, thus making them reach legal life" (B. JEANNEAU, *Les principes généraux du droit dans la jurisprudence administrative*, Sirey, 1954, p. 123).

545 CE, Sect. 23 April 1982, *Ville de Toulouse c/ Aragon, Lebon* p. 151, concl. D. LABETOULLE.

546 Doctrinal writers have long been reluctant to recognise the normative power of case law (see M. WALINE, "Le pouvoir normatif de la jurisprudence", *La technique et les principes du droit public. Etudes en l'honneur de Georges Scelle*, t. 2, LGDJ, 1950, p. 613 et seq. DUPEYROUX, "La jurisprudence, source abusive de droit", in *Mélanges offerts à Jacques Maury*, t. II, Dalloz Sirey, 1960, pp. 349-377; J. ROCHE, "Réflexions sur le pouvoir normatif de la jurisprudence", *AJDA* 1962, pp. 532 et seq.; *La réaction de la doctrine à la création du droit par les juges*, Travaux de l'association Henri Capitant, Economica, 1980). The Conseil d'Etat relativised its creative role by resorting to the hackneyed stratagem, the traditional sophism according to which jurisprudence is made up of "principles that the judge formalises but which pre-exist his intervention" (H. SAVOIE, concl. on CE, Ass., 6 February 1998, *Tête et association de sauvegarde de l'Ouest lyonnais*, *RJDA* 5/98, n° 669, p. 387). The Council of State defends itself in particular from being the author of general principles of law. It presents itself as the servant of a body of unwritten rules that are imposed on it from the outside and that it "merely notes" (M. LETOURNEUR, "Les principes généraux dans la jurisprudence du Conseil d'Etat", *EDCE* 1949, note p. 31). Today, this presentation has changed. As M. Morvan points out, "The myth of the pre-existence of principles (in particular the 'general principles of law' established since 1945 by the Council of State) no longer abuses any observer and has been the subject of definitive criticism" (P. Morvan, "En droit, la jurisprudence est une source de droit", *RRJ* 2001/1, p. 83, note 27). The courts themselves affirm that case law is a source of law in the same way as the law. Thus, in the above-mentioned *Tête* judgment, the Conseil d'Etat accepted an exception of illegality in relation to Community law based not on a law but on its own case law, noting that "the national rules applicable on the date of the contested decision (...) were not compatible with the objectives of the Directive of 18 July 1989; they cannot, therefore, provide a legal basis for the contested decision". On this question, see generally the above-mentioned study by Professor Morvan, pp. 77-110.

appeal on the merits, it would be impossible to envisage such extensive creative power in the hands of a judge ruling alone and within 48 hours. The judge cannot oppose the administration to a norm that the legislator has not made applicable to it, for example a provision of the labour code which the administrative judge would impose on it for the first time, i.e. without having applied it beforehand by means of the general principles of law. Its creative power is therefore limited in this respect. If the judge can identify a fundamental freedom by crystallisation of converging provisions, it can only be from provisions *expressly applicable* to the administration before his intervention.

Two applications can be noted in this respect in the case law relating to Article L. 521-2 of the Code of Administrative Justice. Firstly, the judge used this recognition-synthesis technique to define an element constituting a fundamental freedom. The judge refers to a "right to benefit from a procedure for examining one's asylum application that complies with the guarantees that must be attached to it"⁵⁴⁷. This component of the right to asylum is deduced not from a specific provision but from all the guarantees granted to the person concerned in this area and which require the possibility of being present during the examination of his or her application in order to be able to provide the required justifications and answer the questions of the authorities in charge of the case. Secondly, the interim relief judge seems to have recognised the existence of a fundamental freedom on the basis of convergent provisions ensuring its protection. In the *Pegini* order of 29 July 2003, the interim relief judge stated that "such disregard of the rules governing extradition constitutes a serious infringement of a fundamental freedom"⁵⁴⁸. This formula is open to two interpretations. Either the right to be extradited in accordance with the rules governing extradition is a fundamental freedom. In this respect, it should be noted that the applicant claimed an infringement of "his freedom of movement, his safety and the *right to be extradited in accordance with due process*". Either the administration has infringed a fundamental freedom that the interim relief judge does not expressly designate, which may be freedom of movement or personal freedom - which is then mentioned in the decision, but only to qualify the urgency⁵⁴⁹. If the first interpretation were to be retained, it would mean that the judge has identified this freedom on the basis of a synthesis of the various texts and case law principles applicable to the matter, which together form the "rules governing extradition" referred to by the judge.

However, it is not enough for a legal standard to exist to constitute a freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice. It is also necessary, as this is a subjective *public* right, that this standard is binding on the public authority, i.e. that the legal obligation it contains is directly enforceable against the administrative authority.

B. A legal norm directly enforceable against the administration

128. Fundamental freedom, within the meaning of Article L. 521-2, has its source in a norm that can be enforced against the public authority. This means that the administration must be the debtor of the right or freedom in question, but also that individuals must be able to invoke it before the ordinary courts⁵⁵⁰.

547 CE, ord. 25 November 2003, *Ministre de l'Intérieur, de la Sécurité intérieure et des Libertés locales c/ Nikoghosyan*, *Lebon T.* p. 927.

548 CE, ord. 29 July 2003, *Pegini*, *Lebon* p. 345.

549 The judge stated that, "given the importance for individual liberty of the safeguards surrounding the extradition procedure, the condition of urgency (...) is met".

550 It should be mentioned that this requirement of justiciability of the norm is also found in foreign legal systems. Thus, in Germany, "The primary characteristic of a fundamental right is that it is justiciable" (C. Autexier, *Introduction au droit public allemand*, PUF, 1997, no. 109). "A statement that cannot be implemented by a judge always causes perplexity to the German jurist, who will not see it as a fundamental right, but at best as a goal assigned to the action of the State" (*ibid.*). In Spain, the Constitution distinguishes three sets of provisions. Fundamental rights and public freedoms" (Section 1^{er} of Chapter 2 of Title 1^{er}) may be invoked before the ordinary courts and protected by the remedy of *amparo*. The "rights and duties of citizens" (second section of Chapter 1^{er} of Title 1^{er}) may also be invoked before the ordinary courts but are not guaranteed *amparo*. Finally, the Constitution refers to the 'guiding principles of social and economic policy' (Chapter 3 of Title 1^{er}), which correspond in particular to the obligation of the public authorities to ensure the protection of the family (Article 39), the action of the public authorities in favour of economic and social development (Article 40), the 'right to protection of health' (Article 43) or the 'right' to access culture (Article 44). In this regard, Article 53-3 of the Constitution provides that the guiding principles of social and economic policy "may simply be invoked before the ordinary courts in the terms defined by the laws which develop them". Thus, "these are not real subjective rights *stricto sensu* that citizens can assert directly before the public authorities" but "constitutional mandates whose direct addressee is above all the legislator" (M. RODRIGUEZ-PINERO Y. BRAVO FERRER and J. LEGUINA VILLA, "Spanish Report", *AJIC* 1990/VI, p. 123). In Colombia, the trusteeship action provided for in Article 86 of the Constitution is limited to "fundamental rights" which are "of immediate application" by virtue of its Article 85. Other constitutional rights do not enjoy this special protection (see R.A. BREWER CARIAS, "La justice constitutionnelle et le pouvoir judiciaire", in *Etudes de droit public comparé*, Bruylant, 2001, p. 1082). In Portugal, "only the constitutional precepts relating to 'rights, freedoms and guarantees' (and fundamental rights of a similar nature) are *directly applicable*. This means, basically, (...) that the content and scope of these rights are determined at the constitutional level, so that it is up to the legal operators (either the Administration or the Courts) to apply them, even though there is no law to give them concrete form; on the other hand, the exact configuration and dimension of the 'social' rights continue to depend on a subsequent legislative intervention, which gives them concrete form and shape, and only then do they acquire their full effectiveness and possibility of execution" (J.-M. CARDOSO DA COSTA, "Portuguese Report", *AJIC* 1990/VI, *VIII Conference of Constitutional Courts*, Ankara 7-10 May 1990, p. 181. Underlined). The Charter of Fundamental Rights of the European Union

1. The requirement of direct effect

129. The requirement of direct effect was expressly formulated by the government commissioners and the interim relief judge of the Council of State.

This was first mentioned by Pascale Fombeur in her conclusions on the *Casanovas* judgment. Ms Fombeur states that 'the right to employment is clearly not a right whose benefit could be claimed directly before an ordinary court; *a fortiori*, you will not see it as a fundamental freedom for the application of Article L. 521-2⁵⁵¹. Thus, a correlation is expressly established between the direct effect of the norm and its eligibility for the procedure of Article L. 521-2 of the Code of Administrative Justice. In the case in point, the right to employment set out in paragraph 5^{ème} of the preamble to the 1946 Constitution, the fact that this provision cannot be invoked before the ordinary courts is an obstacle to its being recognised as a fundamental freedom. The purpose of this reasoning is to limit the scope of fundamental freedoms to those rights and freedoms that an applicant can directly claim before an ordinary court. Constitutional norms whose respect is only required of the legislator are therefore excluded. This requirement of completeness of the norm will also be affirmed by Isabelle de Silva in her conclusions on the *Tliba* judgment. For Ms de Silva, the qualification of fundamental freedom must be excluded when "the right is formulated in very general terms, or implies an obligation of the State whose contours are difficult to determine, or is similar to a declaration of intent - we are thinking of the "right to employment" or the "principle of equality before the burdens resulting from national disasters" (...)552. This requirement is not limited to constitutional norms. In the field of international law rules too, it must lead to the exclusion of the recognition of a fundamental freedom for "obligations that are imposed on States or are formulated in terms that are too general" for the Conseil d'Etat to recognise them as having direct effect for the benefit of individuals553. "Conversely, a stipulation that produces direct effects for the benefit of individuals could, in certain cases, conceal a right or a fundamental freedom (...)554.

The requirement of direct effect of the fundamental freedom standard was then explicitly affirmed by the interim relief judge of the Conseil d'Etat in an order of 3 May 2002, *Association de réinsertion sociale du Limousin et al.*555. The applicant associations asked the administrative judge to recognise as a fundamental freedom a "right" to housing, which they had seen enshrined in the Constitution and in conventions. The applicants based themselves on an objective of constitutional value: the possibility for all persons to have decent housing556; on the other hand on "the stipulations relating to access to housing for individuals which are contained in certain international conventions ratified by France"557. The interim relief judge refused to see in these provisions the recognition of a right to housing that individuals could claim before the ordinary courts. These provisions do not create a legal obligation directly enforceable against the public authorities and, consequently, do not confer on individuals a right to obtain housing from the administration. The wording of the ordinance is particularly explicit in this respect. With regard to the international source, the judge noted that the stipulations invoked "create obligations only between the States parties to these conventions and do not produce any direct effect with regard to private persons". As far as the constitutional source is concerned, the possibility for all persons to have decent housing represents an objective imposed on the legislator but in no case a subjective right that can be invoked before the ordinary courts. By enshrining an objective, the interim relief judge stated, the Constitutional Council 'did not enshrine the existence of a right to housing with the status of a constitutional principle'558. In both cases, the lack

distinguishes between "rights", which must be respected, and "principles", whose application must be promoted.

551 P. FOMBEUR, concl. on CE, Sect. 28 February 2001, *Casanovas*, RFD A 2001, p. 402.

552 I. DE SILVA, concl. on CE, Sect. 30 October 2001, *Minister of the Interior c/ Tliba*, RFD A 2002, p. 329.

553 I. DE SILVA, *op. cit.* p. 330.

554 Ibid.

555 CE, ord. 3 May 2002, *Association de réinsertion sociale du Limousin et autres*, Lebon p. 168, AJDA 2002, pp. 818-821, note E. DESCHAMPS.

556 Recognised by the Constitutional Council in the *Diversité de l'habitat* decision (CC, No. 94-359 DC, 19 January 1995, *Rec.* p. 176) and subsequently confirmed (see CC, No. 98-403, 29 July 1998, *Rec.* p. 276).

557 The decision does not provide any indication of the conventions in question. However, Ms Deschamps (note cited above) states that Article 21 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees had been invoked before the first instance judge. This provision reads as follows: "With regard to housing, the Contracting States shall accord to refugees lawfully staying in their territory treatment as favourable as possible in so far as this matter is covered by laws and regulations or is subject to the control of the public authorities; such treatment shall in no case be less favourable than that accorded in the same circumstances to aliens generally".

558 As M. Zitouni has stated, 'although the public authorities must aim to achieve this objective, without being subject to an obligation of result', individuals cannot 'assert a subjective right to obtain housing' (F. ZITOUNI, 'L'enrichissement du droit au logement', in *Droit de l'aménagement, de l'urbanisme et de l'habitat* (GRIDAUH dir.) Dalloz, 2001, p. 173). The possibility of access to decent housing applies to the legislator and not to the administration. "We are in the presence of an objective assigned by the Constitution to the legislator, with a view to better satisfying the fundamental right that constitutes the dignity of the human person. There is therefore no fundamental right to decent housing, insofar as nowhere does the Constitution state any such right" (J. TREMEAU, note under CC, no. 98-403 DC, 29 July 1998, RFD C 1998, p. 767). An identical interpretation prevails, as regards the scope of this norm, in foreign constitutional litigation. Article 47 of the Spanish Constitution states: 'All Spaniards have the right to decent and appropriate housing. The public authorities shall help to create the necessary conditions and establish the appropriate rules to make this right effective, regulating the use of land in accordance with the general interest to prevent speculation'. In the same sense, Article 65 of the Portuguese Constitution provides that "Everyone has the right, for himself and his

of direct effect of the norm is an obstacle to its recognition as a fundamental freedom. The interim relief judge only grants this status to standards that confer real rights on their beneficiaries.

130. In other words, fundamental freedom is a self-executing norm. It must be self-sufficient, having the qualities required to confer on individuals rights that can be directly invoked before the courts. This criterion leads to the exclusion from the category of fundamental freedoms of legal norms⁵⁵⁹ which, not having the purpose of creating rights for the benefit of individuals, are not directly applicable before the ordinary courts⁵⁶⁰. According to the definition given by Ms Tigroudja, 'An incomplete or non-enforceable legal standard is (...) one which, by its nature (imprecise and general) and/or its purpose (to regulate the exercise of a right, for example), requires the subsequent intervention of the public authorities and in particular, most often, of the legislator'⁵⁶¹. However, this criterion does not automatically exclude from the scope of fundamental freedoms any constitutional or conventional norm that has no direct effect. These norms can always be the subject of implementing measures by the legislator, which then gives full effect to constitutional and international provisions that lack such effect. In this case, rights and freedoms can be applied before the ordinary courts, but only within the limits of the laws passed by Parliament to provide for their implementation. It is only through the law that the rights and freedoms proclaimed in provisions without direct effect become, through its intermediary, invocable before the ordinary courts. It follows from the foregoing that a norm can only be regarded as a fundamental freedom if it has direct effect in itself or, failing that, has been the subject of implementing measures that make it directly applicable. Three situations may therefore arise.

2. Three situations

131. A distinction must be made according to whether the disputed norm has direct effect, lacks direct effect or, finally, lacks direct effect but has been implemented by the legislator.

a. Direct effect

132. The first situation corresponds to legal norms that have direct effect in themselves. This category is made up of norms which, being complete in nature, confer on their beneficiaries prerogatives that can be directly

family, to a dwelling of suitable size, which meets the standards of hygiene and comfort and which preserves personal and family intimacy". As Laurence Gay notes, 'Neither the objective in France nor the written or praetorian principles on the "right to housing" abroad are interpreted as directly giving the possibility of obtaining a roof over one's head' (L. GAY, 'Propriété et logement. Réflexions à partir de la mise en œuvre du référent-liberté' (2^{de} part), *RFDC* 2003, p. 544). The Paris Court of Appeal considered that the possibility for all persons to have decent housing must be implemented by the legislator and does not justify infringements of property rights resulting from the occupation of a private building (CA Paris, 26 November 1997, *D.* 1998, IR. 6, cited by A. LEVADE, 'L'objectif de valeur constitutionnelle, vingt ans après. Réflexions sur une catégorie juridique introuvable', in *L'esprit des institutions, l'équilibre des pouvoirs. Mélanges en l'honneur de Pierre Pactet*, Dalloz, 2003, p. 699). If the ordinary judge cannot *apply* this objective, it is nevertheless possible for him or her to be *inspired by it* or to take it into consideration as a superabundant argument. See in this sense CAA Nancy, 4 December 2003, *Commune de Verdun*, *AJDA* 2004, pp. 82-83: the court applies the provisions of the law of 31 May 1990, known as the 'Besson law', in the light of this objective in order to conclude that the requirement of decent housing had been violated and to engage the responsibility of the commune of Verdun on this basis. The Court affirmed "that the travellers, in the absence of suitable facilities on the land in question, which are essential accessories to their caravans, did not benefit from decent housing when they stopped on the territory of the municipality of Verdun".

⁵⁵⁹ A distinction must be made between normativity, which is the ability to produce legal effects, and applicability, which refers to the direct effect or invocability of the norm. A norm without direct effect is nonetheless a legal norm. As Dean Vedel pointed out, 'the imprecision of the provision does not eliminate its normative character' (G. Vedel, 'La place de la Déclaration de 1789 dans le bloc de constitutionnalité', in *La Déclaration des droits de l'homme et du citoyen et la jurisprudence*, PUF, coll. Recherches politiques, 1989, p. 55). The norms that are incomplete in nature constitute rules of law; only, they do not bind the administration with respect to individuals. Addressed to the State (as regards international commitments creating obligations only between States) or to the legislator (for objectives of constitutional value, programme laws and other multi-annual commitments), they nevertheless constitute legal obligations that may be sanctioned by the courts. See, for a declaration of unconstitutionality, due to the disregard of an objective of constitutional value: CC, n° 86-210 DC, 29 July 1986, cons. 23, *Rec.* p. 110.

⁵⁶⁰ Rights are directly applicable if their consecration "suffices to generate subjective rights, which individuals can concretely oppose to public authorities" (E. WILLEMART, "La valorisation formelle des droits fondamentaux: une tradition européenne commune?", *Annales de droit de Louvain*, 1997, p. 394).

⁵⁶¹ H. TIGROUDJA, "Le juge administratif français et l'effet direct des engagements internationaux", *AJDA* 2003, p. 156. Generally speaking, this criterion, well known to internationalists, is not limited to international commitments. It is, in fact, a requirement that must be met by any norm that a litigant intends to invoke before an ordinary court. The completeness of the norm is a criterion for the applicability of *any* legal norm. "It would be wrong to make the criterion of the perfection of the norm a condition of the direct effect of the latter specific to the law of international commitments. Indeed, if it is true that the administrative judge uses it to rule out the direct applicability of international provisions deemed too vague or general to be binding, he proceeds in the same way when confronted with internal standards of this quality" (*ibid.*). The criterion of the completeness of the norm finds its theoretical justification in the principle of the separation of powers. By distinguishing between the author of the norm and the body responsible for applying it, this principle entrusts the judge with the task of applying the law and not creating it. The judge - and in particular the judge of summary proceedings - cannot, without exceeding his competence, accept a claim on the basis of a norm that the legislator did not intend to make opposable to the administrative authority.

invoked before the courts.

133. The supporting norm may, first of all, be a legislative provision. This is the case, for example, for freedom of assembly. This has its source in Article 1^{er} of the law of 30 June 1881, which solemnly proclaims in Article 1^{er} that "Meetings are free". This provision is directly applicable. Similarly, by providing that the person placed in an involuntary care setting has "in any event" the right "to communicate with the authorities mentioned in Article 3222-4", Article L. 3211-3 of the Public Health Code directly confers on the patient the right to communicate with the administrative and judicial authorities. A particularity must be noted with regard to the right to medical consent, which was established on the basis of two distinct legislative sources, only one of which is formally applicable to the administration: on the one hand, Article L. 1111-4 of the Public Health Code, and on the other hand, Article 16-3 of the Civil Code⁵⁶². However, it is reasonable to think that this second provision only plays a supportive role here and is mentioned above all to justify the fundamentality of this right. Moreover, it will no longer be mentioned in subsequent decisions, the judge relying solely on the provisions of the Public Health Code⁵⁶³.
134. The norm of fundamental freedom may also find its source in a written provision of the constitutionality block if it has direct effect. Thus, paragraph 7^e of the preamble to the 1946 Constitution, which enshrines the right to strike, has long been recognised as a provision with direct effect⁵⁶⁴. Similarly, the principle of free administration of local authorities is based on Article 72 of the Constitution, which the administrative judge has recognised as having direct effect⁵⁶⁵.
135. Freedom can also be based on an unwritten principle. This is the case, for example, with personal freedom, which was established as a principle of constitutional value in 1988⁵⁶⁶. Similarly, the right to lead a normal family life has direct effect as a general principle of law⁵⁶⁷ and a constitutional principle⁵⁶⁸.

b. No direct effect

136. The status of fundamental freedom is excluded for legislative, constitutional or international norms that are similar to mere objectives or, more generally, are not comprehensive in character.
137. Some legislative norms enshrine only simple objectives. They cannot, therefore, benefit from the protection of Article L. 521-2 of the Code of Administrative Justice. In an order of 19 January 2005, the interim relief judge refused to establish as a fundamental freedom an objective set out in the Code of Criminal Procedure. The applicant had invoked an infringement of the "right to reintegration of incarcerated persons", which he had seen recognised in various texts, and in particular in Articles 727 and 728 of the Code of Criminal Procedure. The judge considered that these provisions "do not allow the criminal policy objective of enforcing custodial sentences in criminal or correctional cases not only to punish the convicted person but also to promote his or her reformation and prepare for his or her possible reintegration" to be included among the fundamental freedoms (...) ⁵⁶⁹.
138. International standards without direct effect are also excluded from the scope of fundamental freedoms. The administrative judge must make a distinction between *self-executing* and incomplete norms. The difficulty arises from the fact that international law is not clearly divided into norms that produce binding legal effects and those that do not, but is made up of a multitude of provisions that may sometimes come under *soft law*, sometimes under preemptory law and sometimes under classic international treaty law. In principle, international conventions that have been duly ratified and published are deemed to produce direct effects in domestic law, allowing them to be invoked in support of a contentious appeal⁵⁷⁰. This presumption will

562 CE, ord. 16 July 2001, *Feuillatey*, *Lebon* p. 309.

563 See CE, ord. 8 September 2005, *Ministre de la Justice c/ Bunel*, *Lebon* p. 388.

564 Even if this solution was not obvious from its wording. See the observations of the authors of the *Great judgments* under CE, Ass. 7 July 1950, *Debaene*, *G.A.J.A* n° 68. See also P. TERNEYRE, "paragraph 7", in *Le préambule de la Constitution de 1946. Histoire, analyse, commentaires* (G. CONAC, X. PRETOT, G. TEBOUL dir.), Dalloz, 2001, pp. 169-178.

565 This provision may be invoked before its court in the absence of interposition of the law. See CE, 28 December 1992, *Ville de Romainville et autres*, *Lebon T.* p. 1010; CE, 6 May 1996, *Commune de Villeurbanne et autres*, *Lebon T.* p. 1119 (which expressly mentions the 'principle of free administration of territorial authorities laid down in Article 72 of the Constitution'); CE, 14 June 1999, *Commune de Montreuil-sous-Bois*, *Lebon T.* p. 936; CE, 23 February 2000, *Commune d'Heyrieux*, *Lebon T.* p. 1190; CE, Ass. 12 December 2003, *Département des Landes*, *Lebon* p. 502.

566 See *infra*, § 203.

567 CE, Ass., 8 December 1978, *GISTI*, *Lebon* p. 493, *G.A.J.A* n° 96.

568 CC, No. 93-325 DC, 12-13 August 1993, *Rec.* p. 224, *GDCC* No. 46.

569 CE, ord. 19 January 2005, *M. Laurent X.*, *Lebon* p. 23.

570 Since the *Dame Kirkwood* judgment, treaty norms are 'among the rules of law which are binding on all public authorities (...) but also among those which every citizen may invoke and claim, where appropriate, before the courts of the domestic order' (M. WALINE, note under CE, 30 May 1952, *Dame Kirkwood*, *RDP* 1952, p. 781). Since the adherence of our legal system to the monist principle by virtue of Article 26 of the 1946 Constitution confirmed by Article 55 of the 1958 Constitution, international treaties, incorporated into the national legal

nevertheless give way for "stipulations whose purpose is undoubtedly to guarantee rights for the benefit of individuals, but which are formulated in terms too general to be sufficient in themselves, and to be susceptible of immediate application to particular cases. In such a case, what stands in the way of direct effect is not the purpose of the norm, but its *lack of precision* or its *conditional* nature (...). The international norm tends to protect individuals, it aims to guarantee them rights, but it necessarily presupposes the intervention of national implementing legislation without which it is powerless to produce concrete effects"⁵⁷¹. The situation of international instruments is heterogeneous on this point. While the *self-executing* nature of the European Convention on Human Rights or the International Covenant on Civil and Political Rights is not disputed⁵⁷², the imprecise and overly general provisions of the European Social Charter⁵⁷³, the International Covenant on Economic, Social and Cultural Rights⁵⁷⁴ or the New York Convention of 26 January 1990 on the Rights of the Child⁵⁷⁵ are not. These provisions enshrine so many objectives in which it is impossible to detect the enshrinement of a right or, where applicable - if the other criteria are met - of a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice.

139. Such norms are also to be found among the written and unwritten provisions of the constitutionality block. Some have a textual origin and appear essentially in the preamble to the 1946 Constitution and the Charter of the Environment; others have a jurisprudential origin and have been identified by the Constitutional Council, most often on the basis of the written provisions of the constitutionality block⁵⁷⁶. Whether of textual or jurisprudential origin, these standards have the nature of 'objectives of a constitutional nature'⁵⁷⁷. They assign a purpose to the legislator, whose action they frame, but they are not opposable to the administration⁵⁷⁸. Their nature as objectives results not from the qualifications used by the Constitutional Council⁵⁷⁹ but above

order by the effect of their ratification and publication in the official gazette, "are generally presumed to produce direct effects in domestic law, i.e. to create subjective rights which individuals may invoke before the national court" (R. ABRAHAM, concl. on CE, Sect, 23 April 1997, *GISTI*, *RFDA* 1997, p. 589).

571 R. ABRAHAM, concl. cited above, p. 590. Underlined.

572 See E. DECAUX, "Les droits fondamentaux en droit international", *AJDA* 1998 special issue, p. 71.

573 CE, 20 April 1984, *Ministre du budget c/ Valton et Crépeaux*, *Lebon* p. 148.

574 CE, Ass. 5 March 1999, *Rouquette*, *Lebon* p. 37, *RFDA* 1999, pp. 357-371, concl. C. MAUGÛE.

575 The Council of State assesses the direct applicability of the provisions of this text on a case-by-case basis. It has accepted the direct effect of Article 3.1, which gives "primary consideration" to "the best interests of the child" in all decisions concerning him or her (CE, 22 September 1997, *Cinar*, *Lebon* p. 379; *RFDA* 1998, p. 562 et seq, concl. R. ABRAHAM) but not to other articles by which States recognise the right of the child to health, social security or an adequate standard of living (CE, Sect., 23 April 1997, *GISTI*, *Lebon* p. 142; *RFDA* 1997, pp. 585-596, concl. R. ABRAHAM).

576 Doctrine most often reserves the qualification of objective of constitutional value for objectives of jurisprudential origin only (see B. FAURE, "Les objectifs de valeur constitutionnelle : une nouvelle catégorie juridique ?", *RFDC* 1995, pp. 47-77; A. LEVADE, "L'objectif de valeur constitutionnelle, vingt ans après. Réflexions sur une catégorie juridique introuvable", in *L'esprit des institutions, l'équilibre des pouvoirs. Mélanges en l'honneur de Pierre Pactet*, Dalloz, 2003, pp. 687-702; F. LUCHAIRE, "Brèves remarques sur une création du Conseil constitutionnel: l'objectif de valeur constitutionnelle", *RFDC* 2005, pp. 675-684; T. S. RENOUX and M. DE VILLIERS, *Code constitutionnel*, 3^{ème} ed., Litec, 2005, n° 419). However, this reductionism does not seem justified insofar as, on the one hand, the objectives identified by the Constitutional Council are not all qualified as such in its decisions and, on the other hand, the Council sometimes qualifies textual objectives as such. Moreover, they all have the same nature and are subject to the same legal regime. Pierre de Montalivet rightly groups all these objectives, both textual and jurisprudential, under the generic term of objective of constitutional value (P. de MONTALIVET, *Les objectifs de valeur constitutionnelle*, thesis Paris II, 2004, 695 p.).

577 Cf., using this expression in relation to paragraphs 10 and 11 of the Preamble to the 1946 Constitution: CC, No. 97-393 DC, 18 December 1997, cons. 30, *Rec.* p. 320.

578 Compliance with them is the sole responsibility of Parliament. The objective is an instrument for guiding or orienting legislative action in a specific direction. As a 'guideline' or 'roadmap' for the legislator, it imposes an obligation on the latter to pursue certain goals without conferring directly invocable subjective rights on individuals. The nature and function of these objectives is similar to that of the German *Staatsziel* or *Staatszielbestimmungen* or the 'guiding principles of social and economic policy' provided for in the Spanish Constitution (Chapter 3 of Title 1^{er}). The objective appears above all as a social goal, justifying different types of public intervention and providing a legal basis for the restrictions placed on constitutional rights and freedoms (in particular the right of ownership or the freedom of enterprise) by the laws that provide for their implementation. The administrative authority, on the other hand, is not *bound* by these standards. At most, the Government is, within the framework of its powers, and concurrently with Parliament, responsible for *implementing* these objectives (CC, n° 89-269 DC, 22 January 1990, cons. 25-26, *Rec.* p. 33; n° 97-393 DC, 18 December 1997, cons. n° 29, *Rec.* p. 320; n° 94-359 DC, 19 January 1995, *Rec.* p. 176; n° 93-325 DC, cons. 125, *Rec.* p. 224; n° 93-330 DC, 29 December 1993, cons. 13, *Rec.* p. 572).

579 The Constitutional Council frequently describes constitutional objectives as "principles" or "rights". Thus, the Council refers to the protection of health as a "principle" (CC, no. 74-54 DC, 15 January 1975, cons. 10, *Rec.* p. 19; no. 80-117 DC, 22 July 1980, cons. 4, *Rec.* p. 42). It has also spoken of the "right to health" (CC, No. 77-92 DC, 18 January 1978, cons. 2, *ECR* p. 21) or classified the "right" to employment as a "fundamental right and freedom" (CC, 98-401 DC, cons. 3, *ECR* p. 258). Despite these qualifications, it is common ground that the "right" to employment and the protection of health constitute mere "objectives" for the Council (see, using the expression for the protection of health: CC, no. 89-269 DC, 22 January 1990, cons. 26, *ECR* p. 33). It follows that while a norm qualified as an objective by the Council is necessarily devoid of direct effect, on the other hand a norm qualified as a right or a principle by the Council must not be regarded for this reason alone as a directly applicable norm. The element to be taken into account is therefore not the name given to it by the Constitutional Council but only its enforceable or non-enforceable nature. Only the subject matter and the degree of completeness of the regulation are relevant for assessing its ability to produce a direct effect by itself.

all from the imprecise character⁵⁸⁰ or programmatic⁵⁸¹ of their formulation, which reveals an absence of intention on the part of the normative authority to recognise directly invocable rights. By themselves, they are devoid of direct effect and cannot be invoked in support of a judicial appeal lodged before the administrative judge⁵⁸².

For this reason, "objectives" are denied the status of fundamental freedom. For example, by guaranteeing to individuals "the protection of health", paragraph 11 of the preamble to the 1946 Constitution in no way confers on the persons concerned a subjective right that could be enforced against the public authorities. This norm, devoid of direct effect, is similar to a simple objective⁵⁸³ and cannot, therefore, be the basis for the recognition of a fundamental freedom⁵⁸⁴. The same analysis applies to the "right to obtain employment" proclaimed by the 5th paragraph of the Preamble to the 1946 Constitution. This provision cannot be regarded as giving rise to a right to work in the event of inactivity; it "does not lay down a rule which can be directly invoked to demand employment"⁵⁸⁵. It does not recognise any prerogative which an individual could directly claim before the ordinary courts⁵⁸⁶. The same fate seems to be reserved for the "right" to the environment enshrined in the following terms in Article 1^{er} of the Charter of the Environment: "everyone has the right to live in a balanced environment that respects health". In view of the very general terms of its wording, it is highly unlikely that this provision could be the basis for the recognition of a subjective right⁵⁸⁷ and, consequently, the recognition of a fundamental freedom⁵⁸⁸.

Generally speaking, to proclaim these principles "is, on the part of the Constituent, to assign a goal to the action of the legislator, not to confer on man a power likely to be effectively implemented"⁵⁸⁹. These provisions contain principles "whose implementation requires the intervention of a law giving them concrete form"⁵⁹⁰. Once the legislator has intervened, these principles are given full effect, making them directly invocable before the courts.

c. No direct effect, legislative implementation

580 If the principles set out in the preamble to the 1946 Constitution are inapplicable, it is, for M. Rials, because they are "weakly determined" (S. RIALS, "Les incertitudes de la notion de Constitution sous la V^e République", *RDP* 1984, p. 592). In order to be directly applicable, they lack a sufficient degree of precision (see G. BRAIBANT and B. STIRN, *Le droit administratif français*, 6^{ème} ed, Presses de sciences po et Dalloz, 2002, p. 236). As regards the preamble of the 1946 Constitution, see M. CLAPIE, *De la consécration des principes politiques, économiques et sociaux particulièrement nécessaires à notre temps. Etude de droit public*, thesis Montpellier, 1992, p. 75 et seq.

581 To use a concept used in Italian constitutional law, we would say that they are "programming" norms, i.e. norms "commanding the future activity of the legislator, by prescribing more or less generally determined aims" (V. CRISAFULLI, *Lezioni di Diritto Costituzionale*, 2^{ème} ed., CEDAM, Padone, 1974, t. II, p. 179, quoted by M. CLAPIE, *op. cit.*, p. 158). These norms do not confer any prerogative on the subjects of law: "unlike a classical right, a constitutional objective cannot be materialised by a subjective right that can be invoked both with regard to the public authorities and in the context of private law relations" (B. MATHIEU, "La protection du droit à la santé par le juge constitutionnel. A propos de la décision de la Cour constitutionnelle italienne n° 185 du 20 mai 1998", *CCC* n° 6, 1999, p. 65).

582 The authors analyse this principle as an objective that cannot be given direct effect. Thus, M. Mathieu notes that "it is difficult to see real rights in them" (L. FAVOREU, "Le droit constitutionnel jurisprudentiel en 1981-1982", *RDP* 1983, p. 389). "The notion of constitutional objective does not refer directly to constitutional rights or freedoms but, essentially, to guiding principles that must guide the legislator and are used by the judge as a reference standard for assessing the constitutionality of the provisions taken" (B. MATHIEU and M. VERPEAUX, *chron. LPA* 21 September 1999, n° 188, p. 13). Consequently, the plea based on the violation of a constitutional objective cannot be invoked in support of an action brought before the ordinary courts. "Unlike fundamental rights, objectives of constitutional value are not justiciable (...). This means that they cannot be invoked before the ordinary courts in support of a contentious appeal" (J. Tremeau, note under *CC*, no. 98-403 DC, 29 July 1998, *RFDC* 1998, p. 767).

583 See S. Juan, "L'objectif à valeur constitutionnelle du droit à la protection de la santé: droit individuel ou collectif? It should be noted that the international instruments that refer to this principle do not have direct effect either (see L. CASSAUX-LABRUNEE, "Le droit à la santé", in *Libertés et droits fondamentaux* (R. CABRILLAC, A.-M. FRISON-ROCHE, T. REVET dir.), 11^{ème} éd., Dalloz, 2005, p. 755).

584 CE, ord. 8 September 2005, *Minister of Justice v. Banel, Lebon* p. 388.

585 G. BRAIBANT and B. STIRN, *op. cit.* p. 236.

586 The principle set out is only akin to an objective imposed on the legislature, which is "responsible for laying down rules to ensure the best possible right for everyone to obtain a job, with a view to enabling the greatest possible number of people to exercise this right" (*CC*, No. 83-156 DC, 28 May 1983, cons. 4, *Rac.* p. 41).

587 The authors analyse this principle as an objective that cannot be given direct effect. Thus, M. Mathieu notes that it falls into the category of constitutional objectives and is not intended to become a subjective right that an individual could demand to be respected (B. MATHIEU, "Observations sur la portée normative de la Charte de l'environnement", *CCC* n° 15, p. 145). See also, in the same sense, N. CHAHID-NOURAI, "La portée de la Charte pour le juge ordinaire", *AJDA* 2005, pp. 1175-1181, special p. 1178. See *contra*, defending the idea of a direct effect of the right to the environment, despite the wording chosen by the constituent: A. PERI, "La Charte de l'environnement: reconnaissance du droit à l'environnement comme droit fondamental?", *LPA* 24 February 2005, n° 39, pp. 8-18. In the same vein, Dean Prieur maintains that "the summary procedure of Article L. 521-2 of the Code of Administrative Justice will be (...) usable insofar as the judge admits that the right to the environment has become a fundamental freedom, constitutionality entailing fundamentality. No constitutionally recognised right has, to date, been excluded from the référé liberté" (M. Prieur, "Du bon usage de la charte constitutionnelle de l'environnement", *Environnement* 2005, study no. 5, p. 5). While it is true that constitutionality automatically entails fundamentality, this requirement alone is not sufficient to qualify as a fundamental freedom. In addition to the criterion of fundamentality, there is in particular the requirement of a direct effect of the norm in question, which, for the "right" to the environment, seems doubtful.

588 For a decision to the contrary by a judge of the first instance, qualifying this right as a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice, see TA Châlons-en-Champagne, ord. 29 April 2005, *Conservatoire du patrimoine naturel et autres*: *AJDA* 2005, pp. 1357-1360, note H. GROUD and S. PUGEAULT; *JCP A* 2005, 1216, note P. BILLET; *Environnement* 2005, comm. n° 61, note C. NOUZZA.

589 J. RIVERO, "Les droits de l'homme, catégorie juridique?", in *Perspectivas del Derecho Publico en la segunda mitad del siglo XX. Homenaje a Enrique Sayagues-Laso*, t. III, Instituto de estudios de Administracion local, 1969, p. 32.

590 R. BADINTER and B. GENEVOIS, "Normes de valeur constitutionnelle et degré de protection des droits fondamentaux", *Report presented at the VIIIth Conference of European Constitutional Courts*, Ankara, 7-10 May 1990, *RFDA* 1990, p. 333.

140. Thanks to the implementing measures taken by the legislator, several constitutional norms without direct effect have been recognised as fundamental freedoms within the meaning of Article L. 521-2 of the Code of Administrative Justice. The intermediation of the law gives, within the limits of the legislative text that ensures this implementation, a full effect to the constitutional principles concerned.
141. Thus, the right to asylum has its source in the 4^{ème} paragraph of the preamble to the 1946 Constitution (supplemented by Article 53-1 of the Constitution of 4 October 1958). This provision is in itself devoid of direct effect and, consequently, cannot be directly invoked in support of a contentious appeal⁵⁹¹. Nevertheless, this right is implemented mainly through the law of 25 July 1952 and the Geneva Convention relating to the Status of Refugees. These texts give the constitutional right to asylum its full effect in positive law. When the conditions for granting asylum are met, the foreign national has a genuine right, enforceable as such against the public authorities, to benefit from it. Invocable before the ordinary courts, the right to asylum can be qualified as a fundamental freedom when the other criteria are also met.

The "principle of the pluralist character of the expression of currents of thought and opinion" recognised as a fundamental freedom in the *Tibéri* Order of 24 February 2001⁵⁹² may also be considered to fall into this category. According to a first interpretation, this principle was in itself, at the time of its recognition by the interim relief judge, a constitutional norm with direct effect. Indeed, while the Constitutional Council has established as "objectives" the preservation of the pluralistic nature of socio-cultural currents of expression⁵⁹³, the pluralism of daily political and general information newspapers⁵⁹⁴ and the pluralism of the means of communication⁵⁹⁵, it has, on the other hand, qualified as a "principle" the pluralism of currents of ideas and opinions⁵⁹⁶. As M. de Montalivet points out, "the Council has never mentioned the 'objective' quality of pluralism of currents of ideas and opinions, unlike what it did for pluralism of socio-cultural currents of expression"⁵⁹⁷. It was therefore possible to envisage that, as a principle, pluralism of currents of ideas and opinions represented a norm with direct effect, making it possible to invoke it before the ordinary courts. But in reality, as has been shown above, the qualification given by the Constitutional Council is not such as to render the norm thus designated justiciable before the ordinary courts. Standards described as "principles" may in fact be similar, by virtue of their purpose, to mere objectives. Moreover, as the Council is not consistent in its use of this expression, the changes in name that occur in its case law should not be given undue importance⁵⁹⁸. It would seem that from the point of view of its structure, and beyond its changing qualifications, the pluralism of currents of ideas and opinions has always been envisaged as an objective in jurisprudential constitutional law.

591 CE, 27 September 1985, *Association France Terre d'Asile et autres*, *Lebon* p. 263. ^{591c}The Conseil d'Etat considers that the principle set out in the 4th paragraph of the Preamble of the 1946 Constitution "is only binding on the regulatory authority, in the absence of sufficient precision, under the conditions and within the limits defined by the provisions contained in the laws or in the international conventions incorporated into French law; consequently, the applicant associations cannot usefully invoke this principle independently of the said provisions in order to criticise the legality of Article 9 of the decree in question.

592 CE, ord. 24 February 2001, *Tibéri*, *Lebon* p. 85.

593 CC, No. 82-141 DC, 27 July 1982, cons. 5, *Rec.* p. 48; 86-217 DC, 18 September 1986, cons. 8, *Rec.* p. 141.

594 CC, No. 84-181 DC, 10-11 October 1984, cons. 38, *Rec.* p. 78.

595 CC, No. 86-210 DC, 29 July 1986, cons. 23, *Rec.* p. 110; No. 86-217 DC, 18 September 1986, cons. 35, *Rec.* p. 141.

596 The Constitutional Council has described the pluralism of currents of ideas and opinions as a "principle", both as an electoral judge (CC, 23 August 2000, *Larroutrou*, cons. 6, *Rec.* p. 137) and as a judge of the constitutionality of laws (CC, No. 2003-468 DC, cons. 11, *Rec.* p. 325; No. 2004-490 DC, 12 February 2004, cons. 84, *Rec.* p. 41; No. 2004-507 DC, 9 December 2004, cons. 24, *Rec.*)

597 P. DE MONTALIVET, thesis cited above, p. 245. Nevertheless, the doctrine of reducing this dimension of pluralism to a mere "objective", even though this qualification has never been attributed to it by the constitutional court, has seen the *Tibéri* order as a bold decision. Some members of the Conseil d'Etat have argued that the interim relief judge had here enshrined pluralism as an objective (see I. DE SILVA, concl. on CE, Sect. 30 October 2001, *Ministre de l'Intérieur c/ Tliba*, *RFDA* 2002, p. 329; the *Tibéri* ordinance enshrines pluralism, "which is an objective of constitutional value, not a freedom"; see in the same sense chron. M. GUYOMAR and P. COLLIN under CE, Sect. 30 October 2001, *Ministre de l'Intérieur c/ Tliba*, *AJDA* 2001, p. 1055). Academic doctrine develops the same analysis. According to M. Sales, "the Council of State shows great freedom of appreciation in transforming into a principle what until then was only qualified by it as an objective" (E. SALES, "Vers l'émergence d'un droit administratif des libertés fondamentales?", *RDP* 2004, p. 224). M. Pez states that "The Council of State refuses to do for the right to decent housing what it has accepted for pluralism" (T. PEZ, "Le droit de propriété devant le juge administratif du référé-liberté", *RFDA* 2003, p. 382). Similarly, Dean Favoreu stated that the *Tibéri* ordinance "qualified as a fundamental freedom what is considered by the Constitutional Council as one of the 'objectives of constitutional value' intended to strengthen the freedom of audiovisual communication, alongside the objective of financial transparency: the Council of State therefore broadens the notion of fundamental freedom insofar as the objective of constitutional value intended to strengthen the fundamental freedom of audiovisual communication becomes in turn a fundamental freedom" (L. FAVOREU, "La notion de liberté fondamentale devant le juge administratif des référés", *D.* 2001, p. 1741). For Ms Deschamps, the interim relief judge was "innovative, in the *Tibéri* order, in daring to qualify as a fundamental freedom a simple objective of constitutional value" (E. DESCHAMPS, note under CE, ord. 3 May 2002, *Association de réinsertion sociale du Limousin et autres*, *AJDA* 2002, p. 820).

598 In constitutional litigation, the Constitutional Council initially referred to "the requirement of pluralism of ideas and opinions" (CC, No. 89-271 DC, 11 January 1990, *Amnesty for Members of Parliament*, cons. 12, *Rec.* p. 21; No. 2000-428 DC, cons. 21, *Rec.* p. 70). After describing this norm as a "principle" in the above-mentioned *Larroutrou* decision, the Council referred a few months later, still in electoral cases, to "the constitutional requirement of pluralism of ideas and opinions" (CC, 6 September 2000, *Pasqua*, cons. 6, *ECR* p. 144). Similarly, while the qualification of principle had seemed to be imposed in the dispute over constitutionality, the Council declared in a decision of 1^{er} July 2004 "that the pluralism of currents of thought and opinion is in itself an objective of constitutional value" (CC, No. 2004-497 DC, 1^{er} July 2004, cons. 23, *Rec.* p. 107).

In fact, it seems that it is through the law that this principle is invoked before the ordinary courts. Two elements argue in favour of such an interpretation. Firstly, the precise formula used by the interim relief judge has no counterpart in constitutional case law. It does not constitute a repetition of a formula of the Constitutional Council but a direct borrowing from the terms of the Act of 30 September 1986. The interim relief judge stated that "Article 1^{er} of the Act of 30 September 1986 entrusted the Conseil supérieur de l'audiovisuel with the task of ensuring compliance with the principles defined in Articles 1^{er} and 3, which include equal treatment and the expression of pluralism of currents of thought and opinion. While the constitutional formula refers to the pluralism of currents of *ideas* and opinions, the law - and the interim relief judge - refers to the pluralism of currents of *thought* and opinion. In the mind of the judge, it is as a legislative and not a constitutional norm that pluralism has direct effect"⁵⁹⁹. Secondly, this position is in line with that of the Constitutional Council, for whom pluralism enjoys direct effect *through the intervention of the legislator*. In Decision 93-333 DC of 21 January 1994, the Council stated that "in exercising its powers, the Conseil supérieur de l'audiovisuel, like any administrative authority, shall be subject to a control of legality which may be exercised by the Government or by any person having an interest therein; it shall be the responsibility of the administrative court to ensure in particular that the objective of pluralism is respected"⁶⁰⁰. This reservation of interpretation gives an important role to the administrative judge in the control of the respect of the objective of pluralism. The reference to "any person" indicates that the objective may be invoked by any individual before the ordinary court. According to Mr Cassia, this reservation confers "a character of opposability to this objective before the ordinary judge in the sense that it is addressed to individuals and not only to public authorities"⁶⁰¹. It is through the law, and in the framework and conditions it defines, that the principle is recognised as being invocable. "The Council thus seems to recognise a certain applicability of the objective of pluralism, but the litigant can only invoke it because it has been implemented by the Law of 30 September 1986 and the CSA intervenes on the basis of this Law. In this sense, the objective cannot be invoked directly before the ordinary judge, without the intermediary of a law"⁶⁰². It is therefore the law which gives this principle its full effect.

142. This case law raises the question of whether constitutional rights⁶⁰³ can be given full effect when they have been the subject of legislative implementation measures. At issue here are, on the one hand, the right to education and, on the other, the right to social assistance. The situation of these two principles differs from that of the other rights and claims examined so far in that they have been the subject of implementing measures by the legislator *conferring on them the character of prerogatives* enforceable against the public authorities and invocable before the courts. It was established earlier that, in the absence of a legislative extension, a constitutional or conventional right to claim cannot confer any prerogative on the individual. In order for the right to claim to be enforceable, there must be a legislative framework that makes its exercise possible. Only a right to claim organised and implemented by law can be analysed as a subjective right and, where appropriate, as a fundamental freedom. The individual can only invoke the benefit of claim rights when these have been the subject of implementing measures that make them directly applicable. According to M. Sasso, "Subjective rights only exist insofar as the legislator has, in implementing these principles, demonstrated the will to confer such rights on individuals"⁶⁰⁴. Once implemented, there is nothing to prevent the invocability of claim rights. Although many authors doubt their eligibility for the summary procedure⁶⁰⁵, it should be noted that to date,

599 The Constitution is not mentioned anywhere in the order of the interim relief judge. Neither in the grounds nor in the citations is there any reference to the constitutional principle. It is likely that the constitutional standard only came into play as a criterion of fundamentality in the consecration of this principle as a fundamental freedom. The interim relief judge thus proceeds to a combination of norms in order to recognise this freedom: the Constitution confers fundamentality on it, the law confers direct effect. On this subject, see H.-M. CRUCIS, *Les combinaisons de normes dans la jurisprudence administrative française*, LGDJ, coll. BDP, t. 161, 1991, 377 p.

600 CC, No. 93-333, 21 January 1994, cons. 14.

601 P. CASSIA, *Les référés administratifs d'urgence*, LGDJ, coll. Systèmes Droit, 2003, p. 111.

602 P. de MONTALIVET, *Les objectifs de valeur constitutionnelle*, thesis Paris II, 2004, p. 523.

603 Rights of claim are understood as rights whose main object is the attribution of a benefit to individuals. These are rights that predominantly involve the obligation to allocate goods (see L. FAVOREU *et al.*, *Droit des libertés fondamentales*, 3^{ème} éd., Dalloz, coll. Précis, 2005, n° 129 *et seq.*) Taking into account the *dominant* deontic modality makes it possible to exclude from the notion of rights to claim ("droits-à") rights to freedom ("droits-de") that may involve, on an ancillary basis, financial intervention by the public authorities, for example the obligation to deploy police services to ensure the effectiveness of freedom of assembly. On the issue of rights of claim, see L. GAY, *Les droits-créances constitutionnels*, thesis Aix-en-Provence 2001, 562 p. The proclamation of these rights in the Preamble to the 1946 Constitution was presented as aiming to make the individual the "creditor of the Nation" (see G. VEDEL and J. RIVERO, "Les principes économiques et sociaux de la Constitution: Le préambule", *Dr. soc.* 1947, pp. 13-35). Their recognition is part of the model "of a *welfare state* capable of contributing, through positive benefits, to the creation of this 'material security' guaranteed to everyone" (L. FERRY and A. RENAUT, *Des droits de l'homme à l'idée républicaine*, 3^{ème} éd., PUF, coll. Philosophie politique, 1992, p. 31. Underlined).

604 L. SASSO, "Les fonctions des droits fondamentaux en Europe", in *Questions sur le droit européen*, colloque Caen, 23 February 1996 (C. GREWE ed.), Presses universitaires de Caen, 1996, p. 177.

605 Thus, President Vandermeeren considered it unlikely that the Council of State would regard as fundamental freedoms "rights constituting 'claims' against the state (right to employment, to health protection, to leisure, etc.)" (R. VANDERMEEREN, *D.* 2002, SC contentieux administratif, p. 2229). According to MM. Bourrel and Gourdou, the rights of claim "are often rather vague in content and are sometimes more of a petition of principle, such as the famous 'right to work'. It is immediately clear how difficult it is to include such economic and social rights in the review of the interim relief judge, unless the latter is transformed into a real administrator, obliging the public authorities to make up for any shortcomings in the effective implementation of their constitutional 'claims'" (A. BOURREL and J. GOURDOU, *Les référés d'urgence devant le juge administratif*, L'Harmattan, coll. La justice au quotidien, 2003, pp. 76-77). In the same sense, see M. GUYOMAR and P. COLLIN, *chron.* under CE, Sect. 30 October 2001, *Minister of the Interior c/ Tliba*, *AJDA* 2001, p. 1056.

the Council of State has only ever had to rule on rights of claim that do not include legislative implementation measures. In the absence of direct effect, their exclusion from the field of fundamental freedoms was therefore only natural. The situation of the right to education and the right to social assistance, on the other hand, is different insofar as both have been the subject of implementing measures conferring on them the rank of a prerogative directly enforceable against the administrative authority.

The right to education, proclaimed in the 13^{ème} paragraph of the preamble to the 1946 Constitution⁶⁰⁶, has been the subject of legislative and regulatory measures for its implementation. The sub-constitutional texts supplementing and specifying this provision give it the status of a prerogative directly enforceable against the public authorities. For this reason, the administrative judge has considered that the right to education constitutes a public freedom during the period of compulsory schooling⁶⁰⁷. When called upon to rule on the eligibility of this right to the procedure of Article L. 521-2, the judges of the first instance did not hesitate to qualify it as a fundamental freedom⁶⁰⁸. The question never arose directly before the Council of State. Nevertheless, the government commissioners who have pronounced on the issue have very clearly taken a position in favour of recognising this right as a fundamental freedom during the period of compulsory education. For Rémy Schwartz, "The right to public education, guaranteed by Article 13 of the 1946 Preamble, is undoubtedly (...) a fundamental freedom, at least most certainly until the age of compulsory schooling". He argues that "a refusal of access to the public education service (...) would, in our view, constitute an infringement of a fundamental freedom for a child of up to 16 years of age or, perhaps more broadly, for a child likely to be enrolled in secondary school"⁶⁰⁹. M. Collin develops a comparable analysis. After recalling the provisions of the 13^{ème} paragraph of the preamble to the 1946 Constitution, he states: "It is easy to deduce from this that there is a right of access to education, which is guaranteed by the obligation to send children between the ages of 6 and 16 to school and by the organisation of national education by the State. Following the example of Rémy Schwartz, he limits the scope of this fundamental freedom to the period of compulsory schooling: "the right, for a person over the age of compulsory schooling, to have access to the public service of secondary education does not constitute a fundamental freedom within the meaning of Article L. 521-2 of the CJA"⁶¹⁰.

The question of the right to social assistance has never arisen before the interim relief judge of the Council of State and has not given rise to any significant applications at the level of the courts of first instance⁶¹¹. It should nevertheless be noted that this right, which has a constitutional basis⁶¹², is given full effect under the conditions defined by the legislator. But for the time being, the question remains unresolved.

II. A pre-oriented individual interest

143. The norm of fundamental freedom aims at the protection of an abstractly identified interest. Its object may relate to an activity, a quality or a position of the subject; it could also relate to the attribution of a benefit to him or her. In terms of its mode of realisation, fundamental freedom may require action or inaction on the part of the public authority.

A. An abstractly identified interest

144. In order to qualify as a fundamental freedom, the disputed norm must aim at the protection of an individual interest⁶¹³. It must be possible to identify the interest and the area protected by the law. Abandoning the

606 "The nation guarantees equal access for children and adults to education, professional training and culture. The organisation of public and secular education at all levels is a duty of the State.

607 See *supra*, § 110.

608 TA Paris, ord. 30 January 2001, *Ben Ayed, Dr. adm.* 2001, n° 102; TA Melun, ord. 23 March 2006, *Pineda*, n° 06-1796/5, *AJDA* 2006, obs. C. de MONTECLER; TA Versailles, ord. 18 March 2006, X, *c/ Université Paris X*, n° 0602618.

609 Unpublished conclusions of R. Schwartz on CE, 18 October 2002, *Caunes-Rey*, n° 249678. In accordance with the texts that govern it, the government commissioner clearly intends to limit the scope of this fundamental freedom to the period of compulsory schooling: "If access to the public education service constitutes, in our opinion, in accordance with the republican tradition, a fundamental freedom as long as schooling is compulsory, it is no longer the same afterwards. Access to university is therefore a right for graduates but not a fundamental freedom".

610 Unpublished conclusions by P. COLLIN on CE, 29 November 2002, *Arakino, Lebon* p. 422.

611 Nevertheless, a decision of the interim relief judge of the Administrative Court of Marseille of 4 October 2002 (*Psbenychnyak*, no. 024716/0) should be noted. Using the right to a decent life, the interim relief judge ordered a department to reinstate the social assistance that had been withdrawn, consisting of accommodation for a refugee father and his child. The order states that 'the right to a decent life constitutes a fundamental freedom of which child welfare and home help are manifestations falling within the scope of Article L. 521-2'.

612 Paragraph 11^{ème} of the Preamble to the 1946 Constitution states that the nation "guarantees to all, in particular to children, mothers and elderly workers, protection of health, material security, rest and leisure. Every human being who, by reason of age, physical or mental condition or economic situation, is unable to work has the right to obtain from the community adequate means of subsistence".

613 According to Jhering's famous formula, subjective rights are defined as "legally protected interests" (see J. HUMMEL, "La volonté dans la pensée juridique de Jhering", *Droits* 1999, pp. 71-81). Using a similar formulation, which eliminates any ambiguity, Professor Foulquier

traditional schemes and classifications, the interim relief judge shows a certain flexibility in the apprehension of the interest protected by the norm of fundamental freedom.

1. The existence of an individual interest

145. The norm of fundamental freedom is a norm whose purpose is to ensure the protection of a specific individual interest. It tends to ensure the subject's capacity for free disposition and realisation. It imposes on the public authority an action of a determined content. It must be possible to identify abstractly the area protected by the norm. The interest refers to an action, a situation or a quality whose content must be determined *in abstracto* without taking into account the particular data of each case. This is the case, for example, of the norm protecting opinion, property or the free administration of local authorities. The beneficiaries of these norms have an interest in the preservation of their object. They have a *right* and an interest in the preservation of their opinion, the free disposal of their property and the possibility of free administration.
146. If it is not possible to determine abstractly the interest protected by the standard, it cannot be regarded as a fundamental freedom. This requirement thus explains the exclusion of the principle of continuity of public services from the scope of Article L. 521-2 of the Code of Administrative Justice. Although this principle is fundamental in nature⁶¹⁴, it is not a fundamental freedom because it does not specifically aim to protect an interest of the subject⁶¹⁵. The same reason explains why equality, a principle of objective law, has not been regarded as a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice. Several authors have challenged the refusal to include the principle of equality in the category of fundamental freedoms, arguing that it is a fundamental principle in our legal system⁶¹⁶. Equality is undeniably a fundamental principle⁶¹⁷. However, fundamentality is not sufficient to qualify a norm as a fundamental freedom. The principle of equality is not a fundamental freedom simply because it is not a subjective right and, more precisely (insofar as it is a norm that can be enforced against the administration and has direct effect, thus meeting the first criterion of a subjective right) because it does not protect an individual interest. What this principle lacks in order to be analysed as a fundamental freedom is that it does not confer on subjects a subjective *right* to equality. It is difficult to understand the principle of equality as a genuine individual prerogative. For example, Isabelle de Silva stated that 'challenging it does not necessarily infringe a "right" (...)'⁶¹⁸. In the same vein, Professor Fromont stated that "the assimilation of the principle of equality to a freedom is very artificial"⁶¹⁹. It should be noted that in German doctrine, equality is not considered a subjective right⁶²⁰. As M. Jouanjan has shown, the principle of equality, which is analysed as a principle of non-discrimination, has the particularity of being a 'modal' right. This means that it imposes on the public authority a particular modality of action and not an action of a determined content. This principle "does not

defines the subjective right as "a legally *enshrined* interest". He justifies this alteration of Jhering's formula by a desire to eliminate the idea that the subjective right only exists if it is protected by the courts, a concept defended in particular by Kelsen (*Pure Theory*, *op. cit.*, spe p. 141) and Bonnard (aforementioned article, spe p. 707). As the author points out, "According to the Palais-Royal and the majority of the doctrine, legal action does not condition the existence of a subjective right. It only contributes to its perfection" (N. FOULQUIER, *Les droits publics subjectifs des administrés. Emergence d'un concept en droit administratif français du XIX^e au XX^e siècle*, Dalloz, coll. NBT, 2003, p. 281).

614 The principle of continuity of public services is fundamental because of its constitutional value. It has also been described as a "fundamental principle" by the Council of State (CE, 13 June 1980, *Bonjean, Lebon* p. 274).

615 For M. Lachaume, "it is not strictly speaking a fundamental right that is directly at issue here" (J.-F. LACHAUME, "Droits fondamentaux et droit administratif", *AJDA* 1998, special issue, p. 93).

616 Thus, M. Brenet states that the Conseil d'Etat's solution "is by nature unjustifiable" and wonders "whether the Conseil d'Etat has not crossed the limits of reasonableness" since "no one disputes that the principle of equality enjoys remarkable legal protection, both at national and supranational level, and that it conveys a value whose high degree of 'essentiality' is indisputable" (F. BRENET, "La notion de liberté fondamentale au sens de l'article L. 521-2 du CJA", *RDJ* 2003, p. 1576). Similarly, Professor Cassia states that the exclusion of the principle of equality "cannot be based on any legal justification, as all constitutional and international human rights protection texts enshrine it" (P. CASSIA, *Les référés administratifs d'urgence*, *op. cit.*, p. 112). The question of its eligibility for the Article L. 521-2 procedure did not raise the slightest doubt for M. Verpeaux, who stated that "the principle of equality constitutes, if one may say so, one of the most essential fundamental freedoms that the référé-liberté procedure is clearly intended to protect" (M. VERPEAUX, note under CE, Sect., 18 January 2001, *Commune de Venelles, RFDJ* 2001, p. 685).

617 Its fundamental nature is not open to discussion. In the light of the Council's definition of the adjective "fundamental" (see *infra*, § 169 et seq.), there can be little doubt that the principle of equality, enshrined in a great many sources, starting with the constitutional source, represents a fundamental norm. See in particular G. PELLISSIER, *Le principe d'égalité en droit public*, LGDJ, coll. Systèmes, 1996, 143 p.; F. MELIN-SOUCRAMANIEN, *Le principe d'égalité dans la jurisprudence du Conseil constitutionnel*, Economica PUAM, coll. DPP, 1997, 397 p.; N. BELLOUBET-FRIER, "Le principe d'égalité", *AJDA* 1998, special issue, pp. 152-164; G. BRAIBANT, "Le principe d'égalité dans la jurisprudence du Conseil constitutionnel et du Conseil d'Etat", in *La déclaration des droits de l'homme et du citoyen et la jurisprudence (The Declaration of the Rights of Man and of the Citizen and the case law)*, PUF, coll. Recherches politiques, 1989, pp. 97-110.

618 I. DE SILVA, concl. on CE, Sect. 30 October 2001, *Ministre de l'Intérieur c/ Tliba, RFDJ* 2002, p. 329. On the articulation between the principle of equality and 'fundamental rights', see F. BENOIT-RHOMER, 'L'égalité dans la typologie des droits', in *Classer les droits de l'homme* (E. BRIBOSIA and L. HENNEBEL eds.), Bruylant, coll. Penser le droit, 2004, pp. 135-152.

619 M. FROMONT, "Le principe de proportionnalité", *AJDA* 1995 special issue, p. 165.

620 Thus, Jellinek excluded that the principle of equality before the law could be considered as a subjective right (see O. JOUANJAN, *Le principe d'égalité devant la loi en droit allemand*, Economica PUAM, coll. DPP, 1992, p. 176). Similarly, Professor Luhmann states that the idea of equality is to be found in objective law (see O. JOUANJAN, *op. cit.*, p. 177).

prohibit certain contents of state action, but only certain modalities of action"⁶²¹. Equality "does not protect (...) a human activity or quality, nor an institution created by law"⁶²². M. Jouanjan affirms that "With regard to the sole norm of equality before the law, the individual is therefore not protected against, nor is the public authority obliged to take action with a particular content, but only with a specific modality"⁶²³. Moreover, unlike the norms that the Council of State has included in the category of fundamental freedoms, what equality requires in each case depends on the factual circumstances of each case. The realisation of equality is always based on a judgement of reality ("x is like y" or "x is not like y"). It is only on the basis of this judgement of reality that it can be determined whether it is possible or necessary to treat two given situations identically or differently. The interest at stake in equality is thus only derivative. What it actually consists of in each case is not predetermined; it is only discovered by comparison with other interests at stake. Since it is always discovered by comparison with other subjective situations, the interest at stake is rather intersubjective than purely subjective; 'one cannot determine *a priori* a materially protected domain of equality'⁶²⁴. Its concrete content is only knowable in each case by starting from the concrete case itself.

The judge thus requires the presence of an interest to qualify the existence of a fundamental freedom. Moreover, it uses a broad definition of protected interests.

2. Going beyond the classical patterns

147. The interest refers to the protected object and the way it is achieved. The interest protected by the standard of fundamental freedom is conceived in the broadest possible way by the interim relief judge. Refusing to be confined to any one scheme, he did not intend to limit fundamental freedoms to a specific type of interest. At this level, the autonomous nature of the conception of fundamental freedoms developed by the administrative judge is still apparent. It transcends the classical categories and presentations. It is not limited to defensive rights, does not exclusively involve an obligation of abstention on the part of the public authority and does not only protect a possibility of doing. According to Jellinek's status theory⁶²⁵, which is based on the type of legal relationship between the legal subject and the public authority, fundamental freedoms are not limited to a negative status alone, but can also have a positive status⁶²⁶, such as the right of asylum, or an active status⁶²⁷, such as the free expression of suffrage. Similarly, fundamental freedom, within the meaning of Article L. 521-2, cannot be reduced to the powers of self-determination alone, powers that man exercises over himself⁶²⁸. The concept of the interim relief judge escapes the classical presentations. Consequently, one cannot read or account for his conception of freedoms through the prism of traditional schemes, at the risk of giving a partial and even distorted vision of his jurisprudence.
148. Nor does the summary judgment judge focus on the qualifications given by the texts or on the doctrinal controversies concerning the existence of a possible difference between 'rights' and 'freedoms'. On this point, clever constructions have been developed to establish or deny a difference between 'rights' and 'freedoms'. Some authors distinguish between two types of norms on the basis of the purpose of the norm under consideration. Rights' would allow public authorities to be required to take action in the form of a claim; 'freedoms' would allow public authorities to be required to refrain from action⁶²⁹. Other authors, noting the

621 O. JOUANJAN, *op. cit.* p. 178.

622 G. MÜLLER, quoted by O. JOUANJAN, *op. cit.* p. 178.

623 O. JOUANJAN, *op. cit.* p. 178-179.

624 O. JOUANJAN, *op. cit.* p. 179.

625 See G. JELLINEK, *System der subjektiven öffentlichen Rechte*, 1892, 2^{ème} ed., Mohr, 1905, p. 85 et seq. For a presentation, see in particular: W. PAULY, "Le droit public subjectif dans la doctrine des statuts de Jellinek", in *Figures de l'Etat de droit* (O. JOUANJAN ed.), PUS, 2001, pp. 293-312; T. RAMBAUD, "Actualité de la pensée constitutionnelle de Goerg Jellinek (1851-1911)", *RDP* 2005, pp. 707-732, special p. 723.

626 Positive status refers to those rights that generally require positive action by the state.

627 Active status grants a right to participate in normative production, especially through voting and eligibility rights: *status activus* ensures participation in the state, in the "formation of the state will" (G. JELLINEK, *op. cit.*, p. 136).

628 For M. Lebreton, freedoms "are always powers of self-determination, i.e. powers that man exercises over himself. For example, the freedom to come and go can be analysed as the power, exercised over oneself, to move. Freedoms are therefore essentially exercised independently, without the intervention of others being necessary. Theoretically, they require only an attitude of abstention, of non-impediment, from others in order to be accomplished, and in no way a positive behaviour, an obligation to act" (G. LEBRETON, *Libertés publiques et droits de l'homme*, 5^{ème} éd., Armand Collin, 2001, p. 11). A quasi-unanimous doctrine similarly considers 'freedoms' as conferring powers of self-determination and calling only for an attitude of abstention on the part of the public authorities. See thus P. MBONGO, "Constitution française et libertés. Dits, non-dits, clairs-obscur et idées reçues", *RA* 2002, p. 602 ('the notion of "liberty" necessarily refers (...) to a faculty of choice, to a power of self-determination of the individual!'); J. RIVERO and H. MOUTOUH, *Libertés publiques*, t. 1, 9^{ème} éd, PUF droit, coll. Thémis droit public, 2003, p. 6 (the authors consider freedom as a "power of self-determination", i.e. "a power that man exercises over himself"; the consequences of freedoms "are purely negative: they are reduced to the obligation to respect, through abstention, the freedom of others"); F. LUCHAIRE, *La protection constitutionnelle des droits et des libertés*, Economica, 1987, p. 77 ("la liberté reste toujours un droit à l'abstention d'autrui", emphasis added); J. MORANGE, "Liberté", in *Dictionnaire de la culture juridique*, *op. cit.* ("there is (...) legal freedom only when the individual is recognised by the State, in the present context, as having the right to carry out a given activity free from external pressures"). Similarly, for Philippe Braud, public liberties are "obligations not to do" (P. BRAUD, *La notion de liberté publique en droit français*, LGDJ, coll. BDP, t. 76, 1968, p. 85), "negative obligations" (*op. cit.*, p. 85), obligations to abstain (*op. cit.*, p. 88).

629 Whereas rights are "part of a relationship between their creditors and their debtors", freedoms "are zones of autonomy, quasi legal

absence of a clear distinction between the two expressions in positive law, are more nuanced on the scope to be attributed to the lexical variations around the words 'right' and 'freedom'. Consequently, they relativise or reject such a categorical distinction between rights and freedoms, which in reality "are hardly distinguishable"⁶³⁰. In line with these authors, the administrative judge considers with a certain caution the theoretical controversies concerning a possible opposition between "rights" and "liberties". He does not stop at the titles used and is only interested in the object of the norm considered. Standards described as "freedom" (to come and go, to assemble, to undertake), "right" (to property, to asylum, to lead a normal family life, to consent to medical treatment), "principle" (pluralistic nature of the expression of currents of opinion and thought, free administration of local authorities, presumption of innocence) or "possibilities" (to exercise one's right to defence before a judge) are all eligible for protection under Article L. 521-2. Far from stopping at the vocabulary used by the texts, the judge in summary proceedings focuses exclusively on the nature of the prerogative conferred on the beneficiary or, more precisely, on the purpose of the norm.

B. The protected object

149. The object protected by the norm of fundamental freedom may be an activity, a quality or a position of the subject. It is also possible that the judge may include in the field of freedoms norms aimed at the attribution of benefits.

1. An activity (do)

150. The majority of fundamental freedoms recognised by the interim relief judge are concerned with the protection of an opportunity to do (or not to do). These are freedoms in the strict sense. They protect a specific activity or action: undertaking, travelling, meeting. They can also, in their negative dimension, be embodied in freedoms not to do, for example not to be forced to do forced labour. As these norms correspond to the classical meaning of the term "freedom", their recognition does not, in principle, raise any difficulties. Within this first category, only the enshrinement of the right to property and the principle of free administration of local authorities have given rise to debate.
151. The interest protected by the right of ownership is the possibility for its beneficiary (whether owner or tenant) to be able to dispose - in the broadest sense - of the property over which he exercises his rights (by virtue of the law or a contractual obligation) without interference or hindrance from third parties. It is, in this sense, a freedom in the strict sense, a genuine possibility to do. The legal order excludes the use of the thing by anyone other than the owner or the tenant. The judge of summary proceedings has emphasised the exclusive nature of the right of ownership by stating that it "generally implies that the property may not be used *by third parties* without the owner's authorisation"⁶³¹. As René Capitant stated, "ownership is a freedom, because it is the right of its holder to carry out acts of use, enjoyment and disposal of the thing, which are discretionary, free acts, which are subject neither to obligation nor to prohibition". And, he continued, it is a freedom "protected

no-man's lands recognised by the prince or the legislator, within which their beneficiaries can decide to act as they wish" (A. SERIAUX, L. SERMET, D. VIRIOT-BARIAL, *Droits et libertés fondamentaux*, Ellipses, 1998, p. 10). In the same vein, Mathieu and Verpeaux state that "The difference between rights and freedoms essentially covers the difference between the affirmation of principles relating to the autonomy of individuals or classical freedoms and the rights of claim, i.e. the obligations weighing on the State in social matters" (B. MATHIEU and M. VERPEAUX, *Contentieux constitutionnel des droits fondamentaux*, LGDJ, 2002, p. 16). In accordance with this strict interpretation, M. Verpeaux considers as "freedoms" the "rights" that recognise the possibility of choice or the refusal of constraint for individuals or communities. The right to education, recognised in particular in the Preamble to the 1946 Constitution, is thus not a freedom, unlike the freedom of education, since it recognises the choice of both the school and the content of education" (M. VERPEAUX, "La liberté", *AJDA* 1998 special issue, p. 144). For M. Lebreton, freedoms are powers of self-determination, powers that man exercises over himself (see previous note), rights in the strict sense are "powers that man does not exercise over himself, but over others"; they are then differentiated from freedoms in that "they relate to powers to require positive behaviour from others, and not simply abstention" (G. LEBRETON, *op. cit.*, pp. 11-12). Similarly, Rivero and Moutouh identify "a difference in nature between freedoms, which are powers to determine oneself that only have a negative impact on others, and most other rights, which are powers to impose positive behaviour on others or on the community" (J. RIVERO and H. MOUTOUH, *op. cit.*, p. 6). Mr Collin and Mr Guyomar also state that "To put it in simple, even simplistic terms, the guarantee of a freedom requires the prohibition of excessive interference by the public authority, whereas the exercise of a right presupposes action by this same public authority with a view to making it effective" (M. GUYOMAR and P. COLLIN, chron. under CE, Sect., 30 October 2001, *Minister of the Interior v. Ms Tliba*, *AJDA* 2001, p. 1055).

630 F. TERRE, *Introduction générale au droit*, 5^{ème} éd, Dalloz, 2000, n° 256. As Xavier Bioy has rightly pointed out, while the distinction between rights and freedoms may be of theoretical interest, on the other hand "positive law in this area does not show any distinction" (X. BIOY, *Le concept de personne humaine en droit public (Recherches sur le sujet des droits fondamentaux)*, Dalloz, NBT, 2003, p. 498-499). In the same sense, see: P. Pactet, "Quelques réflexions sur les principes relatifs aux libertés et aux droits sous la V^e République", in *Etudes offertes à C.-A. Colliard. Droits et libertés à la fin du XX^e siècle: influence des données économiques et technologiques*, Pedone, 1984, pp. 575-588.

631 CE, ord. 20 July 2001, *Commune de Mandelieu-la-Napoule, Lebon* p. 388.

by the prohibition against third parties interfering with its exercise"⁶³². The idea was taken up by Robert and Duffar. For these authors, "property is indisputably a freedom" because "it presupposes a general obligation, imposed on all those who are not owners of the thing, to accept that the owner exercises his right over it in full and to refrain from doing anything that might oppose it"⁶³³. This is how the Constituents of 1789 understood the right of ownership, which was seen as the freedom to use and dispose of one's property without being disturbed or prevented by anyone⁶³⁴.

However, arguing that the right to property is a real right, a summary proceedings judge of the Paris Administrative Court developed the idea that this right cannot be analysed as a freedom⁶³⁵. On the basis of Article L. 521-2, this judge adopted a strict interpretation of the notion of freedom, understood as the right "to have the power of self-determination", adding that "nothing allows one to suppose that the legislator intended the word freedom to have another meaning in the above-mentioned provisions than that which is traditionally used in French public law". The order mentions that "although the right of ownership has sometimes been considered as a condition for the exercise of certain freedoms, it has never been considered as constituting one of the public freedoms". Finally, the decision indicates that "if the attributes of the right of ownership have the effect of conferring on its holder the 'free' use, enjoyment and disposal of the thing owned, they cannot nevertheless in themselves have the consequence of making this real right a freedom in the above sense"⁶³⁶. The position adopted by this judge was censured by the Supreme Court⁶³⁷ and was strongly condemned by the Council of State⁶³⁸. However, this dissenting case law received the unexpected support of a representative of the doctrine. Fully endorsing the approach developed by the interim relief judge of the Paris administrative court, Mr Pez asserts that freedom "belongs more to the category of personal rights than to that of real rights. As property rights are real rights par excellence, we can understand the reluctance of the administrative court judge to confuse them with freedom"⁶³⁹. This argument, based on the real nature of property rights, is not convincing. Indeed, as previously indicated, the right of ownership, before being a right to a *thing*, is above all a right to *persons*. Therefore, as Kelsen pointed out, the distinction made between real and personal rights can be regarded as "a spurious distinction"⁶⁴⁰. In these circumstances, the assimilation of the right to property to a fundamental freedom does not, in principle, pose any difficulty. In terms of its structure and purpose, this right has all the characteristics of a subjective right and undeniably falls within the first category of fundamental freedoms, that of the freedom *to do*.

152. The principle of free administration of local authorities also falls into this category. This principle, which has its source in Article 72 of the Constitution, corresponds to a freedom of action. This character justified its consecration as a fundamental freedom even if, at first sight, this was not an obvious solution.

At first glance, free administration is analysed as a simple principle of state organisation. Defending this 'institutional' conception of free administration, Verpeaux asserts that it constitutes, in the same way as the (horizontal) separation of powers, a principle of organisation. For the author, these two principles only represent guarantees of the exercise of rights or freedoms but do not represent, by themselves, freedoms. "Both do not constitute rights but can be conceived as conditions deemed constitutionally necessary, by Article 72 of the Constitution for the one, by Article 16 of the Declaration of Rights for the other, for the affirmation of the freedoms recognised in other provisions which are no longer organic but which concern substantial rights"⁶⁴¹.

632 R. CAPITANT, Cours de principes du droit public, DES de droit public 1956-1957, Les cours de droit, p. 38.

633 J. ROBERT and J. DUFFAR, *Droits de l'homme et libertés fondamentales*, Domat Montchrestien, 7^{me} éd., 1999, p. 20. See also J. TREMEAU, "Le référé-liberté, instrument de protection du droit de propriété", *AJDA* 2003, pp. 653-658.

634 See J.-L. MESTRE, "La propriété, liberté fondamentale pour les Constituants de 1789", *RFDA* 2004, pp. 1-5.

635 It should be noted that this dissenting case law should not be seen as a rebellion of a whole court against the solution given by the Conseil d'Etat, but as the opinion of a summary procedure judge whose position was apparently isolated within his court. For an orthodox application of the case law of the Council of State - qualifying the right to property as a fundamental freedom - by an interim relief judge of the same court, see e.g. TA Paris, ord. 12 December 2002, *Société Kerry*, no. 0216294/9-1, cited by T. PEZ, note under TA Paris, ord. 3 February 2003, *SCI OBK, RFDA* 2003, p. 577, note 7.

636 TA Paris, order of 9 November 2002, *Société Brink's France*, n° 0215084/9-1, *D.* 2002, p. 3151. See, taking up this formula and denying the right to property the character of a fundamental freedom: TA Paris, ord. 3 February 2003, *SCI OBK, RFDA* 2003, pp. 576-578, note T. PEZ; order of 20 February 2003, *Société Outremer Finance Limited*; order of 30 July 2003, *Société Resimmo, RFDA* 2003, pp. 30 July 2003, *Société Resimmo*.

637 The orders referred to the judge of cassation were all annulled for errors of law. See CE, 2 July 2003, *Société Outremer Finance Limited, Lebon* p. 306, *AJDA* 2003, pp. 1780-1785, concl. G. BACHELIER; *JCP A* 2003, 1384, note J.M.; CE, 29 October 2003, *Société Resimmo, Lebon* p. 911.

638 See in particular the above-mentioned conclusions of Government Commissioner Gilles Bachelier.

639 T. PEZ, note cited above, p. 576. See, by the same author, and in the same sense "Le droit de propriété devant le juge administratif du référé-liberté", *RFDA* 2003, pp. 370-385.

640 H. KELSEN, *Pure Theory of Law*, *op. cit.* p. 136. As Kelsen explains, in order to maintain this distinction between real and personal rights, the former is defined as a right of an individual to dispose of a thing in a certain way: "it is then forgotten that *this right consists solely in the fact that other individuals are legally obliged to tolerate this disposition, that is to say, not to prevent or hinder it in any way*; and consequently, *jus in rem* is at least also a *jus in personam*. It is the relationship between human persons that is of primary importance in the case of droit réel too; and this relationship consists in the obligation to a certain behaviour towards a particular individual. The relation to the thing is only of secondary importance: it only serves to further specify the primary relation; it is the behaviour of an individual in relation to a certain thing, which behaviour all other individuals are obliged to tolerate towards the former" (*op. cit.*, pp. 136-137). Emphasis added.

641 M. VERPEAUX, note under CE, Sect. 18 January 2001, *Commune de Venelles, RFDA* 2001, p. 684. It should be noted that the comparison between these two forms of separation of powers has an obvious limit. Indeed, whereas the horizontal division involves authorities

In Germany, free administration is not considered as a right but as an institutional guarantee⁶⁴². According to the Federal Constitutional Court, 'Article 28, paragraph 2, does not protect the municipalities individually, but as an institution'⁶⁴³. If communities can invoke this principle in support of a constitutional appeal, it is only insofar as it protects their existence and not insofar as it recognises the community's ability to act. Its understanding as an institutional principle excludes the qualification of a fundamental right.

However, it is possible to go beyond this institutional approach and consider free administration as a subjective right recognised in favour of territorial authorities, and conferring on the latter a genuine possibility 'to do'. The object at issue here is the possibility for a community to administer itself, i.e. to administer itself or to exercise its prerogatives freely. From the point of view of the subject matter, the recognition of this principle as a fundamental freedom is therefore perfectly consistent with the solutions adopted for the other freedoms. Moreover, this recognition did not run counter to the case law and doctrinal positions on the issue. On the one hand, the principle of free administration of local authorities had been established as a fundamental freedom by a court of appeal in the procedure for assault⁶⁴⁴. On the other hand, some authors had accepted the assimilation of this principle to the theoretical concept of 'fundamental right'⁶⁴⁵. Finally, the principle of free administration was conceived as a freedom by the constituent in 1946 and 1958⁶⁴⁶. Consequently, since the interest at stake was clearly identified - the right to self-government - there was nothing to prevent its recognition as a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice. Unlike decentralisation, which is a simple principle of administrative organisation, free administration is a subjective right that a local authority can invoke⁶⁴⁷.

2. A quality or position of the subject (being)

153. Fundamental freedoms are not limited to possibilities to do, i.e. freedoms in the strict sense. Not all of them can be reduced to permissions to *act* or behave in a certain way. President Vandermeeren has thus emphasised that certain rights, such as the right to asylum, come under Article L. 521-2 of the Code of Administrative Justice, even though they "cannot be analysed, strictly speaking, as 'freedoms'"⁶⁴⁸.
154. It is true that on several occasions, the judge seemed to be locked into a strict reading of the term "freedom", artificially presenting rights that, at first glance, did not have this nature in terms of *possibilities*. The judge then tried to designate the norms qualified as 'right' through the term 'freedom' or its derivatives, the adjective 'free' and the adverb 'freely'. In the *Hyacinthe* ordinance, it is - according to Messrs. Collin and Guyomar⁶⁴⁹ - to justify the inclusion of the 'right' of asylum in the field of fundamental freedoms that the interim relief judge affirmed that this right 'has as its corollary the right to apply for refugee status, the obtaining of which is

with legal personality (legal person State, territorial authorities), the vertical division concerns "powers" (executive, legislative) which do not have, as such, an organic existence.

642 First formulated by Carl Schmitt (cf. C. SCHMITT, *Théorie de la Constitution* (1928), PUF, coll. Léviathan, 1993, pp. 308-309), the idea of institutional guarantee implies the obligation for the state to create or maintain institutions of private law such as marriage and the family, or of public law such as the autonomy of universities.

643 BVerfG, 18 September 1995, *NJW* 1995, p. 3378, quoted by L. SASSO, *Les obligations positives en matière de droits fondamentaux*, thesis Caen, 1999, p. 118.

644 CA Papeete, ch. civ, 26 February 1992, *Vernaudon c/ Juventin*, *JCP G* 1992, II, 21926, note A. MOYRAND.

645 See in particular D. DE BECHILLON, *Hiérarchie des normes et hiérarchie des fonctions normatives de l'Etat*, *Economica* PUAM, coll. DPP, 1996, p. 300; X. PHILIPPE, *Droit administratif des libertés*, *Economica*, 1998, p. 14; J.-F. LACHAUME, "Droits fondamentaux et droit administratif", *AJDA* 1998, special issue, p. 94). The principle of free administration is also described as a "public freedom" (M. BOURJOL, "Constitution", *Jcl. Collectivités locales*, fasc. 20 (2000), n° 24, n° 25, n° 28, n° 30).

646 As a result of the debates of the 1946 Constitutional Commission, the constituent wanted to enshrine genuine local liberties and not a simple principle of administrative organisation (see C. BACCOYANNIS, *Le principe constitutionnel de libre administration des collectivités territoriales*, *Economica* PUAM, coll. DPP, 1993, special pp. 96-97). During the preparatory work on the 1958 Constitution, the expressions "free administration", "freedom of local authorities", "communal freedom" and "local liberties" were synonymous (*op. cit.*, p. 98).

647 As regards the beneficiaries of this right, it should be noted that free administration was traditionally attached to a human group. In this sense, Mr Bacoyannis emphasises that the right to self-government is not conferred on the legal person "territorial community" but on the natural group that is delimited by its attachment to a territory and that pre-existed its renewal by the State. The term "territorial community" initially referred to a group formed by all human groups defined by their attachment to a certain territory (C. BACCOYANNIS, *op. cit.*, p. 100). In the same vein, M. Marcou indicates that the terminology used "refers to the original character of local communities based on the settlement, the human group" (G. MARCOU, "Le référé administratif et les collectivités territoriales", *LPA* 14 May 2001, No. 95, p. 47). In a break with this approach, the Council of State has broadened the perspective by considering that free administration is not the prerogative of a human group but of a legal person. The only thing that matters is that the community in question has legal personality and is one of the legal persons protected by the generic formula in Article 72 of the Constitution. If the administrative judge had adopted the classic approach, this would have led to reserving the benefit of this freedom for the commune - the only community meeting the above-mentioned criteria - and to refusing it to other territorial communities - department, region, grouping of communities -, which represent artificial creations.

648 R. VANDERMEEREN, *D.* 2002, SC contentieux administratif, p. 2228.

649 M. GUYOMAR and P. COLLIN, chron. under CE, Sect. 30 October 2001, *Minister of the Interior v. Mrs Tliba*, *AJDA* 2001, pp. 1055-1056.

decisive for the exercise by the persons concerned of the freedoms generally recognised to foreign nationals⁶⁵⁰. Similarly, for the Council of State, the right to lead a normal family life has been qualified as a fundamental freedom "in that its purpose is to preserve from excessive interference by the public authority the freedom of all persons to live with their family"⁶⁵¹. In the same vein, the right to property has been considered in terms of "free" disposal of property or "free" access to the public highway, suggesting that this right is not itself a fundamental freedom and that this status should be reserved for each of its components. However, as Professor Cassia has pointed out, this attempt to attach "rights" to "freedoms" is sometimes "artificial"⁶⁵². This explains why this recognition process has not been multiplied. In practice, few 'rights' have been artificially reclassified as 'freedoms'. For example, such formulas have not been used for the right to strike or the right to consent to medical treatment. Lastly, the formulas used for the rights that were the subject of this study were not systematically used thereafter. In particular, the judge has on many occasions straightforwardly enshrined the "right" of ownership without reference to the free disposal of property by the owner⁶⁵³. As for the right of asylum, the reference to "freedoms generally recognised to foreign nationals" does not necessarily identify a freedom. It is a repeat of a formula used by the Constitutional Council in the *Maîtrise de l'immigration* decision⁶⁵⁴. In the end, it would seem that the only purpose of these formulas was to conceal the fact that the strict meaning of the term "freedom" had been exceeded. However, with regard to the case law that has developed on the basis of Article L. 521-2 of the Code of Administrative Justice, it is constant that fundamental freedoms are not limited to the possibility of doing things, i.e. to the protection of specific actions or activities.

155. For the administrative judge, freedoms may also be aimed at protecting qualities, characteristics or positions of the subject. This is the case, for example, with personal freedom, the presumption of innocence or the right to asylum. These principles do not protect a possibility of doing but, in substance, the right not to be subjected to illegitimate subjection and, in particular, to torture and inhuman or degrading treatment, the right not to be presented as the author of a fault or an offence before the outcome of a repressive procedure, and the right to obtain the protection of the authorities of the Republic for persons persecuted because of their action in favour of freedom⁶⁵⁵. It also seems possible to include freedom of opinion, which does not protect an action - expressing an opinion - but a position of the subject - not to be penalised, sanctioned or discriminated against because of one's opinions. Indeed, the true meaning of this freedom is not to allow everyone to hold the opinions they wish, but the guarantee that none of their rights will be infringed, that they will not be discriminated against as a result of the use they make of this freedom⁶⁵⁶. The right to lead a normal family life can also be added, which protects above all a situation: the possibility of being and living in a family.

3. A benefit (credit)

156. Finally, it could be envisaged that the object of the fundamental freedom concerns a benefit, i.e. the obtaining of a good or the benefit of a service. Indeed, the Conseil d'Etat has refused to exclude as a matter of principle the rights of claim from the scope of the *référé-liberté* and there is every reason to believe that, like its government commissioners and the judges of the first instance, it will agree to qualify as such rights that have been the subject of implementing legislative measures. Ms de Silva has very explicitly reserved the possibility that claim rights may be assimilated to fundamental freedoms: "The approach we are proposing to you is therefore not based on an opposition between 'rights' and 'freedoms', nor is it based on a principled exclusion of rights qualified as 'claim rights'"⁶⁵⁷.
157. According to Messrs. Collin and Guyomar, however, it seems "hardly debatable" that, beyond the "exceptions" that they consider to be the right to asylum and the right to apply for refugee status, "the 'rights' enshrined in the Constitution, in the common sense of the term, and in particular all the rights of claim that appeared after the Liberation, are not intended to benefit from the specific protection of the *référé-liberté*. The authors go

650 CE, ord. 12 January 2001, *Hyacinthe, Lebon* p. 12.

651 CE, Sect. 30 October 2001, *Ministre de l'Intérieur c/ Tiba, Lebon* p. 523.

652 P. CASSIA, *Les référés administratifs d'urgence*, LGDJ, coll. Systèmes Droit, 2003, p. 115.

653 See for example CE, ord. 22 October 2001, *Gonidec and Brocas*, n° 239165; CE, ord. 10 January 2005, *Société SIMBB et autres*, n° 276137.

654 In this decision, the Council refers to the right to asylum as "a fundamental right, the recognition of which determines the exercise by the persons concerned of the freedoms and rights generally recognised to foreigners residing in the territory by the Constitution (...)" (CC, No. 93-325 DC, 13 August 1993, cons. 81, *Rec.* p. 224).

655 On the content of these different rights, see *infra*, § 196 et seq.

656 The wording used in the texts proclaiming freedom of opinion expresses this idea perfectly. The provisions at issue are not limited to stating that "Everyone has the right to freedom of thought" but affirm that "No one shall be molested for his opinions, even if they are religious..." (Article 10 of the Declaration of 1789), "No one shall be molested for his opinions" (Article 19 of the International Covenant on Civil and Political Rights) and "No one shall be molested for his opinions" (Article 19 of the International Covenant on Civil and Political Rights). " (Article 10 of the Declaration of 1789), "No one may be disturbed for his or her opinions" (Article 19 of the International Covenant on Civil and Political Rights) or that "No one may be prejudiced in his or her work or employment on account of his or her origins, opinions or beliefs" (5^{ème} paragraph of the preamble to the 1946 Constitution).

657 I. DE SILVA, concl. on CE, Sect. 30 October 2001, *Minister of the Interior v. Tiba*, RFD-A 2002, p. 330.

on to say: "One can think, in particular, of the 'right to obtain employment' proclaimed by the Preamble to the 1946 Constitution, which cannot as such be given the label of 'fundamental freedom'. It is only at the cost of an effort to link it to a constitutionally guaranteed freedom, which is itself an individual freedom of the first order, that the Conseil d'Etat has included the right to lead a normal family life in the scope of the *référé-liberté*. It seems to us that this is more likely to be a sign that the Council of State intended to mark the limit of the extension of the scope of this procedure rather than the first step in opening up this procedure to all economic and social rights"⁶⁵⁸. These statements seem questionable and do not correspond to the reality of positive law.

Firstly, Collin and Guyomar seem to merge economic and social rights and entitlements into a single legal category, whereas the former have a broader scope than the latter. In particular, the category of economic and social rights is not limited to claim rights but also extends to a certain number of freedom rights, including freedom of association and the right to strike, which have been recognised as fundamental freedoms within the meaning of Article L. 521-2 of the Administrative Justice Code. Similarly, the right *to* lead a normal family life is not a right to claim but a right to freedom insofar as it does not in any way call for the right to a benefit from the public authorities. Secondly, if the right to employment - the only real claim right mentioned by the authors - must be excluded, it is only insofar as it is devoid of direct effect, as Mrs Fombeur very clearly stated in her conclusions on the *Casanovas* judgment⁶⁵⁹. In these circumstances, it cannot reasonably be argued that the Conseil d'Etat intended to exclude as a matter of principle rights of claim from the scope of application of the *référé-liberté*. If certain rights of claim have been expressly excluded from the category of fundamental freedoms, it is only because they do not produce a direct effect⁶⁶⁰. These rights require legislative implementation in order to be enforceable. As Dean Favoreu stated, "what are often called 'rights of claim' have a particular configuration, but they are indeed fundamental freedoms. They are simply not protected in the same way as the others, and it may happen that the *référé-liberté* procedure cannot be used to their advantage because, as the government commissioner says, they only produce effects in relation to the government. However, the hypothesis of a direct effect of the right of appeal on individuals cannot be excluded"⁶⁶¹.

158. From the point of view of its mode of realisation, the object protected by freedom may involve a passive or active attitude on the part of the public authorities. Since freedom is a subjective right, it is embodied in a legal faculty that enables its beneficiary to demand compliance with the duties of abstention or action that are incumbent on the public authorities towards him.

C. The way in which freedoms are realised

159. "To have a subjective right to a certain subject means to be able to claim a certain behaviour from that subject"⁶⁶². In the context of Article L. 521-2 of the Code of Administrative Justice, "freedoms" cannot be defined as calling only for abstention by the public authority. They cannot be reduced to strictly negative obligations on the part of the administration. Some fundamental freedoms, such as property or pluralism, call for actions as well as abstentions; others, such as asylum, only call for actions⁶⁶³. Many freedoms have some distribution of both aspects. They thus have a double dimension, taking the form of abstention from acting or abstention from not acting.

160. Considered in their negative dimension⁶⁶⁴, the purpose of freedoms is to oppose an action by the public authority. It is forbidden to intervene or interfere in the area protected by the freedom. Its implementation takes the form of an obligation of non-interference and presupposes the abstention of the public authority. It enables its beneficiary to repel state disturbances and claims. In this respect, freedom is easy to protect. It is sufficient for the judge to impose compliance with provisions guaranteeing administrative abstention, by depriving acts or actions that contravene this guarantee of effect.

161. In their positive dimension, fundamental freedoms imply action by the public authorities. The state must not

658 M. GUYOMAR and P. COLLIN, *op. cit.*, p. 1056.

659 See *supra*, § 129.

660 See *supra*, §§ 129-139.

661 L. FAVOREU, "La notion de liberté fondamentale devant le juge administratif des référés", *D.* 2001, p. 1742.

662 R. GUASTINI, "Réflexion sur les garanties des droits constitutionnels et la théorie de l'interprétation", *RDJ* 1991, p. 1080.

663 As Mr Guyomar and Mr Collin have pointed out, the exercise of the right to asylum "clearly calls for action by the public authorities rather than abstention" (see above, p. 1055).

664 In Germany, the defensive function is presented as the most important function of fundamental rights. In a famous passage from the *Lüth* decision, the Federal Constitutional Court stated that "fundamental rights are undoubtedly intended primarily to protect a sphere of freedom of the individual against interference by the public authorities; they are *Abwehrrechte* [defensive rights] of the citizen against the state" (BVerfGE 7, 198, *Lüth*, 15 January 1958, p. 204, quoted by D. CAPITANT, thesis, p. 105). The authors who take a theoretical view of the concept of fundamental right also state that in European constitutional rights, the function of the latter is "to protect the individual in his sphere of freedom against interference by the public authorities" (C. GREWE and H. RUIZ FABRI, *Droits constitutionnels européens*, PUF, 1995, no. 131). The individual is recognised as having a sphere freed from the State (*Staatsfrei*, according to Jellinek's formula: see O. BEAUD, "La théorie allemande des droits fondamentaux", *op. cit.*, p. 45).

affect the area protected by freedom by its refusal, failure or abstention. It is obliged to promote or guarantee freedom, to make an active contribution to its realisation. In this dimension, freedom imposes on the public authority an action or the adoption of measures to ensure its guarantee. For example, pluralism may imply positive action by the Conseil supérieur de l'audiovisuel to ensure its respect. In cases where the public authorities refuse to enforce a court order to evict unauthorised occupants, respect for the right to property implies action by the administrative authority. This positive dimension is not specific to *référé-liberté*. As early as the beginning of the 20th century⁶⁶⁵, the judge of the excess of power had recognised that the respect of the freedom of worship could imply a positive intervention of the administrative authority⁶⁶⁶. The principle of positive obligations has been applied in important and noteworthy ways in constitutional litigation⁶⁶⁶ and in the case law of the European Court of Human Rights⁶⁶⁷. The individual interest protected must be recognised as belonging to a subject of law or to an identified category of subject of law.

III. An identified beneficiary

162. The third criterion for identifying a subjective public right is the existence of an identified beneficiary. Since the text of Article L. 521-2 does not impose any particular status for benefiting from a fundamental freedom, the interim relief judge has adopted the broadest possible approach. It recognises that any person may benefit from fundamental freedoms regardless of their nationality or legal form⁶⁶⁸.

A. Natural person

163. In principle, any individual may invoke the benefit of the fundamental freedoms recognised under Article L. 521-2 of the Code of Administrative Justice. The case law that has developed on this basis has established the principle of the universality of the enjoyment of fundamental freedoms. First of all, these freedoms are valid not only for national citizens but also for foreign nationals, whether or not they are present on French territory. This solution, which is perfectly classic, is in line with the case law that has developed in the area of *de facto* assault⁶⁶⁹ and with the general orientation of European constitutional rights⁶⁷⁰. Fundamental freedoms are

665 See N. Foulquier, *Les droits publics subjectifs des administrés. Emergence d'un concept en droit administratif français du XIX^e au XX^e siècle*, Dalloz, coll. NBT, 2003, p. 548.

666 See L. SASSO, *Les obligations positives en matière de droits fondamentaux*, Caen thesis, 1999, 384 p. This theory has been applied in the case law of the Karlsruhe Court. For example, it has been ruled that the German State must not only refrain from preventing any individual from setting up a school or a newspaper, it must also take the necessary measures to ensure a certain pluralism in education or in the press (see M. FROMONT and H. SIEDENTOPF, "Administration and Constitution in the Federal Republic of Germany", *AEAP* 1993/XVI, pp. 177-178). In a bold move, the Federal Administrative Court deduced from the Constitution the right of an indigent person to public assistance that was not provided for in the regulations organising this type of assistance (see D.-H. SCHEUING, "La protection des droits fondamentaux en République fédérale d'Allemagne", in *Perspectivas del Derecho Publico en la segunda mitad del siglo XX. Homenaje a Enrique Sayagues-Laso*, vol. III, Instituto de estudios de Administracion local, 1969, p. 327, references note 55). On the question, see more generally D. CAPITANT, above-mentioned thesis, p. 173 et seq. In France, the preventive nature of the control makes it difficult to discover and impose positive obligations. Some decisions of the Constitutional Council have nevertheless been interpreted as containing such obligations. Decision 181 DC has thus been read as requiring the legislator to provide for the institutions necessary to preserve freedom of expression and pluralism (CC, No. 84-181 DC, 10-11 October 1984, *Rec.* p. 78).

667 The European Court has repeatedly stated that the State's obligations under the Convention are not limited to refraining from violating its provisions, but may also give rise to obligations to act. In the *X. and Y. v. Netherlands* judgment of 25 March 1985 (Series A no. 91), concerning sexual abuse of a mentally handicapped minor over the age of 16, the Court found Dutch legislation insufficient to meet the requirements of Article 8 of the Convention. In order to ensure "concrete and effective protection" of the rights guaranteed by this article, Dutch law should have provided for more protective criminal legislation. The *Plattform Ärzte für das Leben v. Austria* judgment of 21 June 1988 (Series A, no. 139) is also significant in this respect. This case concerned a demonstration that was held in poor conditions due to a counter-demonstration that was poorly contained by the police. The Court stated: "In a democracy, the right to counter-demonstrate cannot go so far as to paralyse the exercise of the right to demonstrate. Therefore, real and effective freedom of peaceful assembly cannot be accommodated by a mere duty of non-interference on the part of the State; a purely negative conception would not be consistent with the aim and purpose of Article 11. Like Article 8, it sometimes calls for positive measures, if necessary even in inter-individual relations" (§ 32).

668 In 1990, a broad approach also prevailed in the draft constitutional revision concerning the introduction of a preliminary question of constitutionality. The rapporteur of the draft in the National Assembly had indicated that fundamental rights "would be those of French citizens as well as foreigners and of natural persons as well as legal persons" (Report by Michel SAPIN on the draft constitutional law instituting a constitutionality review by way of exception, report no. 1288, 19 April 1990, p. 33).

669 Constant case law recognises that foreigners have access to administrative proceedings and, consequently, the benefit of the fundamental freedoms that are recognised there. See in particular the references cited by Jean-Yves Plouvin in his study "Au secours, le juge civil des référés arrive! (or of the reduction of the administrative judge by the judicial judge of summary proceedings)", *GP* 4 March 1989, 1, pp. 102-106.

670 In Germany, "fundamental rights with a human rights content" are valid "for Germans as well as for foreigners" (A. DITTMANN, "German Report", *AJJC* 1991/VII, Cours constitutionnelles et droits fondamentaux, colloquium Aix-en-Provence, 12 and 13 July 1991, p. 177 et seq.) In Portugal, the principle of the universality of the enjoyment of fundamental rights is expressly stated in the 1976 Constitution, Article 15.1 of which provides that "foreigners and stateless persons staying or residing in Portugal shall enjoy the same rights and be subject to the same duties as Portuguese citizens". In Spain, Article 13.1 provides that "foreigners shall enjoy in Spain the public freedoms guaranteed by this Title in the terms established by the treaties and the law". Article 128 of the Belgian Constitution provides that "any foreigner who is in the territory of Belgium shall enjoy the protection granted to persons and property, except for the exceptions established by law". In France, the

also recognised for natural persons in a particular situation. They are thus fully enjoyed by public servants⁶⁷¹, despite the constraints imposed on them by their statutes, which, according to Maurice Hauriou, make them "special citizens"⁶⁷². Fundamental freedoms are also recognised for prisoners. For the judge of summary proceedings, "persons detained in penitentiary establishments are not by this very fact deprived of the right to exercise fundamental freedoms likely to benefit from the special procedure instituted by Article L. 521-2 of the Code of Administrative Justice"⁶⁷³. It is equally applicable to persons hospitalised in a psychiatric establishment⁶⁷⁴ or to incapable persons. Thus, the right to lead a family life may benefit a minor child separated from his or her parents and be invoked directly by this child⁶⁷⁵.

164. However, the principle of the universality of the enjoyment of fundamental freedoms is not absolute. Secondary discrimination may occur between individuals with regard to the enjoyment of certain freedoms. These differences and distinctions are not arbitrary but are simply justified by the particular nature or characteristics of the freedoms in question. Moreover, they concern only specific categories of beneficiaries. Thus, the benefit of certain fundamental freedoms is conceivable only for nationals and legally resident aliens and cannot, therefore, be claimed by illegally resident aliens⁶⁷⁶. Similarly, the free expression of suffrage, as a prerogative attached to citizenship, is reserved for persons with the status of voters, i.e. persons with French citizenship or Community citizenship - it being specified that for the latter, this right is logically open only for municipal and European elections⁶⁷⁷. As for the right to asylum, its recognition is necessarily limited to foreigners only. By definition, this right can only be invoked by non-nationals. Because of the specific configuration of this right, only foreign nationals can claim it. Thus, the principle of universality only includes exceptions justified by the particular nature of the rights concerned, the enjoyment of which necessarily presupposes a particular status for the persons invoking it. The approach is also broad in that the judge has also recognised the benefit of fundamental freedoms to legal persons.

B. Legal person

165. All legal persons, both private and public, can benefit from the fundamental freedoms.
166. Their recognition for the benefit of legal persons under private law has not, in principle, raised any difficulties. While it is true that the primary purpose of fundamental freedoms is to protect natural persons, there is nothing to prevent their benefit being extended to legal persons. Insofar as they can, like physical beings, express a will through their decision-making and representative bodies, legal persons are assimilated by law to natural persons⁶⁷⁸. They benefit from so-called "aspectual" protection⁶⁷⁹. This means that they can enjoy fundamental freedoms but only if the exercise of these freedoms is compatible with their kind or nature. Some freedoms, such as the right to lead a normal family life or the right to asylum, are attached to the physical person and can only be understood by reference to individuals. Their exclusion in favour of legal persons simply results from the nature of things, from the irreducible difference between flesh-and-blood beings and immaterial beings. On the other hand, legal persons can fully benefit from the fundamental freedoms which, since they do not presuppose any intrinsic or natural characteristics of man, are compatible with their nature. It is therefore without difficulty that the interim relief judge has recognised the benefit of certain fundamental freedoms to legal persons under private law, in particular the right of ownership⁶⁸⁰ or the freedom of assembly⁶⁸¹. Here again, the solution is perfectly classic. It is in line with the case law on administrative

Constitutional Council recognises in principle that foreigners benefit from constitutional rights and freedoms subject to certain restrictions linked to public order and the legality of their stay (see in particular CC, No. 93-325 DC, 13 August 1993, *Rec. p. 224*; No. 97-389 DC, 22 April 1997, *Rec. p. 45*). It should be added that under Article 1^{er} of the European Convention on Human Rights, the Contracting States must recognise the rights and freedoms enshrined in the Convention "to everyone within their jurisdiction".

671 See in particular CE, Sect. 28 February 2001, *Casanovas*, *Lebon* p. 108.

672 M. HAURIOU, *Précis de droit administratif*, 3^{ème} ed, Sirey, 1933, p. 744.

673 CE, ord. 27 May 2005, *Section française de l'observatoire international des prisons et autres*, *Lebon* p. 232. However, the exercise of these freedoms must deal with the constraints linked to their confinement and is therefore "subordinated to the constraints inherent in their detention". See, in the same sense, CE, ord. 8 September 2005, *Ministre de la Justice c/ Bunel*, *Lebon* p. 388: "as regards persons detained in penitentiary establishments, their situation is necessarily dependent on the constraints inherent in their detention".

674 See, for example: CE, 15 May 2002, *Baudoin*, n° 239487.

675 CE, ord. 29 September 2004, *Minister of the Interior, Internal Security and Local Freedoms v. Aubame*, n° 272584.

676 See CE, ord. 5 March 2001, *Préfet de l'Hérault c/ Hajjaj*, *Lebon* T. p. 1130.

677 On this point, it should be noted that the Portuguese (Article 15.2) and Spanish (Article 13.2) Constitutions expressly provide for an exception to the principle of universality for the right to vote. The same is true in other countries (see *AJJC* 1991/VII, *op. cit.*, pp. 211 et seq.).

678 On the assimilation of legal persons to natural persons, see Y. GUYON, "Droits fondamentaux et personnes morales de droit privé", *AJDA* 1998, special issue, pp. 136-142.

679 L. FAVOREU et alii, *Droit des libertés fondamentales*, 3^{ème} éd, Dalloz, coll. Précis, 2005, n° 111.

680 CE, ord. 23 March 2001, *Société Lidl*, *Lebon* p. 154.

681 CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL)*, *Lebon* p. 311.

assault⁶⁸² and European constitutional rights⁶⁸³.

167. The attribution of fundamental freedoms to legal persons governed by public law has raised more difficulties in principle. Resistance came not from the Council of State itself but from the academic community, or rather from part of it. The debate arose when the principle of free administration of local authorities was enshrined as a fundamental freedom in the *Commune de Venelles* judgment⁶⁸⁴. In his conclusions, the government commissioner Laurent Touvet defended a broad approach to the scope of beneficiaries of fundamental freedoms. He based his argument on the text of Article L. 521-2, which does not limit the circle of beneficiaries in any way. Mr Touvet also stated that "Although the victims of the infringements referred to in this article will most often be private persons, it cannot be ruled out that public persons may infringe a fundamental freedom of another public person"⁶⁸⁵.

The attribution of fundamental freedoms to legal persons under public law has been criticised by some authors. Mr Marcou, for example, has argued that fundamental freedoms can only be granted "to private persons, whether they are natural persons, which is the origin of the concept, or legal persons"⁶⁸⁶. With regard to the theoretical concept of "fundamental right", the doctrine appeared divided. While Mr Picard was hostile to the recognition of such rights in favour of public persons⁶⁸⁷, Mr Drago was in favour⁶⁸⁸. Generally speaking, the objections to the attribution of fundamental freedoms to public persons are based on the following idea: since the nature of fundamental freedoms is to protect individuals, the State could not be both the recipient and the beneficiary of freedoms. If fundamental freedoms are directed against the state, they cannot be enjoyed by entities that are themselves attributable to the state (i.e., the state as a public entity, local authorities and public institutions), otherwise the state would be directed against itself. As Mr Pfersmann pointed out, this reasoning is based on a confusion between the *theoretical* and *legal* concept of the state. Understood as a theoretical concept, the state refers to a legal order. Viewed as a concept of positive law, it corresponds to such and such a set of bodies to which the legal order confers this name, i.e. a territorial collectivity encompassing the entire territory. Fundamental freedoms are subsets of the state in the theoretical sense, since they are norms that attribute subjective rights to identified beneficiaries. There is no reason why, in our legal system, the norms thus qualified should not be imposed on the public authority - the state as a legal concept⁶⁸⁹.

In the context of assault, the question of the invocation of fundamental freedoms by public persons has rarely arisen. Nevertheless, on at least two occasions, the Court of Conflicts has accepted to recognise the existence of assault and battery due to the encroachment of an administrative authority on the powers of another administrative authority⁶⁹⁰. In constitutional law, the situation is mixed as regards the attribution of constitutional rights and freedoms to public persons. The position of the constitutional courts is nevertheless mostly oriented towards recognition of this ownership⁶⁹¹. By also recognising the benefit of fundamental freedoms for public persons,

682 The judge of the assault has long admitted the possibility that legal persons may benefit from fundamental freedoms. See for example: TC, 8 April 1935, *Action française, Lebon* p. 1226, concl. JOSSE, *GAJA* n° 51; Civ. 1^{ère}, 3 May 1983, *Syndicat interprofessionnel des radios et télévisions indépendantes et autres c/ Télédiffusion de France*, *Bull. civ. I*, n° 138.

683 In France, the Constitutional Council stated very early on that the ownership of constitutional rights and freedoms was not the prerogative of natural persons (see in particular CC, No. 79-109 DC, 9 January 1980, *Rec.* p. 29; No. 81-132 DC, 16 January 1982, *Rec.* p. 18; No. 82-137 and 138 DC, 25 February 1982, *Rec.* p. 38; No. 86-207 DC, 25-26 June 1986, *Rec.* p. 61; 98-401 DC, 10 June 1998, *Rec.* p.258). In Portugal, the Constitution states in Article 12.2 that "All legal persons enjoy the rights and are subject to the duties that are compatible with their nature". In Germany, Article 19 III of the Basic Law contains a certain restriction by providing for the application of fundamental rights "to national legal persons where their nature so permits". As Dittmann points out, "The inclusion of legal persons in the protection of fundamental rights is only valid for national legal persons, i.e. legal persons actually having their seat on the territory of the Federal Republic of Germany. In contrast to natural persons, the protection of fundamental rights is therefore basically denied to foreign legal persons. Only procedural rights are granted to them (A. DITTMANN, above-mentioned report, pp. 183-187). In Spain, "For legal persons under private law, it can be stated that the situation of legal persons is identical to the German situation" (P. CRUZ VILLALON, "Spanish Report", *AIJC* 1991/VII, p. 229).

684 Other freedoms have followed, notably the right to property (CE, ord. 21 November 2002, *Gaz. de France, Lebon* p. 408; CE, 19 November 2001, *Commune d'Escuillens et Saint Just de Belengard*).

685 L. TOUVET, concl. on CE, Sect. 18 January 2001, *Commune de Venelles, RFDA* 2001, p. 386.

686 G. MARCOU, "Le référé administratif et les collectivités territoriales", *LPA* 14 May 2001, n° 95, p. 47.

687 E. PICARD, "La liberté contractuelle des personnes publiques constitue-t-elle un droit fondamental", *AJDA* 1998, pp. 651-666, esp. pp. 661-662.

688 R. DRAGO, "Droits fondamentaux et personnes publiques", *AJDA* 1998, special issue, pp. 130-135.

689 Cf. L. FAVOREU et alii, *Droit des libertés fondamentales*, 3^{ème} éd, Dalloz, coll. Précis, 2005, n° 112.

690 See TC, 15 March 1951, *Comptoir limier, Lebon* p. 630; TC, 28 February 1952, *de Kernier, Lebon* p. 620, cited by M.-C. ROUAULT, *JCP G* 1992, II, 21804, p. 14. For an application of de facto assault in a relationship between public persons, and for the benefit of a territorial authority, see, more recently: Civ. 1, 28 November 2006, *Commune de Saint-Maur-des-Fossés, Bull. civ. I*, n° 529, *JCP A* 2007, 2118, note O. RENARD-PAYEN.

691 The Constitutional Council has established the possibility for legal persons under public law to be beneficiaries or holders of constitutional rights and freedoms. In particular, the Council has stated on several occasions that the constitutional protection of property "concerns not only the private property of individuals, but also, on an equal footing, the property of the State and other public persons" (CC, No. 86-207 DC, 25-26 June 1986, cons. 58, *ECR* p. 61; No. 86-217 DC, 18 September 1986, cons. 47, *ECR* p. 141; No. 94-346 DC, 21 July 1994, cons. 3, *ECR* p. 96). In Spain, the Constitutional Court was initially hostile to the idea that public persons could rely on fundamental rights. Following a jurisprudential development, it ruled that public authorities may be holders of such rights (cf. P. CRUZ VILLALON, "Spanish Report", *AIJC* 1991/VII, pp. 231-235). In Germany, the Constitutional Court considers that Article 19 III cannot normally benefit legal persons governed by public law, on the grounds that the public authority cannot be both creditor and debtor of the fundamental right (BVerfGE 21, 362 [369], cited by C. AUTEXIER, *Introduction au droit public allemand*, PUF, 1997, no. 113). This can only be different for rights of a processual nature (BVerfGE 13, 132 [140], cited by C. AUTEXIER, *op. cit.*, no. 113).

the interim relief judge has established the broadest possible understanding of the circle of beneficiaries.

168. A freedom, within the meaning of Article L. 521-2 of the Code of Administrative Justice, is analysed as a subjective public right. The recognition of a freedom presupposes that the interim relief judge gives a positive answer to the following three questions. Firstly, is the principle in question a legal standard? Secondly, does this norm have a direct effect that makes it enforceable against the administration? Finally, does it aim to protect an individual interest of its beneficiary, whether a natural person or a legal entity, and, more specifically, an activity, a quality or a position of the subject, or even the obtaining of a benefit? If a positive answer can be given to each of these questions, the judge is dealing with a subjective public right. However, fundamental freedoms are not an ordinary type of subjective right. They are, like the German fundamental rights, "the most important subjective public rights"⁶⁹².

Section 2. The criterion of fundamentality

169. To be eligible for the procedure of Article L. 521-2, the freedom must be "fundamental". For the administrative judge, fundamentality is a property that cannot be reduced to a specific source. In identifying fundamentality, the judge contrasts constitutional norms, which are *all* fundamental, and infra-constitutional norms, only some of which may have this character.

I. Fundamentality is not linked to a source

170. In Germany, fundamentality is reduced to a specific normative level: the constitutional level. In the expression "droit fondamental", according to Capitant, "the constitutional character is expressed by the word 'fondamental', which means nothing more"⁶⁹³. In French doctrine, the supporters of the formal approach also associate fundamentality with a specific normative level: the supralegislative level. For the juge des référés, on the other hand, fundamentality is not linked to a specific source. This means, on the one hand, that it is not linked to a single source and, on the other hand, that borrowed sources are only material sources.

A. The diversity of sources

171. There are four criteria for determining the source of a fundamental freedom. Apart from these hypotheses, it is logically impossible to link a fundamental freedom to a precise norm. It is therefore impossible to establish or know the source on which the judge has based himself to enshrine the said freedom.

Firstly, the source may be expressly mentioned in the reasons for the decision. Of all the recognised freedoms, cases are relatively rare. Firstly, there is the principle of free administration of local authorities, which is explicitly mentioned in Article 72 of the Constitution⁶⁹⁴. Then there is the 'constitutional' right to asylum⁶⁹⁵. Of course, the word 'constitutional' is used above all to specify *the field of the right in question*, i.e. to distinguish it from the conventional asylum protected by the Geneva Convention of 28 July 1951 on the status of refugees. Nevertheless, it incidentally specifies *the source*, since the constitutional right of asylum is by definition based on the Constitution (more precisely, on paragraph 4 of the preamble to the 1946 Constitution, supplemented by Article 53-1 of the 1958 Constitution). Two freedoms of legislative origin should also be mentioned: firstly, the freedom of communication of the hospitalised patient, a freedom "recognised by Article 3211-3 (...) of the Public Health Code"⁶⁹⁶, and secondly, consent to medical treatment, a freedom "protected by the provisions of Article 16-3 of the Civil Code and by those of Article L. 1111-4 of the Public Health Code"⁶⁹⁷.

Secondly, in cases where the decision is rendered by a collegiate body, the government commissioner will almost always indicate the source serving as a basis for the consecration of the freedom. Thus, in his conclusions on the *Aguillon* ruling of 9 December 2003, Jacques-Henri Stahl indicated that the Council of State could "without difficulty" enshrine the right to strike as a fundamental freedom insofar as this right "is constitutionally guaranteed by the provisions of the Preamble to the Constitution of 27 October 1946"⁶⁹⁸. The right to strike is thus expressly linked to a single source: the Preamble of the 1946 Constitution and, more precisely, its 7^{ème} paragraph.

Thirdly, the source of a fundamental freedom can be identified from the citations of the decision. Article R. 741-2 of the Code of Administrative Justice requires the judge to mention in the citations of his decision the texts he applies. The term "application" is understood in a broad sense, as synonymous with use⁶⁹⁹. The difficulty arises from the fact that a text - with the exception of procedural texts - may be mentioned either to establish the

693 D. CAPITANT, *Les effets juridiques des droits fondamentaux en Allemagne*, LGDJ, coll. BSCP, t. 87, 2001, p. 3, note 4.

694 CE, Sect. 18 January 2001, Morbelli, maire de la Commune de Venelles, *Lebon* p. 18.

695 CE, ord. 12 January 2001, *Hyacinthe*, *Lebon* p. 12; CE, ord. 2 May 2001, *Ministre de l'Intérieur c/ Džiri*, *Lebon* p. 227; CE, ord. 12 November 2001, *Minister of the Interior v Farhoud*, *Lebon* T. p. 1126; CE, 15 February 2002, *Hadda*, *Lebon* p. 45; CE, ord. 25 March 2003, *Minister of the Interior, Internal Security and Local Freedoms v Sulaimanov*, *Lebon* p. 146.

696 CE, 15 May 2002, *Baudoin*, n° 239487. Article L. 3211-3 of the Public Health Code provides that a person hospitalised automatically "has the right: (...) 1° to communicate with the authorities mentioned in Article L. 3222-4; (...) 4° to send or receive mail".

697 CE, ord. 16 July 2001, *Fenillatey*, *Lebon* p. 309. The formula used is nevertheless ambiguous. It can be read in two ways, since 'protecting' a freedom can mean both *enshrining* it and *implementing* it. An analysis of the citations nevertheless favours the first solution: the Constitution is not mentioned, and the European Convention on Human Rights is only mentioned in relation to the condition of manifest illegality. However, this is not enough to dispel any uncertainty, since the Constitution may serve as a basis for the enshrinement of a fundamental freedom without being mentioned by the court (see, below, the fourth hypothesis for identifying the source of fundamental freedoms, in particular the *Marvel* and *Kurtarici* decisions).

698 J.-H. STAHL, concl. on CE, 9 December 2003, *Aguillon and others*, *Dr. soc.* 2004, p. 173.

699 It is not necessary for the text to be formally *applied in order* to appear in the reasons. A text is mentioned by the judge as soon as he uses it or relies on it to render his decision (see Y. GAUDEMET, *Les méthodes du juge administratif*, LGDJ, coll. BDP, t. 108, 1972, pp. 78-79).

existence of a fundamental freedom or to assess the condition of manifest illegality; it may even be used for both conditions. When several of the texts mentioned are the bearers of the freedom, it is difficult to determine which one or ones - a combined basis not being excluded - actually serve for the consecration⁷⁰⁰. In any case, and if we confine ourselves to certain cases, an analysis of the citations highlights the heterogeneous nature of the grounds used. The interim relief judge referred to the Constitution, "in particular Article 4", combined with the law of 30 June 1881 on public meetings, to enshrine the right of a legally constituted political party to hold meetings⁷⁰¹. He referred to the Constitution and "in particular" its Preamble to enshrine the free disposal of property by the owner⁷⁰², freedom of enterprise⁷⁰³, freedom of worship⁷⁰⁴ and individual freedom⁷⁰⁵.

Fourthly and lastly, the determination of the source can be deduced from the verbatim repetition of an established textual or jurisprudential formula. The *Tliba* judgment of 30 October 2001 is an illustration of this method of identification⁷⁰⁶. In this decision, the Conseil d'Etat had two formulas at its disposal enabling it to recognise the protection of the family as a fundamental freedom: on the one hand, the constitutional formula, referring to the "right to lead a normal family life"⁷⁰⁷, and on the other, the conventional expression, enshrining the "right to respect for family life" (Article 8 of the European Convention on Human Rights). While the judge of the first instance had noted an infringement of "the right of Mrs Tliba to respect for her family life", thereby expressing a link to the conventional source, the Council of State prefers to speak of the "right to lead a normal family life" of the person concerned. Authoritative observers have pointed out that the choice of words was "not a matter of chance"⁷⁰⁸. By using this formula, the Council implicitly but necessarily links this fundamental freedom to the constitutional source. Similarly, in the aforementioned *Kurtarici* ordinance, the formula used constitutes a borrowing not from European law but from constitutional case law. Under these conditions, and although the Constitution is not referred to by the judge in his decision, there is no doubt that it represents the material source of this fundamental freedom. The same reasoning can also be applied to the enshrinement of personal freedom⁷⁰⁹, which is a concept of constitutional origin. Here again, its origin is certain, although the judge does not mention the Basic Law either in the grounds for his decision or in the citations to it.

172. It follows from the above that fundamental freedoms are not extracted by the judge from a given normative level. Fundamentality cannot be reduced to a given level in the hierarchy of norms. Recognised fundamental freedoms have their origin either in the Constitution or in ordinary law⁷¹⁰. The legal obligations described as fundamental freedoms are derived from norms at various levels of the hierarchy. They also represent material sources.

B. Material sources

173. The standard serving as a basis or support for the establishment of a fundamental freedom is only the material source of the latter. Moreover, it cannot be otherwise, insofar as the interim relief judge does not *apply* as such - i.e. formally - the text carrying the norm of fundamental freedom. The concept of fundamental freedom represents, like that of general principle of law, a legal category allowing a mediate application of the textual

700 In some decisions, it is relatively easy to distinguish between the text that serves as the basis for establishing a freedom and the text that is used to assess the illegality. Thus, in the *Kurtarici* order, the European Convention, mentioned in the citations, is then taken up again in the grounds to assess the proportionality of the infringement of the applicant's right to respect for family life. It may therefore be assumed that the text is taken into account in the legality of the contested measure (CE, ord. 3 April 2002, *Minister of the Interior v. Kurtarici, Lebon T.* p. 871). Sometimes the division is more difficult to achieve, as in the order of 3 May 2005, *Confédération française des travailleurs chrétiens, Lebon T.* p. 1034. The decision, which enshrines as a fundamental freedom the employee's freedom not to be forced to perform forced labour, includes in its citations four "substantive" texts: the Constitution and in particular its preamble, the European Convention on Human Rights, the Labour Code and Act No. 2004-626 of 30 June 2004 amending the Labour Code by instituting a "solidarity day" in the form of an additional day of unpaid work for employees. Of these four texts, three are mentioned in the grounds of the decision. The Labour Code and the law of 30 June 2004 are mentioned in order to present the so-called "solidarity day". The European Convention on Human Rights - and more precisely its Article 4 - is mentioned in the context of the requirement of manifest illegality of the contested measure. The Constitution, on the other hand, is not mentioned in the grounds. Its presence in the grounds can therefore only be explained by the fact that it constitutes the basis of this fundamental freedom. Otherwise, there would be no justification for its inclusion in the grounds. One element nevertheless raises doubts: the prohibition of forced labour, which is explicitly enshrined in the European Convention on Human Rights, is not recognised either in the constitutional text or in constitutional case law. The constitutional connection is nevertheless justified by the judge who, by mentioning freedom of work in the same recital, implicitly but necessarily derives the prohibition of forced labour from this principle. If the European Convention on Human Rights played a role in this consecration, the wording of the decision suggests that it is strictly subsidiary.

701 CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL), Lebon p.* 311.

702 CE, ord. 23 March 2001, *Société Lidl, Lebon p.* 154.

703 CE, ord. 12 November 2001, *Commune de Montreuil-Bellay, Lebon p.* 551.

704 CE, ord. 16 February 2004, *Benaissa, Lebon T.* p. 826.

705 CE, ord. 27 March 2001, *Ministre de l'Intérieur c/ Djalout, Lebon p.* 158.

706 CE, Sect. 30 October 2001, *Ministre de l'Intérieur c/ Tliba, Lebon p.* 523.

707 See *supra*, § 135.

708 M. GUYOMAR and P. COLLIN, *op. cit.* p. 1055.

709 CE, ord. 2 April 2001, *Ministre de l'Intérieur c/ Consorts Marcel, Lebon p.* 167.

710 On the other hand, it seems possible to state, in the light of all the decisions handed down, that international instruments, and in particular the European Convention on Human Rights, have so far never served as a basis for recognising a fundamental freedom. In practice, this is only mentioned by the interim relief judge when assessing the legality of the situation submitted to him.

or jurisprudential norms which constitute its foundation. In both cases, a norm is required for recognition (a textual norm for the general principle of law, a textual or jurisprudential norm for the fundamental freedom). But once the fundamental freedom or principle has been recognised, it then exists independently of the supporting norm and becomes autonomous from it. According to the case law formula, the general principles of law apply "even without a text"⁷¹¹. This has two consequences in the context of the theory of general principles of law. On the one hand, this mediate application allows the judge to take a liberty with regard to the text and to free himself from the narrow framework of its statement. On the other hand, the principle enjoys greater stability than the original text, even if the latter is of constitutional rank. As President Genevois pointed out, "The absence of a link to a constitutional text ensures that the 'general principles of law' are more durable"⁷¹². This approach "has the advantage of not tying the principle identified to a formal text and of ensuring its survival in the Constitution which served for its legal protection (...)"⁷¹³.

174. Several elements suggest that the judge intends to draw heavily on this technique in the context of Article L. 521-2 of the Code of Administrative Justice. Firstly, the wording of the fundamental freedom is often transformed in relation to the source norm, i.e. the text or case law that served to establish it. Thus, the right to lead a family life is reformulated into a "freedom to live with one's family"⁷¹⁴, a "right of everyone to live with his or her family"⁷¹⁵, a "right to a normal family existence"⁷¹⁶, a "right to a family life"⁷¹⁷ or a "right to respect for family life"⁷¹⁸. Similarly, while Article L. 1111-4 of the Public Health Code mentions "the free and informed consent of the person" to medical care, the judge will, on the basis of this provision, enshrine "the right of a patient of full age to give his or her consent to medical treatment, when he or she is in a condition to do so"⁷¹⁹. In a later decision, this right becomes "the free and informed consent of the patient to the medical care provided"⁷²⁰. Similarly, the "right to communicate", set out in Article L. 3211-3 of the Public Health Code, becomes "freedom of communication"⁷²¹. In all cases, the raw norm is thus transformed at the level of its formulation. Secondly, the normative source of the fundamental freedom is not always stated by the judge, which may suggest that it does not necessarily have to result from a specific text. Thirdly, some statements by members of the administrative court corroborate this impression. Thus, according to President Racine, the "concept of fundamental freedom (...) takes shape from a skilful syncretism of constitutional law, treaty law and general principles of law"⁷²². Similarly, Collin and Guyomar state that 'it will be up to the courts to define the boundary between fundamental freedoms (...) and the *simple* rights recognised by the Constitution, which by its very nature is bound to change as society and the hierarchy of its values evolve'⁷²³. One may be surprised by this statement, which reduces the Constitution, the founding text of our legal order, situated at the top of it and recognising nothing superior to it, to the rank of a 'simple', ordinary and commonplace norm. But in reality, this formula expresses a desire to transpose the philosophy of the general principles of law to fundamental freedoms, in order to give them a capacity to resist change that is greater than that of the texts that contribute to their creation. Constitutional freedoms are by nature linked to the text that enshrines them and can disappear in the event of a constitutional revision or change of constitution. Fundamental freedoms, on the other hand, would be detached from any text and, consequently, insensitive to normative changes likely to affect the Basic Law itself. Once enshrined, the fundamental freedom would thus become autonomous from the legal data that served to enshrine it. Recognised as a fundamental freedom, incorporated into Article L. 521-2, the norm begins to exist in its own right, a new life independent of the norm that gave rise to it. It is detached from its original support and undergoes a novation. Considered in the context of Article L. 521-2, it is no longer a constitutional or legislative freedom but a fundamental freedom. It becomes independent of its original source.

Thus, there is no precise and formal source of fundamentality. If fundamentality is not reducible to a source, it is, necessarily, a property or quality of the norm.

711 See J.-M. MAILLOT, *La théorie administrativiste des principes généraux du droit. Continuité et modernité*, Dalloz, coll. NBT, 2003, special p. 380.

712 B. GENEVOIS, "Principes généraux du droit", *Répertoire Dalloz de contentieux administratifs*, 2000, n° 57.

713 M. MIGNON, "La valeur juridique du Préambule de la Constitution selon la doctrine et la jurisprudence", *D.* 1951, p. 130, quoted by F. BATAILLER, *Le Conseil d'Etat juge constitutionnel*, LGDJ, coll. BDP, t. 68, 1966, p. 587, note 15. See in the same sense: K. BUTERI, *L'application de la Constitution par le juge administratif*, thesis Aix-en-Provence, 2000, pp. 167-168.

714 CE, ord. 5 March 2002, *Fikry*, *Lebon T.* p. 872.

715 CE, ord. 10 July 2002, *Boulema*, No. 248422.

716 CE, ord. 29 September 2004, Minister of the Interior, Internal Security and Local Freedoms v. Aubame, n° 272584.

717 CE, ord. 19 January 2005, *M. Laurent X.*, *Lebon p.* 23.

718 CE, ord. 25 November 2003, *Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c/ Nikoghosyan*, *Lebon T.* p. 927.

719 CE, ord. 16 July 2002, *Feuillatey*, *Lebon p.* 309.

720 CE, ord. 8 September 2005, *Minister of Justice v. Bunel*, *Lebon p.* 388.

721 CE, 15 May 2002, *Baudoin*, n° 239487.

722 P.-F. RACINE, "Les grands principes spécifiques au procès administratif", *Droit des libertés fondamentales* (R. CABRILLAC, M.-A. FRISON-ROCHE, T. REVET dir.), 9^{ème} éd., Dalloz, 2003, p. 545.

723 M. GUYOMAR and P. COLLIN, chron. under CE, Sect. 18 January 2001, *Commune de Venelles*, *AJDA* 2001, p. 156. Emphasis added.

II. Fundamentality is a property

175. The essence of fundamentality is not linked to the legal value of the norm that carries the freedom. The latter is certainly not indifferent (at least if it is constitutional), but it only represents an indication for the judge. It acts as an indicator of fundamentality. Nothing more. The hierarchy of norms does not intervene as such in the identification of fundamentality. What characterises this property is the importance or essentiality of a norm. As Gilles Bachelier states, 'what counts is the *eminent character of the freedom or right in question*'⁷²⁴. What makes a freedom fundamental is its essential character. The interim relief judge has very clearly opted for a material approach to fundamentality.
176. To assess the fundamental nature of a freedom, the administrative judge must measure the attachment that citizens have to it. In this task, he is helped by several criteria or indices that make it possible to limit the subjectivity inherent in such an operation. The main and almost exclusive criterion is that of supreme legal value. By hypothesis, the rules of constitutional value are all - formally and materially - fundamental. Conversely, sub-constitutional norms are not foundational to a legal order, i.e. formally fundamental⁷²⁵. If some of them may prove to be fundamental, it is only because of their importance, i.e. exclusively from a material or substantial point of view. Thus, the case law shows that there is an opposition, not between 'available' norms (legislative or sub-legislative) and 'unavailable' norms (supra-legislative), but between constitutional norms (which are all and necessarily fundamental) and all other norms (only some of which are fundamental)⁷²⁶. The constitutional source prevails over all other sources of discovery of fundamental freedoms⁷²⁷. The other sources play only a subsidiary, supplementary role.

The priority vocation of the constitution in determining fundamentality is explained by a simple consideration: the attachment of citizens to a right or freedom is directly formalised in the Basic Law. However, citizens may also express their attachment to a right or freedom without it being included in the Constitution. Simply stated by an infra-constitutional norm, it may nevertheless be essential, i.e. of a materially fundamental nature. Thus, although the Constitution is the main source of fundamental freedoms, it is not their exclusive source. The constitutional source necessarily conceals fundamentality; sub-constitutional sources are only likely to reveal it in exceptional cases. This privileged position of the Constitution explains why judges sometimes prefer to 'internalise' conventional standards and link them to a constitutional standard by making them a constituent element of the latter⁷²⁸.

A. Constitutional norms are necessarily fundamental (formal and material fundamentality)

177. Constitutionality is not a condition for fundamentality, but it is more than an indication. It is not necessary, insofar as non-constitutional norms may be recognised as fundamental. However, it is more than an indication, since it is sufficient in itself to qualify a norm as fundamental. It is a criterion, and indeed by far the most important one, since it is sufficient in itself to characterise the fundamental nature of a norm. It is the criterion par excellence of fundamentality. Constitutional norms enjoy a presumption of fundamentality⁷²⁹. They

⁷²⁴ G. BACHELIER, "Le référé-liberté", *RFDA* 2002, p. 263. Underlined.

⁷²⁵ On the contrary, they exist and can only be invoked by and under the Basic Law itself.

⁷²⁶ Mrs de Silva perfectly expresses this cleavage established between constitutional standards and all other standards by stating that "A right or freedom enshrined in the Constitution, or *even* in an international convention, a law or a general principle of law, may be qualified as 'fundamental' within the meaning of Article L. 521-2" (I. DE SILVA, concl. on CE, Sect., 30 October 2001, *Ministre de l'Intérieur c/ Tliba*, *RFDA* 2002, p. 329. Emphasis added).

⁷²⁷ When a freedom is recognised, in similar terms, by the Constitution *and* by an international convention, the administrative judge will systematically choose the constitutional formulation. With regard to the right to lead a normal family life, Collin and Guyomar stated that "Although the invocation of this right now seems to be inextricably linked to the protection afforded to it by the stipulations of Article 8 of the European Convention on Human Rights, it should be borne in mind that this right has, first and foremost, a constitutional status" (M. GUYOMAR and P. COLLIN, *op. cit.*, p. 1055).

⁷²⁸ Thus, the prohibition of torture and inhuman and degrading treatment, set out in Article 3 of the European Convention on Human Rights, has no counterpart in the French Constitution. The constitutional text could not, therefore, serve as a basis for recognising this prohibition as a fundamental freedom. If the judge intended to ensure the protection of the principle laid down by this provision, he had to rely on the text of the European Convention. Nevertheless, instead of enshrining this prohibition as a fundamental freedom in its own right, the interim relief judge chose to make the principle set out in Article 3 of the Convention a *component* of a freedom recognised in constitutional law, which would be either individual freedom or personal freedom (see *below*, § 203).

⁷²⁹ The only question is whether it is a simple presumption or an irrebuttable presumption. In the current state of jurisprudence, it can be seen that the courts have never refused to qualify a constitutional freedom as a fundamental freedom. If certain constitutional norms have been denied the status of fundamental freedom, it is only because they do not have the nature of freedoms (i.e. do not meet the criteria of subjective public law), and not because they do not have a fundamental character. It seems highly unlikely that the administrative judge would

correspond to the two meanings of the term 'fundamental'. On the one hand, they have an *essential* character, which justifies their enshrinement in a text outside the parliamentary majorities. On the other hand, they are *the foundation* of our legal and political order. In this respect, constitutionality is in essence a sign of fundamentality.

178. Constitutional norms are formally fundamental; indeed, they are the only formally fundamental norms. As Robert Alexy has pointed out, 'constitutional rights norms are formally fundamental as a result of their place at the top of the hierarchy of the legal system (...)'⁷³⁰. The Constitution is indeed the 'foundation of the legal order'⁷³¹, 'the indispensable basis of the legal norms that regulate the life of the community'⁷³². The unity and coherence of a legal order are formed around its fundamental law. The latter, in particular because of its particular stability, represents the foundation and the basis of a legal order⁷³³; it establishes its foundations. It is the basis for the validity of all other norms⁷³⁴. As the legal order is conceived as a pyramid of hierarchical norms⁷³⁵, the sub-constitutional norms must respect the provisions of the Constitution. Under the conditions laid down by the texts and case law, the validity of a conventional, legislative or administrative provision may be challenged before the constitutional court or the ordinary court⁷³⁶. In the event of contradiction with the fundamental law, the sub-constitutional norm will be annulled or deprived of effect, depending on the case. Insofar as they are among the norms of constitutional value, i.e. they represent the basis of the legal system, constitutional rights and freedoms are *ipso facto* fundamental. The same is true in Germany, where the freedoms set out in Part I of the Basic Law "tend to be the basis of the whole of German law"⁷³⁷. In the same sense, Starck states that "fundamental rights are basic norms of any legal system"⁷³⁸.
179. Constitutional norms are also materially fundamental. As the norm of consensus⁷³⁹, the Constitution is the seat of essential values and freedoms⁷⁴⁰. Therefore, it is in the Constitution that one is supposed to find the most important freedoms. The rights set out in the Constitution are considered sufficiently overriding or essential to be beyond the reach of parliamentary majorities⁷⁴¹. They correspond to "positions which are attributed such importance that the decision as to their acceptance or non-acceptance cannot be left to the mere parliamentary majority"⁷⁴². And indeed, a close link has long existed between constitutions and

refuse to qualify a constitutional norm as a fundamental norm.

730 R. ALEXY, *A theory of constitutional rights* (translated from the German by J. RIVERS), Oxford University Press, 2003, p. 349.

731 G. VEDEL, "Les bases constitutionnelles du droit administratif", *EDCE* 1954, p. 21.

732 B. GENEVOIS, *La jurisprudence du Conseil constitutionnel. Principes directeurs*, STH, 1988, p. 189.

733 The higher up the hierarchy of norms, the more cumbersome the procedure for adopting and amending normative acts, i.e. the more binding the formalities and the more difficult it is to obtain consent: the stability of the rules is therefore proportional to the rank they hold. Located at the top of the hierarchy of norms, constitutional rules and principles enjoy remarkable stability. "The rules of law contained in the constitutionality block are much more assured of permanence or perennity than those contained in ordinary laws. The law therefore has a much greater security coefficient when it is of constitutional rank than when it is of ordinary legislative rank (...) (L. FAVOREU, 'Droit et loi. Brèves réflexions d'un Constitutionnaliste', in *La philosophie à l'épreuve du phénomène juridique. Droit et loi*, colloque des 22 et 23 mai 1985, PUAM, 1987, p. 13).

734 H. KELSEN, *Pure Theory...*, *op. cit.* p. 199: "If the question is asked as to the basis of the validity of a legal norm belonging to a given legal order, the answer can only consist in relating it to the fundamental norm of this legal order, in other words: it lies in the assertion that this norm has been created in accordance with the fundamental norm".

735 See H. KELSEN, *op. cit.* pp. 224 ff.

736 The control of the constitutionality of laws and international commitments ensures the effective supremacy of the Constitution over all other legal norms (cf. H. KELSEN, "La garantie juridictionnelle de la Constitution (La Justice constitutionnelle)", *RDP* 1928, pp. 197-257; C. EISENMANN, *La justice constitutionnelle et la Haute cour constitutionnelle d'Autriche*, thèse Paris 1928, re-edited 1986, *Economica PUAM*, coll. DPP, 383 p.). The administrative court ensures that the administrative authority complies with constitutional norms.

737 M. FROMONT and A. RIEG, *Introduction au droit allemand*, tome I Les fondements, Cujas, 1977, p. 153.

738 C. STARCK, *La Constitution cadre et mesure du droit*, *Economica*, 1994, p. 104.

739 As M. Zagrebelsky pointed out, the "constitutional moment" is by definition the moment of general cooperation: "In the constituent moments, the political wills of the political subjects agree with a common goal: to establish the principles that dominate the particular interests of each one in order to allow the life in common of all" (G. ZAGREBELSKY, *Le droit en douceur* (translated from Italian by M. LEROY), PUAM, 2000, p. 111). In this sense, "The Constitution is the basic consensus of a people on its way of life" (U. KARPEN, "The Rule of Law", in *The Constitution of the Federal Republic of Germany. Essay on the Basic Rights and Principles of the Basic Law with a translation of the Basic Law* (U. KARPEN ed.), Nomos Verlagsgesellschaft, 1996, p. 174). As Yann Aguila states, "The Constitution, more than the law, constitutes the true founding foundation in which, beyond the ephemeral parliamentary majorities, the continuity of the nation is rooted" (Y. AGUILA, *Le Conseil constitutionnel et la philosophie du droit*, Travaux et recherches Panthéon-Assas Paris II, 1993, p. 11).

740 Its very purpose is "to define a system of values common to a human group" (B. MATHIEU and M. VERPEAUX, *Contentieux constitutionnel des droits fondamentaux*, LGDJ, 2002, p. 19). As M. de Béchillon points out, "The constitutional expression of a rule, whatever its nature, expresses, by the very fact that it is intended to be constitutional, a *founding value* for society as a whole" (D. DE BECHILLON, *Hiérarchie des normes et hiérarchie des fonctions normatives de l'Etat*, *Economica PUAM*, coll. DPP, 1996, p. 241. *Emphasis added*). In all countries, "the fundamental norm has the primary role of establishing and founding a general political consensus, particularly in the field of fundamental rights and public freedoms" (P. BON, "Les droits et libertés en Espagne. Eléments pour une théorie générale", in *Dix ans de démocratie constitutionnelle en Espagne*, CNRS Publishing, 1991, p. 40). It is the "charter of the organisation of the State and of fundamental values" (U. KARPEN, *op. cit.*, p. 175). President Marceau Long noted that, "Placed at the top of the hierarchy of norms, the Constitution enshrines the founding principles of our social order, the content of which refers to political or moral values" (M. LONG, Preface to the above-mentioned work by Y. AGUILA). In other words, it "guarantees fundamental rights and principles" (O. SCHRAMECK, "Droit administratif et droit constitutionnel", *AJDA* 1995, special issue *Le droit administratif*, p. 34).

741 "They are rights that the ordinary legislator (as opposed to the constituent legislator) is not allowed to limit, modify or abolish" (R. GUASTINI, "Réflexion sur les garanties des droits constitutionnels et la théorie de l'interprétation", *RDP* 1991, p. 1080).

742 R. ALEXY, "Idée et structure d'un système de droit rationnel", *APD* t. 33 *La philosophie du droit aujourd'hui*, 1988, p. 32.

freedoms⁷⁴³. In France, the principle of a constitutional definition of rights and freedoms was established as early as the Revolution⁷⁴⁴. The Constitutions that have followed one another since 1791 have in principle included a list of rights and freedoms. Even the most authoritarian constitutions contain at least one explicit guarantee of the main freedoms (Title VII for the Constitution of the year VIII; Articles 1^{er} to 26 for the Constitution of 1852). This tradition was nevertheless interrupted with the constitutional laws of 1875. Between 1870 and 1946, i.e. for more than 65 years, the principle of constitutionally defining rights and freedoms was no longer applied. "This long interruption explains why, when the constituent of 1946 intended to revive the tradition of a constitutional guarantee of liberties, it lost the initial mechanism (...)"⁷⁴⁵. Instead of enshrining freedoms in the text of the Constitution itself, it recalled its attachment to the Declaration of the Rights of Man and of the Citizen and added a certain number of economic and social rights to the preamble to the Constitution. Similarly, but for different reasons, the drafters of the Constitution of 4 October 1958 did not draw up an ordered catalogue of rights and freedoms but merely referred in its preamble to the Declaration of 1789 and the preamble to the Constitution of 1946⁷⁴⁶. The absence of a constitutional declaration of rights and freedoms led to questions about their legal value. In 1971, the Constitutional Council confirmed the full legal value of the Preamble to the Constitution and, by the same token, of the Declaration of 1789 and the Preamble of 1946 to which it refers⁷⁴⁷.

180. Constitutionality automatically entails fundamentality. Constitutional norms are all fundamental because of the conjunction, as far as they are concerned, of the two meanings of the term fundamental. Nothing can affect the fundamentality of a right. In particular, legislative restrictions on the exercise of a constitutional right do not in any way remove its fundamental character⁷⁴⁸. However, the administrative judge considers that a norm may also be fundamental from a strictly substantive point of view. If the Constitution exhausts formal fundamentality, it does not exhaust material fundamentality. Thus, some rights may fall within the scope of the *référé-liberté* procedure "even if they are 'fundamental' only in substance"⁷⁴⁹. Fundamentality, in the sense of Article L. 521-2 of the Code of Administrative Justice, is not limited to constitutionality.

B. Infraconstitutional freedoms can be fundamental (exclusively material or substantial fundamentality)

181. The judge does not intend to exclude any normative level from the scope of the summary judgment.

⁷⁴³ Hegel already stated that "By Constitution, one must understand freedoms in general and the organisation and realisation of these freedoms" (G.W.F. HEGEL, *Encyclopédie des Sciences philosophiques*, § 540, quoted by A. SERIAUX, L. SERMET, D. VIRIOT-BARIAL, *Droits et libertés fondamentaux*, Ellipses, 1998, p. 7). As M. Ardant observed, "The first texts of constitutional value in the modern era, the English texts of the XIII^e to XVIII^e century: Magna Carta of 1215, Petition of Rights of 1628, Habeas Corpus of 1679, Bill of Rights of 1689, are less concerned with institutions than with freedom in its various forms and with procedures designed to protect it. When, at the end of the 18th century^e, the Americans and the French decided to put in writing a set of rules concerning the organisation and functioning of power, they quite naturally placed Declarations of Rights at the head of these constitutions, thereby placing the whole text under the sign of liberties" (P. ARDANT, "Les Constitutions et les libertés", *Pouvoirs* n° 84, 1998, p. 61).

⁷⁴⁴ See L. HAMON, "La définition constitutionnelle des droits et libertés en France", in *Droit constitutionnel et droits de l'homme*, Economica PUAM, coll. DPP, 1987, pp. 41-62.

⁷⁴⁵ J. RIVERO and H. MOUTOUH, *Libertés publiques*, t. 1, 9^{ème} ed, PUF droit, coll. Thémis droit public, 2003, p. 144.

⁷⁴⁶ This absence results first of all from the insufficient legitimacy of the drafters of the new Constitution. Indeed, it was the government presided over by General de Gaulle, and not an assembly elected by universal suffrage, that was entrusted with its drafting. The minutes of the working group meeting of 12 June 1958 state that "it is not in keeping with the French political and legal tradition to have a declaration of rights drafted by the government" (*Documents pour servir à l'histoire de l'élaboration de la Constitution du 4 octobre 1958*, vol. 2, La documentation française, 1988, p. 243). The same explanation was repeated by M. Janot, Government Commissioner, before the Constitutional Advisory Committee (*op. cit.*, p. 95). Secondly, the drafters were pressed for time: they had to move quickly. The minutes of the meeting of 12 June indicate that "the most appropriate solution appears to be to draft an article maintaining in force the Declaration of 1789 and the 1946 addendum" (*op. cit.*, p. 243). The choice of a reference preamble saved a considerable amount of time while encouraging the emergence of a consensus. The continuation of the Algerian conflict also contributed to the absence of a catalogue of rights and freedoms, in particular because of the existence of certain repressive laws whose constitutionality could be seriously questioned. On this subject, see V. TCHEN, "Questions sur un silence : les droits fondamentaux dans l'élaboration de la cinquième République", *Revue juridique d'Auvergne*, vol. 97-98/3, special colloquium issue, pp. 119-140; B. GENEVOIS, "Le préambule et les droits fondamentaux", in *L'écriture de la Constitution de 1958*, colloquium of 8-11 September 1988, Aix-en-Provence (L. FAVOREU, D. MAUS and J.-L. PARODI dir.), Economica, 1992, pp. 483-499.

⁷⁴⁷ See CC, No. 71-44 DC, 16 July 1971, *Rec.* p. 29, *GDCC* No. 19.

⁷⁴⁸ On this point, M. Pez contested the fundamental character recognised to the right of property by putting forward the limitations that have long been brought to it by the legislator (T. PEZ, "Le droit de propriété devant le juge administratif du *référé-liberté*", *RFDA* 2003, p. 372). It is true that constitutional case law enshrines the right to property *today*, i.e. a right that has undergone multiple "limitations required in the name of the general interest" (CC, no. 81-132 DC, cons. 16, *Rec.* p. 18). This circumstance, however, is not such as to weaken the constitutionality of this right or, consequently, its fundamentality.

⁷⁴⁹ B. PACTEAU, *Contentieux administratif*, 6^{ème} éd, PUF, coll. Droit fondamental, 2002, n° 278.

Consequently, it accepts to recognise the existence of fundamental freedoms based on sub-constitutional norms⁷⁵⁰. This desire for openness was clearly expressed in the first year of application of this procedure. In her conclusions on the *Tliba* judgment, Ms de Silva told the Section: "We do not believe that you are strictly limited to the constitutional field: certain principles that appear in international conventions - for example, the International Convention on the Rights of the Child - may be 'fundamental' at a given time. It is also the case that, whatever extension one gives to the constitutional substratum, the level of legal protection may evolve with the state of society and, in the face of new infringements - for example those involving the right to privacy, or those relating to the field of bioethics - certain rules emanating from complementary sources may be recognised as involving a fundamental right"⁷⁵¹. Taking into account complementary sources - international conventions, laws and general principles of law - should make it possible to give flexibility to case law and thus to promote the discovery of fundamental freedoms in accordance with the expectations and developments of society. As Mr Glénard explains, the Conseil d'Etat intends to "use as little formalism as possible in the concept of fundamental freedom" by leaving itself "the possibility of deriving a fundamental freedom from a statute or a general principle of law when its subject matter is distinguished by its importance"⁷⁵².

The reference to the general principles of law⁷⁵³ may be surprising if one focuses on the value of this legal category. However, the perspective changes radically if one takes into account the importance of the norms thus qualified⁷⁵⁴ and the remarkable stability that characterises them. However, not all general principles of law can become fundamental freedoms. In order to justify this qualification, they must have the nature of a freedom and be of a properly fundamental character. These requirements must not be lost sight of. In this respect, Mr Brenet states that "it is hard to see what could prevent [the administrative judge] from putting an end, on the basis of Article L. 521-2 of the CJA, the violation of the principles prohibiting the administration from dismissing a pregnant employee or obliging it to reclassify, or even dismiss, the agent in the event of physical inaptitude preventing him or her from occupying his or her job or, in another area, the infringements of the patient's freedom of choice of doctor and freedom of prescription"⁷⁵⁵. It is seriously doubtful that the obligation to dismiss a public official can be considered as a freedom. As for the last two examples cited by the author, their essentiality can be discussed. It may be thought that the violation of these norms is more likely to fall within the competence of the judge of the summary suspension.

As regards the establishment of a fundamental freedom on the basis of a legislative provision, this is not without risk in view of the precarious and subordinate nature of the law today. Not only can the law always be deprived of effect on the grounds of unconstitutionality or unlawfulness, but it can also be repealed by Parliament at any time. However, the importance of this risk must be put into perspective. While it is true that a law can be invalidated or deprived of effect *a posteriori* by one of the judges of the law⁷⁵⁶, this possibility is highly unlikely for legislative norms that the interim relief judge has qualified as fundamental freedoms. First of all, it is difficult to see what constitutional, treaty or Community rule could come into conflict with, for example, freedom of assembly or consent to medical treatment. Moreover, although legislative texts are nowadays genuinely unstable⁷⁵⁷, this phenomenon does not in practice concern the norms enshrining freedoms or contributing to their implementation.

750 At present, the fundamental freedoms derived from sub-constitutional norms are all legislative norms. No fundamental freedom seems to have been recognised on the basis of an international treaty or a general principle of law (it being specified that the wording of the orders does not always make it possible to determine with precision the precise source from which the freedom is derived). It is reasonable to believe that this situation does not reflect a desire on the part of the judge to exclude these sources from the scope of fundamentality.

751 I. DE SILVA, concl. on CE, Sect. 30 October 2001, *Minister of the Interior c/ Tliba*, RFD A 2002, p. 329.

752 G. GLENARD, *op. cit.* p. 2016.

753 Explicit reference, in the conclusions of Ms de Silva (see concl. above, p. 329).

754 According to President Genevois, "the notion of general principle of law must be reserved for norms that have a certain permanence, that are situated at a high level of the hierarchy of legal acts and that correspond to values that are considered essential in our legal system. In concrete terms, although the criterion of the principle's generality does not have an absolute scope for identifying a general principle of law, the qualitative criterion remains indispensable" (B. GENEVOIS, "Principes généraux du droit", *Répertoire Dalloz de contentieux administratifs*, 2000, No. 103). For M. Genevois, "It is the importance of the standard, applicable to a given field, because of its permanence and its connection to essential values, which makes it possible to identify a general principle of law within the other manifestations of the normative power of case law" (*op. cit.*, no. 105).

755 F. BRENET, "La notion de liberté fondamentale au sens de l'article L. 521-2 du CJA", *RDP* 2003, p. 1557.

756 The annulment may come from the Constitutional Council in application of the jurisprudence of the *State of Emergency in New Caledonia* (see *GDCC* No. 37). A ruling by the Strasbourg or Luxembourg courts may also neutralise the effects of a legislative provision. Finally, the declaration of unconstitutionality may come from the ordinary courts themselves, although it is difficult to imagine the Conseil d'Etat declaring the unconstitutionality of a legislative provision that it has itself declared a fundamental freedom.

757 In this respect, it has been observed that "permanence, abstraction and generality have given way to the proliferation and contingency of laws, as well as to the detailed nature of their content" (N. POULET-GIBOT LECLERC, *La place de la loi dans l'ordre juridique interne*, PUF, 1992, p. 129). The law loses its traditional qualities, especially its immutability (see F. TERRE, "La crise de la loi", *APD* t. 25, *La loi*, 1980, pp. 17-28). Indeed, "As soon as it becomes precise and detailed, it risks being struck down more quickly" (J. CHEVALLIER, "La dimension symbolique du principe de légalité", *RDP* 1990, p. 1666. Underlined). Seeking to adapt to changing and evolving situations, the law appears more and more as a "transitory" law and legality becomes "mobile" (C. MORAND, "Le droit et l'Etat-providence", *Revue de droit suisse* 1988, p. 542). This development has been the subject of definitive criticism by members of the Council of State. For its vice-president, "the law should be solemn, brief and permanent"; instead, "today it is talkative, precarious and trivialised" (R. DENOIX DE SAINT MARC, "Trop de lois tue la loi", *Journal du dimanche*, 21 January 2001, p. 7). These attacks by the Conseil d'Etat on legislative work are not new and were systematised in the 1991 Public Report, which denounced "the frequency of changes" in legislation ("De la sécurité juridique", *EDCE* 1991, no. 43, pp. 23-24).

While these may be amended, restricted or extended, there is never any question of their being abolished. Moreover, in view of the concept of fundamental freedoms developed by the administrative judge, it is not impossible that a fundamental freedom may survive the disappearance of the text that gave rise to it.

182. As far as its identification is concerned, the fundamentality of an infra-constitutional norm is assessed according to a purely material criterion. This is where the major difference between constitutional and sub-constitutional norms arises. Whereas the criterion of supreme legal value alone is sufficient to recognise the fundamentality of a given norm, a provision of sub-constitutional rank will only be fundamental if it has an eminent or essential character. By definition, purely material fundamentality is not formalised in a text or located at a specific normative level.

There are no legal criteria at this stage to distinguish between fundamental and non-fundamental norms. The judge does not prefer the highest normative level. It does not give primacy to treaties over the law in the search for substantive fundamentality. In this respect, all sub-constitutional norms are on an equal footing. From a substantive point of view, the treaty source is not more fundamental than the legislative source. It does not enjoy a higher degree of fundamentality. A significant example is provided by the order of 19 August 2002, *FN IFOREL*, in which the interim relief judge enshrined the freedom of assembly as a fundamental freedom⁷⁵⁸. This freedom is absent from the constitutional text and has not been recognised by the Constitutional Council. It is nevertheless enshrined at the sub-constitutional level by two provisions: on the one hand, Article 1^{er} of the law of 30 June 1881 on public meetings, and on the other, Article 11 of the European Convention on Human Rights. In order to enshrine freedom of assembly in the context of Article L. 521-2 of the Code of Administrative Justice, the interim relief judge therefore had a choice between these two sources; he could also opt for a combined basis. It is clear from the citations of the decision that the judge attached this fundamental freedom solely to the legislative source without mentioning the European Convention. This choice shows that the hierarchy of norms is not taken into account at this stage. The legislative source, of lesser legal value⁷⁵⁹, is preferred to the conventional source.

Measuring the substantive fundamentality of a norm is a relatively delicate operation that requires a certain effort of appreciation on the part of the judge. When he is faced with a constitutional norm, things are simple: all he has to do is note its supreme legal value, from which its fundamentality follows by right. It is imposed on him; he does not therefore have to measure it. His assessment is much more important when it comes to evaluating the fundamental nature of a non-constitutional norm and, consequently, to select from a colossal mass of norms⁷⁶⁰ the rules that stand out because of their eminence or essentiality. In doing so, the judge does not venture into the realm of values or assess fundamentality on the basis of a personal judgement⁷⁶¹. He endeavours to measure the importance of the freedoms in question. In an order of 22 October 2001, *Caillat et al.*, the interim relief judge affirmed that "notwithstanding the general interest character recognised by the law of 16 July 1984 to physical and sports activities and, in particular, to the development of high-level sport, neither the right to practice a sport nor the right to take part in sports competitions constitute fundamental freedoms within the meaning of Article L. 521-2 of the Code of Administrative Justice"⁷⁶². By this formula, the interim relief judge suggests that he has gauged the importance of the rights concerned. By taking care to specify that the law recognises that physical and sports activities are of "general interest", he admits that the subject of the rights in question is certainly not without importance, but that this importance is not sufficient for these rights to be considered as having a fundamental character.

183. In practice, it seems possible to highlight four criteria for assessing the essentiality of a conventional or legislative norm or a general principle of law.

The first criterion is the degree of protection of the freedom. The extent of protection is shown by the ease with which a freedom can be exercised, the guarantees attached to its exercise, and the absence of exceptions or qualifications to the principle. Thus, the right to consent to medical care is enshrined without reservations or restrictions by the Act of 4 March 2002. Article L. 1111-4 of the Public Health Code provides numerous precise and detailed guarantees for its exercise. In the eyes of the interim relief judge, these guarantees justify the qualification of fundamental freedom⁷⁶³.

The second criterion corresponds to the historical constancy or permanence of a right. The fact that it is rooted

758 CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL)*, *Lebon* p. 311.

759 See CE, Ass., 20 October 1989, *Nicolo*, *Lebon* p. 190, concl. P. FRYDMAN, *GAJA* n° 102.

760 See the figures quoted by P. TRONQUOY (in *Le droit dans la société française*, La documentation française, 1998, 104 p.), particularly with regard to the number of international laws and treaties applicable in France.

761 Its approach may, in some respects, be reminiscent of the method developed by the Supreme Court to identify fundamentality under the *due process of law* clause (see *supra*, § 66).

762 CE, ord. 22 October 2001, *Caillat and others*, *Lebon* p. 479.

763 See in this sense, P. WACHSMANN, *Libertés publiques*, 4^{ème} éd., 2002, Dalloz, coll. Cours, 2002, n° 222: "It should also be accepted that freedoms can be qualified as fundamental, given the importance of the legislative guarantees to which they are subject: it may be thought that by enshrining the right of a patient of full age to give consent to medical treatment, the Conseil d'Etat has embarked on this path. It should be added that this right is further extended in Article 16-3 of the Civil Code. Although this provision is not formally applicable to the administration, it nevertheless contributes to reinforcing its fundamental nature."

in our legal system is an indication of its essentiality. This is the case, for example, with freedom of assembly, which has been enshrined in domestic law for over a century. Similarly, to justify the fundamental nature of the secrecy of correspondence, the government commissioner Sophie Boissard states, first of all, that 'Breach of this secrecy, expressly enshrined in a decree of 5 December 1789, has been an offence that has been constantly punished since the criminal code of 25 September 1791'⁷⁶⁴. The mention of this longevity is no accident. For the Government Commissioner, it reveals the importance or essentiality of this right. Ms Boissard could have noted that this principle was contained in the current Criminal Code, i.e. limited to positive law. The reference to the durability of the principle and its constant reaffirmation by the legislator tends to demonstrate its substantial fundamentality.

The third criterion is the link between the freedom in question and constitutionally protected rights and freedoms. This criterion is sometimes mentioned by the government commissioners. For example, with regard to the right to seek territorial asylum, Government Commissioner Sophie Boissard argued, in order to justify the qualification of a fundamental freedom, that "although the right to territorial asylum is not, in itself, recognised by the Constitution, it is nevertheless intended to guarantee rights and freedoms which are, in turn, of constitutional value, in particular, the right to life and the safeguarding of human dignity"⁷⁶⁵. In this case, however, the Council of State did not follow the reasoning of the government commissioner. It preferred to link it to the constitutional right of asylum using the corollary technique, by making territorial asylum a constituent element of the constitutional right of asylum. Generally speaking, this identification criterion is relatively imprecise insofar as any sub-constitutional norm can be considered as having, closely or remotely, a link with the Constitution, because of the very broad wording of its provisions. Nevertheless, the judge will be sensitive to the direct link that may exist between a constitutional norm and a legislative norm that constitutes its extension or contributes to its implementation. Thus, the freedom of communication of a hospitalised person may be regarded as an extension, in medical matters, of the general freedom of communication enshrined in the Constitution. Using a similar approach, the Constitutional Council referred in Decision No. 97-389 DC to the "provisions protecting individual freedom provided for in legislation on information technology, files and freedoms"⁷⁶⁶. In so doing, it presented the law of 6 January 1978 on information technology, files and freedoms as an extension of the individual freedom enshrined in the Constitution.

Finally, it could be argued that enshrinement in converging norms is also an indication of fundamentality. For the time being, no application of this criterion can be found in the decisions of the Council of State⁷⁶⁷. It will come into play, if necessary, in the event of the consecration of a norm by several convergent sub-constitutional sources.

Conclusion of Chapter 2

184. For the administrative judge of summary proceedings, a fundamental freedom is analysed as an essential subjective public right, essentiality being measured mainly, but not exclusively, on the basis of constitutionality⁷⁶⁸. The norms qualified as fundamental freedoms all and without exception meet all the criteria; the norms excluded from the protection of L. 521-2 do not meet at least one of the criteria. It is unlikely that this combination of criteria will change in the future, partly because of their broad nature and partly because of the stability that characterises administrative case law⁷⁶⁹. Once the interim relief judge has recognised the existence of a fundamental freedom, he must determine its meaning, content and limits. This is the same approach that governs the discovery of fundamental freedoms, i.e. a broad understanding of the

⁷⁶⁴ S. BOISSARD, concl. on CE, 9 April 2004, *Vast, RFDA* 2004, p. 779.

⁷⁶⁵ S. BOISSARD, unpublished conclusions on CE, 15 February 2002, *Hadda, Lebon* p. 45. It should nevertheless be specified that if the principle of safeguarding the dignity of the human person is a norm of constitutional value, this is by no means the case for the right to life.

⁷⁶⁶ CC, No. 97-389 DC, 22 April 1997, cons. 5, *Rec.* p. 45.

⁷⁶⁷ This criterion was only developed by the government commissioners, and then only to a greater extent, as it concerned constitutional norms in each case. Ms de Silva thus noted that the freedom to come and go is recognised by Articles 2-2 and 2-3 of the 4^{ème} Protocol to the European Convention on Human Rights (concl. cited above, p. 332). Ms Fombeur pointed out that the freedom of opinion of public servants is explicitly mentioned in Article 6 of the Act of 13 July 1983 on the general status of civil servants and that their freedom of association is mentioned in Article 8 (above-mentioned conclusions, p. 403). It should be noted, however, that these references are strictly superfluous, as the constitutional consecration of a norm is sufficient, in itself, to make it fundamental.

⁷⁶⁸ This priority vocation gives new vigour to the phenomenon of the constitutionalisation of law, which is defined as "the gradual dissemination of the norms resulting from the Constitution and the case law of the Constitutional Council in all branches of law, revealing a constitutional law that is no longer merely a rule for the organisation of the public powers but a substantial, effective and sanctioned right" (G. DRAGO, *Contentieux constitutionnel français*, PUF, coll. Thémis droit public, 1998, p. 65). On the phenomenon of constitutionalisation, see L. FAVOREU, "L'apport du Conseil constitutionnel au droit public", *Pouvoirs* n° 13, 1980, pp. 17-26; *ID.*, "La constitutionnalisation du droit", in *L'unité du droit. Mélanges en hommage à Roland Drago*, *Economica*, 1996, pp. 25-42; *ID.*, "L'influence de la jurisprudence du Conseil constitutionnel sur les diverses branches du droit", in *Itinéraires. Etudes en l'honneur de Léo Hamon*, *Economica*, 1982, pp. 235-244, esp. p. 244; S. MOUTON, *La constitutionnalisation du droit en France*, thesis Toulouse I, 1998, 833 p.; B. MATHIEU and M. VERPEAUX (dir.), *La constitutionnalisation des branches du droit*, proceedings of the workshop of the III^e Congrès de l'Association française des constitutionnalistes, Dijon, 14-16 June 1996, *Economica* PUAM, coll. DPP, 1998, 204 p. On the constitutionalisation of administrative law, see P. BON, "Constitution de 1958 et droit administratif", *LPA* 1^{er} December 1993, n° 144, pp. 4-8.

⁷⁶⁹ See H. LE BERRE, *Les revirements de jurisprudence en droit administratif de l'an VIII à 1998*, LGDJ, coll. BDP, t. 207, 1999, special pp. 626 et seq.

scope of application of the summary procedure.

Chapter 3

Defining the content of the various fundamental freedoms: an enrichment approach

185. In order to implement Article L. 521-2 of the Code of Administrative Justice, the interim relief judge must establish the content and limits of each of the recognised fundamental freedoms. The definitional operation, which is subject to certain constraints, is necessary in order to determine what precisely allows or covers a given freedom. In general, the judge favours a concrete and extensive definition of the content of each freedom. The only exception is the right to medical consent.

Section 1. The defining operation: necessity and constraints

186. The rights and freedoms eligible for the procedure of Article L. 521-2 are most often of a weakly determined content. This lack of precision is a consequence of the generally vague and general formulation of the standards to which the administrative judge of summary proceedings recognises the quality of fundamental freedom⁷⁷⁰. This is true, first of all, of freedoms that have their source in the Constitution⁷⁷¹. It is also found, but in a less marked and systematic way - because of their more easily revisable character - for the fundamental freedoms of legislative origin. This is the case, for example, for the freedom of assembly. On the other hand, the right to medical consent is subject to a very precise definition as to its content.

187. Because of this indeterminacy, it is often difficult to know *a priori* the exact scope of protection covered by each fundamental freedom. In particular, when a freedom of action is at issue, it is difficult to see the precise limits of the actions that are permitted as opposed to those that are not. Since the area protected by fundamental freedoms cannot be identified from the mere wording of their statement, it is up to the interim relief judge, in the course of his or her case law, to determine their consistency and limits⁷⁷². The judge must

770 The same observation applies to the theoretical concept of fundamental right or fundamental freedom. "Whatever the source considered", states Mrs Delmas-Marty, "fundamental rights and freedoms have the same characteristics of norms that are weakly determined by the text that states them ('weak predetermination')" (M. DELMAS-MARTY, in *Libertés et droits fondamentaux* (M. DELMAS-MARTY and C. LUCAS DE LEYSSAC dir.), Seuil, 1996, p. 28).

771 In this sense, Bockenforde observed that "The provisions of the German Basic Law on fundamental rights, like those of other constitutions establishing a state governed by the rule of law, are, in their letter and language form, lapidary formulae and provisions of principle which are in themselves largely lacking in precision as to their content" (E.-W. BOCKENFORDE, "Théorie et interprétation des droits fondamentaux", in *Le droit, l'Etat et la Constitution démocratique*, Bruylant LGDJ, coll. La pensée juridique, 2000, p. 253). This imprecision of wording, sought by the drafters, is intended to ensure the pre-eminence of the principles guaranteed beyond any overly strict definition of the content of the various rights and freedoms. The open-ended nature of the wording encourages their adaptation to social, technological, cultural or other changes that may occur. In France, this indeterminacy can also be explained by historical considerations, in particular for the provisions of the Declaration of the Rights of Man and of the Citizen. Indeed, the question of the content of the rights and freedoms was of little concern to the drafters of these provisions, who did not conceive them as rules of law but as a summary of their political philosophy, as a credo and not as the formulation of a legal norm (see S. RIALS, *La Déclaration de 1789*, Hachette, 1988, 771 p.). The weakly determined nature of the provisions has also been emphasised for the rights and freedoms recognised by the European Convention on Human Rights. As Mr Melchior has pointed out, the Convention "abounds in vague notions, indeterminate or imprecise concepts. The rights guaranteed are most often simply cited, enumerated; they are not defined in their constituent elements. Even where the content of the right is the subject of some precision, a beginning or an attempt at definition - as is the case for the right to the proper administration of justice guaranteed in Article 6 of the Convention - the fact remains that the terms used on this occasion are open to a wide range of interpretations, from the minimalist to the maximalist" (M. MELCHIOR, "Vague" or "indeterminate" notions and "gaps" in the European Convention on Human Rights, in *Protection des droits de l'homme: la dimension européenne. Mélanges en l'honneur de Gérard J. Wiarda*, 2^{ème} ed., Carl Heymanns Verlag KG, 1990, p. 411).

772 Generally speaking, where rights and freedoms are indeterminate, it is up to the judicial bodies to specify their content. As Ms Delmas-Marty points out, the weakly determined nature of these rights "leads the judge, whoever he or she may be, to take part in the work of determining the meaning of the norm, by means of a creative interpretation ('strong codetermination')" (M. DELMAS-MARTY, *op. cit.*, p. 28). The courts concerned carry out this determination in a variety of ways, sometimes drawing on theoretical considerations, sometimes adhering to a pragmatic approach, and sometimes combining the two. In interpreting the provisions of the European Convention, the Strasbourg Court has shown a certain pragmatism, which consists in giving full effect to the principles set out without exceeding certain "limits". These limits, says Melchior, "It seems impossible to determine them rationally, by implementing a legal principle. They result only from an appreciation of the meaning of the measure, from the implementation of a kind of pragmatism. This pragmatism consists (...) in appreciating what can be accepted by the States, perhaps not without difficulties, but in any case, certainly, without manifest impossibility. Caution and progressiveness are the two virtues that characterise this pragmatism. In other words, it is important for the Court and the Commission to calculate and estimate how far they should go in taking a position so that the limit is not crossed beyond which the States would cease to bow to the mechanism of the Convention, to the requirements that the latter implies for them" (M. MELCHIOR, *op. cit.*, p. 412). As regards the interpretation of constitutional rights, there are no fewer than five theories of interpretation of fundamental rights in Germany: the liberal, institutional, axiological, democratic and functional, and social theories (see E.-W. BOCKENFORDE, *op. cit.*, pp. 256-273). The substantive content of a

constantly specify the content of the fundamental freedoms and establish their practical consequences in the particular legal situations that arise. For the implementation of this procedure, the definitional operation is thus of major practical interest because it is with regard to the material content of a freedom that the existence of a possible infringement will be assessed. In order to determine whether a fundamental freedom has been violated or disregarded, it is necessary to know its consistency and scope.

188. Here again, for the judge of the *référé-liberté*, it is a problem of interpretation. Once again, depending on the interpretation adopted, the judge chooses to define the scope of application of Article L. 521-2 of the Code of Administrative Justice more or less broadly. The problem, however, arises in different terms in relation to the interpretation of the concept of fundamental freedom itself. In fact, the standard pre-exists its intervention. Consequently, it has already been interpreted, applied, implemented or clarified. For each fundamental freedom, there is a reference definition - resulting either from a text or from a case law interpretation - in the light of which the consistency and contours of each freedom can be determined. From a chronological point of view, the interim relief judge intervenes after other bodies or institutions which have, each in their own sphere of competence, enacted, adjusted or interpreted the norm in question. He is the second to know the issue, and this is likely to influence him in determining the content of the fundamental freedoms.
189. The judge's margin of freedom, in relation to the text that sets out a freedom, depends on the degree of precision of the latter. Where the wording is imprecise, as is most often the case, the judge has considerable freedom in relation to the textual statement. On the other hand, in the rare cases where the content and limits of the right have been clearly and precisely stated by the ordinary or constitutional legislator, the interim relief judge must apply the norm as it has been precisely defined by the text. He does not have to set or modify its limits since the normative authority, which created the norm, itself intended to determine its scope. In the case where the content of a fundamental freedom is precisely defined by a text, the latter is binding on the judge: "the legislator or the constituent, as the case may be, is able to impose the precise meaning of a fundamental right when it is set out in a legislative or constitutional text (...)"⁷⁷³. It should be noted that the assumption of a detailed definition of the content of freedoms is in practice limited to fundamental freedoms of legislative origin and even, more precisely, to some of them. As far as they are concerned, the constitutional freedoms do not have their content defined precisely by the constitutional text. The question is then to know to what extent the administrative judge of summary proceedings is bound by the interpretation given by the constitutional judge⁷⁷⁴.
190. When specifying the content, contours and limits of each fundamental freedom of constitutional origin, is the administrative judge of summary proceedings bound by the definition given by the Constitutional Council? Several years ago, Mr Braconnier stated that the arrival of the Council on the jurisdictional scene would "fundamentally call into question the monopoly, shared until now between the administrative judge and the judicial judge, of the determination of the major principles protecting fundamental rights"⁷⁷⁵. The Council of State and the Constitutional Council were called upon, as it were, to 'hunt on the same territory'⁷⁷⁶. It was then argued that under the dual movement of constitutionalisation and Europeanisation of the law, the administrative judge would lose all initiative in determining the content of freedoms. "Insofar as the French Constitutional Council and the European Court of Human Rights alone control almost the entire process of interpreting fundamental human rights, administrative case law is condemned, in the long term, to be no more than the expression of principles established outside the administrative jurisdictional order. The idea may appear excessive, even unrealistic, in some respects. However, it seems to us to be in line with the logic of a

right may vary significantly depending on the theoretical orientation chosen.

⁷⁷³ G. DRAGO, "Les droits fondamentaux entre juge administratif et juges constitutionnels et européens", *Dr. adm.* 2004, Study n° 11, p. 9.

⁷⁷⁴ Insofar as freedoms at a supra-legislative level are all of constitutional rank, the question of the authority of interpretation in practice concerns only the Constitutional Council. In the event of recognition of conventional freedoms, it could also arise with regard to the case law of the Strasbourg Court. The problem will then be posed in strictly identical terms, subject to the existence of an appeal that could lead to an intervention by the European judge after that of the national judge. On the other hand, the question of the authority of the interpretation does not concern the judicial judge. As an ordinary judge, like the administrative judge, he is at the same level as the latter in the hierarchy of state bodies. In law, its interpretation is not binding on the judge of the *référé-liberté*. In the words of M. Drago, there is an "autonomy of definition of fundamental rights" between the administrative jurisdictional order and the judicial jurisdictional order: "The administrative judge is not bound by the definition of a fundamental right given by the judicial judge and conversely the judicial judge does not have to take into account the definition given by the administrative judge" (G. DRAGO, *op. cit.*, p. 9). For the fundamental freedoms which would possibly result from general principles of law, the question of authority does not arise either; it is moreover difficult to imagine that the administrative judge decides, in summary proceedings, to take the opposite view of a position adopted on the merits. Lastly, no mention will be made of the case law of the Court of Luxembourg insofar as no fundamental freedom currently derives from a standard of primary or secondary Community law.

⁷⁷⁵ S. BRACONNIER, *Jurisprudence of the European Court of Human Rights and French Administrative Law*, Bruylant, 1997, p. 434.

⁷⁷⁶ D. TURPIN, *Contentieux constitutionnel*, 2^{ème} ed, PUF, coll. Droit fondamental, 1994, p. 169. As Dean Favoreu stated, the problem was "to know how the High Administrative Jurisdiction will accept to apply a right resulting from constitutional principles established by the Constitutional Council, and no longer from its own case law" (L. FAVOREU, "L'apport du Conseil constitutionnel au droit public", *Pouvoirs* n° 13, 1980, p. 25).

parallel and increasingly coordinated development of constitutional and European laws protecting human rights"⁷⁷⁷. What is the situation from a strictly legal point of view? Is there, in strict law, a standard requiring the interim relief judge to define the content of rights and freedoms in accordance with the interpretation given by the constitutional court⁷⁷⁸?

In law, the authority that attaches to the case law of the Constitutional Council is purely *persuasive* for the administrative judge. In the first place, the jurisprudence forged by the Council in its decisions does not enjoy the authority of *res judicata*, which is attached only to the operative part of the decision. This authority extends to the reasons for the decision only when the latter are the necessary support for the operative part⁷⁷⁹. As Mr Aguila points out, 'In pure law, nothing obliges the administrative or judicial judge to follow an interpretation adopted by the Constitutional Council'⁷⁸⁰. The ordinary judge is bound by the decisions of the Council, but not by its case law. Secondly, the concept of the authority of the interpreted matter is not legal in nature and is, to say the least, faced with a problem of effectiveness. This concept, which is intended to be legal, has been developed by authors in order to establish the binding force of case law - and not only of decisions - constitutional, Community and European⁷⁸¹. According to Professor Andriantsimbazovina, it is the function of guardian of the norm constituting a legal order that constitutes the basis of the legal nature of the authority of interpreted matters. Each legal order is based on a constitutive norm (the Constitution of 4 October 1958 for the national legal order); and each legal order has a jurisdiction that ensures the custody of this constitutive norm (the Constitutional Council for the internal legal order). The custodian of the constitutive norm is vested with the function of ensuring the internal coherence of the legal order and the uniformity of interpretation of the constitutive norm of that legal order. According to M. Andriantsimbazovina, "each constituent norm of a legal order has an authentic interpreter; in order to achieve uniformity of interpretation of that constituent norm, it is obvious that the interpretation of the constituent norm by the court in charge of doing so must be imposed on all the other courts that make up the legal order concerned"⁷⁸². This presentation, however, can be discussed. First of all, the function of *exclusive* guardian of the Constitution thus attributed to the constitutional court may be questioned, especially since the latter does not review the acts of the executive or, more generally, those of the administrative authority. Secondly, and assuming that it is well-founded, the theory of the authority of the thing interpreted comes up against a problem of *effectiveness* in any case. In the absence of a procedural mechanism enabling the constitutional court to impose its decisions on the ordinary court, compliance with its case law will ultimately depend on the goodwill of the latter. As Professor Moderne pointed out, 'the Constitutional Council is not, as a judge, the superior of the Council of State. It hardly has the means to impose its solutions on the supreme courts of the two orders, which are sovereign like the Council of State and are not subject to its control'⁷⁸³. Even today, the debate on the authority of the interpreted thing remains 'fascinating but essentially theoretical'⁷⁸⁴.

The authority that attaches to the case law of the Constitutional Council is not legally binding but of a purely persuasive nature⁷⁸⁵. It is only binding if the administrative judge is convinced of the correctness and

⁷⁷⁷ S. BRACONNIER, *op. cit.* pp. 440-441.

⁷⁷⁸ The question is that of the *authority that attaches to the case law of the Constitutional Council*. On this subject, see in particular J. ANDRIANTSIMBAZOVINA, *L'autorité des décisions de justice constitutionnelles et européennes sur le juge administratif français. Conseil constitutionnel, Cour de justice des Communautés européennes et Cour européenne des droits de l'homme*, LGDJ, coll. BDP, t. 192, 1998, 663 p.; L. POTVIN-SOLIS, *L'effet des jurisprudences européennes sur la jurisprudence du Conseil d'Etat français*, LGDJ, coll. BDP, t. 187, 1999, 799 p.; V. BACQUET-BREHANT, *L'article 62, alinéa 2 de la Constitution du 4 octobre 1958. Contribution à l'étude d'une norme dépourvue de sanction*, LGDJ, coll. BSCP, t. 220, 2005, 462 p.; J. RODEVILLE-HERMANN, "L'évolution des fonctions du principe d'autorité de chose jugée dans les rapports du juge administratif avec le juge judiciaire, le Conseil constitutionnel et la Cour de justice des Communautés européennes", *RDP* 1989, pp. 1735-1779; J. MEUNIER, *Le pouvoir du Conseil constitutionnel. Essai d'analyse stratégique*, Bruylant, coll. La pensée juridique, 1994, special pp. 319-351. A.-S. OULD-BOUBOUTT, *L'apport du Conseil constitutionnel au droit administratif*, Economica PUAM, 1987, spe pp. 310-349.

⁷⁷⁹ See the constitutional, administrative and judicial case law cited by President Genevois in *La jurisprudence du Conseil constitutionnel. Principes directeurs*, STH, 1988, p. 58 et seq.

⁷⁸⁰ Y. AGUILA, "Five questions on constitutional interpretation", *RFDC* 1995, p. 21.

⁷⁸¹ Initiated with regard to the case law of the Court of Justice of the European Communities (see in particular J. BOULOUIS, "A propos de la fonction normative de la jurisprudence. Remarques sur l'œuvre jurisprudentielle de la Cour de justice des Communautés européennes", in *Le juge et le droit public. Mélanges offerts à Marcel Waline*, t. I, LGDJ, 1974, p. 149), the notion has been extended to the case law of the European Court of Human Rights (see in particular G. COHEN-JONATHAN, "La convention européenne des droits de l'homme", *Economica PUAM*, 1989, p. 255) and to that of the Constitutional Council (see in particular L. FAVOREU, "Les effets des décisions du Conseil constitutionnel à l'égard du juge administratif français", *RIDC* 1987, p. 463). It has been the subject of a remarkable theorization by Professor Andriantsimbazovina (see above-mentioned thesis, p. 365 et seq.).

⁷⁸² J. ANDRIANTSIMBAZOVINA, *op. cit.* p. 438.

⁷⁸³ F. MODERNE, "Complémentarité et compatibilité des décisions du Conseil constitutionnel et des arrêts du Conseil d'Etat?", in *Conseil constitutionnel et Conseil d'Etat*, colloquium 21 and 22 January 1988, LGDJ Montchrestien, 1988, p. 318. On the other hand, when there is a mechanism of preliminary question or direct appeal, the constitutional court has the means to impose its interpretations on the ordinary court. In France, "in the absence of either of these mechanisms, the Council of State remains a sovereign court organically independent of the Constitutional Council" (I. LARZUL, *Les mutations des sources du droit administratif*, L'Hermère, 1994, p. 83). As summarised by M. Drago, "The administrative judge and the judicial judge, the latter particularly in the case law relating to de facto assault, legitimately demonstrate an autonomy of definition of the fundamental rights that they use because they are not bound by any procedural obligation to apply the decisions of the Constitutional Council or the judgments of the European Court of Human Rights. It is true that the two French judicial orders recognise both the importance of constitutional and European case law and the imperative need not to deviate from it, but no procedure can force them to apply this case law exactly" (G. DRAGO, *op. cit.*, p. 9).

⁷⁸⁴ R. ABRAHAM, "Le juge administratif et la Cour de Strasbourg", in *Quelle Europe pour les droits de l'homme* (P. TAVERNIER ed.), Bruylant, 1996, p. 243.

⁷⁸⁵ Cf. L. FAVOREU and T.-S. RENOUX, *Le contentieux constitutionnel des actes administratifs*, Sirey, coll. Droit public, 1992, n° 348:

appropriateness of the solution adopted. Under these conditions, if the administrative judge is strongly encouraged to take into account the case law of the Constitutional Council when determining the content of the fundamental freedoms, he is not legally bound to do so. "Free to discover the fundamental freedoms protected by Article L. 521-2, the administrative judge is also free to define them. It may give them a specific material content that will be more or less precisely in line with the case law of the Constitutional Council applying the same freedom"⁷⁸⁶.

191. From the constraints highlighted, it emerges that the interim relief judge has an appreciable margin of freedom to determine the content of fundamental freedoms. The contours and components of each of these freedoms are revealed and specified in the course of the decisions. The definition of the content of each freedom is, of course, dependent on the chance of referrals. Since the judge only rules on what he is asked to rule on, the content given to a freedom is likely to evolve and be enriched according to the hazards of litigation. Consequently, there is no question here of taking an interest in the content of all fundamental freedoms, but of focusing on certain significant examples on which the judge has expressly taken a position. On the basis of these examples, it is possible to identify the main trends in the case law and to highlight the key elements that characterise it. In this respect, the general principle governing the definition of the content of fundamental freedoms is to give them a broad, concrete and extensive content in compliance with the applicable texts. On one occasion, however, the judge has diminished the content of a fundamental freedom in relation to the source norm.

Section 2. A broad definition

192. The judge defines the content of fundamental freedoms in accordance with the texts that govern them. Drawing all the implications of these provisions, it gives these freedoms a broad and extensive definition.

I. A definition in accordance with the applicable law

193. In order to determine the content of a right or freedom, the judge starts first of all with the norm and the general orientation that its author wanted to give it. However vaguely it may be formulated, the norm nevertheless has a meaning that may itself be very general. The judge respects this prescription, which serves as a starting point for defining the content of the freedom in question. The judge will not give it a meaning that would be visibly contrary to the letter of the text and the will of its author. The definition of the content of the right is dependent on the legislation governing it. He will not, under the guise of interpretation, distort its content or call into question what forms its essence. In the same way that he cannot on his own authority "create" a fundamental freedom, the summary jurisdiction judge cannot "invent" a constituent element of the latter that is not recognised by the law. Several examples are significant of this logical approach.

194. First of all, the principle of free administration of territorial authorities. In the *Commune de Venelles* case, the first judge misunderstood the meaning of this principle, considering that free administration could be applied to relations between the organs of a community, in this case between a mayor and his municipal council⁷⁸⁷. This is obviously not the meaning of the principle. In French and foreign constitutional law, free administration is the right of a local authority to manage its own affairs freely, i.e. to exercise its own powers without interference from another public authority⁷⁸⁸. It is opposed to a public person, whether the State, another territorial authority or an inter-municipal cooperation establishment, hindering its free functioning. It can only come into play in relations between a local authority and a third party public entity. This is the meaning of the principle of free administration, as the Conseil d'Etat recalled when it stated that the refusal

⁷⁸⁶ Unlike the *authority of res judicata* attached to the decisions of the Constitutional Council and which is imposed in relation to the application of a text, in relation to the solution given to the *question of its constitutionality*, in relation to the *interpretation given to the said text*, but also in relation to the *interpretation of the provisions of the Constitution* in the light of which the validity of this text has been assessed, the *authority attached to the case law* of the Constitutional Council, independently of any application of the text examined by the constitutional court and, correlatively, of any reference to the constitutional provisions in the light of which this text has been examined, is at most that of *persuasion*" (underlined).

⁷⁸⁷ B. FAURE, "Juge administratif statuant en urgence. Référé-liberté", *Jel. Justice administrative*, fasc. 51 (11, 2002), n° 34.

⁷⁸⁸ Cf. an identical interpretation of the principle: CA Papeete, ch. civ, 26 February 1992, *Vernaudon c/ Juventin*, JCP G 1992, II, 21926, and the critical note by A. MOYRAND. The Court of Appeal had stated that "this principle must be protected against the State but also against certain emanations of these communities and against these communities themselves", the president of the territorial Assembly being assimilated to an "emanation" of the community.

⁷⁸⁸ It emerges from the constitutional jurisprudence that "free administration can be considered as the freedom for communities to manage their own affairs" (L. FAVOREU and A. ROUX, "La libre administration des collectivités territoriales est-elle une liberté fondamentale? ROUX, "La libre administration des collectivités territoriales est-elle une liberté fondamentale", CCC No. 12, 2002, p. 92). An identical solution prevails, for example, in Austrian law: "The right to self-administration is violated only if a public authority takes decisions by which the right of the municipality to manage certain affairs within its domain is denied as such" (O. PFERSMANN, "Austrian Report", *AIJC* 1991/VII, p. 208).

by the mayor of Venelles to requests to convene the municipal council 'concerns only internal relations within the municipality and cannot, therefore, be regarded as disregarding this principle'⁷⁸⁹. If it is possible to enrich this principle by considering, within the framework and on the basis of the texts that organise it, that it implies, for example, the existence of sufficient resources, functional autonomy or freedom of personnel management, it is, on the other hand, unnatural to want to apply this principle to the internal relations of a community. Free administration does not apply to the internal relations of a local authority but to the relations between a local authority and another public authority. By refusing to enshrine free administration from this angle, the Council of State has not shown any restriction or reductionism. On the contrary, it 'has indeed enshrined the free administration of territorial authorities in its fullness; simply because the holder of this freedom is a legal person, only the organs of the latter may invoke it'⁷⁹⁰. The principle protects the authority itself against other public persons, not one body against the behaviour of another.

195. Another example is provided by the principle of free expression of suffrage, to which, according to the judge, the provisions of Articles L. 28 and R. 10 of the Electoral Code "are intended to contribute". Under these provisions, voters, candidates and political parties are entitled to be informed of the electoral roll and the corrections made to it each year by the administrative commission. As organised by the law, the principle of free expression of the vote thus gives the interested parties the right to a *global* communication of the electoral list and not to a communication by polling station. Consequently, this principle is not at issue when a mayor refuses to grant a request to provide the list *separately for each polling station*⁷⁹¹. Thus, in general, the judge defines the content of the freedom in accordance with the legislation that organises and implements it. Thus, trade union freedom "has as its corollary the free constitution of trade unions in accordance with the procedure laid down by law"; on the other hand, in the absence of a legal norm enshrining it, "it does not imply that a trade union may establish its headquarters in administrative premises without the agreement of the authorities on which they depend"⁷⁹².
196. The case law on the right of asylum is also particularly interesting in that it shows, on the one hand, that the interim relief judge cannot include in a fundamental freedom a "right" that is not recognised by the law, and on the other hand, that he cannot maintain a right once it has disappeared from the legislation.

First of all, the administrative judge cannot go against the will of the legislator and grant the citizen a right that no normative authority has recognised. Thus, Article 53-1 of the Constitution recognises the possibility for the French authorities to grant asylum to a foreigner when the examination of his or her application falls within the competence of another State⁷⁹³. However, this provision does not recognise a *right* for the State to implement this prerogative but simply organises a *possibility*. Consequently, unless the principle of the separation of powers is disregarded, the judge cannot recognise a "right" - which does not exist - for the State to make use of this option as a constituent element of the right of asylum. The implementation of this possibility is a prerogative of the State and not a right of the asylum seeker⁷⁹⁴. In the absence of an obligation on the part of the administration, this cannot result in a subjective right for the applicant. In the same sense, drawing the consequences of the terms of the law, the judge affirms that the constitutional right to asylum does not imply that a new residence permit should be issued after the rejection of a first application for lateness of presentation. Such a right is not recognised by the law⁷⁹⁵. Similarly, in the absence of a provision to this effect, the right to asylum "does not require or imply that an applicant for *stateless* status be admitted temporarily to stay in France for the time necessary to examine an application for statelessness"⁷⁹⁶.

Conversely, a right recognised as a component of a freedom may disappear if the legislation changes. Indeed, the judge cannot maintain a right as a component of a freedom after it has been abolished by the legislator. Thus, territorial asylum, recognised by the law of 11 May 1998, was considered as an element protected by the

789 CE, Sect. 18 January 2001, Morbelli, maire de la Commune de Venelles, *Lebon* p. 18.

790 L. FAVOREU, "La notion de liberté fondamentale devant le juge administratif des référés", *D.* 2001, p. 1742.

791 CE, ord. 7 February 2001, *Commune de Pointe-à-Pitre*, *Lebon T.* p. 1129. The interim relief judge of the Conseil d'Etat annulled the order by which the first judge had ordered the mayor to deliver a copy of the electoral lists and rectifying tables established *for each polling station*.

792 CE, ord. 28 March 2006, *Commune de Saint-Chély d'Apcher*, n° 291399, mentioned in the *Recueil Lebon*.

793 In cases where, pursuant to the Dublin Convention of 15 June 1990 (replaced by Council Regulation (EC) No 343/2003 of 18 February 2003), the examination of the asylum application falls within the competence of another Member State of the European Union, Article 53(1) expressly recognises the right of the authorities of the Republic "to grant asylum to any foreigner persecuted because of his or her action in favour of freedom or who seeks the protection of France for another reason".

794 See CE, ord. 2 May 2001, *Ministre de l'Intérieur c/ Dziri*, *Lebon* p. 227. See also CE, ord. 4 September 2003, *Thanattikul*, *Lebon T.* p. 928; CE, ord. 21 February 2005, *Sutaev*, n° 277757.

795 See CE, ord. 16 December 2005, *Kabengeru et association Forum réfugiés*, n° 287905; CE, ord. 5 October 2005, *Ministre de l'Intérieur c/ Abalo*, *Lebon T.* p. 1036, *AJDA* 2006, pp. 204-206, note D. RIBES. The judge emphasised that it is up to the foreigner concerned to formulate his or her application under the conditions provided for by the legislation and regulations in force. These conditions include the requirement to submit a complete file to the French Office for the Protection of Refugees and Stateless Persons within 21 days of the issue of the temporary residence permit. The order specifies "that this deadline, which is imperative, has been set in order to ensure a rapid examination of asylum applications". As a result, following the rejection of an asylum application submitted after the expiry of this period, "the person concerned is *not entitled* to be issued with a provisional residence permit and may be refused regardless of the cases listed in Article L. 741-4 of the Code on the Entry and Residence of Foreigners and the Right of Asylum".

796 CE, ord. 2 May 2006, *Amiraleva, alias Kirilova, épouse Konlayeva*, n° 292910, mentioned in the *Recueil Lebon*.

constitutional right to asylum⁷⁹⁷. Since it was abolished by the law of 10 December 2003, which replaced it with a mechanism known as "subsidiary protection"⁷⁹⁸, the interim relief judge cannot maintain *contra legem* a right that no longer exists. The content of a fundamental freedom may thus vary according to changes in legislation. It must follow the changes, whether they enrich or impoverish the content of the rights.

197. On the other hand, once the general content of a freedom has been respected, the interim relief judge gives a broad definition of it and draws all the consequences that may arise from it. He can thus explore the various ramifications and deduce all the implications in compliance with the legislation in force.

II. A broad, concrete and extensive definition

198. First of all, the judge enshrines the fundamental freedoms he recognises in their entirety. Between a minimalist and a maximalist interpretation of the content of a right, the summary judgment judge most often favours the broadest possible approach⁷⁹⁹. Thus, the secrecy of correspondence is not limited to exchanges of an exclusively private nature; it covers all personal correspondence more widely. As Government Commissioner Sophie Boissard points out, "it protects all mail addressed in a sealed envelope to a designated person, even to an address other than his or her personal home, such as his or her place of work"⁸⁰⁰. The scope of freedom of assembly is also understood broadly. The notion of meeting extends, in particular, to summer universities organised by political parties at the end of holiday periods, in towns or tourist resorts⁸⁰¹. The freedom to come and go is also enshrined in all its dimensions. It includes freedom of movement within the national territory⁸⁰², freedom to travel outside French territory⁸⁰³ and freedom to return⁸⁰⁴.

Similarly, the right to lead a normal family life, traditionally confined to the litigation of aliens, is understood more broadly as the right of anyone to be and live in a family. This broad approach has the important consequence of freeing this right from the domain of the administrative police. In the litigation of foreigners, this right classically includes the right to family reunification⁸⁰⁵ and is also concerned "when the decision of the public authority separates a family already constituted and regularly established on French soil"⁸⁰⁶. However, for the interim relief judge, this right is broader since it can, for example, be called into question in the presence of a decision to place the person in a psychiatric institution ordered by the prefectural authority, particularly when the psychiatric institution is too far away geographically from the place of residence of the family members⁸⁰⁷.

199. The presumption of innocence is also understood broadly. In the *Gollnisch* order of 14 March 2005, the interim relief judge considered that this principle extends beyond the sphere of criminal proceedings⁸⁰⁸. Respect for this principle "implies that in criminal matters the guilt of a person being prosecuted cannot be publicly presented as established before a conviction that has become irrevocable". For the interim relief judge, "compliance with this requirement is essential, not only before the bodies responsible for investigating and then judging the case, but also vis-à-vis other public authorities". It follows that these authorities have certain obligations that are very precisely set out by the judge. Admittedly, respect for this principle cannot "prevent the prosecuting or investigating authority from gathering all evidence likely to support a guilty verdict in its eyes". Furthermore, "the presumption of innocence must be reconciled with the provision of information to the public on the progress of ongoing criminal proceedings in accordance with the rules laid down by the laws and regulations". However, in the event that a teacher-researcher is accused of having seriously disregarded

797 See *infra*, § 201. The Minister of the Interior could, after consulting the Minister of Foreign Affairs, grant territorial asylum to a foreigner whose life or freedom was threatened in his or her country. The scope of territorial asylum was broader than that of refugee status: threats of any kind, whether or not from the public authorities of the State of origin, made it possible to seek the protection of the Minister of the Interior.

798 This protection is granted for one year, renewable, to persons who, without qualifying as refugees, are exposed to serious threats from State authorities, organisations controlling part of the territory of a State or non-state actors, including militias or armed groups.

799 The same willingness can be observed on the part of the Strasbourg Court. It "adopts a broad and extensive interpretation of the guaranteed rights, both as regards their content and their scope (...)" (M. MELCHIOR, *op. cit.*, p. 411).

800 S. BOISSARD, concl. on CE, 9 April 2004, Vast, *RFDA* 2004, p. 779. The Court of Cassation has also adopted a broad concept. The social chamber considers that the employer cannot take cognisance of personal messages received or sent by the employee without the latter's agreement (Soc., 2 October 2001, *Société Nikon France SA and M. Onof*, *Bull. civ.* V, n° 291; *Dr. soc.* 2001, p. 915, note J.-E. RAY).

801 CE, ord. 19 August 2002, Front national et Institut de formation des élus locaux (IFOREL), *Lebon* T. p. 311.

802 CE, ord. 8 November 2001, *Kağısız*, *Lebon* p. 545.

803 CE, ord. 9 January 2001, *Déperthes*, *Lebon* p. 1; CE, ord. 11 October 2001, *Tabibou*, *Lebon* T. p. 1133.

804 CE, ord. 11 June 2002, *Aït Oubba*, *Lebon* T. p. 869.

805 CE, ord. 13 January 2006, *Rasamoelina*, n° 288434. This right allows a foreign national, whose residence in France is stable and regular, to bring his or her minor children and spouse to France (CE, Ass., 8 December 1978, *GISTI*, *Lebon* p. 793, *GAJA* n° 96; CC, n° 93-325 DC, 12-13 August 1993, cons. 70, *Rec.* p. 224, *GDCC* n° 46).

806 I. DE SILVA, concl. on CE, Sect. 30 October 2001, *Minister of the Interior c/ Tliba*, *RFDA* 2002, p. 331.

807 CE, ord. 14 October 2004, *Arre*, n° 273047.

808 CE, ord. 14 March 2005, *Gollnisch*, *Lebon* p. 103. The European Court of Human Rights also affirms that the presumption of innocence must be respected by the public authorities and not only in criminal proceedings (see ECHR, 10 February 1995, *Allenet de Ribemont v France*, series A, no. 308; *Les grands arrêts de la Cour européenne des droits de l'homme* (F. SUDRE et alii), 3^{ème} éd., PUF, coll. Thémis droit, 2005, judgment no. 29).

his or her ethical obligations, the powers of the education authority are limited by the obligation to respect the presumption of innocence. In such a case, it is up to him, if the president of the institution fails to do so, to initiate disciplinary proceedings after having gathered all the necessary evidence. It is legally possible for him to inform the public about the progress of the procedure. However, if he decides to communicate on the matter, "he must, without prejudice to the presumption of innocence, refrain from prejudging the outcome of the proceedings".

By providing very precise indications on how to reconcile public information and the presumption of innocence, the judge gives a *concrete* definition of this principle in the event of a disciplinary procedure. He determines in a practical way what the limits and consistency of the presumption of innocence are in a particular factual situation. This is a consequence of the concrete nature of the review exercised by the interim relief judge. The question of the content of rights is raised from a different angle than in constitutional litigation. Unlike a judge exercising an abstract control, the judge of summary proceedings can define the content of fundamental freedoms as close to reality as possible. He is thus led to determine what the scope of a given freedom should be in a general way in a given factual situation.

200. However, the approach is not only broad and concrete; it is also extensive. The elements contained in a fundamental freedom may be identified or revealed by the judge as long as they constitute its necessary extension. The interim relief judge extracts from the norm of fundamental freedom all the potentialities it contains. He starts from the hard core that constitutes the freedom in question, i.e. what forms its essence. From there, while respecting its basic substance, he allows himself to deduce from this basic norm all the elements it may contain and to explore all the ramifications it may have. Sometimes, this constitutive element will be expressly attached to a norm that enshrines it. Thus, the 'free disposal of property necessary for the exercise of a religion' stems from the law of 9 December 1905, several provisions of which give religious associations and the faithful the free disposal of property allocated to religion⁸⁰⁹. At other times, this constitutive element is deduced from the text proclaiming the fundamental freedom and combined with the texts that implement it in a specific area. For example, the judge affirms that the freedom to come and go "has as its corollary that any person whose French nationality and identity are established may, subject to the safeguarding of public order and respect for prohibition decisions taken by the judicial authority, obtain a passport at his or her request"⁸¹⁰. In this case, the component of freedom of movement is deduced from the combined provisions of the Constitution and the texts relating to the conditions for issuing and renewing passports. These "engendered" freedoms are sometimes described as the "corollary" or "accessory" of freedom of movement. Derived from them, they then constitute a facet or component of it⁸¹¹.

In order to enshrine a corollary freedom, and following the example of the accessory criterion used in matters of public domain, the interim relief judge takes into account the usefulness it presents for the key freedom or the link that connects it to it. This technique of recognising new rights and freedoms is not specific to the summary judgment judge. It has been applied in constitutional litigation, particularly in France⁸¹² and Portugal⁸¹³, in the case law of the Spanish Supreme Court⁸¹⁴ and in decisions of the European Court of Human Rights⁸¹⁵. In the

809 CE, ord. 25 August 2005, *Commune de Massat, Lebon* p. 386. The judge indicated that freedom of worship, as governed by the law of 9 December 1905 concerning the separation of the Churches and the State, "is not limited to the right of any individual to express the religious convictions of his or her choice while respecting public order". Within the framework of this law, "it also includes the free disposal of the property necessary for the exercise of a religion".

810 CE, ord. 26 April 2005, *Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c/ M'LAMALI, Lebon* T. p. 1034; CE, ord. 10 August 2005, *Diabira*, n° 283444.

811 For example, the interim relief judge qualifies the freedom to dispose of one's property in the strict sense - i.e. *abusus* - as a 'corollary' of the right of ownership (CE, ord. 21 November 2002, *Gaz de France, Lebon* p. 408). However, it is constant that *abusus* represents an attribute and not a corollary of the right of ownership. Free disposal does not derive or result from the right of ownership; it is one of its constituent elements. It is part of the "content of the right of ownership" (P. DELVOLVE, *Droit public de l'économie*, Dalloz, précis, 1998, n° 107). It is the "capital attribute of ownership" (J. CARBONNIER, *Droit civil, Les biens*, 19^{ème} éd., PUF, 2000, n° 25); it constitutes "an essential attribute of the right of ownership" (CC, n° 96-373 DC, 9 April 1996, cons. 22, *Rec.* p. 43; n° 98-403 DC, 29 July 1988, cons. 40, *Rec.* p. 276). Consequently, the notion of "corollary", as used by the judge of the *référé-liberté*, must be understood as synonymous with "component". For example, the right to apply for territorial asylum was described as a corollary of the constitutional right of asylum, whereas it was one of its constituent elements.

812 The Constitutional Council has affirmed that the principle of non-retroactivity of repressive texts has as its corollary the prohibition on the legislature "reviving a legally acquired prescription in this area" (CC, no. 88-250 DC, 29 December 1988, cons. 6, *Rec.* p. 267). Explicitly, the principle of adversarial proceedings has been described as a corollary of the principle of the rights of the defence (CC, no. 89-268 DC, 29 December 1989, cons. 58, *ECR* p. 110). See B. MATHIEU, "Pour une reconnaissance de 'principes matriciels' en matière de droits fondamentaux", *D.* 1995, pp. 211-212.

813 For the Portuguese Constitutional Court, the right to a double level of jurisdiction in criminal proceedings is a corollary of the principle of guarantees for the defence of the accused; the right to knowledge and recognition of paternity is a corollary of the right to "personal identity" and the right to "moral integrity" of persons; the right of a person to object, for reasons of conscience, to the use of his or her own corpse is the corollary of the right to moral integrity (cf. M. CARDOSO DA COSTA, "Portuguese Report", *AJIC* 1990/VI, *VIII^e Conference of European Constitutional Courts*, Ankara 7-10 May 1990, pp. 185-186).

814 The Supreme Court has ruled that the right of parents to choose their child's educational institution is a corollary of the right to free education (Judgment of the Supreme Court of Spain, 21 July 2000, reproduced in *Recueil de décisions des hautes juridictions administratives* 2003, No. 3, *La documentation française*, 2004, pp. 200-208).

815 As Ms Potvin-Solis points out, "The Court's evolving interpretation has made it possible to protect certain rights that were not

context of Article L. 521-2 of the Code of Administrative Justice, this technique has given rise to noteworthy applications with regard to the right of asylum and, even more so, the right to property.

201. For the interim relief judge, the right to asylum includes, firstly, the right to apply for refugee status⁸¹⁶. It then includes the right to remain on French soil while the application is being processed by the French Office for the Protection of Refugees and Stateless Persons and, where applicable, the Refugee Appeals Commission⁸¹⁷. The right to temporary residence is exercised under the conditions and within the limits provided for by the law⁸¹⁸. As the above-mentioned guarantees are all provided for by law, their recognition by the interim relief judge was perfectly natural. On the other hand, the judge took a much greater initiative in recognising that the fundamental freedom to apply for refugee status includes the right to benefit from a procedure for examining one's asylum application that complies with the guarantees that must be attached to it⁸¹⁹. The recognition of this right is the result of a synthesis of several provisions applicable in this field⁸²⁰.

202. Nevertheless, it is in the area of property rights that the corollary technique has been most widely applied. In a relatively classic way, the interim relief judge first considered that this right includes *abusus*, i.e. the right to dispose of one's property in the strict sense⁸²¹, as well as *usus* and *fructus*, the right of the owner to use his property and to reap the fruits⁸²². The judge also recognised that the right of ownership has as a corollary the right of the riparian to have free access to the public highway⁸²³. It also includes the right to defer payment under Article L. 277 of the Book of Tax Procedures⁸²⁴. More boldly, the interim relief judge affirmed that the right of ownership includes the right of the tenant to "dispose" of the leased property⁸²⁵. Thus, the free use of a property is protected in whichever hands it is in, both those of the landlord and those of the tenant (when the landlord contractually transfers enjoyment of the property to a third party for a limited period). The tenant then benefits from *usus* and can invoke it before the judge of the référé-liberté⁸²⁶. The term "dispose" must again be understood as synonymous with "use", as the tenant only benefits from *usus* and *fructus* but not from *abusus*. In his decisions, the interim relief judge presents the tenant's right to the property as a 'corollary' of the right of ownership. Some authors have criticised the correlation thus established on the grounds that the tenant's right cannot derive from the right of ownership⁸²⁷. Their criticism is based on the

initially included in it, through the theory of 'protection by ricochet'" (L. POTVIN-SOLIS, *op. cit.*, p. 245; see especially the examples cited on p. 662 et seq.)

⁸¹⁶ CE, ord. 12 January 2001, *Hyacinthe, Lebon* p. 12; CE, ord. 25 March 2003, *Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c/ Sulaimanov, Lebon* p. 146. The applicant also had the right, before it was abolished by the Law of 10 December 2003, to apply to the Minister of the Interior for territorial asylum (CE, ord. 12 November 2001, *Ministre de l'Intérieur c/ Farhoud, Lebon T.* p. 1126; CE, 15 February 2002, *Hadda, Lebon* p. 45).

⁸¹⁷ The constitutional right to asylum, which has as its corollary the right to refugee status, "implies that a foreigner who applies for recognition of refugee status should in principle be allowed to remain in the territory until his application has been decided" (CE, ord. 25 March 2003, *Ministre de l'Intérieur, de la Sécurité intérieure et des Libertés Locales c/ Sulaimanov, Lebon* p. 146; CE, ord. 4 September 2003, *Thanattikul, Lebon T.* p. 928). The right to temporary residence was also valid in the context of territorial asylum during the examination of the application by the services of the Ministry of the Interior (CE, ord. 12 November 2001, *Ministre de l'Intérieur c/ Farhoud, Lebon T.* p. 1126). This right was enshrined by the Constitutional Council in the aforementioned decision 93-325 DC. For the Council, "respect for the right to asylum, a principle of constitutional value, implies in a general way that foreigners who claim this right should be authorised to remain temporarily in the territory until a decision has been taken on their application" (cons. 84).

⁸¹⁸ Consequently, the foreigner cannot avail himself of this right in the case of applications submitted after the deadline (see *above*, § 196). This right may also be refused by the administrative authority when the application is manifestly unfounded. See CE, ord. 24 October 2005, *MBIZI MPASSI*, n° 286247; CE, ord. 17 March 2006, *Saidon*, No. 291214: the right to apply for refugee status "implies that a foreigner who applies for recognition of refugee status is in principle authorised to remain in the territory until a decision has been taken on his or her application; (...) it is only in cases where the application is 'manifestly unfounded' that the Minister of the Interior may, after receiving the opinion of the French Office for the Protection of Refugees and Stateless Persons (OFPRA), refuse him or her access to the territory".

⁸¹⁹ CE, ord. 25 November 2003, *Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c/ Nikoghosyan, Lebon T.* p. 927.

⁸²⁰ See *supra*, §127. In the *Nikoghosyan* decision, the interim relief judge indicated that the fundamental freedom to apply for refugee status would be compromised if the examination of an asylum application submitted in one of the Member States of the European Communities by a third-country national took place without the presence of the applicant, who was the only person able to provide the required justification and answer the questions of the authorities in charge of examining the case.

⁸²¹ See for example: CE, ord. 21 November 2002, *Gaz de France, Lebon* p. 408 (realisation of a sale project); CE, ord. 1^{er} June 2001, *Ploquin, Lebon T.* p. 1126 (possibility of alienating a herd of cattle)

⁸²² See, for example, the above-mentioned *Gaz de France* order, which refers, in connection with "the freedom to dispose of a property", to the possibility for the owner to derive from the building the income he could expect from it. The property in question may be both movable and immovable property (CE, ord. 8 November 2005, *Moissinac Massenat, Lebon* p. 491). It should be noted that the interim relief judge is referring here to the 'free disposal' of property, but this time in its common sense, as a synonym of free use and not in its strict or civil law sense. It refers to the possibility of using property in the broad sense and is not reduced to the sole possibility of alienating it.

⁸²³ CE, ord. 31 May 2001, *Commune d'Hyères-les-Palmiers, Lebon* p. 253.

⁸²⁴ CE, ord. 13 June 2007, *Soppelsa*, n° 306252, published in the *Recueil Lebon*.

⁸²⁵ CE, 29 March 2002, *SCI Stéphaneur and others, Lebon* p. 117: "the right of ownership has, like its corollary which is the right for the tenant to freely dispose of the leased property, the character of a fundamental freedom within the meaning of the aforementioned article L. 521-2 of the Code of Administrative Justice".

⁸²⁶ On the other hand, the judge of the assault has always refused to extend the benefit of the right of ownership to the tenant. The infringement of the use of the property must concern the owner and can only be invoked by the owner. Consequently, the tenant of a building cannot rely on the existence of an assault against him (Civ. 1^{ère}, 18 June 1974, *Bull. civ. I*, n° 197).

⁸²⁷ Some have stated that the reasoning of the interim relief judge is akin to "a sleight of hand" (Y. Lequette, note under CE, 29 March 2002, *SCI Stéphaneur and CE*, ord. 27 November 2002, *SCI Résidence du théâtre, RFD.A* 2003, p. 386) or that the deduction is based "on a somewhat artificial connection" (E. Sales, "Vers l'émergence d'un droit administratif des libertés fondamentales?", *RDP* 2004, p. 239).

idea that the landlord's right, a real right, cannot be the basis for the tenant's right, a personal right⁸²⁸. However, this approach is too simplistic. It is necessary to reason in terms of legal norms and obligations and not on the basis of a 'fallacious distinction'⁸²⁹ between real and personal rights. Through this deductive link, the administrative judge simply derives a norm from another norm insofar as both relate to an identical object: the leased property. A legal obligation weighs on the administration requiring it to respect the prerogatives conventionally devolved to the tenant. If the tenant's right consists primarily in obtaining from the lessor the enjoyment of the leased property, such a right is nonetheless enforceable against all persons, including third parties to the agreement, which include legal persons under public law⁸³⁰.

203. Finally, we should mention the case of certain fundamental freedoms whose content is so indeterminate that the judge of the *référé-liberté* has an almost unlimited margin of manoeuvre in deciding what it covers. The concept of "personal freedom", which appeared in constitutional jurisprudence in Decision 244 DC831, is undoubtedly a model of its kind. This notion is indeed affected by a great uncertainty as to its content. With regard to the few jurisprudential elements on which it is possible to rely in the constitutional jurisprudence, M. Renoux has stated that "respect for the rights of the individual is a fundamental principle of the Constitution. Renoux stated that "respect for personal freedom prevents any natural person, and certainly any legal person, from being subjected to coercive, fussy or vexatious measures which, without affecting his or her individual freedom, and in particular his or her freedom of movement, nonetheless unnecessarily define a technique for progressively reducing his or her freedom of action, and in particular the autonomy of his or her will"⁸³². As Mr Lichère has pointed out, the enshrinement of personal freedom in the context of Article L. 521-2 "is interesting in terms of the potential of the freedom in question, despite the vagueness that surrounds it and perhaps precisely because of this vagueness. He states that the praetorian notion of personal freedom "could become (...) for the administrative judge a functional notion, allowing him to include freedoms not explicitly enshrined in a text"⁸³³.

The veil surrounding this notion has been partly lifted by a series of decisions rendered by the *référé-liberté* judge. Firstly, this freedom was considered to be infringed in a case of withdrawal of identity documents from members of a family of French nationality⁸³⁴ and in an unjustified refusal to issue a passport to the applicant's children⁸³⁵. Similarly, it has been ruled that personal freedom "implies, in the case of persons of French nationality, that they may, after the administration has been able to ensure that the documents produced by the applicant are of such a nature as to establish his or her identity and nationality, be issued with a national identity card"⁸³⁶. The judge was also able to specify "that this freedom implies in particular that a foreign national who is the subject of a removal order cannot be returned to a State for which there are serious and proven grounds for believing that he or she would be exposed to a real risk to his or her person as a result of the authorities of that State, or even by persons or groups of persons not under the control of the public authorities, where, in the latter case, the authorities of the State of destination are not in a position to counter such a risk by appropriate protection"⁸³⁷. Nevertheless, it is the *Bunel* Ordinance that has provided the most valuable guidance on this freedom, referring to "the right of every person to respect for his personal freedom, which implies in particular that he may not be subjected to constraints exceeding those imposed for the protection of public order or the respect of the rights of others"⁸³⁸. Personal liberty thus aims to limit the degree of constraints on the individual. It tends to spare the person constraints, subjection and sacrifices that go beyond what is normally implied by the situation in which he finds

828 M. PEZ thus affirms that "The object of the right of ownership is a thing, a property (the building), that of the right of lease an obligation, a service (the free enjoyment of the building). The right of ownership is a relationship between a person and a thing (*ius in re*: right on a thing), the right to lease a relationship between two persons (*ius ad personam*: right against a person)" (I. PEZ, "Le droit de propriété devant le juge administratif du *référé-liberté*", *RFDA* 2003, p. 376). It follows, according to him, that "The corollary of a real right can be another real right, not a personal right. (...) The tenant's right over the landlord derives not from the landlord's right but from the lease contract, not from the property but from the obligation" (*op. cit.*, p. 377). "The tenant does have rights, but not directly over the property he occupies: his rights are exercised over the landlord, from whom he has the right to obtain the enjoyment of his property" (*ibid.*).

829 H. KELSEN, *Pure Theory of Law*, *op. cit.* p. 136. See *supra*, § 151.

830 It should be noted that in a decision of 26 May 1993, the German Federal Constitutional Court reached an identical result by bringing in an objective dimension of the right to property. Professor Fromont points out that in this decision the Constitutional Court extends the constitutional guarantee of ownership to the tenant's right to his dwelling and "more precisely to his right of possession, since in German civil law the objective protection of possession leads to the tenant being considered as a possessor" (M. Fromont, "République fédérale d'Allemagne: la jurisprudence constitutionnelle en 1992 et 1993", *RDP* 1995, p. 340). On this decision, see also T. MEINDL, *op. cit.* p. 145.

831 CC, No. 88-244 DC, 20 July 1988, *Rec.* p. 119.

832 T. S. RENOUX and M. DE VILLIERS, *Code constitutionnel*, 3^{ème} ed., Litec, 2005, n° 1245.

833 F. LICHERE, Note sous CE, ord. 27 March 2001, *Ministre de l'Intérieur c/ Djalout*, *JCP G* 2002, II, 10003, p. 40. On this notion, see A. PARIENTE, "La liberté personnelle dans la jurisprudence du Conseil constitutionnel", *La Constitution et les valeurs. Mélanges en l'honneur de Dmitri Georges Lavruff*, Dalloz, 2005, pp. 267-282; P. PEREON, *La protection constitutionnelle de la liberté personnelle*, thèse Toulon, 2001, 529 p.; *La liberté personnelle, une autre conception de la liberté?* (H. ROUSSILON et X. BIOY dir.), Presses de l'université des sciences sociales de Toulouse, 2006, 156 p.

834 CE, ord. 2 April 2001, *Ministre de l'Intérieur c/ Consorts Marcel*, *Lebon* p. 167.

835 CE, ord. 4 December 2002, *Du Comédic de Kéranant*, *Lebon T.* p. 875.

836 CE, ord. 26 April 2005, *Minister of the Interior, Internal Security and Local Freedoms v. M'LAMALI*, *Lebon T.* p. 1034.

837 CE, ord. 14 January 2005, *Bondo*, *Lebon T.* p. 915.

838 CE, ord. 8 September 2005, *Minister of Justice v. Bunel*, *Lebon* p. 388.

himself.

Finally, it should be noted that the content of personal freedom could overlap, on certain points, with that of individual freedom. In cases concerning the deportation of foreign nationals sentenced to deportation, the prohibition of torture and inhuman and degrading treatment has been considered to be a constituent element of personal freedom *and* liberty⁸³⁹. By linking the right not to be subjected to torture or inhuman or degrading treatment to personal freedom and liberty, the interim relief judge intends to include the right to physical integrity in these freedoms.

204. Determining the content of the freedoms, the interim relief judge must also set their limits. For example, he states that, for its beneficiary, the freedom to undertake "means the freedom to carry out an economic activity in compliance with the laws and regulations in force and in accordance with the requirements legally imposed"⁸⁴⁰. In reality, this limit seems to be common to all the freedoms of action whose exercise is strictly regulated. Thus, the interim relief judge transposed its application to the right to property, a fundamental freedom which "has as its corollary the freedom of the owner to dispose of his property *in accordance with the laws and regulations*"⁸⁴¹. Similarly, the free exercise of their mandates by local elected representatives is not absolute; it may be limited but "may only be limited or restricted for reasons based on provisions or general principles of law intended to ensure the proper functioning of the deliberative bodies of the Republic's territorial communities or their executive bodies"⁸⁴². The judge also considered that the right to consent to medical treatment could be limited if there was a risk of death for the patient. As this limitation is not included in any provision, the freedom to consent to treatment has been defined in a way that diminishes its content in relation to the source norm. This is the only fundamental freedom whose content has been interpreted in a way that diminishes its content in relation to the textual statement enshrining it in positive law.

Section 3. The counter-example of consent to medical care

205. The principle of medical consent implies the freedom of the patient to choose the care provided⁸⁴³. This includes the right to object to unwanted care. The question is to what extent the medical profession should defer to the patient's wishes, especially when the patient refuses medical treatment that is essential to his or her survival. "The essential issue is whether a patient's highly personal decision, which he or she is so attached to that he or she maintains it at the risk of his or her life, should be respected"⁸⁴⁴. Can the medical profession violate the patient's wishes in order to save him/her? When the patient, without seeking death, nevertheless considers it as a possible consequence of his choice, when undergoing treatment seems so unbearable to him that he prefers to give up his life, can a treatment that he categorically refuses be imposed on him by force and against his will? To the question of whether the patient's will must be systematically respected, the legislator has given a positive answer: the law has established respect for the patient's will as an absolute principle. *Contra legem*, the administrative judge gave a negative answer, considering that the patient's will is no longer taken into account when his or her life is threatened. The interim relief judge tempered the principle

839 The wording of the *Hamani* order is particularly significant in this respect, since it uses both expressions. In order to challenge the prefectural order fixing Algeria as the country of destination for deportation, the applicant invoked the provisions of Article 3 of the European Convention on Human Rights. The interim relief judge stated that "he was thus referring to *individual freedom*, which is one of the fundamental freedoms to which Article L. 521-2 of the Administrative Justice Code applies". After reviewing the applicant's arguments aimed at establishing the reality of the threats he alleged, the judge affirmed that the decision fixing Algeria as the country of destination could not be considered "as a manifestly illegal infringement of *personal freedom*" (CE, order of 15 October 2001, *Minister of the Interior v. Hamani, Lebon* p. 466). Previously, and without explicitly recognising personal freedom as a fundamental freedom, the interim relief judge had declared in the *Djalout* order that "the determination of the country of return is likely to seriously affect the *personal freedom* of a foreign national in the event that he or she is thereby exposed to risks of the kind referred to in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms" (CE, order of 27 March 2001, *Minister of the Interior v. Djalout, Lebon* p. 158). In a *Chikh* decision, which came after the *Hamani* order, he only mentioned personal freedom. The facts of the case are strictly identical to those of the *Hamani* case. The applicant, who was deported to Algeria, referred to Article 3 of the European Convention to challenge the order establishing Algeria as the country of destination. The judge affirmed that "he was thereby referring to his *personal freedom*, which is one of the fundamental freedoms to which Article L. 521-2 of the Code of Administrative Justice applies" (CE, order of 20 December 2001, *Chikh*, No. 241154).

840 CE, ord. 25 April 2002, *Société Saria Industries, Lebon* p. 155.

841 CE, ord. 13 July 2005, *Société Combé Chavat 2*, No. 282220.

842 CE, ord. 11 April 2006, *Tefaarere, Lebon* p. 197. It follows from this same decision that the free exercise of their mandate by local elected representatives includes the right for an elected representative to resign.

843 For an overview of administrative, judicial and European case law, see GP 5 January 1999, special issue *Le consentement aux actes médicaux*, pp. 1-50; J.-P. GRIDEL, "Le refus de soins au risque de la mort", GP 19-20 June 2002 special issue *Droit de la santé*, pp. 997-1003; A. GARAY, "Le consentement à l'acte médical au regard de la Convention européenne des droits de l'homme", *LPA* 18 June 1997, n° 73, pp. 9-12.

844 A. DORSNER-DOLIVET, "Le consentement au traitement médical : une liberté fondamentale en demi-teinte", *RFDA* 2003, p. 529.

proclaimed by the law by making it a merely relative principle.

I. An absolute principle for the legislator

206. Traditional regulations did not establish a hierarchy between the doctor's obligation to provide care and respect for the patient's consent. In response to a request for clarification implicitly addressed to it by the Conseil d'Etat, the legislator established the right to medical consent as an absolute principle.

A. The uncertainties of traditional regulation

207. The traditional regulations did not clearly set the limits of the right to consent. Article 36 of the code of medical ethics, issued from the decree of 6 September 1995, did not reserve the particular hypothesis of vital urgency but did not refer to it either. Nor did the legislative provisions establish a hierarchy between the doctor's obligation to provide care and the patient's consent. Article 16-3 of the Civil Code, resulting from the law of 29 April 1994, known as the *Bioethics* Law, establishes the requirement of prior consent to any medical act by providing: "The integrity of the human body may only be violated in the event of therapeutic necessity for the person. The consent of the person concerned must be obtained beforehand, except in cases where his or her condition makes necessary a therapeutic intervention to which he or she is not in a position to consent. This provision, which excludes the case of an emergency, has however a limited scope of application: it corresponds to the situation of a patient who is unable to express his or her will and not to that of a patient of full age who is capable of expressing himself or herself. Moreover, Article L. 1111-2 of the Public Health Code authorised "the patient (...) to oppose any investigation or treatment" but there was considerable uncertainty as to the scope of this article. Indeed, this text was originally derived from the Act of 9 June 1999, which included a Title 1^{er} devoted to the "rights of the sick person" but, in its very title, this Act aimed to "guarantee the right of access to palliative care". Consequently, this text "suggested that the right to oppose care should be seen as a right to oppose therapeutic prolongation and to choose a palliative approach"⁸⁴⁵.

208. It is in this uncertain legal context that the *Senanayake* case intervenes. A hospital having performed a blood transfusion despite the patient's opposition, the judge had to determine whether the performance of a medical act against the person's will constituted a fault that could engage the responsibility of the administration⁸⁴⁶.

The Paris Administrative Court of Appeal considers that the doctor's obligation to provide care must absolutely prevail over the patient's consent when the patient's survival is at stake. The decision sets out a general rule: "the doctor's obligation to always respect the will of the patient who is able to express it (...) finds (...) its limit in the doctor's obligation, in accordance with the very purpose of his activity, to protect health, that is to say, in the last resort, the life itself of the individual. Under these conditions, the doctor's behaviour, which is essential to the patient's survival, "cannot" be qualified as wrongful, even if it violates the obligation to respect the patient's wishes⁸⁴⁷. Implicitly, this reasoning leads to the obligation to save life prevailing in all cases over the obligation to respect the individual's will, but also to the systematic exclusion of the commission of a fault. An appeal in cassation was lodged with the Council of State. The government commissioner Didier Chauvaux proposed a solution diametrically opposed to that adopted by the appeal court. He advocated bowing unreservedly to the patient's will, even when the patient's life was immediately threatened by his or her opposition to a medical act: "We believe (...) that in the event that the patient is conscious and enjoys all his or her mental faculties at the moment when his or her life is threatened, and where he or she clearly and firmly maintains his or her refusal to undergo a given act, the duty of doctors is to refrain"⁸⁴⁸.

The discrepancy between the solution adopted by the administrative court of appeal and that proposed by the government commissioner is explained by the uncertainties of the applicable regulations. This ambiguity in the state of the law is precisely why the Conseil d'Etat refuses to make any hierarchy between the doctor's obligation to provide care and respect for the patient's consent⁸⁴⁹. The Conseil excludes the general precedence of the

845 A. DORSNER-DOLIVET, *op. cit.* p. 532.

846 The patient had refused a transfusion because he was a Jehovah's Witness. On the issue of blood transfusion refusals, see *Consentement éclairé et transfusion sanguine. Aspects juridiques et éthiques* (A. GARAY and S. GROMB dir.), ENSP editions, 1996, 254 p.

847 CAA Paris, 9 June 1998, *Donyob and Senanayake* (2 species), *RFDA* 1998, pp. 1231-1242, concl. This solution was the fruit of a reflection exposed by the government commissioner, Mrs. Heers, and linked to the legislative uncertainties.

848 Concl. D. CHAUVAUX on CE, Ass. 26 October 2001, *Senanayake*, *RFDA* 2002, p. 151. The government commissioner stated: "it seems to us radically impossible to consider that a person's right to receive care can be transformed into an obligation to undergo it" (*op. cit.*, p. 150). "The patient who refuses a medical act simply chooses, as he or she is free to do, not to use his or her right to care, and his or her will must be respected" (*op. cit.*, p. 151).

849 CE, Ass. 26 October 2001, *Senanayake, Lebon* p. 514; *RFDA* 2002, pp. 156-162, note D. DE BECHILLON; *Dr. adm. comm.* n° 40,

obligation to provide care, as the Court of Appeal did, or the principle of consent, as proposed by the government commissioner. It does not support either of these two solutions. The judge of cassation criticised the court for having "intended to give general precedence to the doctor's obligation to save life over that of respecting the patient's wishes". Referring to the case, he admitted, however, that the doctor's choice to perform an act essential to the patient's survival and proportionate to his condition, given the extreme situation in which he found himself, did not constitute a fault despite the obligation to respect his wishes⁸⁵⁰. The decision to administer life-sustaining treatment is ultimately the responsibility of the medical team, even if the patient refuses to receive such treatment. Although in this case the patient had clearly expressed his opposition to the treatment, the doctor does not incur the responsibility of the hospital when he ignores this refusal.

209. In so doing, the Conseil d'Etat arrives at the same solution as the administrative court of appeal, using legal means that are not fundamentally different, but through an approach that carefully avoids pronouncing on the question of a hierarchy between the doctor's obligation and the patient's consent. "Clearly", says M. de Béchillon, "the ambition of this judgment was to send back to the legislator a ball with which the Conseil d'Etat absolutely did not want to play"⁸⁵¹. Indeed, the author states, "if the Council of State overturned the decision of the administrative court of appeal, it was not at all because it disapproved of the outcome, nor even, in essence, of the motivation, but because it intended to pursue another objective, which can be described as political: to summon the legislator to assume his responsibilities by taking the initiative to say *generally* whether or not, in France, it is decided to allow a patient to demand that he be allowed to die"⁸⁵². Clearly, "the judge is confronting the legislator with his responsibilities by urging him to enshrine a new norm through a simple alternative: to let the patient decide his fate, or even his death, or to oblige the doctor to save him in spite of himself"⁸⁵³.

B. The establishment of an absolute principle in 2002

210. The legislator was called upon to assume his responsibilities and clarified the state of the law with the law of 4 March 2002. Very explicitly, it enshrines the right to consent as an absolute principle. Aligning itself with the solutions prevailing in European law and in many countries, it affirms the primacy of consent over the obligation to provide care.

211. Two texts serve as references at European level. The *Declaration on the promotion of patients' rights in Europe*, signed in Amsterdam on 28-30 March 1994, contains a §3 devoted to consent. After recalling that no medical act may be performed without the prior informed consent of the patient, this paragraph recognises the patient's right to refuse a medical act or to discontinue it, requiring the doctor to make clear to him or her the implications of such a refusal or interpretation. In no case, however, does this statement allow the physician to override the patient's refusal on grounds of vital necessity. Similarly, a *Convention on Human Rights and Biomedicine* was signed under the aegis of the Council of Europe on 4 April 1997⁸⁵⁴. This text constitutes a framework convention: it constitutes a minimum and reserves the possibility for each signatory State to deal with particular issues in more detail at a later stage (Article 27). Article 5 states that an intervention in the field of health may only be carried out after free and informed consent has been given by the person; it recognises the latter's right to freely withdraw it at any time. This minimum does not reserve the hypothesis of vital necessity. Any additions to it in domestic law can only provide greater protection, and will not have the possibility of introducing such a restriction. In both instruments, the right to consent is presented as an absolute principle. On reading these texts, "it is clear that vital necessity does not allow the doctor to override the patient's opposition to treatment"⁸⁵⁵.

note E. AUBIN; *D.* 2001, IR, p. 3253, obs. X.; *AJDA* 2002, pp. 259-263, note M. DEGUERGUE; *LPA* 15 January 2002, n° 11, pp. 18-21, note C. CLEMENT; *RDS* 2002, No. 38(1), pp. 41-51, note L. DUBOUIS; C. GUETTIER, *chron. LPA* 19 August 2002, No. 165, pp. 8-13; *GP* 16-17 October 2002, p. 27 et seq. See also the study by A. MEERSCH, "Le refus de soins devant le Conseil d'Etat", *Dr. adm.* 2002, *chron.* n° 13; J. MOREAU, *JCP G* 2002, II, 10025.

850 The reasoning is expressed in a very precise recital: "Considering that, given the extreme situation in which Mr Senanayake found himself, the doctors who were treating him chose, with the sole aim of saving him, to perform an act that was *essential to his survival and proportionate to his condition*; that, under these conditions, and whatever their obligation to respect his wishes based on his religious beliefs, they did not commit a fault likely to engage the responsibility of the Assistance publique-Hôpitaux de Paris".

851 D. DE BECHILLON, *op. cit.* p. 161.

852 D. DE BECHILLON, *op. cit.* p. 162.

853 A. PARIENTE, "Le refus de soins : réflexions sur un droit en construction", *RDP* 2003, p. 1432.

854 Council of Europe, ETS No. 164.

855 A. DORSNER-DOLIVET, *op. cit.* p. 531. On these texts, see Dorsner-Dolivet, pp. 530-531.

The European Court of Human Rights has ruled that "the imposition of medical treatment without the consent of the patient if he or she is an adult and of sound mind would amount to an infringement of the physical integrity of the person concerned, which could call into question the rights protected by Article 8§1 of the Convention (privacy)"⁸⁵⁶. In a previous decision, the Strasbourg Court had already considered that a "medical intervention under duress, even if of minimal importance, must be regarded as an infringement of this right"⁸⁵⁷.

A similar orientation emerges in comparative law. In the United States, the courts unconditionally give precedence to the patient's wishes. Thus, for the Superior Court of New Jersey, "A Jehovah's Witness in full possession of his faculties or a person of similar views has full discretion to refuse all or part of a medical treatment, even if his decision leads to the sacrifice of his life"⁸⁵⁸. The Court of Appeal in England has established the principle that every adult normally has the right to decide whether or not to accept medical treatment, even if a refusal may result in permanent damage to his or her health or death, and even if the reasons for refusal are irrational⁸⁵⁹. Similarly, in Canada, the Ontario Court of Appeal in 1990 ordered a doctor who had performed a blood transfusion on an unconscious person with a card indicating that he or she was refusing transfusions to pay damages of \$20,000⁸⁶⁰. In Japan, the Supreme Court awarded \$5,000 to the heirs of a Jehovah's Witness who was transfused against his will⁸⁶¹.

212. The law of 4 March 2002⁸⁶² is part of this approach aimed at promoting the autonomy and the will of the patient. It "gives the patient the right to refuse any medical act in the sense of the North American logic"⁸⁶³. The wording of this text is innovative: it recognises a right to oppose care by introducing into the public health code Article L. 1111-4, which deals with the question of consent. The legislator has chosen to make consent an absolute right, the recognition and exercise of which are not subject to any reservation or limit.

The first paragraph reaffirms the principle of consent. In contrast to previous texts which established the patient as the acceptor of the care proposed by the doctor, this provision provides for genuine consultation between the two protagonists by genuinely involving the patient in the medical decision. "More than consent, it is the recognition of the patient's power to decide about his or her health"⁸⁶⁴.

Paragraphs 2 and 3 deal with refusal of care. Paragraph 2^{ème} recalls the need for the doctor to "respect the wishes of the person after having informed him of the consequences of his choices". It then envisages the hypothesis where "the will of the person to refuse or to interrupt a treatment puts his life in danger" in order to oblige "the doctor [to] make every effort to convince him to accept the indispensable care". This provision therefore "confers on the patient, in a state of self-expression and duly informed, a right to oppose care at the risk of his life"⁸⁶⁵. The "respect for the autonomy of the patient's will is such that if the patient refuses medical treatment, the doctor is obliged to respect this choice"⁸⁶⁶. Paragraph 3^{ème} affirms the prevalence of the consent of the patient of full age, in a state of free and informed consent, even in the event of a life-threatening emergency: "No medical act or treatment may be carried out without the free and informed consent of the person, and this consent may be withdrawn at any time". As Mr Mathieu states, "the doctor no longer has the power to override the patient's wishes even in the event of a vital emergency"⁸⁶⁷. The law of 4 March 2002 "expressly recognises the patient's right to oppose an intervention, even at the risk of his life"⁸⁶⁸. The text does not limit the pre-eminence of consent to cases in which the patient's life is not threatened. It does not envisage any circumstances in which consent can be overridden. As M. Pariente points out, "in any case, the possibility of a conscious patient refusing care to the point of death is theoretically possible and legally provided for and authorised by the law"⁸⁶⁹. The law puts an end to the limit that appeared in the *Senanyake* jurisprudence in case of vital risk. The patient's choice is sovereign and must be respected.

The last two paragraphs of Article L. 1111-4 of the Public Health Code deal with the particularities of the

856 ECHR, 29 April 2002, *Pretty v/ United Kingdom*, § 63, *AJDA* 2003, pp. 1383-1338, note B. LE BAUT-FERRARESE, "La Cour européenne des droits de l'homme et les droits du malade: la consécration par l'arrêt *Pretty* du droit du refus de soins". The problem of consent to care is addressed by the Strasbourg Court incidentally in this judgment. The central issue was not the refusal of care but the existence of a possible "right" to die. The Court held that the Convention does not grant the individual a right to assisted suicide. The right to life proclaimed by the Convention cannot be the basis for a symmetrical right to die.

857 *Cases X. v. The Netherlands*, 4 December 1978, and *X. v. Austria*, 13 December 1979, cited by B. LE BAUT-FERRARESE, *op. cit.*

858 Decision of the Appellate Division of the Superior Court of New Jersey, *In re Hughes*, 611 A.2d, 1148 (N.J. 1992), quoted by A. PARIENTE, *op. cit.* at 1425.

859 English Court of Appeal, Re T [1992] 4 All ER 649, quoted by D. CHAUVVAUX, *op. cit.* pp. 154-155.

860 Ontario Court of Appeal, 3 March 1990, *Malette v. Shulman*, 72 O.R. (2d) 417, quoted by D. CHAUVVAUX, *op. cit.* at 154.

861 Supreme Court of Japan, 29 February 2000, *Takeda v. State*, cited by D. CHAUVVAUX, *op. cit.* p. 154.

862 Law of 4 March 2002 on patients' rights and the quality of the health system, OJ 5 March 2002, p. 4118.

863 A. PARIENTE, *op. cit.* p. 1423.

864 B. MATHIEU, "Les droits des personnes malades", *LPA* 19 June 2002, n° 122, special issue La loi du 4 mars 2002 relative aux droits des malades et à la qualité du système français" (A. LAUDE dir.), p. 16.

865 A. DORSNER-DOLIVET, *op. cit.* p. 531.

866 P. MISTRETTA, "La loi n° 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé. Réflexions critiques sur un Droit en pleine mutation", *JCP G* 2002, I, 141, p. 1079.

867 B. MATHIEU, *op. cit.* p. 16.

868 A. DORSNER-DOLIVET, *op. cit.* p. 532.

869 A. PARIENTE, *op. cit.* p. 1433.

consent of a person who is unable to express his or her will (4^{ème} paragraph) or incapable (5^{ème} paragraph)⁸⁷⁰.

213. In his commentary on the *Senanayake* judgment, M. de Béchillon had stated that if a legislative provision provided for the obligation of abstention on the part of the practitioner in the face of a patient's clearly expressed refusal of care, the doctor would have "not only the right but also the duty not to transfuse his patient"⁸⁷¹. The reservation formulated by the Conseil d'Etat having been set aside by the legislator, the doctrine as a whole concluded that the *Senanayake* case law had lapsed following the adoption of the law of 4 March 2002⁸⁷². The preparatory work also confirms this interpretation. The rapporteur of the bill in the National Assembly specified that "the principle of the patient's consent gives him the right to refuse the proposed care" and that, consequently, "there can be no imposed treatment or diagnostic examination"⁸⁷³. When asked by a parliamentarian whether doctors should "let a Jehovah's Witness who refuses a blood transfusion die", the Minister of Health stated that "there is no question of transfusing someone who refuses it for whatever reason". Only a person who has not objected to the procedure can be transfused. Transfusion is "only possible when the person's life is in danger and he or she can neither refuse nor consent, as is the case in a coma"⁸⁷⁴. If, on the other hand, the person has explicitly refused the transfusion before losing consciousness, his or her wishes must be respected.

The text was precise and the legislator's intention unambiguous. Nevertheless, the legislative requirement of absolute primacy of consent was "refused by the case law"⁸⁷⁵.

II. A relative principle for the judge

214. For the interim relief judge, the right to choose medical treatment, and in particular to oppose unwanted care, is a relative right. The scope of this fundamental freedom does not extend to medical acts necessary for the survival of the patient. The patient's wishes are only respected to a certain extent. When the patient's choice risks causing his or her death, the medical profession has the possibility to override the patient's consent.

215. As early as the summer of 2002, the interim relief judge was called upon to rule on a refusal of life-threatening medical treatment. The case concerned the opposition to a blood transfusion expressed by a person belonging to the Jehovah's Witnesses⁸⁷⁶. The case began on 5 August 2002. Hospitalised at the Saint-Etienne hospital, Valérie Feuillatay underwent, despite her oral and written refusal, a blood transfusion considered by the

870 Paragraph 4^{ème} provides that no intervention or investigation may be carried out, except in an emergency or where it is impossible, without the trusted person or the family or, failing that, one of their relatives having been consulted. As this text expressly reserves the right to an emergency, it is reasonable to think that the legislator would also have excluded this circumstance in the case of an adult who is capable of expressing his or her wishes, if he or she had really wanted to do so. However, it did not do so. The same observation can be made in the case of a minor or adult under guardianship.

871 D. DE BECHILLON, *op. cit.* p. 159.

872 M. Mathieu states that one can "consider that the law has deprived the doctor of the choice implicitly left to him by the Conseil d'Etat and requires him to give precedence to his obligation to respect the patient's will over his duty to save his life" (B. MATHIEU, *op. cit.*, p. 16). After the adoption of this text, "the case law that legitimises a blood transfusion carried out against the expressed will of a Jehovah's Witness (C.E., 26 October 2001) should no longer apply" (Y. LAMBERT-FAIVRE, "Les droits des malades, usagers du système de santé", *D.* 2002, p. 1296). See in the same sense: P. MISTRETTA, *op. cit.*; F. BELLIVER and J. ROCHFELD, *RTD civ* 2002, p. 574; J.-P. GRIDEL, *op. cit.* The authors reaffirmed this position when, a few months later, cases arose that tested the limits of this fundamental freedom. For Ms Mersch, 'the prevalence of consent is an obstacle to the practitioner's ability to override the patient's acceptance of a medical act, even if this decision would be prejudicial to the patient's survival' (A. MERSCH, 'Quand les juges font fi de la loi Kouchner et confirment la jurisprudence Senanayake', *JCP A* 2002, 1022, p. 27). Similarly, M. Garay considers that the law of 4 March 2002 put an end to the *Senanayake* case law (A. GARAY, 'Volontés et libertés dans la relation médecin-malade: la mise à l'épreuve des articles 16-3 du Code civil et L. 1111-4 du Code de la santé publique', *RGDM* 2003/10, p. 161). The patient "may oppose any act. It seems impossible for the practitioner to override the Jehovah's Witnesses' dissent to blood transfusions if the latter have the intellectual faculties necessary to understand the consequences of their refusal" (A. FLASQUIER, L. LAMBERT-GARREL, B. PITCHO, F. VIALLA, "Droits des patients et refus de soins", *JCP G* 2003, II, 10098, p. 1112)

873 AN Report No. 3263, 26 September 2001, p. 60.

874 B. KOUCHNER, *JO déb. AN* 2001, CR session 3 October 2001, p. 5448.

875 A. PARIENTE, *op. cit.* p. 1433. For the author, the judge "refused to apply the law" (*ibid.*).

876 CE, ord. 16 July 2002, *Feuillatay, Lebon* p. 309, *Droit, déontologie et soin* septembre 2002, vol. 2, n° 3, pp. 416-425, note L. OUATAH; *LPA* 26 March 2003, n° 61, pp. 4-10, note C. CLEMENT; *JCP G* 2002, II, 10184, note P. MISTRETTA; *GP* 2002, 2, p. 1345, note F.-J. PANSIER. A similar case was brought before the interim relief judge of the Lille administrative court the following week: TA Lille, ord. 25 August 2002, *M. and Mme G. cf. CHR de Valenciennes*, *JCP G* 2003, II, 10098, note A. FLASQUIER, L. LAMBERT-GARREL, B. PITCHO, F. VIALLA; *GP* 2003, 2, pp. 486-489, note A. GARAY. These two decisions have also been the subject of joint studies and comments: Y. LACHAUD, "Le droit au refus de soins après la loi du 4 mars 2002 : premières décisions de la juridiction administrative" *GP* 2002, 1, pp. 1729-1731; A. MERSCH, "Quand les juges font fi de la loi Kouchner et confirment la jurisprudence Senanayake", *JCP A* 2002, 1022; S. PORCHY-SIMON, "Le refus de soins vitaux à l'aune de la loi du 4 mars 2002 (à propos de deux ordonnances des juridictions administratives des 16-25 août 2002)", *Resp. civ. et ass.* 2002, chron. n° 21; E. AUBIN, "Refus de soins et urgence médicale après la loi du 4 mars 2002", *Dr. adm.* 2002, comm. n° 188; B. MATHIEU, "De la difficulté de choisir entre la liberté et la vie. Réflexions sur la jurisprudence administrative relative à la transfusion sanguine des témoins de Jéhovah", *RGDM* 2003/9, pp. 97-104; A. GARAY, "Volontés et libertés dans la relation médecin-malade: la mise à l'épreuve des articles 16-3 du Code civil et L. 1111-4 du Code de la santé publique", *RGDM* 2003/10, pp. 143-155; O. YACOB, "L'article L. 1111-4 du code de la santé publique à l'épreuve du référé-liberté (ou le refus de soins, liberté fondamentale)", *GP* 23 March 2003, pp. 2-5; *Droit de la famille* 2003, comm.

doctors to be essential for her survival. The patient had made it known that she would refuse, under any circumstances, the administration of any blood product. She and her sister, a "trusted person" within the meaning of Article L. 1111-6 of the Public Health Code⁸⁷⁷, referred the matter to the interim relief judge of the Lyon administrative court on 7 August 2002. By order of 9 August 2002, the latter ordered the doctors not to give the patient any further transfusions, and specified that this injunction would cease to apply if the patient 'were to find herself in an extreme situation where her prognosis was at stake'. The applicants appealed against this order, asking the interim relief judge of the Council of State to annul the reservation concerning the vital risk. Nevertheless, the appeal judge approved the reservation mentioned by the first judge. He only reformed the order to specify that, on the one hand, the care must be essential to the patient's survival and proportionate to his condition and, on the other hand, the doctors must make every effort to convince the patient to accept care.

The requirement to do everything possible to convince the patient to accept the treatment shows that the new state of the law has been taken into account, since Article L. 1111-4 of the Public Health Code imposes such an approach prior to any medical act. Nevertheless, the innovations introduced by the law of 4 March 2002 have not been fully taken into account, since the judge maintains the reservation, resulting from the *Senanayake* ruling, concerning the care essential to the patient's survival⁸⁷⁸. While the legislator had wanted to see this reservation disappear, the interim relief judge considers that the law did not intend to exclude the possibility of overriding the patient's wishes in the event of vital risk. Through a "*contra legem*" interpretation⁸⁷⁹ of the law of 4 March 2002, the administrative judge "thus comes to consider that the right to oppose treatment, far from being absolute, may give way under the effect of particular circumstances"⁸⁸⁰.

216. As Ms Porchy-Simon pointed out, "the relevance of such reasoning can only be accepted on condition that a rule authorising the doctor to give precedence to his obligation to provide care over the wishes of the person concerned is identified in positive law, a rule that must, moreover, be recognised by a legislative or supra-legislative text"⁸⁸¹. However, it must be noted that "neither of these two proposals (...) seems to be verifiable in the current state of positive law. The search for a rule expressly authorising doctors to treat patients against their will, even under the very specific conditions referred to by the Conseil d'Etat, appears doomed to failure"⁸⁸².

Obviously, this solution cannot be based on the law of 4 March 2002, which recognises the patient's right to refuse medical treatment without placing *any limits* on the consequences of the refusal for the health of the person concerned. Since the consent expressed is, as the law requires, "free and informed"⁸⁸³, it must be absolutely respected. The law makes no provision for respecting the patient's consent. Article L. 1111-4 of the Public Health Code is content, in the event that the patient's decision to interrupt a treatment could endanger his or her life, to oblige the doctor to try to convince the person to accept the essential care, without giving the doctor any possibility of implementing it in an authoritarian manner. "This right to refuse care entails only one obligation for the doctor, that of persuading the patient to accept the treatment that is objectively the most appropriate for his condition. If the patient cannot be persuaded, his refusal must in any case be respected"⁸⁸⁴. Beyond the letter of the texts themselves, the general philosophy of the law of 4 March 2002 seems to be opposed to an authoritarian implementation of care because this law, relating to patients' *rights*, "appears to be the bearer of an autonomist protection of the medical relationship, in total opposition to the solutions adopted by the administrative courts"⁸⁸⁵.

Nor do the provisions of the penal code constitute a limit to the patient's consent. The incrimination of failure to assist a person in danger, by the second paragraph of Article 233-6 of the Criminal Code, has sometimes been invoked as a justification for forced care. According to this reasoning, the possibility that the doctor could be prosecuted for failure to assist a person in danger, particularly when the refusal of care entails a vital risk for the patient, would justify *a contrario* his intervention despite the patient's opposition. The question is therefore whether

877 This is the person designated by the patient to make decisions for him or her in the event that he or she is unable to do so.

878 As M. Pariente points out, "the correlative use of the jurisprudential criterion identified in *Senanayake* of the relevance of treatment essential to survival and proportionate to the patient's condition also clearly demonstrates the setting aside of the legislative provisions establishing the primacy of consent" (A. PARIENTE, *op. cit.*, p. 1434).

879 A. PARIENTE, *op. cit.* p. 1434.

880 A. DORSNER-DOLIVET, *op. cit.* p. 529.

881 S. PORCHY-SIMON, *op. cit.* p. 5. In fact, since compliance with the refusal is imposed by a text of legislative value - Article L. 1111-4 of the Public Health Code -, a derogation can only result from a text of at least equal value.

882 Ibid.

883 It should be noted that the reasons for refusing care cannot be taken into account in order to deny freedom of choice. A contrary solution would in fact establish the doctor as the true arbiter of the patient's intentions. However, such an approach would be in opposition to Article L. 1111-4, which states that "any person shall take, in consultation with the health professional and taking account of the information and recommendations he or she provides, decisions concerning his or her health", without recognising any right of control by the doctor over the person's motivations." Even if the reasons leading Jehovah's Witnesses to refuse blood transfusions may seem unreasonable to a rational mind, it is not up to the practitioner to invoke such a belief to justify, in itself, the disregard of the patient's wishes" (S. PORCHY-SIMON, *op. cit.*, p. 7).

884 A. MERSCH, "Quand les juges font fi de la loi Kouchner...", *op. cit.*, p. 27.

885 S. PORCHY-SIMON, *op. cit.* p. 5.

a doctor who, in order to comply with his patient's refusal, does not provide him with the care that would have prevented his death, should be considered to have refrained from assisting a person in danger. The Court of Cassation has never recognised such a solution. On the contrary, the case law establishes the impossibility of prosecuting the doctor on this basis in the event that the person in danger refuses the assistance provided⁸⁸⁶.

Some authors have seen Article 16-3 of the Civil Code as a limit to the principle set out in Article L. 1111-4 of the Public Health Code. Developing this hypothesis, Ms Ouatah maintains that "Obviously, the Conseil d'Etat refuses to give this Article L. 1111-4 its full scope because, however ambitious the law of 4 March 2002 may be, it must be assessed within a broader framework, that of Article 16-3 of the Civil Code (...)"⁸⁸⁷. However, it should be pointed out that the two texts have very different scopes of application. Article 16-3 of the Civil Code corresponds to the situation of a patient who is unable to *express his or her wishes* and not that of a patient of full age who is capable of expressing himself or herself, which is the case under Article L. 1111-4. Article 16-3 of the Civil Code was therefore not at issue in the case submitted to the interim relief judge, as the patient had expressed her wishes in writing and orally when she was able to do so.

Could this limit then come from the doctor's duty of care? Again, the answer seems to be no. As M. Pariente pointed out, "the importance of the doctor's obligations is often amplified by commentators, whereas these obligations have a precise legal framework which in no case excludes limits"⁸⁸⁸. To affirm the prevalence of the obligation of care over the principle of consent is, according to M. Penneau, a real "flaw in reasoning". The author explains that "the doctor's obligation to protect the health and life of the individual exists, in fact, only through the will of the person concerned, in other words, the reference to the doctor's obligation to protect the life and health of the individual loses all meaning in the event of refusal of care, since, precisely, the individual refuses this protection"⁸⁸⁹. If the doctor is bound by various textual sources to provide care, this obligation only exists on the condition that the patient consents. However, the patient may, while consenting to the therapeutic relationship, object to certain types of acts being performed on him. While the doctor is obliged to treat a patient who so requests, he or she cannot impose on the patient acts to which the patient objects.

Can the patient's consent finally be limited by an implicit public order which, governing the doctor's action or governing the status of the human body, would take the form of an "objective right to life"⁸⁹⁰? Some authors maintain that general principles of law, revealing a virtual public order, could lead the practitioner to give precedence to his obligation of care over respect for the patient's will⁸⁹¹. In support of this argument, the principle of the dignity of the human person or the principle of the unavailability of the human body are invoked. But in reality, the invocation of these principles in the case of a patient refusing vital care is highly questionable. The principle of the unavailability of the human body cannot be invoked to compel a patient to undergo treatment against his or her will, when this refusal does not infringe the rights of third parties or the general interest. While this principle prohibits the patient from forcing the doctor to perform an act contrary to public policy, it does allow the patient to object to an unwanted act being performed on his or her body. With regard to the principle of human dignity, the "dwarf-throwing" case⁸⁹² demonstrated that this notion could not be understood in a purely subjective way and, on the contrary, that it could lead to the objective protection of the individual prevailing against the conception that the latter may have of his or her own dignity⁸⁹³. However, this principle does not in any way prevent the sick person from exercising his or her subjective rights. The rights of third parties are in no way at stake in the case of a patient who simply refuses care: such a decision involves only his or her own interests. More fundamentally, this kind of argument "raises a certain uneasiness in its very principle, as well as in the risks of drift that it could imply"⁸⁹⁴. It refers "to an animal conception of life, which should be preserved by any means, even if this means is unbearable for the person concerned, for reasons that the doctor, no more than anyone else, has no right to judge, whatever the nature of these reasons"⁸⁹⁵.

217. Thus, in the current state of the law, no text or principle recognises the right of a doctor to impose a medical act on a patient against his will. No rule of positive law can justify the solution adopted by the administrative judge of summary proceedings. The latter 'reserves the case where the patient's life would be in danger, and adds to the law; he sets a condition that the law has not mentioned'⁸⁹⁶. The judge has freed himself from the letter of the text by adding a condition that was not mentioned in it; he has set a limit that the legislator had explicitly intended to exclude. Summing up the opinion of an almost unanimous body of doctrine, Ms Porchy-

886 See Crim. 3 January 1973, n° Juris-Data 1973-095002, D. 1973, Jur, p. 220.

887 L. OUATAH, *op. cit.* p. 417. Cf. also C. CLEMENT, *op. cit.* p. 8: "No doubt a literal application of this article would lead the doctor to respect the patient's wishes absolutely, even though the patient's life would be at stake. The administrative judge did not see it that way and preferred to admit, by virtue of Article 16-3 of the Civil Code, that the right to consent was only relative".

888 A. PARIENTE, *op. cit.* p. 1423.

889 J. PENNEAU, *Urgence, information et consentement*, éditions ENSP, 2001, p. 29.

890 See the above-mentioned conclusion by Mrs. HEERS, p. 1236, also referring to the "public order of protection" (*op. cit.*, p. 1238).

891 See J.-P. GRIDDEL, "Le refus de soins au risque de la mort", study cited above.

892 CE, Ass., 27 October 1995, *Commune de Morsang-sur-Orge, Lebon* p. 372, concl. FRYDMAN; *GAJA* n° 108.

893 See O. CAYLA, "Le coup d'Etat de droit", *Le débat*, 1998, n° 100, pp. 108-133.

894 S. PORCHY-SIMON, *op. cit.* p. 6.

895 J. PENNEAU, *op. cit.* p. 29.

896 J. PENNEAU, "Le médecin face au refus du patient de subir un acte médical", *D.* 2002, p. 2879.

Simon states that the solutions adopted by the judge "do not therefore seem to be justifiable in the current state of positive law"⁸⁹⁷.

The case law developed on the basis of Article L. 521-2 of the Code of Administrative Justice is in line with a classic conception of medicine in which the individual is not master of his own body⁸⁹⁸. Whereas in Anglo-Saxon thinking, which is based on the autonomy of the patient, man is considered to be the owner of his body, in the French model he is only "the usufructuary of a body that belongs to the State"⁸⁹⁹. When the conscious, lucid and informed choice of the individual risks leading to his death, he is dispossessed of his power of decision in favour of the community. Once the patient has consented to the therapeutic relationship, he or she adheres to a specific legal framework, with a set of rights and obligations arising from it. The interim relief judge intends here to oppose the introduction of "à la carte" medicine. If a patient asks to be treated in a public hospital, it can only be within the framework and conditions defined by the medical team. Nevertheless, the enshrinement of this right as a relative principle, in addition to ignoring the letter of Article L. 1111-4 of the Public Health Code, is not without potential risks of drift. As Ms Dorsner-Dolivet points out, "Admitting transfusion means opening a breach in the principle of the prior consent of the patient who is of full age, capable and conscious, and this may ultimately lead, in the case of extremely serious interventions, to the doctor being given the power to decide in the patient's place"⁹⁰⁰.

Conclusion of Title I

- 218.** With a wide margin to determine the list and content of fundamental freedoms, the Council of State has opted for a broad definition of the scope of application of the summary judgment. The administrative judge has drawn up a relatively extensive catalogue of fundamental freedoms. It defined the content and consistency of each of them in an extensive manner. In keeping with a strictly positivist analysis, the position adopted by the interim relief judge cannot be criticised without recourse to extra-legal considerations. In strict law, the conception of fundamental freedoms developed on the basis of Article L. 521-2 is not open to criticism. It appears to respect the legal and logical constraints imposed on it in determining the meaning of this notion.
- 219.** On the other hand, one may wonder whether the generous approach adopted by the Conseil d'Etat to define the scope of application of the *référé-liberté* procedure does not call into question the exceptional nature of this procedure. Has the interim relief judge not opened up the scope of Article L. 521-2 too widely? In other words, has the desire to give a broad interpretation to the notion of fundamental freedom not led to trivialising the use of this procedure? In the light of the text and practice of Article L. 521-2, such a risk is completely ruled out, for two reasons. Firstly, even with a broad definition of fundamental freedoms, the scope of application of this procedure is nevertheless reduced to a very limited number of rights and freedoms. Although envisaged in an extensive manner, the scope of application of the *référé-liberté* remains strictly confined by the notion of fundamental freedom. Although the administrative judge has full control over it, in the end it covers only a tiny part of the rights, freedoms and principles of our legal system. Moreover, the conditions for granting it set out in Article L. 521-2 are quite draconian, which restricts the possibilities of implementing this procedure to relatively exceptional situations.

⁸⁹⁷ S. PORCHY-SIMON, *op. cit.* p. 8.

⁸⁹⁸ In this respect, during his hearing before the information mission on end-of-life support, Mr Denoix de Saint Marc stated that "respect for the patient's wishes, at least in certain very specific cases, must give way to the preservation of life" (Report No. 1708, *Respecting life, accepting death*, July 2004, XII^e legislature, t. 1, p. 247, cited by Y.-M. DOUBLET, "La loi du 22 avril 2005 relative à la droit de malades et fin de vie, LPA n° 124, 23 June 2005, p. 8). M. DOUBLET, "La loi du 22 avril 2005 relative aux droits des malades et à la fin de vie, LPA n° 124, 23 June 2005, p. 8). This orientation can also be compared with several decisions of the European Court of Human Rights showing that the Court is ready to absolve States on public health grounds. The case on sado-masochism is particularly significant in this respect (ECHR, 19 February 1997, *Laksey, Jaggard and Brown*, Rec. 1997-I, p. 131). This decision, handed down in the context of Article 8(2) of the Convention, concerned legislation criminalising practitioners of these practices. The Court considered that the State's interference in private life appeared necessary to achieve the objective of protecting health. In so doing, it "clearly opted for the protection of the individual, even against his or her will, by giving precedence to the intangibility of the human person over any other consideration" (note by J.-M. LARALDE, *D.* 1998, Jur., p. 97).

⁸⁹⁹ S. RAMEIX, "Du paternalisme à l'autonomie des patients. L'exemple du consentement aux soins en réanimation", *Médecine & Droit* n° 12, 1995, p. 1.

⁹⁰⁰ A. DORSNER-DOLIVET, *op. cit.* p. 534.

Title II

Draconian conditions of granting

220. The conditions for granting a safeguard measure set out in Article L. 521-2 of the Code of Administrative Justice are truly draconian, limiting to the extreme the situations in which this procedure can be applied. In addition to the "condition of urgency inherent in the summary procedure"⁹⁰¹, the law makes the pronouncement of a safeguard measure subject to the circumstance that the administration has, in the exercise of its powers, seriously and manifestly illegally infringed a fundamental freedom. As the Vice-President of the Council of State stated, "These terms have been carefully considered. The Council of State will ensure that they are respected"⁹⁰². Because of the very terms used by the legislator, no change in the case law or any relaxation is conceivable or even possible. Moreover, a desire to attenuate the rigour of the conditions laid down by the law through an abusively flexible interpretation of them would not benefit the applicants. Indeed, "The success of the summary proceedings depends on the possibility for the judges appointed for this purpose to continue to rule within forty-eight hours. Exposing them to the risk of an influx of applications would not be in the interests of the parties concerned"⁹⁰³. An overly benevolent or lax assessment of the conditions for granting the right of appeal would penalise the applicants and their right to appeal insofar as the administrative court would no longer be able to respond within 48 hours to the applications addressed to it on this basis. In order for the procedure to function satisfactorily, it is essential that the judge of the *référé-liberté* be able to react very quickly to an infringement. His action must be concentrated on the only - and normally rare - requests that correspond to exceptional situations, without being interfered with in this task by the "ordinary" requests falling within the remit of the judge for interim relief.
221. The conditions of granting set out in Article L. 521-2 are distinct from each other and, consequently, "are assessed separately"⁹⁰⁴. Moreover, by the very wording of Article L. 521-2, they are cumulative in nature⁹⁰⁵, which has two consequences. On the one hand, when one of the conditions for granting is lacking, the judge may reject the application without needing to "decide () whether the other conditions for the application of Article L. 521-2 of the aforementioned Code are met"⁹⁰⁶. On the other hand, the judge can only pronounce a safeguard measure if all the conditions are met⁹⁰⁷, which he must, if necessary, ensure on his own authority⁹⁰⁸. As in the case of assault⁹⁰⁹, the conditions for granting a safeguard measure are assessed in

901 CE, ord. 12 November 2001, *Commune de Montreuil-Bellay*, *Lebon* p. 551.

902 R. DENOIX DE SAINT MARC, "Les procédures d'urgence : premier bilan", *AJDA* 2002, p. 1.

903 M. GUYOMAR and P. COLLIN, chron. under CE, Sect. 30 October 2001, *Minister of the Interior v. Mrs Tiba*, *AJDA* 2001, p. 1056.

904 CE, ord. 21 August 2001, *Manigold*, n° 237385.

905 CE, ord. 12 January 2001, *Hyacinthe*, *Lebon* p. 12; CE, ord. 15 January 2001, *Charlery-Adele*, *Lebon* p. 14; CE, ord. 8 February 2001, *Guillon*, *Lebon T.* p. 1129; CE, ord. 27 March 2001, *Minister of the Interior v. Djalout*, *Lebon* p. 158; CE, ord. 23 March 2001, *Société Lidl*, *Lebon* p. 154; CE, ord. 1^{er} March 2001, *Paturel*, *Lebon T.* p. 1134; CE, ord. 10 April 2001, *Merzouk*, *Lebon T.* p. 1135; CE, ord. 9 April 2001, *Belrose and others*, *Lebon T.* p. 1126; CE, ord. 3 April 2001, *Soriano and others*, *Lebon T.* p. 1128; CE, ord. 1^{er} June 2001, *Ploquin*, *Lebon T.* p. 1126; CE, ord. 21 August 2001, *Manigold*, n° 237385; CE, ord. 10 August 2001, *Association "La Mosquée" and others*, *Lebon T.* p. 1133; CE, ord. 10 August 2001, *Ministre de l'Intérieur c/ Saddouki*, n° 236969; CE, ord. 11 October 2001, *Hauchemaille*, *Lebon* p. 460; CE, ord. 18 October 2001, *Association groupe local cimade Montpellier*, n° 239071; CE, ord. 22 October 2001, *Gonidec et Brocas*, n° 239165; CE, ord. 12 November 2001, *Commune de Montreuil-Bellay*, *Lebon* p. 551; CE, ord. 7 January 2002, n° 241588; CE, ord. 20 February 2002, *Ploquin*, n° 243234; CE, ord. 6 September 2002, *Tetaabi*, n° 250120; CE, ord. 21 December 2004, *Luzolo Kondé*, n° 275361; CE, ord. 20 January 2005, *Commune de Saint-Cyprien*, *Lebon T.* p. 1022; CE, ord. 13 July 2005, *Société Combé Chavat 2*, n° 282220.

906 CE, ord. 26 January 2001, *Gunes*, *Lebon* p. 38.

907 See for example CE, ord. 21 November 2005, *Commune de Lyon*, *Lebon T.* p. 1039. The interim relief judge may not use the power conferred on him by the provisions of Article L. 521-2 'without having established a serious and manifestly illegal infringement of a fundamental freedom'. As the first judge in this case had not found such an infringement before issuing an injunction to the administration, he had "not given sufficient reasons for his order and disregarded the duty conferred on the interim relief judge by Article L. 521-2 of the Administrative Justice Code".

908 CE, ord. 22 March 2001, *Commune d'Eragny-sur-Oise*, *Lebon T.* p. 1134. In this case, the judge of the first degree had rejected the request of the applicant commune for lack of urgency even though this argument had not been raised in defence by the prefectural administration. Before the judge of appeal, the municipality reproached the first judge for having raised a plea "ex officio" within the meaning of Articles R. 522 and R. 611-7 of the Code of Administrative Justice, i.e. which should have been communicated to the parties beforehand. The Council of State's interim relief judge dismissed this argument. He stated that when a case is referred to him on the basis of Article L. 521-2 of the Code of Administrative Justice, the interim relief judge "is required to examine whether the conditions laid down by this article have been met". It is up to the judge to ensure that all the conditions set out in this provision are met, without being obliged to invite the parties to comment on each of them insofar as they are not in any way a matter of public policy (with the exception, however, of the condition relating to the presence of a fundamental freedom, which concerns the scope of application of the law). Thus, in the *Commune de Pertuis* order of 28 February 2003 (*Lebon* p. 68), the Council of State's interim relief judge was able to rely on the absence of urgency, whereas it does not appear from the citations of the decision that the applicant commune had contested the assessment made by the first judge on this point.

909 A constant case law excludes the characterization of the administrative assault if the conditions in which the administrative action took place are abnormal or unusual. See CE, Ass. 7 November 1947, *Alexis and Wolff*, *Lebon* p. 416, *JCP G* 1947, II, 4006, concl. CELLIER, note A. MESTRE; *D.* 1948, p. 472, note C. EISENMANN; Civ. 14 April 1970, *Département de la Corrèze c/ Orlic*, *Bull. civ.* I, n° 116; Civ. 23 March

the light of normal circumstances. Consequently, they cannot be considered satisfied in the event of exceptional circumstances, the occurrence of which is in no way attributable to the administration⁹¹⁰. It should be noted that the order of examination of the conditions of granting does not follow any predefined rule. In particular, and contrary to what one might have thought before the entry into force of the reform of 30 June 2000⁹¹¹, the condition of urgency is not necessarily examined first. As no priority is given to the examination of one condition over another, the order of assessment of the conditions may vary according to each decision⁹¹².

222. In the mind of the drafters of the text, each of the conditions for granting the right to interim relief was designed with a specific objective in mind. The requirement, first of all, of a serious and manifestly unlawful infringement of a fundamental freedom was conceived by reference to the procedure for the abuse of power, of which the *référé-liberté* was intended to be the counterpart before the administrative courts⁹¹³. The condition of urgency is intended to limit recourse to summary proceedings to cases requiring very rapid intervention by the administrative court. Finally, the condition of an infringement by the administration "in the exercise of its powers" was introduced in order to safeguard the jurisdiction of the court in matters of *de facto* abuse. This last requirement, as we shall see, was emptied of its substance by the Council of State. The other conditions, on the other hand, are applied with all the rigour that their wording requires.

M. Chapus stressed that in assessing the conditions for granting Article L. 521-2, the subordination "to what the circumstances of each case are is so narrow that one cannot draw many lessons from the state of case law"⁹¹⁴. In the light of this warning, the systematisation undertaking appears perilous. Nevertheless, it is worth taking the risk by examining these three sets of requirements in turn.

1971, *Plénel*, D. 1971, Somm, p. 159; Civ. 1^{er} June 1976, *Société de la clinique de l'Hermitage*, Bull. civ. I, n° 202; TC, 13 February 1961, *Nanjud, Lebon* T. p. 981; TC, 17 December 1962, *Société civile Saint Domat c/ Etat français*, *Lebon* p. 828; CE, Sect. 24 May 1968, *Mencière, Lebon* p. 329; CE, 23 October 1987, *Nachfolger Navigation Company Limited*, RDP 1988, p. 836, note by J.-M. Auby.

910 Cf. CE, order of 6 April 2001, *Minister of the Interior c/ SARL Le Vivier, Lebon* p. 186. A very large ammunition dump dating from the First World War having been discovered during the construction of a housing estate, the prefect had withdrawn the previously granted subdivision order and taken all the necessary measures for the organisation of mine clearance operations and the removal of the shells present on the site. The interim relief judge of the Conseil d'Etat affirmed "that if the need to preserve public safety delays the implementation of the construction projects planned in the allotment, this delay which, in the circumstances of the case, cannot, *in any case*, be considered as constituting a serious and manifestly illegal infringement of a fundamental freedom, is not attributable to the administration which, on the contrary, took the appropriate measures within the shortest possible timeframe compatible with the difficulty, complexity and risks inherent in the clearance operations to allow the normal exercise of the rights of the developer and the purchasers of the lots. See by comparison, in the context of *de facto* action, CE, 20 March 1968, *Entreprise de publicité générale A. Lioté, Lebon* p. 195 (road users threatened by a danger that the administration stopped).

911 Cf. R. VANDERMEEREN, "La réforme des procédures d'urgence devant le juge administratif", *AJDA* 2000, p. 712, stating that, as this is a summary proceeding conditioned by urgency, this requirement "will necessarily be examined as a priority by the summary proceeding judge".

912 Nevertheless, two main guidelines can be highlighted concerning the orders and judgments issued on the basis of Article L. 521-2 of the Code of Administrative Justice. First of all, it can be observed that when all the conditions are met, the interim relief judge will first establish the existence of a fundamental freedom that has been seriously and manifestly illegally infringed, and will only examine the condition of urgency in the second place. Moreover, it is noted that when at least one of the conditions is lacking, the judge will most often, as is his prerogative, be content to designate the failing condition without examining the other conditions. In the rare cases where he nevertheless proceeds with the examination, he will indicate to the applicant that, in addition, a condition (CE, ord. 24 January 2001, *Université Paris VIII Vincennes Saint-Denis, Lebon* p. 37; CE, ord. 9 February 2001, *Philippart et Lesage*, n° 230112; CE, ord. 10 January 2005, *Société SIMBB et autres*, n° 276137) or several (CE, ord. 30 January 2001, *Tauraatna*, n° 229418; CE, ord. 24 January 2005, *Commune de Wissous*, n° 276493) of the other conditions were also missing.

913 Messrs Guyomar and Collin had thus indicated "that, by its very terms, Article L. 521-2 makes the '*référé-liberté*' procedure the counterpart of that of assault (...)" (M. GUYOMAR and P. COLLIN, chron. under CE, Sect., 18 January 2001, *Commune de Venelles, AJDA* 2001, p. 153). In the same sense, President Vandermeeren had pointed out that the conditions of article L. 521-2 "are obviously not without evoking the 'theory' of the *de facto* assault" (R. VANDERMEEREN, D. 2002, SC contentieux administratif, p. 2228). Professor Chapus has emphasised that the dual requirement of serious infringement of a fundamental freedom and manifest illegality 'evokes the conditions of *de facto* abuse' (R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd., Montchrestien, 2006, No. 1602). Finally, the authors of the *Grand Rulings* noted that "the seriousness and manifest illegality of the infringement are reminiscent of the formula (...) of certain cases of assault (...)" (*GAJA* no. 118, § 11).

914 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd., Montchrestien, 2006, n° 1600.

Chapter 1

Serious and manifestly unlawful interference with a fundamental freedom

223. Firstly, the applicant must demonstrate an infringement of a fundamental freedom, the seriousness of that infringement and its manifestly unlawful nature⁹¹⁵. These conditions are distinct⁹¹⁶ and cumulative. They are nonetheless closely linked by the wording of Article L. 521-2. Indeed, the law does not require, on the one hand, a serious infringement of a fundamental freedom and, on the other, manifest illegality. The two requirements are linked by the coordinating conjunction "and", which means that there must be a relationship between the illegality of the infringement and its seriousness⁹¹⁷. It is not enough for the administration to have taken a manifestly illegal act on the one hand and infringed a fundamental freedom on the other. The infringement must be the consequence of the illegality committed⁹¹⁸. If a manifest illegality is found and an infringement of a fundamental freedom is characterised, the conditions of Article L. 521-2 will only be met if the infringement is the direct result of the illegality found⁹¹⁹. It follows in particular that a purely formal illegality, relating for example to the consultation of a body or the reasoning of a decision, does not satisfy this requirement⁹²⁰.

This being said, the three conditions included in this formula - namely, infringement, serious infringement and manifestly unlawful infringement - should be described separately in order to highlight the specific characteristics of each.

Section 1: A breach

915 Despite the use of the conditional past tense ("would have carried"), the interim relief judge requires the applicant to truly demonstrate the serious and manifestly unlawful infringement. This must be proven and certain, and not merely possible or probable. When the judge considers the conditions for granting the order to be met, this means that they are definitely met; the infringement, the seriousness and the illegality are established and proven without any possible doubt. It was not the intention of the drafters of the text to allow the intervention of the judge of référé-liberté in the case of merely probable infringement or illegality. The preliminary draft law referred to "cases where (...) a serious and manifestly unlawful infringement of a fundamental freedom is committed". In practice, the change to the past conditional occurred with the introduction into Article L. 521-2 of the Code of Administrative Justice of the phrase "in the exercise of its powers" (see *infra*, §§ 321-322) without the slightest comment being made on the precise term "would". The purpose of this purely editorial amendment was never to open up the interim relief procedure to merely hypothetical infringements and illegalities. Although the interim relief judge sometimes states that he or she makes his or her decisions "in the light of the state of the investigation" (see for example CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL)*, *Lebon* p. 311; CE, ord. 21 November 2002, *Gaz de France*, *Lebon* p. 408), this in no way means that he is satisfied with a "serious and manifestly illegal infringement" that is not certain in nature. Moreover, it should be noted that the administrative judge also uses this formula in proceedings on the merits (see for example: CE, Ass., 31 May 1957, *Rosan Girard*, *Lebon* p. 355, concl. GAZIER, *GAJA* n° 82).

916 Thus, a measure may infringe a fundamental freedom without being manifestly illegal (CE, Sect., 30 October 2001, *Ministre de l'Intérieur c/ Tliba*, *Lebon* p. 523; CE, ord. 29 September 2004, *Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c/ Aubame*, n° 272584; CE, ord. 9 December 2004, *Commune de Béziers*, n° 274852; CE, ord. 9 April 2001, *Belrose et autres*, *Lebon T.* p. 1126). Conversely, it may be tainted with illegality without constituting a serious infringement of a fundamental freedom (CE, ord. 12 November 2001, *Commune de Montreuil-Bellay*, *Lebon* p. 551). Admittedly, when rejecting a request for interim relief, the judge sometimes denies the presence of a "serious and manifestly illegal infringement of a fundamental freedom" (see in particular CE, ord. 23 May 2001, *Jacques VII*, n° 233941; CE, ord. 20 February 2002, *Ploquin*, n° 243234; CE, ord. 19 July 2001, *Société générale bâtiment et habitation (SGBH)*, n° 248742; CE, ord. 4 October 2002, *Rousselle*, no. 250744). However, this formula seems to be used more to mean that no condition for granting is met. Otherwise, the judge designates the condition which, in the circumstances of the case, is precisely missing.

917 See CE, ord. 12 November 2001, *Commune de Montreuil-Bellay*, *Lebon* p. 551: "it follows both from the terms of Article L. 521-2 and from the purpose for which the procedure it establishes was created that *there must be a direct relationship between the illegality found against the administrative authority and the seriousness of its effects* with regard to the exercise of the fundamental freedom in question".

918 The formulas used by the interim relief judge clearly express the need for such a link. In the *Djalout* order, after noting the irregularity of the procedure followed before the administrative authority during the designation of the country of return of the person concerned, the judge noted "that *this irregularity does not 'seriously infringe' a fundamental freedom*" (CE, order 27 March 2001, *Minister of the Interior v. Djalout*, *Lebon* p. 158). Consequently, it is from the irregularity that the infringement of a fundamental freedom must proceed. Even more explicitly, it stated that in the event of an appeal against a decision, the judge of the référé-liberté can only order its suspension "on condition that he or she has first established that this measure is vitiated by a manifest illegality *from which* a serious infringement of a fundamental freedom *follows*" (CE, ord. 14 October 2004, *Arre*, n° 273047). See, for similar wording, CE, ord. 17 December 2004, *Faure*, No. 275219: "Considering that the implementation of the powers that Article L. 521-2 of the Code of Administrative Justice attributes to the judge of summary proceedings presupposes that a measure taken by an administrative authority is vitiated by a manifest illegality *from which* a serious infringement of a fundamental freedom *follows*".

919 The same applies to the procedure of déféré-liberté. The "serious ground" (now "serious doubt") for annulling the act is the illegality of the infringement of a public or individual freedom. Consequently, the decisions referred to can only be considered as falling within the scope of this procedure "if they are of a nature to illegally compromise the exercise of a public or individual freedom, *the illegality of this infringement constituting the serious ground* which, in the state of the investigation, would be of such a nature as to justify the annulment of the contested act" (CE, ord. 15 December 1982, *Commune de Garches*, RDP 1983, pp. 211-215, note R. DRAGO).

920 See *infra*, § 262.

224. It is up to the applicant to prove the alleged infringement⁹²¹. It may happen, even if this remains very rare, that the judge identifies the infringement of "a" fundamental freedom without specifying precisely which freedom is at issue. In some cases, it is apparent from the facts of the case. For example, a dispute concerning the use of private property necessarily involves, in the circumstances of the case, only the right of ownership⁹²². In other cases, it is more difficult to identify⁹²³.

For a situation to be considered an infringement of a fundamental freedom, it must have certain characteristics. As regards the origin of the infringement, the interim relief judge considers that it may stem either from the subject of an administrative act or action, or from the reasons for it.

I. The characteristics of the injury

225. The infringement of a fundamental freedom is a "violation" of it⁹²⁴. It can be defined as an actual interference with the domain materially recognised to the beneficiary of a fundamental freedom. The infringement therefore presupposes the combination of three elements. Firstly, the contested measure intervenes in the area protected by the fundamental freedom. Secondly, the applicant has the status of a beneficiary of the fundamental freedom invoked. Finally, it is of a present and certain nature.

A. The challenge to the object protected by the fundamental freedom (rationae materiae)

226. From a material point of view, the infringement is analysed as an interference in the area protected by a fundamental freedom. The interim relief judge considers that certain measures are by themselves not capable of materially infringing a freedom.

1. Interference in the area protected by a fundamental freedom

227. Infringement is not always synonymous with a *restriction* on the *exercise* of a fundamental freedom. While this qualification is generally valid for freedoms to do, it is inoperative for freedoms which, strictly speaking, are not exercised. Therefore, it is preferable to use the more general formula of interference with the area protected by the fundamental freedom. This means that the administrative measure must take place within the area materially protected by the fundamental freedom invoked. It must involve one of its constituent elements or components⁹²⁵. There are many examples to illustrate this requirement.

228. However, the infringement is not characterised if the contested measure does not interfere with one of the elements protected by the fundamental freedom. For example, since the principle of free expression of the vote gives rise to a right to *global* communication of the electoral list, it is not at issue in the case of a refusal to communicate this list *separately* for each polling station⁹²⁶. The right to medical consent is limited when the patient's choice risks causing his or her death, but it is not materially at issue when the medical act to which

⁹²¹ The burden of proof is on the applicant. The judge will not qualify the infringement if the applicant does not provide sufficient evidence. See, for example, regarding an allegation of infringement of personal liberty that is not accompanied by the justifications and elements needed to establish its existence: CE, ord. 15 October 2001, *Ministre de l'Intérieur c/ Hamani*, *Lebon* p. 466.

⁹²² CE, ord. 10 September 2003, *Commune d'Hyères-les-Palmiers*, n° 260015. See also CE, ord. 9 December 2004, *Commune de Béziers*, n° 274852: the prohibition made to the applicants "to live in the building of which they are owners, does not affect less the exercise of a fundamental freedom within the meaning of article L. 521-2 of the code of administrative justice".

⁹²³ See, in relation to an extradition measure: CE, ord. 29 July 2003, *Pegini*, *Lebon* p. 345. On this decision, see *supra*, § 127.

⁹²⁴ See, using the expression: CE, ord. 30 December 2003, *SARL People*, n° 263135.

⁹²⁵ The approach is identical in the context of assault, as illustrated in particular by the case law on freedom of association. This freedom refers to the freedom to form and operate associations. It is not at issue in the event of the termination of a contract by which the municipality leased one of its premises to an association (Civ. 1^{ère}, 19 December 1995, *Ville d'Epinay-sur-Seine*, *Dr. adm.* 1996, n° 10; *D.* 1996, IR, p. 39). On the other hand, it is infringed by the affixing of a padlock on the entrance door of the premises of a retirement home run as an association (Civ. 1^{ère}, 24 October 1977, *Bull. civ.* I, n° 386).

⁹²⁶ CE, ord. 7 February 2001, *Commune de Pointe-à-Pître*, *Lebon* T. p. 1129.

he or she intends to object is essential to his or her survival⁹²⁷. The impossibility for a litigant to be physically present at a hearing organised before an administrative court of appeal does not affect the possibility of effectively defending himself. Not only is the procedure before this court written, but the applicant can also be represented by a lawyer⁹²⁸. The freedom of association and the right to strike protect respectively the freedom to form and operate a trade union organisation and the freedom to stop work. These fundamental freedoms are not called into question by a circular from the education authority inspector instructing school headmasters to take a census of absences due to strikes by primary school teachers⁹²⁹. The purpose of this census, which is to make deductions from the salaries of striking teachers, in no way prevents the freedom to stop working and in no way hinders the free functioning of trade unions.

229. Conversely, the infringement may be qualified when the disputed measure interferes in the area materially protected by a freedom. For example, the law recognises that a patient in an involuntary admission centre has the freedom to communicate with the administrative and judicial authorities, but this freedom is affected by the prohibition, verbally mentioned to the person concerned, on sending communications to these authorities⁹³⁰. The right to lead a normal family life implies the right to remain with one's family. Thus, "in view of the fact that a minor child is temporarily separated from both parents as a result of her placement in a waiting zone, the exercise of her right to a normal family life is affected"⁹³¹. Similarly, since freedom of enterprise includes the possibility of exercising an economic activity, it is called into question by the decision ordering the closure of a commercial establishment⁹³² or a restaurant/disco⁹³³.

230. Positive and negative examples from the areas of local government, personal freedom and property rights provide a better understanding of how the judge distinguishes between measures that interfere with the area protected by the fundamental freedom and those that fall outside its boundaries.

The principle of free administration protects the autonomy of a local authority from interference by third parties; it does not cover internal relations within the authority⁹³⁴. Consequently, this principle is not at issue in the case of a refusal to convene the municipal council⁹³⁵ or the irregular functioning of a mixed syndicate with the impossibility for a region to withdraw from it⁹³⁶. On the other hand, the principle is directly at issue when a municipality is included, without its consent, in a public establishment of inter-municipal cooperation⁹³⁷, or when such an establishment prematurely exercises powers still falling within the competence of the member municipalities⁹³⁸.

Personal liberty, insofar as it implies, inter alia, the prohibition of torture and inhuman and degrading treatment, may be applicable in the case of the return of a foreign national to his or her country of nationality. In such a case, the infringement of personal liberty is established if the elements of the file attest that the person concerned would be exposed to a real risk for his or her person⁹³⁹. On the other hand, if the person concerned does not prove the existence of such a risk, personal freedom cannot be considered to have been infringed⁹⁴⁰.

The right of ownership has as its component the right for the residents to have free access to the public road. Thus, this right is in question when land is enclosed following works carried out by the administration, depriving the interested parties of any possibility of access to their plot⁹⁴¹. On the other hand, it is not affected by the installation of a barrier upstream of a private road if this installation in no way hinders the use of the road by its owners and, consequently, does not deprive the latter of access to their plots⁹⁴². In the first case the owners are deprived of the possibility of using their property, in the second they retain free access to it. The right to property also includes the free disposal of one's property in the broad sense. This dimension of the right of ownership is at

927 CE, ord. 16 July 2002, *Feuillatey, Lebon* p. 309.

928 CE, ord. 3 April 2002, *Minister of the Interior v. Kurtarici, Lebon T.* p. 871.

929 CE, ord. 25 July 2003, *Ministre de la Jeunesse, de l'Éducation et de la Recherche c/ Syndicat unifié des directeurs, instituteurs et professeurs des écoles de l'enseignement public Force ouvrière (SNUDI-FO)*, n° 258677, *AJDA* 2004, pp. 447-451, note O. GRIMALDI.

930 CE, 15 May 2002, *Baudoin*, n° 239487.

931 CE, ord. 29 September 2004, *Minister of the Interior, Internal Security and Local Freedoms v. Aubame*, n° 272584.

932 CE, ord. 14 March 2003, *Commune d'Evry, Lebon T.* p. 931.

933 CE, ord. 16 August 2004, *Minister of the Interior, Internal Security and Local Freedoms v. Basset*, No. 271148.

934 See V. HAÏM, "Référé-liberté et administration des collectivités territoriales", *AJDA* 2005, pp. 810-813.

935 CE, Sect. 18 January 2001, *Morbelli, maire de la Commune de Venelles, Lebon* p. 18.

936 CE, 8 March 2002, *Région Languedoc-Roussillon*, n° 236587.

937 See CE, ord. 24 January 2002, *Commune de Beaulieu-sur-Mer, Lebon T.* p. 873, *LPA* 14 March 2002, n° 53, pp. 17-18, note N. KATTINEH (inclusion in a community of agglomeration); CE, ord. 1^{er} March 2006, *Minister delegated to the territorial communities c/ Commune of Salies-du-Salat*, n° 290417, mentioned in the recueil *Lebon* (inclusion in a community of communes).

938 CE, 12 June 2002, *Commune de Fauillet et autres, Lebon* p. 215. The public establishment of inter-municipal cooperation dispossesses the communes of a part of their competences before time.

939 CE, ord. 14 January 2005, *Bondo, Lebon T.* p. 915.

940 CE, ord. 20 December 2001, *Chikh, n°* 241154.

941 CE, ord. 31 May 2001, *Commune d'Hyères-les-Palmiers, Lebon* p. 253. During road and pavement repair works, the municipality had removed the connection to the road of four premises used as garages or warehouses and had installed bollards preventing access by vehicles. The judge stated that "by preventing free access to the premises in question from the public highway for the use for which they were intended", the municipality was infringing the right of ownership.

942 CE, ord. 20 July 2001, *Commune de Mandelieu-la-Napoule, Lebon* p. 388.

issue in the case of the incorporation into a golf course of a parcel of land belonging to the applicant⁹⁴³, the decision to cut down trees located on private property⁹⁴⁴, measures to immobilise transport vehicles⁹⁴⁵, the slaughter of a farmer's cattle⁹⁴⁶, the refusal to use public force to evict unauthorised occupants of a private property⁹⁴⁷ or the removal of a winding chain placed at the entrance to a private road by its co-owners and the issuing of a decree providing for free access and parking for all vehicles on this road⁹⁴⁸. On the other hand, a decision relating to the occupation of a mooring does not call into question the free disposal of a property. Such a decision does not affect the freedom, invoked by the applicant, "to use freely the property constituted by the vessel Tuku Hentu"⁹⁴⁹. It neither deprives nor hinders the free disposal of that property by the interested party.

231. By their very nature, some decisions interfere with an element protected by a fundamental freedom. This is the case, for example, of the refusal to provide assistance from the public force for the evacuation of illegal occupants of a private building. Such a decision in itself infringes the right to property⁹⁵⁰. Similarly, the refusal to issue or renew a passport to a French citizen is in itself an infringement of the freedom to come and go⁹⁵¹. By their very purpose, and because of their characteristics, these types of measures always infringe the right to property in the case of the former, and the freedom to come and go in the case of the latter. They automatically interfere in the area protected by freedom. On the other hand, there are other decisions which, by their very nature, are not likely to infringe a fundamental freedom.

2. Measures that are not likely to infringe a fundamental freedom

232. The judge establishes in a general way that certain categories of measures do not constitute, "by themselves", an infringement of "one" or "no" fundamental freedom. This reasoning, which is "a little short" notes Mr Chapus, "is not the most enlightening"⁹⁵². Since the judge is referring to 'a' fundamental freedom and not the specific fundamental freedom invoked by the applicant, the formulas used seem to exclude the possibility of infringement in a general way. In other words, "a" is synonymous with "all"; the formula used seems to mean that in any event, no fundamental freedom can be affected by the contested measure. It should be pointed out that the absence of infringement is valid only for the measure in question and because it presents specific and constant characteristics. The judge strictly limits the scope of the solutions to a particular type of measure; he is deliberately careful not to use general formulas that would be applicable beyond the single measure in question. It is therefore difficult to generalise case law solutions that are deliberately limited to a specific measure.

This understanding by type of measure never claims to have an absolute scope. Indeed, the characterisation of an infringement becomes possible again, for those measures that are not in themselves likely to infringe a fundamental freedom, in two cases. Firstly, when the act in question will, by its motives, reveal an infringement of a fundamental freedom. Secondly, when the measure has been taken under conditions or in a context that characterise a "particular circumstance", which causes the measure to lose its traditional characteristics and, consequently, justifies abandoning the presumption of non-infringement established for it.

233. The first of these measures is the issue of a building permit. Such a permit, 'the purpose of which is to ensure that the planned construction complies with the applicable regulations' and 'which is granted subject to the rights of third parties', is 'not in itself likely to infringe the right of ownership'⁹⁵³. One might venture to say,

943 CE, ord. 22 October 2001, *Gonidec and Brocas*, n° 239165.

944 CE, ord. 8 November 2005, *Moissinac Massenat, Lebon* p. 491.

945 CE, ord. 9 April 2001, *Belrose and others, Lebon T.* p. 1126.

946 CE, ord. 1^{er} June 2001, *Ploquin, Lebon T.* p. 1126. Such a measure "removes the free disposal by an owner of some of his property and thereby affects the exercise of a 'fundamental freedom' within the meaning of the provisions of Article L. 521-2 of the Code of Administrative Justice".

947 See the decisions cited *belon*, § 273.

948 CE, ord. 10 September 2003, *Commune d'Hyères-les-Palmiers*, n° 260015.

949 CE, ord. 8 March 2004, *Société Yacht club international de Saint-Laurent-du-Var*, n° 265144.

950 See CE, ord. 21 November 2002, *Gaz de France, Lebon* p. 408; CE, ord. 3 January 2003, *Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c/ Société Kerry, Lebon T.* p. 928, p. 931; CE, ord. 15 October 2004, *Société Sud-Est réalisations*, n° 272934.

951 CE, ord. 9 January 2001, *Deperthes, Lebon* p. 1; CE, ord. 11 October 2001, *Tabibou, Lebon T.* p. 1133; CE, ord. 20 July 2004, *Mzimba*, n° 270044. See also, for a refusal to issue a national identity card: CE, ord. 11 March 2003, *Samagassi, Lebon* p. 119; CE, ord. 22 August 2003, *Cohen*, n° 259583.

952 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1598.

953 CE, ord. 11 October 2001, *Commune de Saint-Bauzille-de-Putois, Lebon* p. 462. In the present case, the issue of the disputed permit cannot be considered, in itself, as involving a right of way on an adjacent plot of land - since the rights of third parties were taken into consideration - nor, consequently, as infringing a fundamental freedom. It should be noted that in a similar manner, but without using the formula "by itself",

in view of the reasoning adopted by the order, that this solution is intended to apply to the issue of any authorisation granted subject to the rights of third parties. On several occasions, the judge has affirmed that the refusal to issue such and such an authorisation did not, in itself, infringe a fundamental freedom. Thus, "the refusal to allocate a site on the public domain hosting the Foire du Trône, which was opposed to the requests of the applicants, cannot, even though it has the consequence of depriving them of the possibility of exercising their commercial activity, be considered as infringing a fundamental freedom"⁹⁵⁴. Similarly, "the refusal to authorise a commercial establishment to occupy the communal public domain with a view to installing a terrace, even though it has an impact on the commercial attraction of the latter, cannot in itself be regarded as infringing a fundamental freedom"⁹⁵⁵. The same applies to the withdrawal of an authorisation, when the holder no longer meets the legal conditions for benefiting from it⁹⁵⁶.

Similarly, "an administrative authority does not infringe a fundamental freedom when it takes *measures relating to the exercise of a regulated professional activity*, under the conditions and for the reasons provided for by the law and the regulatory provisions enacted for its application"⁹⁵⁷. For example, in the *Hoffer* decision of 18 September 2002, the Assembly of French Polynesia had made the exercise of the activity of taxi entrepreneur conditional on the possession of a certificate of capacity. The interim relief judge considered that the organisation, according to the rules laid down in this decision, of an examination prior to the issue of certificates of competence could not be regarded as infringing a fundamental freedom⁹⁵⁸. It should be noted that in such a case, the obstacle to the classification of the infringement results from the nature of the measure and not from the fact that the infringement is provided for by the law. Indeed, contrary to what is sometimes asserted, an infringement, even if provided for by law, is still an infringement within the meaning of Article L. 521-2 of the Code of Administrative Justice⁹⁵⁹.

Another category seems to be the sanctioning measures taken by the administration following a fault committed by the applicant. By his behaviour, the applicant has placed himself in contradiction with legislative and regulatory provisions. He committed a breach exposing him to a sanction provided for by the texts⁹⁶⁰. He has placed himself in an illegal situation and is subject to the legally prescribed consequences. For this reason, the interim relief judge considers that "a measure of exclusion of a pupil from a high school for disciplinary reasons cannot be considered as infringing a fundamental freedom"⁹⁶¹. He also affirmed "that the decision, even if it is illegal, excluding a public

the judge of the *déféré-liberté* had affirmed that a municipal decree granting a building permit is not "among the acts referred to in Article 3 as likely to infringe public or individual freedoms" (CE, ord. 11 December 1984, *Commissaire de la République du département de la Charente-Maritime*, no. 64-388, extract quoted in S. MARTIN, *Contrôle a posteriori de la légalité des actes des collectivités locales*, Berger-Levrault, 1990, pp. 228-229). See in the same sense, for the authorization to create a pond: CE, ord. 10 January 1985, *Doret*, *AJDA* 1985, p. 366, note H. PERINET-MARQUET.
954 CE, ord. 6 April 2001, *Lapere et al.* This solution must be compared with the constant jurisprudence of the Conseil d'Etat, which excludes the invocation of the principle of freedom of trade and industry for activities whose exercise is subject to prior administrative authorisation (see for example CE, Ass., 21 November 1958, *Syndicat national des transporteurs aériens*, *Lebon* p. 578).

955 CE, ord. 16 September 2002, *Société EURL La Cour des miracles*, *Lebon* T. p. 314. For a decision by the dental surgeons' association refusing to allow a practitioner to transfer the headquarters of his practice, see CE, order of 9 February 2001, *Philippart and Lesage*, n° 230112. In a comparable way, the judge of the excess of power considers that a decree which provides for the delivery of authorizations of private occupation of the public domain "does not carry, by itself, attack with the principle of the freedom of the trade and the industry" (CE, February 11, 1998, *City of Paris*, *Lebon* p. 146, *AJDA* 1998, p. 527, concl. G. BACHELIER).

956 Thus, "the decision by which, in the exercise of the powers conferred on him by the Civil Aviation Code with regard to the regulated activity of air carrier, the Minister in charge of transport terminates an air carrier operating licence on the *basis that the conditions to which the issue of such a licence is subject are no longer fulfilled*, cannot be regarded as infringing a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice" (CE, order of 10 February 2003, *Société d'exploitation AOM-Air-liberté*, n° 254029).

957 CE, ord. 24 February 2003, *Vincendeau*, n° 254362. In the present case, the decision by which the prefect, in application of the combined provisions of the Environment Code and the Rural Code, suspended for one year the fishing licences granted to the applicant, cannot be regarded as infringing a fundamental freedom.

958 CE, ord. 18 September 2002, *Hoffer*, n° 250331.

959 Cf. CE, ord. 24 January 2002, *Commune de Beaulieu-sur-Mer*, *Lebon* T. p. 873: "Considering that the fact that a decree creating a community of agglomerations includes a municipality without the latter having given its assent affects the free administration of the territorial communities, which constitutes a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice; that this is so, *even though this possibility is expressly provided for by the provisions of Article L. 5211-5 of the General Code of Territorial Communities*. See also CE, ord. 9 December 2004, *Commune de Béziers*, n° 274852: "even if, as the appellant commune argues, a ban on living is among the security police measures that may be taken by the mayor on the basis of the aforementioned provisions of the General Code of Territorial Authorities, the ban on M. and Mrs. Rousset from living in the building they own does not affect the exercise of a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice.

960 With regard to road transport licences, "when the prefect makes use, under the conditions and for the reasons provided for by the law, of his power to withdraw previously granted licences, he cannot be considered to be infringing a fundamental freedom" (CE, order 26 March 2002, *Société Route Logistique Transports*, *Lebon* p. 114). Article 37 of the law of 30 December 1982 on the orientation of internal transport provides that road transport licences may be temporarily or permanently withdrawn in the event of infringement of provisions relating to transport, working conditions and safety. The company Route Logistique Transports had committed various offences falling within the scope of Article 37. By withdrawing the previously granted licences, the Prefect cannot be considered to be infringing a fundamental freedom. Similarly, "when the prefect makes use, under the conditions and for the reasons provided for by the law, of his power to withdraw or not renew the approval previously granted to a driving school, he cannot be considered as infringing a fundamental freedom" (CE, ord. 1^{er} March 2002, *Bonfils*, *Lebon* p. 69). Mr Bonfils had been convicted of teaching the driving of land motor vehicles without personally holding a teaching permit. It follows from the combined provisions of Articles L. 213-1, L. 213-3 and R. 212-4 of the Highway Code that a teaching licence cannot be issued to persons who have been convicted of teaching driving without a licence. By simply applying these provisions, the prefect cannot be considered as infringing a fundamental freedom. Similarly, when the administrative authority uses, under the conditions and for the reasons provided for by law, the power to pronounce the definitive closure of a private establishment accommodating the elderly, on the grounds that the latter has not requested the required authorisation for its extension, it cannot be considered as infringing a fundamental freedom (CE, ord. 29 April 2004, *Département du Var*, n° 266902).

961 CE, 29 November 2002, *Arakino*, *Lebon* p. 422.

servant for disciplinary reasons does not constitute, in itself, an infringement of a fundamental freedom within the meaning of the aforementioned provisions of Article L. 521-2 of the Code of Administrative Justice"⁹⁶². In an order of 15 March 2002, the judge declared "that if the administration's refusal to return Mr Delaplace's driving licence has an impact on the conditions under which he can exercise his profession as a delivery driver (...), this refusal does not in itself infringe a fundamental freedom"⁹⁶³.

This category also includes other decisions such as the transfer of a civil servant in the interest of the service⁹⁶⁴, the transferability order issued in an expropriation procedure⁹⁶⁵, the conditions under which a legal person governed by public law applies the rules relating to the continuation of employment contracts in the event of the transfer of a company, which "cannot be considered as affecting in themselves the exercise of a fundamental freedom"⁹⁶⁶ or the deportation ordered by the administrative authority following a sentence of deportation from French territory pronounced by the criminal court⁹⁶⁷.

234. The reservation of particular circumstances, absent from the first decisions, appeared later to temper the scope of formulations which seemed to exclude in principle and in any event the possibility of an infringement⁹⁶⁸. The question of determining the State responsible for an asylum application illustrates how a presumption of non-infringement can be set aside in particular circumstances. In principle, the right to asylum cannot be "infringed by the mere fact that the provisions (...) of Article 10(1) of the Act of 25 July 1952 have been applied to a foreigner who has submitted an application for asylum, the examination of which falls under the jurisdiction of another State (...)"⁹⁶⁹. In the *Nikoghosyan* order, the interim relief judge stated that the implementation of the procedure for determining the State responsible for examining the asylum application "cannot in itself infringe the fundamental freedom to apply for refugee status"⁹⁷⁰. Nevertheless, this general rule may be overridden in particular circumstances and, depending on the behaviour of the administration, constitute an infringement of a fundamental freedom. Thus, in the aforementioned *Nikoghosyan* order, the judge indicated that the exercise of the freedom to apply for refugee status "would be compromised if the examination of the application was carried out without the presence of its author, who alone was able to provide the required justifications and answer the questions of the authorities in charge of examining the case". In the very specific circumstances of this case, the Prefect infringed the right to benefit from an examination procedure for his asylum application in accordance with the guarantees that must be attached to it. Indeed, by placing the asylum seeker before the alternative of either leaving his family to support his asylum application in another State party to the Dublin Convention of 15 June 1990, or having it examined in his absence for an indefinite period of time, the administration infringed the fundamental freedom to apply for refugee status.

⁹⁶² CE, ord. 27 June 2002, Centre hospitalier général de Troyes, *Lebon* p. 228.

⁹⁶³ CE, ord. 15 March 2002, *Delaplace*, *Lebon* p. 105.

⁹⁶⁴ CE, order of 28 January 2003, *Renard*, n° 253617: "the decision pronouncing, in the interest of the service, the transfer of a soldier does not constitute, by itself, a violation of a fundamental freedom".

⁹⁶⁵ These rulings "are not likely to infringe, by themselves, a serious and manifestly illegal right of ownership of the applicant" insofar as they do not transfer ownership (TA Orléans, ord. 19 February 2001, *Galleau*, *AJDA* 2001, pp. 780-783, note R. HOSTIOU; *AJDI* 2002, pp. 20-21, obs. S. GILBERT and E. SIMONET). These decrees have no direct impact on the applicant's property rights. It is only with the expropriation order, whose litigation is the responsibility of the judicial judge, that the rights of the interested parties are likely to be affected.

⁹⁶⁶ CE, ord. 13 March 2002, *Mori and others*, *Lebon* p. 101.

⁹⁶⁷ When a foreign national is sentenced to a deportation order by a criminal court, the prefectural order to deport him or her does not, in itself, infringe the freedom of movement or the right to respect for family life. The deportation measure is, in principle, the necessary consequence of the criminal court's deportation order. Indeed, under Article 27 of the Ordinance of 2 November 1945, the deportation "automatically entails the deportation of the convicted person to the border". This means that the prefect is obliged to pronounce this measure; the infringement actually stems from the pronouncement by the criminal judge of the penalty of inadmissibility. Since it has no margin of initiative to carry out the deportation measure and does not have to assess it, the administration cannot be considered as infringing a fundamental freedom (CE, ord. 27 March 2001, *Ministre de l'Intérieur c/ Djalout*, *Lebon* p. 158; CE, ord. 15 October 2001, *Ministre de l'Intérieur c/ Hamani*, *Lebon* p. 466, n° 239022; CE, ord. 21 December 2001, *Mahmoudi*, n° 241188; CE, ord. 17 December 2002, *Batoudounou Ntoumi*, n° 252479; CE, 12 July 2002, *Oulai Doué*, n° 245141). Before the judge responsible for deportation, such a request is sanctioned on the grounds of admissibility (CE, ord. 2 December 1991, *Beya*, *Lebon T.* p. 944). It should be noted that the decision determining the country of return may, if it exposes the person concerned to risks of the kind referred to in Article 3 of the European Convention on Human Rights, be considered as infringing his personal freedom or his individual freedom (CE, ord. 27 March 2001, *Ministre de l'Intérieur c/ Djalout*, *Lebon* p. 158; CE, ord. 15 October 2001, *Minister of the Interior v. Hamani*, *Lebon* p. 466, no. 239022; CE, ord. 20 December 2001, *Chikh*, no. 241154). This solution is consistent with the case law that has developed on the basis of Article 22 bis of the Ordinance of 2 November 1945. In the event of a ban from French territory, the judge in charge of deportation considers that the decision fixing the country of return is an administrative measure that can be appealed (CE, opinion 26 May 1995, *Stein*, *Lebon T.* p. 716). In taking this decision, the administration in fact recovers a discretionary power; the measure taken is no longer the necessary consequence of the conviction pronounced by the criminal judge.

⁹⁶⁸ See, for example, CE, ord. 23 March 2004, *Chapron*, n° 265735: "the temporary modification of the detention regime which results for the person concerned from his placement in a disciplinary cell, under the conditions provided for in article D. 251-3 of the code of criminal procedure, cannot by itself and in the absence of particular circumstances, be considered as seriously infringing" on the freedom to come and go.

⁹⁶⁹ CE, ord. 2 May 2001, *Ministre de l'Intérieur c/ Dziri*, *Lebon* p. 227. Consequently, the interim relief judge stated, "the Minister of the Interior is entitled to maintain that in considering that the initiation of a readmission procedure to Spain for the Dziri couple and their children constituted a serious and manifestly illegal infringement of the exercise by them of the fundamental freedom that constitutes the right to asylum and in ordering the Prefect of Haute-Garonne to issue them with a residence permit valid until a decision on their application has been taken by the French authorities, the interim relief judge of the administrative court of Toulouse misapplied the applicable constitutional, conventional and legislative rules and consequently requested the annulment of the contested order. See in the same sense CE, ord. 4 September 2003, *Thanattikoul*, *Lebon T.* p. 928; CE, 3 May 2004, *Dogan épouse Antik*, *Lebon T.* p. 854.

⁹⁷⁰ CE, ord. 25 November 2003, *Ministre de l'Intérieur, de la Sécurité intérieure et des Libertés locales c/ Nikoghosyan*, *Lebon T.* p. 927.

By imposing such a choice on the applicant, the prefect infringes, "depending on the case, either his right to respect for family life, or his right to benefit from a procedure for examining his asylum application that complies with the guarantees that must be attached to it". What is at issue here is not the readmission procedure to the competent State but the particular circumstances in which it takes place. Therefore, the infringement is characterised from a material point of view.

Nevertheless, for the judge to recognise the existence of an infringement within the meaning of Article L. 521-2, it is not enough to be within the scope protected by a fundamental freedom. It is also necessary that the person who invokes the violation has the status of beneficiary of this freedom.

B. Challenge to the beneficiary of the fundamental freedom (rationae personae)

235. The applicant must have the capacity or title to avail himself of the freedom he is invoking. It is obvious that not just any individual can claim the benefit of any fundamental freedom. Only the beneficiaries of a fundamental freedom can invoke its violation. Persons who do not fall within the circle of beneficiaries of a freedom cannot, by assumption, allege infringement of that freedom.

Thus, foreign nationals cannot avail themselves of the rights reserved for French citizens. In particular, as they are "subject to specific measures regulating their entry and residence in France", they do not benefit, "unlike nationals, from the freedom of entry into the territory"⁹⁷¹. Just as logically, an illegal alien cannot invoke the freedoms granted to legal aliens. In particular, he or she "cannot claim the freedom to exercise a profession on French territory and the benefit of the social rights that derive from it"⁹⁷². Conversely, and in application of the same principles, a foreigner in a legal situation may claim the benefit of these rights and invoke their violation before the judge of the *référé-liberté*⁹⁷³.

The status of beneficiary of a fundamental freedom may depend on parameters other than nationality or regularity of residence on French soil. For example, the right to lead a normal family life is reserved for persons who are family members in the legal sense. It is not at issue in the case of a refusal of an entry visa to children who are linked to the applicant only by a simple adoption under Madagascan law, which does not have the same effects as a simple adoption under French law⁹⁷⁴. Similarly, the *de facto* judge refuses to allow persons who are not owners of property to invoke the violation of property rights in support of their application. Thus, neither the tenant of a property⁹⁷⁵ nor the holder of a concession on the public domain⁹⁷⁶ may invoke a violation of this right.

236. Furthermore, the alleged infringement of a fundamental freedom must be direct and personal. In the *Meyet* order of 17 April 2002, the interim relief judge stated that the applicant must 'directly and personally suffer the infringement of the fundamental freedom he or she is claiming'⁹⁷⁷. The applicant considered that the Conseil supérieur de l'audiovisuel had infringed the free exercise of suffrage by not imposing on Canal + an obligation to treat the various candidates in the presidential election fairly in its satirical programme 'Les Guignols de l'info'. The judge stated that in his sole capacity as a voter, the applicant had not suffered any direct and personal harm. The administrative judge did not admit any indirect infringement or infringement that did not concern the applicant's person.

The harm, which is characterised from a material and personal point of view, must also be characterised from a temporal point of view.

C. A constituted violation (rationae temporis)

237. In order to be qualified by the judge, the infringement must exist on the day the case is brought before him, which presupposes that its occurrence is certain and proven. The infringing situation must be current and already constituted. If the case is referred to the court too early, before the infringement has begun, or too

971 CE, ord. 4 March 2002, *Tinor*, n° 243653.

972 CE, ord. 5 March 2001, *Préfet de l'Hérault c/ Hajjaj, Lebon T.* p. 1130. Indeed, this decision states that "the exercise of rights and freedoms that foreigners may enjoy on French territory is subject to the legality of their entry and residence with regard to the applicable laws and regulations and international conventions".

973 CE, ord. 11 June 2002, *Ait Oubba, Lebon T.* p. 869.

974 CE, ord. 12 September 2001, *Langard*, n° 238106.

975 See Civ. 1^{ère}, 18 June 1974, *Bull. civ. I*, n° 197.

976 Civ 1^{ère}, 27 May 1975, *Legros c/ Maire de Saint-Lunaire*, *Bull. civ.* n° 178.

977 CE, ord. 17 April 2002, *Meyet, Lebon T.* p. 870.

late, after it has ceased, the requirement of an infringement within the meaning of Article L. 521-2 cannot be regarded as having been met⁹⁷⁸.

238. The infringement cannot be qualified prematurely, i.e. even before the situation in question arises.

For example, the infringement of the right to property cannot be characterised, from a temporal point of view, when the administrative authority refrains from providing the assistance of the public force during the winter truce arranged by article L. 613-3 of the Code of Construction and Housing⁹⁷⁹. When the texts prohibit the administration from acting, it cannot be considered as infringing a fundamental freedom by its abstention. Between 1^{er} November of the year and 15 March of the following year, the prefect's abstention from providing assistance from the public force cannot be analysed as an infringement of the right of ownership. Since the provisions of this text prevent the prefect from taking the measures requested before 16 March, the applicant 'cannot rely on the administrative authority's failure to act before that date to establish the existence of an infringement of a fundamental freedom'⁹⁸⁰.

Similarly, a simple intention expressed by the administrative authority, which in itself produces no immediate effect, cannot be analysed as an infringement of a fundamental freedom within the meaning of Article L. 521-2. Thus, "the decision of the mayor of Castelnau-le-Lez, made public on 11 October 2001 by a press release, to cease in the future to issue reception certificates allowing families in the municipality to accommodate foreigners who do not belong to the European community, which announces an intention and does not, in any case, prevent other authorities from issuing the certificates requested, does not in itself constitute a concrete and *immediate* infringement of a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice"⁹⁸¹. *A fortiori*, there can be no infringement of a fundamental freedom when the administration is sued for a legal situation that has not yet been established⁹⁸².

239. Should this requirement lead to the exclusion of all future infringements from the scope of the summary proceedings? By mentioning the infringement that the administration "would have made" to a fundamental freedom, the wording of Article L. 521-2 seems to exclude any possibility of preventive intervention. However, as Professor Chapus points out, 'an involuntarily restrictive wording could not exclude the possibility, which everything obviously recommends, of a preventive summary procedure'⁹⁸³. Indeed, imposing on the applicant to wait until he or she actually suffers an infringement that is known with certainty to occur would be contrary to the spirit and purpose of this procedure. Moreover, it is in the very interest of an emergency summary procedure to be able to prevent the occurrence of possible damage. Therefore, in order to give full effect to the summary proceedings procedure, the administrative judge did not apply this provision literally.

He admitted, following the example of the judge of the assault⁹⁸⁴, that the infringement could be future if it concerns a measure already enacted but not yet executed. The procedure of the interim relief is open to the applicant when, in principle, the infringement has been decided by the administration. To do so, it must include a precise date of execution. As soon as the measure is stopped, the infringement can be qualified without having to wait for the intervention of the enforcement measures. Consequently, the individual may initiate a summary application for interim relief to obtain, as a preventive measure, the safeguarding of his fundamental freedoms. In the *Ploquin* order of 1^{er} June 2001, the administrative judge accepted the infringement of property rights in the case of a prefectural order prescribing the slaughter of a herd within a month. Although this measure is future in nature, it definitely affects the free disposal of the breeder's property and thus affects the exercise of a fundamental freedom⁹⁸⁵. In a similar manner, the interim relief judge of the administrative court of Toulouse, in an order of 3 August 2005, accepted the infringement of religious freedom concerning a decision by the mayor of the commune

978 If the situation in dispute has ceased by the date of referral or delivery of the judgment, the court will not rule on the conditions for granting it and will reject the application as inadmissible in the first case, and will dismiss the case in the second. See *infra*, § 384.

979 On this provision, see *infra*, § 273.

980 CE, ord. 10 March 2003, *Commune de Nice*, n° 254838.

981 CE, ord. 18 October 2001, *Association groupe local cimade Montpellier*, n° 239071.

982 See CE, ord. 24 December 2002, *Dondeynaz-Shai*, No. 252690. In a petition registered with the secretariat of the contentious court on 19 December 2002, the applicant claimed that the administration had illegally refused her the right to register for a professional examination in February 2002 and asked the judge for interim relief to order the administration to authorise her registration for the examination that will take place in February 2003. The judge declared that "in the absence of a position from the administration regarding her right to register for this future examination, the applicant cannot, in the state of the investigation, invoke any infringement of one of her fundamental freedoms".

983 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1594.

984 See TC, 18 December 1947, *Hilaire c/ Kigen, Lebon* p. 516, *D.* 1948, p. 62, note M. FREJAVILLE, *JCP G* 1948, II, 4087, note G. VEDEL; TC 26 February 1948, *Dame veuve Pugeat c/ Arnaudon, Lebon* p. 507; TC, 25 May 1950, *Société nationale des entreprises de presse, Lebon* p. 660; TC, 17 December 1962, *Société civile du domaine de Comteville, Lebon* p. 830, *RDP* 1963, p. 317. The judge requires that the decision be accompanied by enforcement measures on a fixed date (TC, 4 November 1996, *Vanères et Laure Robert, GP* 1997, 2, p. 732; TC, 5 July 1999, *Préfet du Calvados, Lebon* p. 459). When the administration has announced the execution of its decision in an imminent way, with a certain date, the civil judge of summary proceedings can prohibit that it is preceded. By aiming, beside the manifestly illicit disorder (which corresponds to the assault already carried out), the imminent damage (which corresponds to the assault in the course of realization), article 809 al. 1 of the new code of civil procedure gives a legal basis to the intervention of the civil judge of the summary proceedings to avoid the realization of an assault.

985 CE, ord. 1^{er} June 2001, *Ploquin, Lebon T.* p. 1126.

of Massat to organise public shows and events in the commune's church from 4 to 15 August 2005⁹⁸⁶.

The infringement of a fundamental freedom, which must be material, personal and temporal, may result from the purpose of an administrative measure or from the reasons for it.

II. The origin of the damage

240. The first form of infringement, which relates to the *content* of an administrative measure, is relatively classic. It corresponds to cases in which the act or action of the public authority interferes, by its object or effects, in the area protected by a fundamental freedom. This is the case, for example, when the administration withdraws and withholds the identity documents of a family⁹⁸⁷, refuses to make a municipal hall available to a political party⁹⁸⁸ or orders the closure of a commercial establishment⁹⁸⁹. Similarly, an act that does not have the purpose of limiting a freedom, but may nevertheless have that effect, may also infringe a fundamental freedom. Thus, "the decision by which the labour inspector refuses to authorise the dismissal of a protected employee, which is requested of him because of acts of moral harassment of his subordinates, may, *by its consequences*, infringe a fundamental freedom"⁹⁹⁰.

241. The infringement may also, in a more original way, result from the *reasons for* an administrative decision. This innovative solution was established by the *Casanovas* judgment of 28 February 2001⁹⁹¹. The applicant, Mr Casanovas, is a trainee captain in the fire brigade. Outside the service, he was a political activist who had, in particular, taken part in setting up an association to support members of the Action directe group. By order of 25 June 1999, the Prefect of Meurthe-et-Moselle and the President of the Urban Community of Greater Nancy refused to grant him tenure and terminated his duties as a trainee fire captain. This decision was justified, according to its authors, by the professional inadequacy of the person concerned. Mr. Casanovas considers himself a victim of his political positions outside the service and his involvement with extreme left-wing militants. He claimed that the decision to terminate his employment had been taken not because of alleged professional inadequacy but because of his political opinions. He asked the interim relief judge to suspend the order of 25 June 1999 on the basis of Article L. 521-2 of the Administrative Justice Code. The interim relief judge of the Nancy administrative court affirmed, in a formula that was intended to be general in scope, that "a decision by which a public servant's duties are terminated following a refusal to grant him tenure is not, in itself, *and regardless of the reasons*, likely to infringe a fundamental freedom". Following an appeal, the Conseil d'Etat censured this order and enshrined the principle according to which the grounds for a decision may, in certain cases, "reveal" an infringement of a fundamental freedom that the sole purpose of the act would not be sufficient to reveal. As the government commissioner indicated, the interim relief judge must not "limit himself to examining the apparent purpose of a measure"; it is up to him to "seek its real scope, which may be revealed by its grounds"⁹⁹². The Council of State therefore verifies whether, as the applicant maintains, the decision to terminate his duties was taken because of his political opinions. In view of the file, the Council found that the decision "was taken not because of the opinions that the person concerned may have expressed outside the service but because of his professional inadequacy". Under these conditions, "it does not infringe any fundamental freedom".

The *Casanovas* case law was subsequently confirmed, mainly in civil service litigation⁹⁹³, but also outside the latter⁹⁹⁴. To date, there has been no positive application: no administrative decision submitted to the interim

986 Order confirmed by the Council of State's interim relief judge: CE, ord. 25 August 2005, *Commune de Massat, Lebon* p. 386.

987 CE, ord. 2 April 2001, *Ministre de l'Intérieur c/ Consorts Marcel, Lebon* p. 167.

988 CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL), Lebon* p. 311.

989 CE, ord. 14 March 2003, *Commune d'Ervy, Lebon T.* p. 931.

990 CE, 4 October 2004, *Société Mona Lisa investissements et autres, Lebon* p. 362.

991 CE, Sect. 28 February 2001, *Casanovas, Lebon* p. 108.

992 P. FOMBEUR, concl. on CE, Sect. 28 February 2001, *Casanovas, RFDA* 2001, p. 403.

993 In an order of 27 June 2002, the interim relief judge noted, with regard to the dismissal of a public employee for disciplinary reasons, "that in the present case, it is neither established nor even alleged that the sanction pronounced against Mrs Prieur would be based on reasons other than disciplinary *and* which would reveal an infringement of a fundamental freedom" (CE, order of 27 June 2002, *Centre hospitalier général de Troyes, Lebon* p. 228). It should be noted that the judge raised *ex officio* the existence of a possible infringement based on the reasons for the decision since this, as the order states, was not "alleged". Likewise, when seized of a petition for interim relief filed by a soldier based in French Guiana against the decision to repatriate him to metropolitan France, the interim relief judge affirmed that "in the case in point, it has not been established that the measure taken against the applicant was based on reasons unrelated to the interests of the service *and* which could reveal an infringement of a fundamental freedom" (CE, order of 28 January 2003, *Renard*, No. 253617).

994 See for example, concerning the refusal to authorise the installation of a terrace on the public domain: CE, ord. 16 September 2002, *Société EURL La Cour des miracles, Lebon T.* p. 314. The judge indicated that the infringement of a fundamental freedom could be characterised "if this refusal was based on a reason foreign to the considerations of general interest likely to justify it with regard to the requirements of the good use of the public domain". If the applicant company failed to justify that this refusal "would be based, as it maintains, on personal animosity linked to the local political context", the interim relief judge ruled out infringement of a fundamental freedom. For an application of the *Casanovas* case law outside the field of public service, see also CE, ord. 26 June 2003, *Conseil départemental de parents d'élève de Meurthe-et-Moselle*, No. 257938. The applicants claimed a breach of the principle of equality in the marking of baccalaureate papers. The judge noted that "certain forms of discrimination may, in view of the reasons behind them, constitute infringements of a fundamental freedom within the meaning of

relief judge of the Council of State has been considered to infringe a fundamental freedom on the basis of its grounds.

The notion of motives, within the meaning of this case law, deserves to be clarified. Are they factual *grounds as* understood by the judge of excess of power, or *motives* in the sense that prevails to characterise a misuse of power? These two concepts must be distinguished. The reason is objective⁹⁹⁵; it corresponds to what the decision is based on⁹⁹⁶. Conversely, the motive is subjective; it corresponds to the intention of the author of an act⁹⁹⁷, the "purpose" for which the decision was taken. While motives are the 'psychological determinants' of the decision, the concept of motives is 'attached by nature to the factual data of the decision'⁹⁹⁸. Ms Rouault states that the control implemented by the interim relief judge, under the *Casanovas* case law, "is close to that of the misuse of power, the judge '*sounding the hearts and minds*' of the Administration"⁹⁹⁹. Similarly, referring to this case law, the government commissioner Pierre Collin states that it is appropriate to 'always reserve the case of a possible misuse of power'¹⁰⁰⁰. In his decisions, the interim relief judge verifies both whether the measure is based on reasons unrelated to considerations of general interest likely to justify it and also, where applicable, whether the intention that motivated the administrator reveals an infringement of a fundamental freedom. In the above-mentioned orders *Centre hospitalier général de Troyes* and *Renard*, the control of motives and that of motives is distinct, but at the same time linked by the coordinating conjunction "and". These two dimensions are therefore indissociable: the interim relief judge does not only review what the decision is "based on"; he also examines, first and foremost, what the administration has acted "with a view to"¹⁰⁰¹. For this case law to be applicable, it is necessary not only that the decision is not based on grounds that could justify it, but also that the administration was motivated by an intention alien to the objective of general interest that it could legally pursue¹⁰⁰². The notion of reasons must therefore be understood in the broad sense "as the 'reasons' for issuing the act"¹⁰⁰³.

However, the infringement of a fundamental freedom is not sufficient. The law also requires that the infringement is serious and manifestly unlawful.

Section 2. A serious breach

242. Article L. 521-2 of the Code of Administrative Justice requires that the infringement of a fundamental freedom be "serious"¹⁰⁰⁴. The requirement of seriousness of the infringement is a condition in its own right. It essentially expresses the idea of a certain intensity of the infringement.

I. The gravity requirement: a condition in its own right

Article L. 521-2 of the Administrative Justice Code'. He added that "in this case, it is neither established nor even alleged that the conditions under which the mathematics test was taken or will be marked by the jury could be the source of discrimination based on grounds that would make them appear to constitute infringements of a fundamental freedom".

995 The review of reasons does not involve psychological data: "Even if it is true that, in the case of the review of reasons, the administrative judge reconstitutes the real facts that may have served as a basis for a decision, by endeavouring to verify whether these facts really inspired the author of the decision, he does not go so far as to take an interest in the administrator's ulterior motives. The nature of the reasons which the administrative judge takes into account in his review is therefore purely objective" (S. KTISTAKI, *L'évolution du contrôle juridictionnel des motifs de l'acte administratif*, LGDJ, coll. BDP, t. 162, 1991, p. 4).

996 The notion of reason corresponds "to the factual situation which, in the concrete case, made the issuing of an administrative act possible or obligatory" (S. KTISTAKI, *op. cit.*, p. 2). These are "facts prior to the decision, or a situation existing at the date of the decision, and whose existence is a condition of the legality of this decision" (M. WALINE, "Etendue et limites du contrôle du juge administratif sur les actes de l'administration", *EDCE* 1956, p. 31). The reasons are the justifications for the content of the decision. The authority can only act if certain factual elements exist and it can only take the measures provided for by the text(s) that confer(s) this competence and specify the implementation methods. Under these conditions, "the grounds for an act must be those provided for, explicitly or implicitly, by the texts which created the competence under which this act is made and which determined the methods of implementation" (F.-P. BENOIT, *Le droit administratif français*, Dalloz, 1968, p. 548).

997 As M. Benoît indicates, the motive is "what pushes the agent to use his competence"; "it is thus the reason which pushes to make this act, the goal which the authority proposes to reach; the motive, it is the intention" (*op. cit.*, p. 543). "The act done for motives alien to the considerations that correspond to the competence in question is vitiated by "misuse of power" (*op. cit.*, p. 544).

998 S. KTISTAKI, *op. cit.* pp. 2-3.

999 M.-C. ROUAULT, obs. under CE, Sect. 28 February 2001, *Casanovas*, *JCP G* 2001, IV-3014, p. 2277.

1000 Unpublished conclusions by P. COLLIN on CE, 29 November 2002, *Arakino* (*Lebon* p. 422).

1001 In the context of an appeal for misuse of power, M. Pacteau had already noted the difficulty of distinguishing the two concepts: see B. PACTEAU, *Le juge de l'exès de pouvoir et les motifs de l'acte administratif*, Travaux et recherches de la Faculté de droit et de science politique de l'Université de Clermont I, 1977, pp. 14-15.

1002 The wording of the *Renard* ordinance cited above can thus be compared to the *Rionx* ruling, in which the Council of State found that the contested act was tainted by misuse of power because it was based on "political motives unrelated to the interests of the service" (CE, 26 October 1960, *Rionx*, *Lebon* p. 558, concl. CHARDEAU).

1003 Formula borrowed from M. Pacteau (B. PACTEAU, *op. cit.*, p. 15).

1004 The same requirement of seriousness of the infringement is found in the context of assault (see for example: TC, 27 June 1966, *Gugon*, *AJDA* 1966, p. 547; Civ. 1^{ère}, 16 April 1991, *Guez v. Préfet de police de Paris*, *Bull. civ.* I, n° 142, D. 1991, IR, p. 155; TC, 23 October 2000, *Bonsadar*, *Lebon* p. 775; TC, 19 November 2001, *Mohamed*, D. 2002, pp. 1446-1450, concl. G. BACHELIER). On the other hand, seriousness is not formally included among the conditions for granting a *déféré-liberté*, as the law refers to an act "of such a nature as to compromise the exercise of a public or individual freedom".

243. Is not every infringement of a fundamental freedom "serious" in nature? The question arose as soon as the Act of 30 June 2000 came into force. Given the eminence of the freedoms protected, should not any infringement of them be considered serious? The government commissioner Laurent Touvet declared himself in favour of this, stating in his conclusions on the *Commune de Venelles* ruling: "This condition of the seriousness of the infringement should not be prolonged for very long when the condition of seriousness relates to the infringement of a fundamental freedom. We cannot imagine that an infringement of a fundamental freedom could not be 'serious'"¹⁰⁰⁵. In other words, any infringement of a fundamental freedom would by this very fact reveal the degree of seriousness imposed by the legislator. With this interpretation, the condition of seriousness was to be considered fulfilled as of right as soon as the infringement of a fundamental freedom was characterised. This generous and relatively free reading of the terms of Article L. 521-2 amounted to limiting "serious" infringement to "simple" infringement. This position led to a relaxation of the conditions for granting it. By exempting the applicant from a requirement, it mitigated the exceptional nature of the *référé-liberté* on this point.
244. However, the interpretation proposed by the government commissioner took too much liberty with the letter of the law to be endorsed by the Council of State. Firstly, to state that any infringement of a fundamental freedom is necessarily serious "would be tantamount to saying that the legislator and the Council of State working group responsible for preparing the reform have provided an overabundant condition for the implementation of the summary procedure, which would be an insult to them"¹⁰⁰⁶. Mr Touvet's position led to the pure and simple removal of one of the conditions for granting interim relief. However, if the law formulates the requirement of a serious infringement, it is because it implicitly but necessarily admits that certain forms of infringement may not be serious. The condition of seriousness of the infringement is a requirement in its own right and cannot be reduced to a style clause. The conditions of infringement and seriousness were conceived by the legislator as distinct and cumulative requirements; they must be applied as such by the interim relief judge. Secondly, the assertion that the infringement of a fundamental freedom is always and by its very nature serious is questionable in principle. As Professor Chapus points out, "it would undoubtedly be excessive to consider that any infringement is serious, as soon as it affects a fundamental freedom. The infringement of fundamental freedoms, however regrettable it may be, is not comparable to a crime of *lèse-majesté*"¹⁰⁰⁷. An infringement can therefore be characterised without being serious. As Ms de Silva points out, "this does not mean that it is harmless" but only "that it does not justify recourse to the judge of extreme urgency"¹⁰⁰⁸. The law requires a qualified injury. It is therefore necessary for the injury affecting the fundamental freedom to reach a certain degree of seriousness in order to give rise to a summary application. Not every infringement of a fundamental freedom is necessarily "serious".
245. How then is the seriousness of the infringement assessed? How does the interim relief judge distinguish between serious and non-serious infringements? As the interim relief judge assesses this requirement on a case-by-case basis, the case law on its application appears to be resistant to any systematisation. The distinction between serious and non-serious infringement is determined by each case. The intensity of the infringement has degrees; there is no precise point at which one leaves the zone of non-seriousness to enter the zone of seriousness. Nevertheless, it is possible to highlight the existence of elements that characterise the seriousness of the infringement, as well as factors that temper the seriousness of the infringement.

II. Elements of seriousness

246. The judge assesses the seriousness of the infringement with regard to two main elements: on the one hand, the intensity of its effects on the personal situation of the applicant, and on the other hand, the particularly questionable or shocking attitude that the administration may have had in the case in question.

A. The effects of the measure

247. The requirement of seriousness of the infringement relates primarily to *the effects of the infringement*, especially its impact on the applicant's situation. The wording of the *Lidl* order, concerning the sealing of a commercial building, is significant on this point. The judge stated that "*because of its effects* on the free disposal by Lidl of the

1005 L. TOUVET, concl. on CE, Sect. 18 January 2001, *Commune de Venelles*, RFD A 2001, p. 385.

1006 M. GUYOMAR and P. COLLIN, chron. under CE, Sect. 18 January 2001, *Commune de Venelles*, AJDA 2001, p. 154.

1007 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1603.

1008 I. DE SILVA, concl. on CE, Sect. 30 October 2001, *Minister of the Interior c/ Tliba*, RFD A 2002, p. 331.

building it owns, *this decision seriously infringes* a fundamental freedom within the meaning of Article L. 521-2 of the Administrative Justice Code". The reference to the effects of the measure concerns the requirement of seriousness and not the requirement of infringement, as is shown by the following sentence stressing that "it is not necessary to investigate whether (...) an infringement of *the same seriousness* also affects the freedom of trade and industry"¹⁰⁰⁹. Thus, in accordance with the common understanding of this standard¹⁰¹⁰, the requirement of seriousness implies "a certain degree in the infringement of the freedom"¹⁰¹¹. The infringement of the fundamental freedom must be of a "substantial nature"¹⁰¹².

It is sometimes argued that the seriousness of the infringement is the *impossibility to exercise* a freedom¹⁰¹³. This presentation, which is appropriate for many situations¹⁰¹⁴, cannot be applied to all fundamental freedoms, for two reasons. Firstly, the notion of the exercise of a freedom is inappropriate for freedoms that, *strictly speaking, are not exercised*¹⁰¹⁵. In practice, the proposed terminology concerns only the freedom to do things - which, it is true, form the essential part of fundamental freedoms within the meaning of Article L. 521-2 of the Code of Administrative Justice. On the other hand, the seriousness of an infringement can be characterised in the presence of a restriction which, although of a significant nature, does not strictly speaking amount to a deprivation or impossibility of exercise. Thus, when a public establishment for inter-municipal cooperation exercises powers that fall within the competence of the member communes, it does not prevent the latter from exercising their freedom of administration; it does not deprive them of their freedom of administration but only impedes its exercise in the matters concerned. The communes retain the possibility of self-administration; their free administration is in no way affected in matters outside the scope of the interference of the public establishment of intermunicipal cooperation. There is no obstacle to free administration, since the communes retain most of their prerogatives, but a simple hindrance. However, the condition of seriousness is satisfied: the infringement of free administration is qualified as serious when a territorial authority is usurped of part of its powers¹⁰¹⁶. Similarly, when a person is punished for his political or trade union opinions, he is not deprived of the exercise of his freedom of opinion. The same is true when a person's personal freedom is seriously infringed. The examples could be multiplied.

A final illustration, concerning the right to property, is nevertheless worth noting. Even though it is a freedom of action, the seriousness of the infringement of the free disposal of property cannot be summed up in a deprivation or impossibility of exercising this freedom. In the context of summary proceedings, the seriousness of the infringement of the right of ownership does not necessarily imply the impossibility to dispose of the property. Indeed, most often, it is in cases where the beneficiary - owner or tenant - is deprived of the free disposal of his property that the judge will qualify the infringement of the right of ownership as serious. This is the case, for example, in the event of the sealing of the main door of the building owned by the applicant¹⁰¹⁷, the refusal to evacuate squatters, which deprives owners of the possibility of renting their property and prevents tenants from disposing of flats which they should have been able to use freely under the rental contract¹⁰¹⁸, or the immobilisation of an aircraft, "which prevents its owner from disposing of it freely"¹⁰¹⁹. The infringement may also be serious when, while continuing to be able to use and dispose of their property, the owners are only deprived of the *exclusive* use of it. The infringement is thus qualified as serious in the case of the removal of a winding chain

1009 CE, ord. 23 March 2001, *Société Lidl, Lebon* p. 154.

1010 In administrative jurisprudence, the adjective "serious" refers to an act or situation that exceeds the usual limits of normality by its intensity (see S. RIALS, *Le juge administratif français et la technique du standard (essai sur le traitement juridictionnel de l'idée de normalité)*, LGDJ, coll. BDP, t. 135, 1980, p. 80). We find an expression identical to that of article L. 521-2 of the Code of Administrative Justice in police matters, the judge referring to the "serious attack" on public order (see for example CE, 5 January 1962, *Bernardet, AJDA* 1962, p. 310; CE, Ass., 7 July 1950, *Debaene, Lebon* p. 426, *GAJA* n° 68; 4 February 1966, *Syndicat national des fonctionnaires du groupement des contrôles radio-électriques, Lebon* p. 80).

1011 *GAJA* No. 188, § 11.

1012 P. CASSIA, *Les référés administratifs d'urgence*, LGDJ, coll. Systèmes Droit, 2003, p. 118.

1013 Thus, M. Chapus asserts that it is appropriate to distinguish, following the example of the case law that has developed in the context of administrative acts, "between (in short) what is an obstacle and what is merely a hindrance to the exercise of a freedom. This is, in any case, the most effective way of distinguishing between infringements according to their seriousness (...)" (R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed., Montchrestien, 2006, No. 1603).

1014 Serious infringement will generally take the form of a pure and simple deprivation of the exercise of a freedom, for example the impossibility of using a property or leaving the national territory. An example, taken from the case law on assault on professional freedom, confirms the often operative nature of this distinction. Thus, a decision that has the effect of totally prohibiting the exercise of a profession, for example the withdrawal of a professional card (Trib. civ. Montpellier, 1^{er} September 1948, *JCP G* 1948, II, 4529) or the suspension of a hospital doctor (Civ. 1^{ère}, 22 November 1983, *Raymondon v Minister of Health and Social Security, Bull. civ. I*, n° 277), will be considered a serious infringement of this freedom. On the other hand, a decision by the administration obliging a street performer to travel an extremely short distance to perform his street show does not have this character. By only modifying the place of the show, this measure in no way prevents the person concerned from carrying out his activity (Civ. 1^{ère}, 16 April 1991, *Guez v. Préfet de police de Paris, Bull. civ. I*, n° 142, *D.* 1991, IR, p. 155).

1015 See *supra*, § 153 et seq.

1016 CE, 12 June 2002, Commune de Fauillet et autres, *Lebon* p. 215.

1017 CE, ord. 23 March 2001, *Société Lidl, Lebon* p. 154. The infringement is qualified as serious 'because of its effects on the free disposal by the Lidl company of the building it owns'.

1018 See for example CE, ord. 21 November 2002, *Gaz de France, Lebon* p. 408. After recalling that the refusal of assistance from the public force to ensure the execution of a judicial decision ordering the eviction of a building infringes the freedom to dispose of a property, the judge of summary proceedings affirms "that insofar as this refusal is an obstacle, not only to the owner drawing from the building the income he could expect from it, but also to the fact that he is carrying out a sale project, the mere fact that the State is obliged to compensate the owner for the damage resulting from a refusal of assistance by the public force cannot suffice, as the Minister maintains, to deny the character of such a refusal as a serious infringement of a fundamental freedom. See also, for example: CE, 29 March 2002, *SCI Stéphaneur and others, Lebon* p. 117.

1019 G. BACHELIER, concl. on CE, 2 July 2003, *Société Outremer Finance Limited, AJDA* 2003, p. 1782.

placed by the co-owners at the entrance to a private road to prevent access by vehicles and the issuing of a by-law providing for free access and parking for all vehicles on this road, measures which impede the exclusive use of this road by their co-owners¹⁰²⁰. Similarly, in the context of de facto rights of way, the condition of seriousness has been considered to be satisfied in cases of infringement of the right of ownership which do not constitute dispossession, but rather a simple hindrance to the enjoyment of one's property, for example as a result of the construction of pipes on a private plot of land¹⁰²¹ or the dumping of waste from a slaughterhouse on the plot¹⁰²².

248. In assessing the seriousness of the infringement, the interim relief judge takes into account the intensity of its effects on the personal situation of the applicant. The assessment of this requirement is very closely linked to the situation in which the person concerned finds himself. A measure will be serious for an applicant, but not for someone in a significantly different personal situation.

The example of the refusal to issue or renew a passport is significant in this respect. In principle, this refusal always infringes the freedom of movement. Nevertheless, the infringement will only be qualified as "serious" in certain cases. It would seem, in the light of the *Depertbes* decision, that these hypotheses correspond to cases in which the applicant justifies having to travel to certain foreign destinations for which this document is required¹⁰²³. In such a case, the refusal prevents the person concerned from travelling to the country of destination. *A contrario*, it can be deduced from this case law that the infringement will not be qualified as serious if the applicant intends to travel to a State for which this document is not required or, even more so, does not justify having to travel abroad in the near future.

The infringement of the freedom of enterprise satisfies the requirement of seriousness when it has substantial effects on the applicant's activity. In a decision of 17 December 2003, the interim relief judge affirmed that when the alleged infringement of the freedom to operate originates in the implementation of a new technical regulation, "the condition of seriousness can only be met if this regulation hinders, in law or in fact, the pursuit by the economic agent of the activity in question or has an equivalent effect"¹⁰²⁴. In this case, the new technical standard imposed by a note from the Minister of Agriculture concerned only products exported to Canada. The judge deduced "that, under these conditions, the application of the memorandum on 1^{er} January 2004 is not likely to hinder the continuation of the economic activity of the two applicant companies and therefore to create a serious infringement of their freedom of enterprise". Conversely, the infringement is qualified as serious when it affects a substantial part of the applicant's activity. In the *Commune de Collioure* order of 2 July 2003, the judge affirmed that the infringement of the freedom to undertake found, "by prohibiting the SARL Côte Radieuse from operating coastal passenger transport services including a stopover in Collioure, which represent 25% of its activity, is of the serious nature required by the aforementioned provisions of Article L. 521-2 of the Code of Administrative Justice"¹⁰²⁵. Similarly, the infringement of freedom of enterprise satisfies the requirement of seriousness when an establishment manufacturing nitrate-oil and storing explosives sees its delivery possibilities considerably restricted for a significant part of the day¹⁰²⁶. The condition is *even more* satisfied if the activity has to cease completely due to a closure ordered by the administration¹⁰²⁷ or any other measure decreed by the administration¹⁰²⁸.

As regards the other fundamental freedoms, several case law solutions illustrate the circumstances in which the requirement of seriousness must be considered to be met. For example, the infringement of the freedom of movement of a legally resident foreigner is qualified as serious when the person concerned, unable to prove that his or her situation is legal under the legislation on the residence of foreigners in France, cannot leave and return to the national territory¹⁰²⁹. Similarly, the infringement of this freedom satisfies the requirement of seriousness when a French citizen does not have a national identity card because the administration has not ruled on the application for issue more than one year after it was lodged with the competent authorities¹⁰³⁰. The infringement of the patient's freedom of communication is serious when the latter is purely and simply forbidden to send mail and to communicate with the administrative and judicial authorities¹⁰³¹. The judge considers as a serious infringement of the freedom of assembly the illegal refusal to make a municipal hall available to a political party¹⁰³²

1020 CE, ord. 10 September 2003, *Commune d'Hyères-les-Palmiers*, n° 260015.

1021 TC, 11 May 1964, *Lajugie c/ Compagnie générale d'entreprises électriques*, *Lebon* p. 791.

1022 Civ. 2^{ème}, 9 January 1974, *Commune d'Aignan c/ Canbet*, *Bull. civ.* II n° 17.

1023 CE, ord. 9 January 2001, *Depertbes*, *Lebon* p. 1: refusal to renew the passport of a national who justifies having to travel to Brazil and Canada for the needs of his professional activity.

1024 CE, ord. 17 December 2003, *EURL Ecosphère and SARL Général services applications*, *Lebon* p. 519.

1025 CE, ord. 2 July 2003, *Commune de Collioure*, *Lebon T.* p. 930.

1026 CE, ord. 26 November 2004, *Commune de Wingles*, n° 274226.

1027 See, for a local shop, CE, ord. 14 March 2003, *Commune d'Evry*, *Lebon T.* p. 931; for a restaurant-discotheque, CE, ord. 16 August 2004, *Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c/ Basset*, n° 271148.

1028 For a prohibition to dock at a marina addressed to a vessel specialised in sea trips, see CE, ord. 6 September 2006, *Commune d'Ota*, n° 296912.

1029 CE, ord. 8 November 2001, *Kaigisiz*, *Lebon* p. 545; CE, ord. 11 June 2002, *Ait Oubba*, *Lebon T.* p. 869; CE, ord. 12 November 2001, *Ministre de l'Intérieur c/ Béchar*, *Lebon T.* p. 1132; CE, 7 May 2003, *Boumaiza*, n° 250002.

1030 CE, ord. 11 March 2003, *Samagassi*, *Lebon* p. 119.

1031 CE, 15 May 2002, *Bandoïn*, n° 239487.

1032 CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL)*, *Lebon* p. 311.

or a religious association¹⁰³³. Similarly, the infringement of religious freedom meets the requirement of seriousness when a mayor intends to organise theatrical performances, exhibitions and conferences in a church building despite the opposition of the authority serving the church¹⁰³⁴. The infringement of the right to asylum is qualified as serious when the administration makes it impossible for the person concerned to lodge an application, for example by refusing to issue the necessary form¹⁰³⁵, by refusing to register his application¹⁰³⁶, by giving him incorrect information about the time limit within which the application must be lodged with the French Office for the Protection of Refugees and Stateless Persons¹⁰³⁷, or by delaying his readmission to another State¹⁰³⁸. This qualification is also necessary if the person concerned cannot remain on French territory while the application is being examined, as the administration refuses to issue a temporary residence permit¹⁰³⁹ or is refused access to the territory even though his or her application is not in fact manifestly unfounded¹⁰⁴⁰. Finally, the infringement of the right to strike is serious in the case of requisitioning all striking personnel, in order to ensure the complete continuation of the service, and this under normal conditions¹⁰⁴¹. This concept of minimum service, which does not result in any reduction in the activity of the service, constitutes a negation of the right to strike.

249. For a fundamental freedom - the right to lead a normal family life - the Conseil d'Etat has given precise indications as to how the condition of seriousness should be assessed. In the *Tliba* judgment, it stated "that the condition of seriousness of the infringement of the freedom to live with one's family must be considered to have been met where the contested measure can be enforced ex officio by the administrative authority, is not subject to a suspensive appeal before the judge of excess of power, and *directly hinders the continuation of life together of the members of a family*; that this is the case of an expulsion order from French territory, which may be enforced ex officio, opposing the return to France of the person who is the subject of it, and pronounced against a foreign national who justifies that he or she is leading a family life in France"¹⁰⁴². Thus, the execution of a deportation order when the person concerned is separated from his or her young child living on French soil is a serious violation of the right to lead a normal family life¹⁰⁴³. Conversely, and in application of the same criteria, the condition of seriousness is not met in the case of a refusal of a residence permit to a foreigner¹⁰⁴⁴ or the rejection of an application for family reunification, "which does not directly hinder the continuation of the life together of the members of a family"¹⁰⁴⁵. Similarly, his readmission to Norway under the Dublin Convention of 15 June 1990, even though his father, who lives in France with his wife and second son, is due to undergo surgery there, does not seriously infringe the applicant's right to respect for family life¹⁰⁴⁶.

In addition to the effects of the measure, the judge may take into account the attitude of the administration to qualify the seriousness of the infringement of a fundamental freedom.

1033 TA Rennes, ord. 21 February 2002, Association locale pour le culte des témoins de Jéhovah de Lorient, GP 29 April 2003, p. 12; TA Paris, ord. 13 May 2004, Association cultuelle des Témoins de Jéhovah de France et autres, AJDA 2004, pp. 1597-1599, note G. GONZALEZ.

1034 CE, ord. 25 August 2005, *Commune de Massat*, *Lebon* p. 386.

1035 CE, ord. 12 January 2001, *Hyacinthe*, *Lebon* p. 12.

1036 CE, 15 February 2002, *Hadda*, *Lebon* p. 45.

1037 CE, ord. 21 December 2004, *Luzolo Kondé*, n° 275361.

1038 The infringement of the right to apply for refugee status is serious if the applicants risk being readmitted to a European State which is not certain to examine their asylum application because of the delays in transferring them to that country (CE, 14 May 2004, *Gaitukaer*, No. 267360).

1039 CE, ord. 12 November 2001, *Ministre de l'Intérieur c/ Farhoud*, *Lebon* T. p. 1126.

1040 CE, ord. 25 March 2003, *Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c/ Sulaimanov*, *Lebon* p. 146; CE, ord. 24 October 2005, *MBIZI MPASSI*, n° 286247; CE, ord. 17 March 2006, *Saidov*, No. 291214.

1041 CE, 9 December 2003, *Aguillon and others*, *Lebon* p. 497.

1042 CE, Sect. 30 October 2001, *Lebon* p. 523. In this case, the Council of State noted that Mrs Tliba had been living in France for over 30 years with five children of French nationality and had no family in her country of origin. The condition of serious interference with her freedom to live with her family must therefore be considered to be met.

1043 CE, ord. 21 February 2005, *Najemi*, n° 277520.

1044 CE, ord. 5 March 2002, *Fikry*, *Lebon* T. p. 872; CE, ord. 15 October 2004, *Sabi*, n° 273110; CE, ord. 6 June 2003, *Benmessaoud*, n° 257429.

1045 CE, ord. 27 January 2003, *Kartboub*, n° 253603. See also CE, ord. 10 July 2002, *Boulemia*, No. 248422: "the fact that an administrative decision would be an obstacle to the establishment of family life in France is not in itself such as to cause that decision to be regarded as seriously disregarding the right of every person to live with his or her family. In this case, the administrative authority had refused to register the application for a residence certificate filed by the applicant, arguing in particular that she did not have the status of spouse of a French national, since her marriage to Mr Mihoubi, celebrated in a religious ceremony, had not been transcribed on the civil status registers. The interim relief judge affirmed 'that, if the refusal to register her application for a residence certificate prevents her from living together with Mr Mihoubi, this circumstance alone does not allow the decision to be considered as seriously infringing a fundamental freedom within the meaning of Article L. 521-2 of the Administrative Justice Code'. In the same vein, CE, ord. 20 July 2005, *Mohammad*, n° 285524: "if the refusal to authorise her husband's arrival in France for family reunification prevents her from leading a common life with Mr Mohammad, this circumstance alone does not allow the decision to be considered as seriously and manifestly unlawfully infringing a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice.

1046 CE, ord. 21 February 2005, *Sutaev*, n° 277757.

B. The attitude of the administration

250. An unspeakable abuse of power or, in general, a particularly inappropriate or offensive attitude on the part of the administration will be considered by the judge as an *aggravating* circumstance, which he will take care to underline in his decision.
251. It is common ground that the refusal to renew a French national's passport infringes on his freedom of movement. When this refusal occurs under particularly unacceptable conditions, as in the *du Couëdic de Kéranant* case, the judge will qualify the infringement of the freedom to come and go as serious, adding in addition the infringement of personal freedom, the involvement of which alone, in a case of this type, testifies to the degree of seriousness of the administration's behaviour. In August 2002, Mr du Couëdic de Kéranant, a French national living in Switzerland and father of two children, had taken steps with the French Consulate General in Geneva to renew his passport - on which his two children were registered - and which he had declared lost in Paris in July 2002. The previous year, the Swiss courts had authorised the applicant and his wife to live separately, custody of the two children being entrusted to the mother and the two parents continuing to exercise parental authority jointly. By letter of 29 August 2002, the deputy consul replied to the applicant that the law required, in the event of separation and shared parental authority, the authorisation of both parents for the children to be registered on their parents' passports. Thus, the consular authority refused to register the applicant's children on the latter's passport if the application for renewal was not accompanied by the express authorisation of their mother. However, as the judge pointed out, such a condition does not result from any text governing the issue of passports. On the contrary, Article 8 of the decree of 26 February 2001 provides that "The application for a passport made in the name of a minor shall be submitted by *one or other* of the persons exercising parental authority (...)". The consular authority has therefore, no more and no less, added to the law a condition that was not there. Thus, "by imposing this manifestly illegal condition on the applicant's actions, the administration has seriously infringed the personal freedom and freedom of movement of family members"¹⁰⁴⁷. To conclude that the infringement was serious, the judge did not look at the applicant and the effects of the measure, but at the administration, which was guilty of a serious act. The seriousness of its failure to comply with the law is reflected, by ricochet, in the seriousness of the infringement of a fundamental freedom.
252. Three other decisions illustrate the consideration of the administration's behaviour in assessing the seriousness of the infringement of a fundamental freedom. In his conclusions on the *Vast* ruling, the government commissioner noted that the mayor's note prescribing the opening of letters addressed to certain municipal councillors infringed the secrecy of correspondence, which could be described as serious. "By its deliberate nature, it may indeed amount to an abuse of power. This is not a simple clumsiness on the part of a councillor who is not very familiar with the subtleties of the legislation, but a clearly stated desire to control mail intended for a certain number of elected representatives by name"¹⁰⁴⁸. And this was done in total secrecy, as the people concerned had not been informed of the existence of this measure. In the *Gollnisch* order, the judge emphasised that the statements asserting the guilt of the teacher concerned by an ongoing disciplinary procedure 'were formulated in derogatory terms with regard to [the applicant], whose name the rector felt he should not even pronounce for the sake of hygiene and whose name he called for to be expelled from the public service'¹⁰⁴⁹. As the infringement had already been established prior to the decision, and the illegality was certain, this clarification necessarily concerns the condition of seriousness. Lastly, the interim relief judge affirmed that the fact that the administration proceeded to cut down and fell trees in a classified wooded area, in disregard of the provisions of Article L. 130-1 of the Urban Planning Code, 'and whereas the applicant had drawn his attention as early as February 2005 to the need to comply with this legislation', seriously infringed the free disposal of his property by an owner¹⁰⁵⁰. Here again, the precision given by the judge concerns the condition of seriousness of the infringement. This could be qualified by the mere fact that the person concerned suffered a significant interference with the freedom to dispose of his property. Nevertheless, in order to affirm the seriousness of the interference, the judge preferred to emphasise the administration's behaviour, which had deliberately disregarded the applicable legislation, even though the applicant had reminded it of its existence and of the need to respect it. In contrast to these factors, which reinforce or characterise the seriousness of the infringement, other elements are likely to temper it or remove its seriousness.

1047 CE, ord. 4 December 2002, *Du Couëdic de Kéranant*, *Lebon T.* p. 875.

1048 S. BOISSARD, concl. on CE, 9 April 2004, *Vast*, *RFD.A* 2004, p. 780.

1049 CE, ord. 14 March 2005, *Gollnisch*, *Lebon* p. 103.

1050 CE, ord. 8 November 2005, *Moissinac Massenet*, *Lebon* p. 491.

II. Elements to temper gravity

253. Two elements can be taken into account to deny the seriousness of the infringement of a fundamental freedom: on the one hand, the wrongful conduct of the applicant, and on the other hand, the fact that the infringement is authorised by law. In practice, these elements concern freedoms of an economic nature, essentially the right to property, freedom of enterprise and freedom of contract.

A. *The applicant's behaviour*

254. The applicant's misconduct may exclude the seriousness of the infringement of his fundamental freedoms. This principle was laid down for the first time in the *Lidl* order of 23 March 2001¹⁰⁵¹. The Lidl company wished to open a retail outlet falling within the scope of the Act of 27 December 1973, and had to obtain the prior operating authorisation required by this text. However, evading the applicable regulations, the company undertook work on the commercial building without submitting an application for authorisation to the departmental commission for commercial facilities. In order to put an end to the irregularities observed, the mayor issued a decree prescribing that seals be affixed to the building in question. The Lidl company challenged this measure before the judge of the *référé-liberté* (interim relief) procedure, claiming a serious infringement of the freedom of trade. When the matter was referred to the interim relief judge of the Council of State, he ruled out any seriousness of the infringement since the applicant company had not complied with the legislation on commercial town planning. Insofar as the company had intended to evade the requirements established by law in this area, the judge stated, after ruling on the existence of a serious infringement of the right of ownership, that "it is not necessary to investigate whether (...) an infringement of the same seriousness" affects the freedom of trade.

The same reasoning applies when a company carries out a classified activity in disregard of the regulations legally imposed on it. In the *Saria Industries* order of 25 April 2002, the judge indicated that for its beneficiary, freedom of enterprise "means the freedom to carry out an economic activity in compliance with the laws and regulations in force and in accordance with the requirements legally imposed on it, especially when they pursue a requirement as pressing as the protection of public health"¹⁰⁵². In this case, Saria Industries had been authorised by the administrative authority to develop an animal waste storage and treatment activity. Based on the company's failure to comply with the requirements imposed by law, the mayor ordered the suspension of its activity under his general administrative police powers. The company saw this as a serious infringement of its freedom of enterprise and asked the interim relief judge to suspend its execution on the basis of Article L. 521-2 of the Administrative Justice Code. The interim relief judge of the Council of State rejected her request, basing his decision on the applicant's failure to comply with the obligations imposed on her under the legislation on classified facilities. The order stated that "the measure requested from the interim relief judge is intended to put an end to the infringement of the applicant company's freedom to continue operating its establishment *without complying with certain requirements legally imposed*, in particular in the interest of public health, by the competent State authority. In these circumstances, the infringement of the freedom to conduct business cannot be regarded as serious.

The same principles apply to the applicant operating a private medical transport vehicle business in disregard of the regulations applicable to ambulances and, in particular, without having sufficient medical equipment. In view of the applicant's failure to comply with his obligations, the decision by which the prefect withdrew the authorisation issued to him to operate these vehicles was not, in the absence of special circumstances, such as to constitute a serious infringement of entrepreneurial freedom¹⁰⁵³.

255. In such cases, the applicant's conduct precludes the seriousness of the infringement. Similarly, when the regime of fundamental freedoms is strictly regulated by the legislator, the requirement of seriousness will be, if not excluded, at least more difficult to satisfy. The judge takes into account the legislative environment in assessing the seriousness of the infringement of a fundamental freedom.

B. *The legislative environment*

256. To assess the degree of seriousness of the infringement of a fundamental freedom, the interim relief judge takes into consideration the restrictions imposed by the law on its exercise. Consequently, he takes a specific

1051 CE, ord. 23 March 2001, *Société Lidl, Lebon* p. 154.

1052 CE, ord. 25 April 2002, *Société Saria Industries, Lebon* p. 155. Formula notably used in CE, ord. 20 April 2004, *Ramon*, n° 266694; CE, ord. 29 April 2004, *Département du Var*, n° 266902.

1053 CE, ord. 20 April 2004, *Ramon*, n° 266694.

look at fundamental freedoms that are subject to a strict legal framework: the seriousness of the infringement must be put into perspective when it is provided for by law; it becomes more difficult to qualify when the law grants the administration extensive powers to limit its exercise. The principle was established in the *Commune de Montreuil-Bellay* order of 12 November 2001. The judge stated that in order to assess the degree of seriousness of the infringement of a fundamental freedom, "it is necessary to take into account the general limitations introduced by the legislation to allow for certain interventions deemed necessary by the public authorities in relations between individuals"¹⁰⁵⁴. The limitations introduced by the legislator therefore have the effect of raising the threshold for seriousness. The infringement must appear all the more serious as the legislation allows the administration to validly limit the freedom in question. It may be subject to greater infringements before seriousness is established, because of the scope of the administration's powers. Some freedoms - in practice, freedoms of an economic nature - are subject to legal requirements more than others, and it therefore becomes more difficult to consider that the administrative authority is *seriously* infringing them when it is merely applying the law correctly. In such a case, the infringement of the fundamental freedom results first of all from the legislation as a whole before being the result of the administration's behaviour.

257. Several examples illustrate how this assessment is made. First of all, in the *Commune de Montreuil-Bellay* order, the judge specified that in town planning matters, the degree of seriousness of the infringements of the freedom to undertake, the free disposal of one's property by an owner or the freedom of contract must be assessed taking into account the legislation which recognises the possibility for public persons to have, in certain areas, a priority right to acquire a property freely put up for sale by its owner. This restriction is provided for by the law itself, and allows the beneficiary public bodies to substitute themselves for the potential purchaser of a property. It is in the context of this restriction that the extent to which the right of ownership or the economy of a legally concluded contract is affected must be assessed. In this case, the possibility of the public authorities using this prerogative had been envisaged by the contracting parties in the promise of sale. The latter had been concluded under the suspensive condition that any natural or legal person holding a right of pre-emption would renounce exercising it and that, in the event that the beneficiary of a right of pre-emption exercised it at the price and under the conditions set out in the promise to sell, the parties to the contract would recognise its nullity without compensation on either side. The judge considered that 'in view of these stipulations, the exercise by the municipality in the present case of the urban right of pre-emption, even if it is vitiated by illegality, does not constitute a serious infringement of the free disposal of its property by any owner or of the economy of a legally concluded contract'.

A second illustration is provided by the *da Costa* order of 8 August 2002¹⁰⁵⁵. The city of Pau acquired by way of pre-emption a parcel of land that Mr da Costa was planning to buy. Having used part of the plot for the extension of public facilities (which was in line with the purpose of the pre-emption), the municipality decided to sell the other part to a non-trading property company. Contrary to the provisions of Article L. 213-11 of the Town Planning Code, the municipality proceeded with this resale without offering to purchase it from Mr da Costa¹⁰⁵⁶. The applicant considered that the disregard of this requirement seriously infringed his freedom to contract. Nevertheless, the interim relief judge of the Council of State ruled out the seriousness of the infringement by putting forward two considerations. On the one hand, the acts of acquisition of the plot by the municipality were not contested by the interested party, whereas it is primarily from these that the infringement of his freedom of contract results. On the other hand, the provisions of Book II of the Town Planning Code, in particular Article L. 213-11, 'are specifically intended to place limitations of general application on this freedom that were introduced by the legislature, both to allow certain interventions by the public authorities in the area of urban development and to safeguard the interests of former owners or persons who had intended to acquire the pre-empted property'. Thus, the infringement is not qualified as serious insofar as it respects the framework set by the law and the conditions it determines. The restriction on the freedom to contract is derived from the law, so that the decision to resell the pre-empted property, which only constitutes its implementation, is not of such a nature as to bring in itself a sufficiently serious infringement of this freedom to justify its suspension.

This case law has also been applied in the field of labour relations. In the case of *Société Mona Lisa Investissements*, Mr X, a protected employee, was accused of serious moral harassment which led his employer to decide to dismiss him. As the labour inspector refused the dismissal, Mr X's employees filed a petition for interim relief in order to

1054 CE, ord. 12 November 2001, *Commune de Montreuil-Bellay*, *Lebon* p. 551. This formula is directly inspired by constitutional jurisprudence. On several occasions, the Constitutional Council has affirmed that the principle of free disposal of property by its owner must be assessed in the context of the limitations of general scope introduced by previous legislation to allow certain interventions deemed necessary by the public authorities in contractual relations between individuals (CC, no. 59-1 FNR, 27 November 1959, cons. 1, *Réc.* p. 71). The formula will be used again in particular with regard to the free disposal of property by the owner and the freedom of contract (CC, no. 61-3 FNR, 8 September 1961, cons. 1, *ECR* p. 48; CC, no. 73-80 L, 28 November 1973, cons. 7, *ECR* p. 45).

1055 CE, ord. 8 August 2002, *da Costa*, n° 249409, *Contrats et marchés publics* 2002, comm. n° 236, note P. SOLER-COUTEAUX.

1056 Article L. 213-11 of the Urban Planning Code provides that within five years of exercising the right of pre-emption, the municipality that decides to use or dispose of the acquired property for purposes other than those invoked to justify the pre-emption must inform the former owners and offer them priority for acquisition. If the latter renounce the acquisition, the public authority must do the same with the person who intended to acquire it. In this case, the municipality had not proposed the acquisition of the property to its former owner or, consequently, to Mr da Costa.

obtain a stay of execution. The Council noted "that for the implementation of the provisions of Article L. 521-2 of the Code of Administrative Justice, the degree of seriousness that a measure affecting freedom of enterprise or freedom of work may have must take into account the general limitations on these freedoms that have been introduced by the legislation to allow certain interventions deemed necessary by the public authorities, particularly in labour relations; among these limitations is the protection enjoyed, in the interest of all the workers they represent, by staff delegates, whose dismissal can only take place with the authorisation of the labour inspector"¹⁰⁵⁷. Consequently, the Council of State must assess the requirement of seriousness in light of the special status enjoyed by Mr X. In the light of this fact, and of all the circumstances of the case - in particular the fact that if the climate in the company is degraded, the employees can nevertheless continue to come to work - the Council of State excludes the seriousness of the infringement. It is clear from the reasoning of the decision that the Council of State justified this solution above all by the protective status enjoyed by Mr X. In the *Confédération française des travailleurs chrétiens* order of 3 May 2005, the applicants challenged the implementation of the law on the "solidarity day", which provides that, in the absence of branch or company agreements fixing another day, Whit Monday will be worked and modifies the annual working time without additional remuneration for monthly employees¹⁰⁵⁸. The interim relief judge ruled out the seriousness of the infringement of the freedom to work after specifying that the degree of seriousness that a measure affecting this freedom may have "must take into account the limitations of general scope on this freedom that have been introduced by the legislator to allow certain interventions deemed necessary by the public authorities in labour relations, in particular with regard to working hours, public holidays and leave".

258. In the end, the *Commune de Montreuil-Bellay* case law distinguishes between two categories of fundamental freedoms with regard to the criterion of seriousness. Some are subject to major legislative restrictions, others leave a more limited power of intervention to the public authorities. These differences in regime are taken into account by the administrative judge to assess whether the infringement of which they are the object satisfies the requirement of seriousness, and in no way, as has been argued, to assess the fundamental nature of a freedom. When the law has recognised extensive possibilities for intervention by the public authorities, the seriousness of the infringement is naturally more difficult to assess. Thus, if the freedom of enterprise is, as Ms Jacquinot states, "a special case", it is not because it is fundamental only in certain circumstances but because, being subject to a very strict legislative framework, the assessment of the seriousness of the infringements made of it is necessarily more demanding¹⁰⁵⁹. If the infringement is more difficult to qualify for these freedoms, it is simply because the legislator intended to subject them to greater limits in the name of the general interest. The administrative judge does not establish a hierarchy between these freedoms based on their greater or lesser importance. The judge of the summary judgment, who is not a judge of the existing legislations and regulations, only draws the implications of the law and of the differences that it organises as regards the regime of exercise of the various fundamental freedoms. All fundamental freedoms are exercised within the framework drawn up by the law, but as this framework is not the same for all these freedoms, the assessment of the seriousness may vary according to the extent of the restrictions authorised by the legislator.

However, in order to justify the implementation of the summary procedure, the infringement of a fundamental freedom must not only be serious; it must also be manifestly illegal.

Section 3. Manifestly unlawful interference

259. According to Article L. 521-2 of the Code of Administrative Justice, the *référé-liberté* can only be used when the administration has "infringed (...) a fundamental freedom in a manifestly illegal manner". It follows from this formula that the law does not require any form of illegality but a specific illegality. The illegality is that of the infringement of a fundamental freedom. It must also be characterised by its obviousness. On the other hand, the illegality does not have to be serious¹⁰⁶⁰. "If a distinction can be made within illegality according

1057 CE, 4 October 2004, *Société Mona Lisa investissements et autres*, *Lebon* p. 362.

1058 CE, ord. 3 May 2005, *Confédération française des travailleurs chrétiens*, *Lebon* T. p. 1034.

1059 For this author, the *Commune de Montreuil-Bellay* case law "suggests that freedoms may be considered fundamental only in certain matters, in certain areas. This would be tantamount to saying that there are fundamental freedoms that are eclipsed", i.e. that would disappear in the event of a major legislative framework (N. JACQUINOT, "La liberté d'entreprendre dans le cadre du *référé-liberté* : un cas à part ?", *AJDA* 2003, p. 665). This point of view does not correspond to the reality of positive law. For the administrative judge, a freedom is either fundamental or it is not; it is always fundamental or it is never fundamental. The case law leads to a clear distinction between the condition relating to the *presence* of a freedom and that relating to the *seriousness of the infringement of it*. These two elements are not on the same level and are perfectly independent of each other. Moreover, the freedom does not "disappear" in this type of situation and remains *invocable* before the judge of the *référé-liberté*. The impact of an important legislative framework has an effect on the assessment of the seriousness of a freedom but not on its invocability.

1060 Some orders of the interim relief judge refer to the requirement of a 'serious illegality' (CE, ord. 24 January 2001, *Université Paris VIII Vincennes Saint-Denis*, *Lebon* p. 37; CE, ord. 22 July 2002, *SARL Société de réalisation et de rénovation immobilière (SRR)*, No. 248734; CE, ord. 2 August 2002, *Société Propbal*, No. 249110; CE, ord. 6 September 2002, *Tetaabi*, No. 250120; CE, ord. 14 October 2002, *Ramon*, n° 250922; CE, ord. 15 October 2002, *Société Pierre conseil foncier SA*, no. 250947; CE, ord. 26 December 2002, *Belakhdar*, no. 252867; CE, ord. 27 June 2002,

to whether it is "external" or "internal", there is no reason, as a rule, to assess the seriousness of an illegality. It does not have degrees"¹⁰⁶¹.

I. Illegality of the infringement

260. The illegality of the infringement is only characterised under certain conditions. It is assessed in much the same way depending on whether it is an action by the administration, or a refusal or abstention by the administration.

A. The conditions of illegality

261. A particular form of illegality is required: the illegality of the infringement of a freedom. This illegality is analysed as an unjustified and disproportionate infringement of a fundamental freedom.

1. The illegality of an infringement

262. An illegality that does not result in the infringement of a fundamental freedom does not meet the requirement set out in Article L. 521-2 of the Code of Administrative Justice. The illegality, in fact, is that of the infringement of a fundamental freedom¹⁰⁶². The law requires that the illegality found has a real impact on the freedom in question. The illegality may be direct and result from the norm enshrining the fundamental freedom, as in the *Gollnisch* or *Gaitukaev* decisions¹⁰⁶³. It "may also be indirect, that is to say, it may result from the manifestly unlawful nature of the infringement of the legislative or regulatory norms governing the enjoyment of this fundamental freedom"¹⁰⁶⁴. In any case, it must necessarily affect a fundamental freedom.

Consequently, a purely formal illegality cannot satisfy the requirement that *the infringement of a freedom be illegal*. While a defect of substantial form may be illegal, and even manifestly illegal, it appears by its nature to be unsusceptible of infringing a fundamental freedom. In a judgment of 30 May 2002, the Conseil d'Etat refused to annul the order by which a judge of summary proceedings rejected an application for a ruling, on the basis of Article L. 521-2, to suspend the orders extending the perimeter of a community of agglomerations and ordering the withdrawal of several communes from the public establishment of inter-communal cooperation. The appeal was rejected on the grounds that in this case, the appellant communes relied solely on external legality grounds relating to consultative procedures. For the Council, 'none of these grounds, assuming they are well-founded, allows the infringement of the principle of free administration of local authorities by the contested decrees to be considered "serious and manifestly illegal"¹⁰⁶⁵. However, it should be noted that in rare decisions, the judge has agreed to examine a plea based on the violation of the law of 11 July 1979, which requires the motivation of certain unfavourable individual decisions. Thus, in the *Tliba* decision, the Conseil d'Etat assessed the requirement of manifest illegality of an expulsion measure with regard to the provisions of this text, and concluded that there was no violation¹⁰⁶⁶. On one occasion, the Council of State ruled that the argument that a police order to close a local shop was in breach of this law was well founded¹⁰⁶⁷. However, in this decision, the judge noted *two* illegalities: on the one hand, the unjustified use of its administrative police powers by the municipal executive, and

Fruilani and SCI Marglore, Lebon T. p. 872; CE, ord. 2 April 2003, *Gaïffé*, no. 255597; CE, ord. 25 June 2003, *Abamada and Saïd Abdallah*, no. 257835; CE, ord. 17 July 2003, *Société de réalisation et de rénovation immobilière (SRRJ)*, No. 258506; CE, ord. 2 September 2003, *Société S-AGEP et autres*, No. 259866; CE, ord. 30 July 2004, *Moussaoui*, no. 270462; CE, ord. 12 November 2004, *Marty*, n° 274029; CE, ord. 2 March 2005, *Commune de Vedene*, n° 278123; CE, ord. 15 July 2005, *Cotten*, n° 282369; CE, ord. 28 August 2006, *S-ARL Fitness Gym*, n° 296846; CE, ord. 29 September 2006, *Traoré*, n° 297752). Nevertheless, it is common knowledge that Article L. 521-2 does not impose such a condition. The illegality must be manifest, the infringement must be serious but the illegality of the infringement does not itself have to be serious.

¹⁰⁶¹ R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1604.

¹⁰⁶² See for example, expressing this link, CE, ord. 22 October 2001, *Gonidec and Brocas*, n° 239165. The judge noted that a plot of land belonging to the applicants 'had been the subject of an irregular taking by the syndicat mixte Côte des Isles Développement, which had incorporated it into a golf course which it manages; that the applicants' *right of ownership had thus been infringed in a manifestly illegal manner*'.

¹⁰⁶³ When a disciplinary procedure is underway against a teacher-researcher, the rector of the academy who, without waiting for the outcome of the procedure, publicly maintains that the breach of ethical obligations by the person concerned has been established and calls for the most severe sanction to be pronounced, unlawfully infringes the presumption of innocence (CE, ord. 14 March 2005, *Gollnisch, Lebon* p. 103). In the *Gaitukaev* judgment, the judge noted the unlawful infringement of the applicants' right to apply for refugee status (CE, 14 May 2004, *Gaitukaev*, no. 267360).

¹⁰⁶⁴ P. CASSIA and A. BEAL, "Les nouveaux pouvoirs du juge administratif des référés. Bilan de jurisprudence (1^{er} January 2001-28 February 2001)", *JCP G* 2001, I, 319, p. 986.

¹⁰⁶⁵ CE, 30 May 2002, *Commune de Gely-du-Fesc et autres*, n° 247273 et 247286.

¹⁰⁶⁶ CE, Sect. 30 October 2001, *Ministre de l'Intérieur c/ Tliba, Lebon* p. 523.

¹⁰⁶⁷ CE, ord. 14 March 2003, *Commune d'Evry, Lebon T.* p. 931.

on the other hand, the insufficient motivation of its decision. The infringement of entrepreneurial freedom was not due to the lack of a statement of reasons but to the unjustified use of police powers by the mayor. While disregard for the provisions of the Act of 11 July 1979 constitutes a manifest illegality, it cannot in itself constitute an infringement of a fundamental freedom. In the case law relating to Article L. 521-2, a purely formal plea has never been accepted as the source of the unlawful infringement of a freedom.

2. Unjustified and/or disproportionate interference

263. Not every infringement of a fundamental freedom is illegal. Fundamental freedoms cannot be guaranteed absolutely, nor can they unconditionally and systematically prevail over any consideration that might oppose them¹⁰⁶⁸. Their beneficiaries must be subject to limitations designed to reconcile them with the rights of others or to make room for the expression of certain forms of the general interest¹⁰⁶⁹. In practice, the infringement of a fundamental freedom will be lawful if it is not only *justified* by law or by a reason of general interest but also *proportionate* to the objective pursued. *A contrario*, the infringement will be illegal in two cases. Firstly, the infringement is unlawful if it is not authorised either by law or by a reason of general interest. This will obviously be the case when a legal norm, whether legislative, conventional, constitutional or other, is directly disregarded. In such a case, the lack of justification for the infringement is immediately apparent. Then, if it is justified, the infringement will be unlawful if it is excessive and thus does not meet the proportionality requirement. This scheme, which concerns infringements resulting from actions but also infringements resulting from refusals or abstentions, deserves to be clarified in its constituent elements.

264. The infringement is *justified* if it is provided for and authorised by law or required by a reason of public interest.

The justifying text may be a law or a regulation in the case of infringement resulting from an abstention or refusal. However, in the case of an infringement resulting from a positive act or an action, the text on which it is based must imperatively be of a legislative nature. Indeed, in the case of an action, only the law can infringe fundamental freedoms initially. This requirement is a consequence of the reservation of law, a legal principle according to which the legislator has exclusive competence to intervene in certain areas¹⁰⁷⁰, the first of which is the infringement of fundamental freedoms¹⁰⁷¹. As this area is an exclusive prerogative of the legislator, the administrative authority is prohibited from intervening in it¹⁰⁷². In the absence of legislative empowerment, the

¹⁰⁶⁸ On this point, see the fear, expressed by M. Drago, "of the social destructuring engendered by a society of law (of rights?) in which the individual and the defence of his or her rights take precedence over any other consideration (...), i.e. of a law that is solely concerned with the private or individual sphere and of which the doctrine of fundamental rights is essentially a part" (G. DRAGO, *Contentieux constitutionnel français*, PUF, coll. Thémis droit public, 1998, p. 69).

¹⁰⁶⁹ This idea is expressed, in essence, by Article 4 of the Declaration of the Rights of Man and of the Citizen, which states that "the exercise of the natural rights of every man has no limits other than those which ensure the enjoyment of these same rights by the members of society". The spirit of this provision is that it is sometimes necessary to limit the freedoms of some people in order to ensure that the greatest number of people can exercise them. Limited freedom is the condition for the freedom of all. See J.-P. COSTA, "Article 4", in *La déclaration des droits de l'homme et du citoyen de 1789. Histoire, analyse et commentaires* (G. CONAC, M. DEBENE and G. TEBOUL dir.), Dalloz, 2001, pp. 101-113.

¹⁰⁷⁰ The legislator is constitutionally reserved - and assigned - a domain that may not be disregarded either by other authorities or by itself. This implies, first of all, that the legislator alone may intervene in these matters, to the exclusion of any other authority. An administrative decision that intervenes in the legislator's sphere of competence is vitiated by illegality. Secondly, this rule means that the legislator must itself exercise its competence and cannot authorise any authority to intervene initially in protected matters (negative incompetence).

¹⁰⁷¹ The Conseil d'Etat affirmed under the Fourth Republic^c that these matters are reserved to the law by virtue of the republican constitutional tradition (see *above*, § 110, opinion of 6 February 1953). Article 4 of the Declaration of 1789 provides that the "limits" on freedoms "can only be defined by law". This is true regardless of the rank of the norm from which the fundamental freedom derives. The reservation of law concerns first of all constitutional freedoms. Article 34 of the Constitution of 4 October 1958 assigns to Parliament the determination of the fundamental guarantees for the exercise of public freedoms. On the basis of this provision, "the law has an irreducible competence for the regulation of constitutionally recognised rights, regulatory power being limited to the implementation of the norms laid down by the legislator" (J. TREMEAU, *La réserve de loi*. For fundamental freedoms of conventional origin, the principle of legislative restriction is expressly set out in the relevant instruments (either specifically for a particular right, as in the European Convention and the International Covenant on Civil and Political Rights, or in a general clause, such as Article 52 of the Charter of Fundamental Rights of the European Union). As for the fundamental freedoms of legislative rank, the legislator, who created them, can alone call them into question.

¹⁰⁷² In this respect, the primary purpose of the reservation of law is 'to ensure that the limitations placed on citizens' freedoms have been consented to by them or by their representatives. The reservation of the law is primarily conceived in a negative way, as the exclusion of the Executive from the possibility of original intervention, and therefore as the prohibition of the latter from infringing on the rights and freedoms of citizens without legislative authorisation" (J. TREMEAU, *op. cit.*, pp. 36-37). The same principle prevails in comparative law. In Germany, the concept of reservation of law (*Vorbehalt des Gesetzes*) "means that there can be an infringement of the freedom and property of the citizens only insofar as a law provides for it and sets out the conditions and extent" (C. AUTEXIER, *Introduction au droit public allemand*, PUF, 1997, n° 95). In Switzerland too, Article 36 para. 1 of the Constitution requires that any serious restriction of a fundamental right be founded on a legal basis (see C. ROULLER, "Protection contre l'arbitraire et protection de la bonne foi en droit constitutionnel suisse", in *Droit constitutionnel suisse* (D. THÜRER, J.-F. AUBERT, J.P. MÜLLER ed.), Schulthess, 2001, p. 683).

infringement by the administrative authority is vitiated by illegality¹⁰⁷³.

The pursuit of an objective of general interest is also a legitimate reason for limiting a freedom. This has long been recognised by the Council of State. As Mr Hadas-Lebel pointed out, "It is constant that one of the most important functions of the concept of general interest in administrative case law is to limit, in the name of the higher purposes it represents, the exercise of certain individual rights and freedoms (...)"¹⁰⁷⁴. This consideration of the general interest, which is a constant in the law of liberties, if not its essential issue, may justify that individuals, driven by private motives, may be led to "bow to more powerful imperatives"¹⁰⁷⁵. The law, like the general interest, may justify the infringement of a fundamental freedom by the administration.

265. Justified, the infringement must also be *proportionate*, i.e. not exceed the threshold of infringement authorised by the law or strictly justified by the pursuit of the general interest¹⁰⁷⁶. Taking into account the criterion of proportionality is linked to the nature of the standards of fundamental freedoms within the meaning of Article L. 521-2 of the Code of Administrative Justice, which constitute optimisation obligations, i.e. 'principles' in the sense given by Ronald Dworkin and Robert Alexy¹⁰⁷⁷, beyond the nuances that may oppose the two authors. This means, to use a formula of the German Federal Constitutional Court, that "the infringement must not be of an intensity unrelated to the importance of the matter and the inconvenience imposed on the citizen"¹⁰⁷⁸. The public authority must not, by its action or abstention, infringe a fundamental freedom beyond what is necessary or reasonable. This requirement concerns both infringements resulting from actions and those resulting from refusal or abstention. In both cases, it takes the form of the requirement of the least

1073 In accordance with this requirement, the Conseil d'Etat ensures that infringements of freedoms originate in a law and, if not, annuls the provisions by which the administrative authority initially infringes them (see for example, for the freedom of trade and industry: CE, Sect., 29 July 1953, *Société générale des travaux cinématographiques, Lebon* p. 430; and for the right of ownership: CE, 5 October 1977, *Secrétaire d'Etat à la culture, Lebon* T. p. 686). In the same vein, Government Commissioner Galmot stated that the provision deciding that the failure to vaccinate against polio is likely to prevent a child from being admitted to a health or educational establishment infringes certain fundamental public freedoms, and can therefore only find its source in the law (concl. GALMOT on CE, 16 June 1967, *Ligne nationale pour la liberté des vaccinations*, JCP G 1967, II, 15303)

1074 R. HADAS-LEBEL, "L'intérêt général", *EDCE* n° 50, 1999, p. 290. It should be noted that in constitutional jurisprudence, the general interest is also given special consideration in order to justify the restrictions placed by the legislator on constitutional rights and freedoms. For example, the Council has accepted restrictions on the right to strike in the name of the continuity of public services (CC, no. 79-105 DC, 25 July 1979, *Rec. p. 33*), on individual freedom in the name of the "necessities of fiscal control" (CC, no. 83-164 DC, 29 December 1983, *Rec. p. 67*; no. 84-184 DC, 29 December 1983, *Rec. p. 67*; no. 84-184 DC, 29 December 1983, *Rec. p. 67*; No. 84-184 DC, 29 December 1984, *Rec. p. 94*; No. 89-268 DC, 29 December 1989, *Rec. p. 110*), freedom of movement and individual freedom in the name of "safeguarding the general interest of constitutional value" (CC, No. 81-127 DC, 19-20 January 1981, *Rec. p. 15*), freedom of movement in the name of protecting national security (CC, No. 93-323 DC, 13 August 1993, *Rec. p. 213*), individual freedom and the right to lead a normal family life in the name of "safeguarding public order" (CC, No. 93-323 DC, 13 August 1993, *Rec. p. 213*), or the right to property in the name of protecting public health (CC, No. 90-283 DC, 8 January 1991, *Rec. p. 11*).

1075 M. LETOURNEUR, "Quelques réflexions sur la codification du droit administratif", in *Etudes juridiques offertes à Léon Julliot de la Morandière*, Dalloz, 1964, p. 277.

1076 On the principle of proportionality, see in particular G. XYNOPOULOS, *Le contrôle de proportionnalité dans le contentieux de la constitutionnalité et de la légalité en France, Allemagne et Angleterre*, LGDJ, coll. PHILIPPE, *Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative française*, Economica, coll. Science et droit administratifs, 1990, 541 p.; J. MEKHANTAR, *Le principe de proportionnalité*, thèse Paris II, 1990; G. BRAIBANT, "Le principe de proportionnalité", in *Mélanges offerts à Marcel Waline. Le juge et le droit public*, t. 2, LGDJ, 1974, pp. 297-306; J.-P. COSTA, "Le principe de proportionnalité dans la jurisprudence du Conseil d'Etat", *AJDA* 1988, pp. 434-437; P. MARTENS, "L'irrésistible ascension du principe de proportionnalité", in *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu*, t. 1, Bruylant, 1992, pp. 49-68; P. MOOR, "Systématique et illustration du principe de proportionnalité", in *Les droits individuels et le juge en Europe. Mélanges en l'honneur de Michel Fromont*, PUS, 2001, pp. 319-341; M. FROMONT, "Le principe de proportionnalité", *AJDA* 1995 special issue, pp. 156-166.

1077 For both authors, rules and principles are genuine legal norms; the differentiation is made according to the degree of their determination. The rule applies to a specific case to which it assigns precise legal consequences leaving no freedom of choice to its addressee. The principle, on the other hand, does not have automatic legal consequences. Thus, "The distinction between rules and principles is (...) a distinction between two types of norms" (R. ALEXY, *A theory of constitutional rights* (translated from the German by J. RIVERS), Oxford University Press, 2003, p. 45): "principles are obligations to optimise, whereas rules have the character of definitive obligations" (R. ALEXY, "Idea and structure of a rational system of law", *APD* t. 33 *La philosophie du droit aujourd'hui*, 1988, p. 34. Underlined). More precisely, rules "are norms which can always either be carried out or cannot be carried out. If a rule is valid and applicable, then it is obligatory to do exactly what it requires, nothing more and nothing less" (*ibid.*). If the rule is applicable in this case, and if the factual circumstances constituting its "minor" are fulfilled, then necessarily the legal consequences of its "major" will be as well. In this respect, "the rules are applicable in an all-or-nothing style" (R. DWORKIN, *Prendre les droits au sérieux*, PUF, coll. Léviathan, 1995, p. 79). In contrast, "As obligations to optimise, principles are norms that command that something will be achieved to the greatest extent possible, relative to what is legally and actually possible. This means that they can be satisfied to varying degrees and that the required degree of their satisfaction depends not only on the factual possibilities but also on the legal possibilities which determine - in addition to the rules - essentially divergent principles. This implies that principles are subject to weighting: for principles, weighting is the characteristic form of the application of law" (R. ALEXY, *op. cit.*, p. 34). Thus, principles are legal norms that do not determine the concrete solution of a dispute solely because they are applicable to it. The fundamental freedoms identified in the context of Article L. 521-2 correspond strictly to this definition. Their exercise must always be reconciled with other imperatives and the violation of these norms never leads to a systematic sanction in the framework of this procedure. Similarly in Germany, "All fundamental rights are 'principles' (...)" (G. XYNOPOULOS, *op. cit.*, p. 348). In the United States, many constitutional rights, like freedom of expression, have the nature of principles. "When an infringement of free speech is discovered, it is unconstitutional unless some other policy or principle arises that, under the circumstances, carries enough weight to authorise the limitation" (R. DWORKIN, *op. cit.*, p. 86).

1078 BVerfGE 63, 88 [115] I, cited by C. AUTEXIER, *Introduction au droit public allemand*, 1997, no. 97. In a comparable manner, the European Court of Human Rights has declared, for example, with regard to respect for the right to private property, that it is for it to "ascertain whether a fair balance has been struck between the requirements of the general interest of the community and the imperatives of safeguarding the fundamental rights of the individual (...). Inherent in the Convention as a whole, the concern to ensure such a balance is also reflected in the structure of Article 1 of the First Protocol" (ECHR, 13 June 1979, *Spörring and Lönroth v. Sweden*, Series A, No. 31).

possible interference with fundamental freedoms by prohibiting both excessive and insufficient measures. In any event, it is up to the applicant to prove the illegality he or she alleges. An insufficient statement of reasons in this respect exposes the applicant to the rejection of his application¹⁰⁷⁹.

B. Illegality of the action

266. The infringement resulting from an action is unlawful if it is unjustified. It is also unlawful if, although well-founded, it is excessive in relation to the terms of the legal empowerment or the objective pursued.
267. The infringement will be unjustified on the one hand if it disregards a substantive legal requirement, and on the other hand if it has no legislative basis or, in police matters, is not based on a reason of general interest.
268. Firstly, the infringement is by nature unjustifiable when it is in conflict with a substantive legal norm. Several examples illustrate this requirement, the application of which does not raise any difficulty. Thus, since the property allocated to the exercise of a religion is, by virtue of the combined provisions of the Act of 9 December 1905 and Article 5 of the Act of 2 January 1907, left at the disposal of the faithful and those who serve them, "the public authority commits a manifest illegality by authorising a demonstration in a building allocated to the exercise of a religion without the agreement of the minister of the religion responsible for regulating its use"¹⁰⁸⁰. Similarly, it follows from the provisions of the Act of 10 March 1927 and the principles of criminal procedure that a decree granting extradition can only legally be issued after the expiry of the time limit for appealing to the Court of Cassation against the opinion of the investigating chamber or, where such an appeal has been lodged, after it has been rejected by the Court of Cassation. The decree of the Minister of Justice granting the applicant's extradition is therefore vitiated by illegality while the appeal against this measure is pending before the Court of Cassation¹⁰⁸¹. In its wording resulting from the Act of 26 November 2003, Article 25 of the Order of 2 November 1945 prohibits the deportation of a foreigner who is the father of a minor French child residing in France. Consequently, the execution of a deportation order against a national in the situation provided for by this provision is vitiated by illegality¹⁰⁸². The decision to cut down trees protected by article 1^{er} of the law of 29 December 1892 without carrying out the assessment imposed by this provision or obtaining the authorisation for cutting and felling required by article L. 130-1 of the town planning code for classified wooded areas¹⁰⁸³ is illegal. It is illegal to prevent a patient placed in an involuntary care facility from corresponding with the administrative and judicial authorities in disregard of the provisions of Article L. 3211-3 of the Public Health Code¹⁰⁸⁴.
269. Secondly, the harm resulting from a positive measure is unjustified if it does not have legal cover or is not based on a reason of general interest.

The infringement is legal if it is based on a legislative text. This is the case, for example, of a measure to immobilise transport vehicles taken on the basis of Article 37 of the law of 3 December 1982 on the orientation

1079 See for example, rejected according to the sorting procedure, CE, ord. 20 April 2004, *Ba*, No. 266647: the first instance summary procedure judge made a fair assessment of the facts submitted to his examination by ruling that neither the applicant's imprecise written submissions nor the poorly detailed explanations given during the public hearing held before him made it possible to consider as manifest the decision to refuse him entry to French territory. See also, rejected after a public hearing, CE, ord. 11 August 2005, *Maingueneau*, no. 283462: the applicant, owner of a building occupied by the company Hôtel du Marais, had been refused the assistance of the public force to execute an order to leave the premises issued by the civil judge on the grounds, according to the administration, that the matter had not been referred to him in the manner prescribed by the law of 9 July 1991 and the decree of 31 July 1992. Before the Council of State's interim relief judge, the applicant merely argued "that the procedural arguments that are manifestly unfounded in the case of hotel premises attest to the administration's dilatory attitude". The judge states "that, in so doing, and while the administration presents a detailed argument on this point, the applicant does not put the interim relief judge in a position to assess whether the infringement of his right of ownership is manifestly illegal". See also, ruling out manifest illegality "in view of the very general nature of the documents produced" by the applicant: CE, ord. 8 December 2003, *Abdi Karim Abdul Kadir Abdi*, no. 262446.

1080 CE, ord. 25 August 2005, *Commune de Massat, Lebon* p. 386. This solution is consistent with established case law. For the Conseil d'Etat, "the law of 9 December 1905 (...) did not give the communes the right to dispose of the churches they own" (CE, 1^{er} mars 1912, *Commune de Saint-Désir*, S. 1913, III, p. 18). It is the assignee who has possession of the keys to the building, which allows him to prevent the mayor from physically occupying the building (CE, 1913, *Abbé Arnaud*, 20 June 1913, *Lebon* p. 717). He alone decides on the use of the church and its development (CE, 17 December 1914, *Abbé Fousadier, Lebon* T. p. 1052). More recently, the Council ruled that "by deciding to institute (...) a right to visit classified movable objects exhibited in the church of Saint-Pierre de Baume-les-Messieurs without having obtained the agreement of the priest, the municipal council of the said municipality infringed the rights recognised to the latter to regulate the use of the property left at the disposal of the faithful by the laws of 9 December 1905 and 2 January 1907" (CE, Sect, 4 November 1994, *Abbé Chalumeau, RFD.A* 1995, p. 986, concl. R. SCHWARTZ). More generally, on the question, see E. TAWIL, "La police administrative des cultes en droit français", RRJ 2004/1, pp. 507-529.

1081 CE, ord. 29 July 2003, *Peqini, Lebon* p. 345.

1082 CE, ord. 21 February 2005, *Najemi*, n° 277520.

1083 CE, ord. 8 November 2005, *Moïsinac Massenet, Lebon* p. 491.

1084 CE, 15 May 2002, *Baudoin*, n° 239487.

of internal transport¹⁰⁸⁵, the prefectural order to create a community of agglomerations including a municipality against its consent taken by virtue of Article L. 5211-5 of the General Code of Territorial Communities¹⁰⁸⁶, the closure, pronounced on the basis of Article L. 3332-15 of the Public Health Code, of a drinking establishment that did not comply with the regulation prohibiting takeaway sales beyond 11pm. 3332-15 of the Public Health Code, of a drinking establishment that has not complied with the regulations prohibiting takeaway sales after 11 p.m.¹⁰⁸⁷ or even the fact that a headmaster requires a pupil to pay the school fees provided for in Articles L. 452-2 and L. 452-8 of the Education Code relating to the Agency for French Education Abroad, on pain of the pupil being exposed to an eviction measure provided for in the texts¹⁰⁸⁸. On the other hand, the law does not justify the infringement of a fundamental freedom if the disputed act or behaviour does not fall within the scope of the text invoked by the administration in support of it. Thus, the placing of seals in support of an order interrupting work is illegal when no criminal proceedings have been initiated¹⁰⁸⁹ or the detention of an aircraft, to the detriment of the owner, when the aircraft no longer has an operator¹⁰⁹⁰. In the *Commune de Collioure* order of 2 July 2003, the judge took care to point out "that, contrary to what the commune of Collioure maintains on appeal", the possibility of introducing a system of prior authorisation for access to the marina "does not find its legal basis in Book III of the code of maritime ports to which article L. 2213-22 of the general code of territorial communities refers". This measure, which disregards a constant jurisprudence of the Council of State, is therefore vitiated by illegality¹⁰⁹¹. A notable illustration is provided by the *Marcel* order of 2 April 2001. The administration had withdrawn the passports and national identity cards of a whole French family. The police authority had justified this measure by the circumstance that, due to the absence of mention of his filiation on his birth certificate, Mr Marcel could no longer be considered to possess French nationality by filiation. The interim relief judge considered that, in the absence of a legislative text authorising the administration to proceed with such a withdrawal on this ground, the absence of mention of his filiation "could not in itself *legally justify* the withdrawal by the administrative authority of national identity cards and passports"¹⁰⁹².

In the field of administrative police, where the intervention of the administration is by hypothesis conditioned by the existence of a legislative text, the justification of the infringement must be based on a reason of general interest based on the preservation of public order. The judge is demanding and, in the absence of threats of public order disturbances, concludes that the measure is illegal. Thus, a decision to close a public house on the basis of facts that have not been established is vitiated by illegality¹⁰⁹³. Similarly, the note taken by the mayor of a municipality, prescribing the opening of mail addressed to certain municipal councillors, is an unjustified infringement of the secrecy of correspondence and the freedom of local elected representatives to exercise their mandates. The Council noted that this measure 'results in all mail addressed to the interested parties being systematically opened without any distinction being made between the different categories of mail that these elected officials may receive; it does not provide for the prior consent of the addressees and *is not justified by any particular circumstance*'¹⁰⁹⁴. In the *Commune de Wingles* order, the judge noted that the order prohibiting the circulation of dangerous vehicles on a portion of the commune located outside the built-up area "*is not justified* by public safety requirements". Moreover, this ban is sufficient to completely block the access of trucks, during the periods concerned, to the Nitrochimie establishment, in particular by preventing these trucks from using another route than the one passing through the Wingles agglomeration. The judge concluded "that this blocking of access to the establishment operated by the Nitrochimie company for a significant part of the day, *without any justification based on*

1085 CE, ord. 9 April 2001, *Belrose and others, Lebon T.* p. 1126. This provision allows the administrative authority, under certain conditions, to order the immobilisation of one or more vehicles following the discovery of a criminal offence against transport regulations. The judge stated "that contrary to what the applicants allege in the last part of their pleadings, the immobilisation measures taken by the Prefect are based on the legislative and regulatory provisions, the general scheme of which has been recalled above". As the offences of which the applicants were guilty are not contested, the immobilisation measures taken by the Prefect are legal and justified.

1086 CE, ord. 24 January 2002, *Commune de Beaulieu-sur-Mer, Lebon T.* p. 873.

1087 CE, 9 February 2005, *SARL "Lou Marseillon"*, n° 272196.

1088 CE, ord. 11 May 2002, *Deynck*, n° 246755. See, in the same sense, CE, ord. 23 July 2003, *Peyre*, n° 258672.

1089 CE, ord. 23 March 2001, *Société Lidl, Lebon* p. 154. The purpose of affixing seals is to assist in the execution of a decree interrupting work. Article L. 480-2 of the town planning code states that "when no proceedings have been initiated, the Public Prosecutor informs the mayor who, either ex officio or at the request of the interested party, puts an end to the measures taken by him" (see CE, 10 May 1985, *Commune d'Aigues-Mortes c/ Mortureux, AJDA* 1985, p. 511, obs. L. RICHER). In this case, the Public Prosecutor had closed the municipality's complaint without taking any action, which prevented the mayor from exercising his powers under article L. 480-2. As the measure does not fall within the scope of this text, it is illegal.

1090 CE, 2 July 2003, *Société Outremer Finance Limited, Lebon* p. 306. None of the provisions of the civil aviation code invoked by the public establishment Aéroport de Paris authorises the administration to retain an aircraft to the detriment of its owner when the aircraft no longer has an operator.

1091 CE, ord. 2 July 2003, *Commune de Collioure, Lebon T.* p. 930. The mayor of Collioure made the access of ships to the marina subject to the issue of a prior authorisation. The issue was therefore not the private occupation of the public domain - which excludes any other use by persons other than the occupant and is subject in principle to authorisation (Article L. 28 of the Code du domaine de l'Etat) - but the circulation and parking on this domain in accordance with its purpose, which cannot in principle be subject to an authorisation system (CE, Ass., 22 June 1951, *Daudignac, Lebon* p. 362, *G.A.J.A.* n° 71). The interim relief judge emphasised that the effect of the measure enacted "is, by illegally requiring such authorisation, the conditions and procedure for granting which are not specified by the police regulations, to allow the mayor to choose at his discretion the coastal passenger transport vessels and the operating companies authorised to call at Collioure, by completely ousting the vessels and companies to which he would not wish to grant authorisation". In so doing, the order states, the administrative authority "unlawfully institutes an authorisation regime which its police powers do not allow it to create".

1092 CE, ord. 2 April 2001, *Ministre de l'Intérieur c/ Consorts Marcel, Lebon* p. 167.

1093 CE, ord. 16 August 2004, *Minister of the Interior, Internal Security and Local Freedoms v. Basset*, No. 271148.

1094 CE, 9 April 2004, *Vast, Lebon* p. 173.

public safety, constitutes a serious and manifestly unlawful infringement of the freedom of enterprise and the freedom to come and go"¹⁰⁹⁵.

270. In the event that the infringement resulting from an action is justified by the law or by a reason of general interest, the measure taken will be illegal if it does not meet the requirement of proportionality. Thus, in the *Aguillon* judgment¹⁰⁹⁶, the Council of State considered that the requisition of all striking staff of a clinic was an excessive infringement of the right to strike in relation to the objective of protecting public health. The decision is certainly justified, since it is based on a provision of the general code of local authorities and there is a threat to public health¹⁰⁹⁷. However, it is not proportionate insofar as the prefect intended to require all striking midwives to continue working in the obstetrics department. The solution is condemned because of its generality. The prefect could have achieved a satisfactory result with regard to the objective of protecting public health by taking a measure that was less intrusive to the freedom in question. The Council indicated that he should have "considered redeploying activities to other health establishments or reducing the operation of the service" and "investigated whether the essential needs of the population could not otherwise be met given the department's health capacities"¹⁰⁹⁸. Similarly, restrictions on the movement of minors are unlawful if they excessively interfere with freedom of movement in relation to the public safety objective. Two decrees issued by the mayor of Montfermeil in the period preceding the summer of 2006, and referred to the *déféré-liberté* judge, illustrate how this classic requirement is assessed. The first order prohibited the circulation of minors aged 15 to 18 years in more than three vehicles at any one time in the part of the territory covering the town centre of the municipality until 30 June 2006. The interim relief judge affirmed "that the ban on people aged 15 to 18 travelling in more than three bears a manifestly disproportionate infringement on their freedom of movement, given its very purpose and its time span, *every day, at all hours* and until 30 June 2006"¹⁰⁹⁹. The second order prohibited minors under 16 years of age from moving freely, without being accompanied by an adult, from 8pm to 5am, in the same part of the municipality, until 30 June 2006. The judge emphasised that although, in order to contribute to the protection of minors, the mayor may make use, depending on the particular local circumstances, of the general police powers he holds under Articles L. 2212-1 et seq. of the General Code of Local Authorities, "the legality of measures restricting the freedom of movement of minors to this end is subject to the twofold condition that they are justified by the existence of particular risks in the sectors for which they are enacted and that their content is adapted to the objective of protection taken into account". In this case, "the disputed prohibition measure, in view of the number of its addressees, minors under 16 years of age, its time span, from 8 p.m. onwards, and its permanent nature, until 30 June 2006, appears to be manifestly excessive and unsuited to the stated objective of protecting minors"¹¹⁰⁰. The infringement is also unlawful if it is an excessive restriction on the freedom of enterprise in relation to the objective pursued. In the *Commune d'Evry* ruling, the municipal safety commission had made certain findings during its visit to a local shop, findings which normally called for a simple formal notice to carry out the various works and checks required within a given period. Under these conditions, the mayor could not legally, in the absence of a particular emergency, order the closure of the establishment on the same day as the commission's visit¹¹⁰¹. If a measure was necessary, the closure order appears excessive in view of the circumstances that justified its issuance.

1095 CE, ord. 26 November 2004, *Commune de Wingles*, n° 274226.

1096 CE, 9 December 2003, *Aguillon and others*, *Lebon* p. 497.

1097 The law on internal security of 18 March 2003 added a 4th degree to Article L. 2215-1 of the General Code of Local Authorities, which allows the prefectural authority to request striking personnel, even from a private employer, when justified by urgency and a threat of public order problems (see F. CHAUVIN, "Les nouveaux pouvoirs du préfet pour la sécurité intérieure", *AJDA* 2003, p. 667; D. MAILLARD DESGREES DU LOU, "L'encadrement législatif du pouvoir de réquisition des préfets et la police administrative générale", *JCP A* 2003, 1475). This requirement was met in this case insofar as the clinic affected by the strike normally provides 42% of the department's deliveries. When the clinic suddenly stops its activity, the other establishments in the department are not able to take care of all the patients in satisfactory safety conditions. The requisition measure taken by the prefect was therefore perfectly justified in terms of the need to protect the health of parturients and newborns.

1098 This solution is in line with the constant jurisprudence of the Council of State, which censures excessive restrictions on the right to strike (see CE, 7 January 1976, *Centre hospitalier général d'Orléans*, *Lebon* p. 10). Before the *Aguillon* decision of the Conseil d'Etat, first instance summary proceedings judges had also sanctioned, on the basis of Article L. 521-2, measures that excessively infringed on the right to strike of health personnel with regard to the objective of preserving public health (TA Nantes, order of 2 April 2001, *Syndicat SUD-CRC services santé-sociaux Loire Atlantique*, *Dr. adm.* 2001, comm. n° 155, note by T.-M. David). Still in the hospital civil service, the judge for interim relief of the administrative court of Orléans ruled that by limiting itself to organising the continuity of the service by assigning only the doctors of the emergency medical service, the administration was disproportionately infringing on the applicants' right to strike (TA Orléans, order of 11 December 2001, *Bennis*, *AJFP* 2002, p. 39).

1099 TA Cergy-Pontoise, order 5 May 2006, *Ott et al.*, No. 0604077, *AJDA* 2006, p. 958, obs. S. BRONDEL.

1100 TA Cergy-Pontoise, order of 5 May 2006, *Ott and others*, No. 0604074, *JCP A* 2006, 1118, note by J. MOREAU. The *déféré-liberté* judge had adopted a similar position with regard to measures prohibiting the night-time movement of young minors, consistently condemning 'curfew' decrees that were too broad in scope. See CE, ord. 29 July 1997, *Préfet du Vaucluse*, *RFDA* 1998, pp. 383-389, note P.-L. FRIER; CE, ord. 4 August 1997, *Maire de Dreux*, *Quot. jur.* 23 October 1997, n° 85, pp. 4-5, note G. PELLISSIER; CE, ord. 9 July 2001, *Préfet du Loiret*, ord. 27 July 2001, *Ville d'Etampes*, *AJDA* 2002, pp. 351-359, note G. ARMAND; CE, ord. 30 July 2001, *Préfet d'Eure-et-Loir*, *Lebon T.* p. 1103; CE, ord. 2 August 2001, *Préfet du Vaucluse*, *Lebon T.* p. 1101; CE, ord. 10 August 2001, *Commune d'Yerres*, *Lebon T.* p. 1106; CE, ord. 10 August 2001, *Commune de Meyreuil*, *Lebon T.* p. 1101. On the process of 'curfew' orders, see B. SIERPINSKI, "La police administrative au secours de la permission de minuit", *RA* 1998, pp. 723-730 (1^{ère} part), *RA* 1999, pp. 28-34 (2^{ème} part).

1101 CE, ord. 14 March 2003, *Commune d'Evry*, *Lebon T.* p. 931.

However, the measure is legal if it is justified *and* proportionate. Thus, in the aforementioned order of the *Commune of Wingles*, the interim relief judge noted that the traffic ban only concerned certain roads in the commune and was limited to the periods from 8:15 am to 12:15 pm and from 1:15 pm to 5:30 pm. Under these conditions, "if this ban disturbs the organisation of work in the establishment operated by the Nitrochimie company by forcing it to carry out receptions and shipments before or after these periods, it is not vitiated, in view of its aim of protecting public health, by a disproportion likely to give it the character of a serious and manifestly illegal infringement of the freedom of movement"¹¹⁰². Similarly, in the *déféré-liberté*, a measure restricting freedom is legal if it is proportionate to the objective pursued. This is the case of the ban on political stands on a market. The administrative judge noted "that given the strict limitation in time and place of this ban, it was necessary for the maintenance of good order and for the convenience of public movement in and around the market, and does not appear to illegally infringe freedom of expression and freedom of the press"¹¹⁰³.

The judge also accepted, in principle, that an excessive restriction on the freedom of enterprise of a company operating in the public domain could be illegal. This solution is noteworthy insofar as, traditionally, restrictions in this area seemed to have to give way systematically to the imperatives of managing the public domain. Traditionally, the Conseil d'Etat affirmed that if the administration ensures the management of the public domain "both in the interest of the said domain and its allocation and in the general interest", the principle of freedom of trade and industry is not likely to "impede" the exercise by the administration of its powers to manage the domain¹¹⁰⁴. The balance between the two requirements was almost systematically to the detriment of economic activities carried out on the public domain¹¹⁰⁵. So much so that the government commissioner Rougevin-Baville declared that "One may doubt the existence of a true freedom of trade and industry when it concerns an activity that is carried out on the public highway"¹¹⁰⁶. Nevertheless, under the influence of Community law in particular, the administrative judge has modified his traditional case law. While the Conseil d'Etat still states that "it is the responsibility of the administrative authority to which the public domain is assigned to manage the latter in the interest of the domain and its use, as well as in the general interest", it now adds that "it is also incumbent on it, when, in accordance with the use of these facilities, they are the site of production, distribution or service activities, to take into consideration the various rules, such as the principle of freedom of trade and industry or the ordinance of 1^{er} December 1986, within the framework of which these activities are carried out"¹¹⁰⁷. Thus, the principle of freedom of trade and industry must no longer be systematically sacrificed on the altar of the general interest. Any interest derived from the management of the public domain can no longer automatically justify a restriction of this freedom. The judge of the *déféré-liberté* drew the consequences in the *Commune de Théoule-sur-Mer* order of 22 May 2003. Admittedly, the judge recalled the "particular constraints on economic activities carried out in the public domain". Nevertheless, by agreeing to examine the extent of the constraints imposed on the company, he admits that a non-proportionate restriction on the freedom to undertake can be sanctioned by means of the *déféré-liberté*¹¹⁰⁸. If the economic actors who carry out their activity on the public domain must bear certain constraints, these are not without limits. The illegality of the infringement may also result from the administration's refusal or abstention.

C. Illegality of refusal or abstention

1102 CE, ord. 26 November 2004, *Commune de Wingles*, n° 274226. The measure is illegal only insofar as it concerns a part of the area covered outside the built-up area (see *supra*, § 269).

1103 CE, ord. 15 December 1982, *Commune de Garches*, RDP 1983, pp. 211-215, note R. DRAGO.

1104 CE, Sect. 20 December 1957, Société nationale d'éditions cinématographiques, *Lebon* p. 702; CE, Sect. 29 April 1996, Société d'affichage Giraudy, *Lebon* p. 293.

1105 See J.-P. BROUANT, "Domaine public et libertés publiques: instrument, garantie ou atteinte? This case law was based on a simple consideration: on the public domain, and in particular public roads, most freedoms are not "in their place", to use Pierre-Henri Teitgen's expression (P.-H. TEITGEN, *La police municipale. Etude de l'interprétation jurisprudentielle des articles 91, 94 et 97 de la loi du 5 avril 1884*, Sirey, 1934, p. 450). By nature, public roads are primarily used for traffic. Since their primary purpose is to guarantee freedom of movement, it is only subsidiarily that they can be used for the exercise of other freedoms. Under these conditions, "he who uses the public highway as the seat of his business or as a means of his industry must suffer the same constraints as he who uses it only to go and come" (P. BON, *La police municipale*, thesis Bordeaux I, 1975, p. 251).

1106 Concl. on CE, Sect. 25 January 1980, *Gadiaga and others*, *Lebon* p. 44.

1107 CE, Sect. 26 March 1999, *Société EDA*, *Lebon* p. 107.

1108 CE, ord. 22 May 2003, *Commune de Théoule-sur-Mer*, *Lebon* p. 232. In this case, the judge ruled out the manifestly illegal infringement of a fundamental freedom after having assessed the extent of the constraints imposed on the company Cannes Aquaculture for the exercise of its activity. The order explained that the applicant company operated a sea fish farming business on public maritime land and that, apart from a few minor incidents that occurred on an occasional basis, deliveries were authorised. While it is true that vehicles must pass through a barrier, which is guarded during working hours by an employee of the harbour master's office, these access arrangements have not caused any serious supply difficulties. Moreover, access to the company's premises on foot is possible at all times. The grounds of the order state that the municipality does not exclude issuing the company with a badge allowing permanent access of trucks to the facilities. The judge added that it was "up to the municipality to ensure that in the event of an emergency, and in particular in the event of a break in the supply of oxygen to fish, the necessary deliveries can be made". In view of all this information, and in particular the reservation formulated by the judge in the event of a break in the supply of oxygen, the conditions under which the Cannes Aquaculture company must carry out its activity do not disproportionately infringe on the freedom of enterprise in view of the requirements of good management of the public domain.

271. Generally speaking, the infringement resulting from a refusal or abstention is unlawful if the administration does not comply with an obligation to act imposed on it. The identification of the illegality of a refusal or abstention presents two differences compared to the assessment of the infringement resulting from an action. On the one hand, the infringement may be lawful without having to find its basis in a legislative text. On the other hand, the proportionality requirement is measured in reverse in the case of abstention: it requires not the minimum intervention of the public authority, but its minimum abstention.
272. The refusal or abstention to carry out an action or to grant a benefit is illegal if it disregards an obligation to act on the part of the administration. Thus, the violation by the prefect of the obligation imposed on him by the decree of 23 June 1998 to register the territorial asylum application file 1109, the refusal to return his valid residence permit to a foreigner whose expulsion order has been suspended on the basis of Article L. 521-1 of the Code of Administrative Justice¹¹¹⁰ or the refusal to issue a territorial asylum seeker with a receipt equivalent to a residence permit to which he or she is entitled under Article 2 of the Decree of 23 June 1998¹¹¹¹. Similarly, the refusal of the French authorities to assume responsibility for examining the applicants' asylum application, and their return to Austria, a State where there is no evidence that it remains willing to examine their application, unlawfully infringes their right to apply for refugee status¹¹¹². As any person whose French nationality is established is entitled to obtain a national identity card, the refusal to issue such a document to a citizen whose French nationality and identity are not contested is vitiated by illegality¹¹¹³.

Conversely, the refusal to grant a benefit to the applicant is legal if no text confers a right to obtain the requested benefit. Thus, no legislative or regulatory provision requires the territorial assembly of French Polynesia to provide elected officials suffering from a disability with a person to help them exercise their mandate. Under these conditions, the decision by which the president of this assembly deferred the application of the *ex gratia* measure previously granted to an elected representative to help her exercise her mandate cannot be considered as manifestly illegal¹¹¹⁴. The same applies when the advantage sought is indeed provided for by a text but the person concerned does not meet the conditions for obtaining it. Thus, if the applicant has not fulfilled his or her obligations under national service legislation, the consular authority's refusal to issue or renew his or her passport is "not manifestly illegal" if it is based on Article 2 of the decree of 13 January 1947, which states that "No passport shall be issued to insubordinates and deserters"¹¹¹⁵. Similarly, the refusal to authorise a dental surgeon to set up in the building where a colleague is already practising is not manifestly illegal as long as this decision is taken in application of article 71 of the decree of 22 July 1967 on the code of ethics for dental surgeons¹¹¹⁶. Candidates for the auditor's office wishing to join the National School of Magistrates must, by virtue of Article 16 of the Ordinance of 22 December 1958, enjoy their civic rights and be of good character. Under these conditions, the refusal to allow a person who has committed theft to take the entrance exam to the school is not manifestly illegal¹¹¹⁷. Article D. 408 of the Code of Criminal Procedure provides that the permit to visit a detainee is granted to family members subject to reasons related to the maintenance of security and good order in the establishment. Therefore, the withdrawal of a visit permit is not manifestly illegal when the person concerned has attempted, during previous visits, to introduce certain objects irregularly into the establishment¹¹¹⁸. As Article 5 of the Ordinance of 2 November 1945 provides that in order to enter France, any foreigner must be in possession of the documents and visas required by international conventions and regulations in force, the refusal to admit a minor child to the national territory is not manifestly illegal if the child does not hold a visa or residence permit allowing him or her to enter the territory¹¹¹⁹. Similarly, refusal to renew the passport of an applicant subject to an international arrest warrant is justified¹¹²⁰. Similarly, the refusal of the administration to grant a favourable response to an incomplete

1109 CE, 15 February 2002, *Hadda*, *Lebon* p. 45.

1110 CE, ord. 8 November 2001, *Kaigisiz*, *Lebon* p. 545.

1111 CE, ord. 12 November 2001, *Ministre de l'Intérieur c/ Farhoud*, *Lebon T.* p. 1126.

1112 CE, 14 May 2004, *Gaitnkaev*, n° 267360.

1113 CE, ord. 11 March 2003, *Samagassi*, *Lebon* p. 119.

1114 CE, ord. 25 November 2003, *President of the Assembly of French Polynesia*, *Lebon T.* p. 928.

1115 CE, ord. 9 January 2001, *Deperthes*, *Lebon* p. 1. The appeal on the merits against the same decision was rejected by a judgment of 3 March 2003 (CE, 3 March 2003, *Deperthes*, *Lebon T.* p. 784).

1116 CE, order of 9 February 2001, *Philippart and Lesage*, No. 230112. According to the aforementioned provision, the interested party "must not settle in the building where a colleague is already practising without the latter's approval or, failing that, without the authorisation of the departmental council of the order (...). The decisions of the departmental council can only be motivated by the needs of public health. In this case, the practitioner practising in the building refused his approval and the Conseil de l'ordre considered that the needs of public health did not justify overriding his refusal.

1117 CE, ord. 18 July 2003, *Jaouik*, n° 258599.

1118 CE, ord. 30 September 2003, *Poupard*, n° 260588.

1119 CE, ord. 29 September 2004, *Minister of the Interior, Internal Security and Local Freedoms v. Aubame*, n° 272584.

1120 CE, ord. 27 October 2003, *Cohen*, n° 261221. The judge stated, in particular, that "if the freedom to come and go is a fundamental freedom within the meaning of the aforementioned provisions, the seriousness and legality of the infringements must be assessed in light of the restrictions provided for by the law, in compliance with constitutional requirements and France's international commitments". As an international arrest warrant had been issued for the applicant, the restriction on his freedom of movement "cannot be assessed in terms of its effects independently of the existence of this arrest warrant". Thus, by refusing to renew his passport, the administrative authority was tending to assist in the execution of a warrant issued by the judicial authority and was not manifestly unlawfully interfering with the applicant's freedom

application¹¹²¹ or one submitted after the deadline¹¹²² is legal.

The justification is only valid if the text invoked by the administration to oppose a refusal really applies to the circumstances of the case. For example, in the *Hyacinthe* case, the services of the prefecture had refused to give the applicant the form needed to submit an application for recognition of refugee status. To legally justify its refusal, the administration had invoked Article 10 of the Law of 25 July 1952, according to which the admission in France of an asylum seeker can be refused if the application "is only presented with a view to thwarting a removal measure". Ms Hyacinthe, who was sentenced to a deportation order on 19 December 2000, had only applied to the prefecture for this form on 26 and 29 December 2000. Nevertheless, the interim relief judge noted that the applicant's partner had applied for refugee status prior to this conviction. Consequently, and in application of the principle of family unity, this provision was not applicable to Ms Hyacinthe's case. The text invoked by the administration could not therefore legally justify the refusal to grant her refugee status¹¹²³. Similarly, the Minister of the Interior can legally refuse access to the territory to foreigners whose application for asylum is manifestly unfounded, by invoking the provisions of the Ordinance of 2 November 1945. When this possibility is used in a case where it appears that the asylum application is not manifestly unfounded, the refusal of access to the territory is vitiated by illegality¹¹²⁴.

273. Refusal to act by the administration may also be justified by a reason of general interest. This may be linked to the principle of continuity of public service, the preservation of public order or the needs of the administration of municipal property.

In the area of leave of absence requested by public employees for religious reasons, it is well established case law, arising from the principle of continuity of public services, that such leave may be refused on the grounds of 'the needs of the normal functioning of the service'¹¹²⁵. The judge of the *référé-liberté* considers that this reason can legally justify the refusal to allow a building caretaker to be absent every Friday from 2pm to 3pm to go to the mosque¹¹²⁶.

Litigation concerning the refusal to rent a hall to political and religious groups also illustrates the conditions under which a consideration of general interest may legally justify a refusal. In accordance with the well-established case law of the Conseil d'Etat, the provision of a municipal hall may only be refused on the grounds of public order or the needs of the administration of municipal property¹¹²⁷. In the *FN IFOREL* order of 19 August 2002, the interim relief judge noted that "in the absence of circumstances specific to the town of Annecy, it does not appear from the documents in the file submitted to the interim relief judge, nor from the information gathered during the hearing, that the holding of the Front National summer university at the town's conference centre would present dangers to public order which the police authorities would not be able to address by taking appropriate measures; thus, in the light of the investigation, the requirements of maintaining public order in Annecy *do not justify* refusing to host the Front National summer university at the town's conference centre"¹¹²⁸. Similarly, in the absence of threats to public order, the fact that an association is classified by a parliamentary report as a sectarian group cannot legally justify refusing to make a municipal hall available to it¹¹²⁹. The second reason for refusal lies in the requirements of the administration of municipal property. This reason can legally justify the refusal to make a municipal hall available to a political group when, on the day the request is submitted to the administrative

of movement.

1121 CE, order of 5 June 2003, *President of the Government of French Polynesia*, No. 257389 (refusal to authorise the applicant to sit an examination because the person concerned had not submitted a complete file before the expiry of the registration deadline). See, in the same sense: CE, ord. 15 December 2005, *Marcon, Lebon* p. 565.

1122 CE, ord. 28 May 2002, *Les Verts, Lebon* p. 188. It follows from Article 2 of the decree of 9 January 1978 that political parties applying for the authorisation provided for in Article L. 167-1 of the Electoral Code had to submit their application by 20 May 2002 at the latest. As the application submitted by the "Les Verts" party was filed on 23 May, the administrative authority was required to reject its application for authorisation. The decision to refuse, based on the failure to comply with the provisions of this text, "is not, under these conditions, vitiated by any illegality".

1123 CE, ord. 12 January 2001, *Hyacinthe, Lebon* p. 12.

1124 CE, ord. 25 March 2003, *Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c/ Sulaimanov, Lebon* p. 146; CE, ord. 24 October 2005, *MBIZI MPASSI*, n° 286247; CE, ord. 17 March 2006, *Saidov*, No. 291214.

1125 CE, 12 February 1997, *Lebon* p. 891. See G. Koubi, "Autorisation d'absence et liberté de conscience des fonctionnaires", *R4* 1987, p. 133 et seq. SAINT-JAMES, "La liberté religieuse du fonctionnaire", *JCP A* 2005, 1143.

1126 In the first instance, the interim relief judge affirmed that "the refusal of authorisation for absence to go to the mosque, based on the organisational rules defined in the interest of the service, is (...) not manifestly illegal" (TA Châlons-en-Champagne, order of 28 January 2004, *Benaissa c/ OPHLM Saint-Didier, JCP A* 2004, 1145, note E. TAWIL). On appeal, the interim relief judge of the Conseil d'Etat confirmed this decision: "by considering that the requirements of the normal functioning of the public service prevented Mr. B from being authorised to go to the hospital. B. was authorised to go to the mosque every Friday from 2 p.m. to 3 p.m., whereas the time regulations applicable to the building caretakers of the office to which he belongs prescribe, with regard to this day of the week, a compulsory presence from 5 a.m. to 8 a.m., from 9 a.m. to 11 a.m. and from 2 p.m. to 4:30 p.m., the president of the Saint-Dizier Municipal Office of Low-Rent Dwellings did not infringe on Mr. B.'s freedom to practice his religion in a manifestly illegal manner. B. to practise the religion of his choice" (CE, ord. 16 February 2004, *Benaissa, Lebon T.* p. 826).

1127 See CE, 15 March 1996, *Cavin, Lebon* p. 83.

1128 CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL), Lebon* p. 311. In comparable circumstances, the Conseil d'Etat annulled a refusal to make a hall available for the organisation of a public meeting of the Front National, on the grounds that it did not emerge "from the documents in the file that this meeting was of such a nature as to threaten public order in such conditions that it could not be prevented by police measures" (CE, 29 December 1997, *Maugendre, Lebon* p. 826).

1129 TA Rennes, ord. 11 February 2002, *Association locale pour le culte des témoins de Jéhovah de Lorient*, GP 29 April 2003, p. 12; TA Paris, ord. 13 May 2004, *Association culturelle des Témoins de Jéhovah de France et autres*, AJDA 2004, pp. 1597-1599, note G. GONZALEZ.

authority, the said hall is already reserved for the days and times requested¹¹³⁰. On the other hand, it cannot be used as a basis for refusing to make a conference centre available to a political party when, on the one hand, the park in which the centre is located is only a small part of the green spaces to which the public has access in the city and, on the other hand, it is not clear from the documents in the case file that the holding of the summer university would be incompatible with maintaining its openness to the public¹¹³¹.

Finally, particular attention must be paid to the litigation of refusal of assistance of the public force insofar as it has been the subject of remarkable applications in matters of summary judgment. The administration unlawfully infringes the right of ownership when it refuses, in the absence of a threat of public order disturbance, to provide assistance from the public force to enforce a court decision ordering the eviction of untitled occupants of private property¹¹³². On the other hand, its refusal is justified - and therefore legal - if there is a real threat of disturbance to public order. On the basis of Article L. 521-2 of the Code of Administrative Justice, the interim relief judge is demanding in assessing the reality of this threat¹¹³³. Not only must the administration provide proof of the risk of disturbance that it alleges¹¹³⁴. But moreover, as this is an exception to the principle of the obligation to execute court decisions, it is strictly understood. The fear of simple resistance, of a minor disturbance, is not sufficient to exempt the administration from the duty to provide assistance from the public force¹¹³⁵. Conversely, the risk of disturbance is established when the use of force is likely to provoke a violent reaction from the persons occupying the premises¹¹³⁶. Disturbance may also result from a situation of social distress, in particular in the case of evictions of families with children without the possibility of rehousing¹¹³⁷, or of isolated persons with no income¹¹³⁸. Even in the absence of a disturbance, the refusal to provide assistance by the public force will be

1130 CE, ord. 2 March 2001, *Dauphine*, n° 230798.

1131 CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL)*, *Lebon* p. 311.

1132 Although the prefectural authority is in principle required to ensure the enforcement of legal decisions (Article 16 of the Law of 9 July 1991 states that "The State is required to assist in the enforcement of judgments and other enforceable titles"), it may legally refuse to provide assistance from the public force if the enforcement of a decision appears to be likely to entail a significant risk for public order (CE, 29 March 2002, *SCI Stéphaneur et al.* 117; CE, ord. 27 June 2002, *Frullani et SCI Marçflore*, *Lebon* T. p. 872; CE, ord. 22 July 2002, *S.A.R.L. Société de réalisation et de rénovation immobilière (SRRJ)*, n° 248734; CE, ord. 2 August 2002, *Société Prophal*, n° 249110; CE, ord. 31 October 2002, *Société coopération et famille*, no. 251314; CE, ord. 21 November 2002, *Gaz de France*, *Lebon* p. 408; CE, ord. 27 November 2002, *SCI Résidence du théâtre*, *Lebon* T. p. 874; CE, ord. 2 September 2003, *Société S.A.G.E.P et autres*, no. 259866; CE, ord. 15 October 2004, *Société Sud-Est réalisations*, n° 272934; CE, ord. 13 July 2005, *Société Combé Chavat 2*, no. 282220; CE, ord. 11 August 2005, *Maingueneau*, n° 283462). The judge of summary proceedings takes up here a constant administrative jurisprudence whose principles were laid down in the *Couëtias* decision of 1923 (CE, 30 November 1923, *Couëtias*, *Lebon* p. 789, *G.A.J.A* n° 43).

1133 This rigorous assessment of the risk of disturbance is not unrelated to the pressure exerted in this area by the Constitutional Council and the European Court of Human Rights. In Decision 403 DC, the Constitutional Council affirmed "that any judicial decision is enforceable; that therefore, any judgment may give rise to forced execution, and the public force must, if required, assist in this execution; that such a rule is the corollary of the principle of the separation of powers set out in Article 16 of the Declaration of the Rights of Man and of the Citizen. The Council specifies that the administrative authority may indeed derogate from this rule, but only "in exceptional circumstances relating to the safeguarding of public order" (CC, no. 98-403 DC, 29 July 1998, cons. 46, *Rec.* p. 276). In a comparable manner, the Strasbourg Court has made the enforcement of judgments and rulings an element of the proceedings within the meaning of Article 6 of the Convention and affirmed that "the right of access to a court would be illusory if the domestic legal order of a Contracting State allowed a final and binding judicial decision to remain inoperative to the detriment of a party" (ECHR, 19 March 1997, *Hornsby v. Greece*, *Rec.* 1997-II, p. 495, § 40). For a condemnation of the Italian State because of a refusal by the prefect to assist the police in the enforcement of decisions to evict tenants, see ECHR, 28 September 1995, *Scallo v. Italy*, Series A, No. 315-C (violation of Article 1^{er} of Protocol No. 1).

1134 CE, ord. 21 November 2002, *Gaz de France*, *Lebon* p. 408.

1135 Thus, a threat of disturbance cannot be deduced "from the mere current of sympathy aroused by the presence of a few artists' studios in the neighbourhood" (CE, ord. 21 November 2002, *Gaz de France*, *Lebon* p. 408). See also CE, ord. 27 November 2002, *SCI Résidence du théâtre*, *Lebon* T. p. 874. To justify his refusal, the Prefect of Police invoked public order grounds relating to the interest of certain inhabitants of the neighbourhood in the shows organised in the occupied premises. However, this reason appears insufficient insofar as it does not appear from the file that granting the assistance of the public force would risk provoking reactions likely to lead to disturbances or violence. The judge noted that public order concerns stemmed, in the opposite direction, from the deteriorated state of the building as well as from the inconvenience to the neighbourhood and the dangers for spectators of events organised without the appropriate safety measures for the public being taken. In the above-mentioned *Stéphaneur* judgment, the Conseil d'Etat highlighted "the objectives, mainly of a protest nature, pursued by the occupants", who were "acting in order to draw attention to the difficulties of housing in the Marseille region". In evacuating the occupants, the aim was to put an end to a media operation and not to deprive destitute families of their homes. Under these conditions, the threat of public disorder is not proven.

1136 In the case of occupation of a company's premises by its employees, the refusal may be justified by "the risk of disturbance of public order that would result from the reactions of the employees of the company *Jardinier Gros Pin*, whose employment could be compromised by the execution of the requested eviction measure" (CE, ord. 27 June 2002, *Frullani et SCI Marçflore*, *Lebon* T. p. 872). This hypothesis is that of the *Société Cartonnerie Saint-Charles* decision (see CE, Ass., 2 June 1938, *Société la cartonnerie et l'imprimerie Saint-Charles*, *Lebon* p. 521, concl. DAYRAS). Similarly, the refusal of assistance appears justified when the person concerned, who has a weapon and has been known to behave violently and refuse to enter into dialogue with the institutions, is prepared to commit serious acts to oppose the eviction of the farm he is running after his father (CE, ord. 15 October 2004, *Société Sud-Est réalisations*, n° 272934). See also, in the same sense: CE, ord. 13 July 2005, *Société Combé Chavat 2*, no. 282220.

1137 In a 1983 decision, the Conseil d'Etat ruled that a refusal to use public force for the expulsion of an unemployed man without resources and father of eight children, including six minors and two infants, was legal, considering that it "could rightly give rise to fears that the expulsion would undermine public order" (CE, 27 April 1983, *Ministre de l'Intérieur c/ Société SIRAP*, n° 40278). The same reasoning was used in the context of summary proceedings. The interim relief judge expressly considered that the refusal to provide assistance from the public force could be justified by the presence on the premises of several families, including many children, for whom there was no solution for rehousing (CE, ord. 22 July 2002, *S.A.R.L. Société de réalisation et de rénovation immobilière (SRRJ)*, no. 248734 and, for the same building, CE, ord. 17 July 2003, *Société de réalisation et de rénovation immobilière (SRRJ)*, no. 258506; CE, ord. 2 August 2002, *Société Prophal*, no. 249110; CE, ord. 31 October 2002, *Société coopération et famille*, no. 251314; CE, ord. 12 December 2002, *Ferre*, n° 252412; CE, ord. 2 September 2003, *Société S.A.G.E.P et autres*, n° 259866; CE, 29 October 2003, *Société Resimmo*, *Lebon* p. 911).

1138 The refusal to provide assistance by the public force may be justified by the fact that the person whose eviction is requested is 83 years old, has lived in the premises for 35 years, lives with his daughter, has little money and has no alternative accommodation (CE, order of

legal during the 'winter truce' period established by Article L. 613-3 of the Construction and Housing Code, which prohibits evictions between 1st November and 15 March of the following year¹¹³⁹. During this period, it is only if the untitled occupants have taken possession of the premises by de facto¹¹⁴⁰ - and there is no threat of disturbance - that the refusal of assistance becomes illegal again¹¹⁴¹. Finally, the judge takes into account all the facts of the case, and in particular the disturbance that may result from the non-execution of the decision, notably 'the immediate threats to the safety of the occupants caused by the delay in evicting them'¹¹⁴².

A text or a reason of general interest may thus justify a refusal or abstention by the administration that infringes a fundamental freedom. The judge will also take into consideration the reasonable or proportionate nature of the abstention in assessing the condition of legality.

274. When assessing the legality of abstentions, the breach of the proportionality requirement takes the form of an unjustified delay in processing a request from a citizen. While a delay in the processing of a request may be *justified* by certain particularities of the case and therefore be lawful, it becomes unlawful if it is manifestly *excessive in time*.

This is the case, for example, in matters of issuing and renewing identity documents. The interim relief judge declared 'that if the refusal to renew or issue a passport to a French citizen infringes the freedom of movement (...), no legislative or regulatory provision sets a time limit, on pain of illegality of any implicit decision to refuse, for the issuance of a passport, no legislative or regulatory provision sets a time limit for the renewal or issue of a passport, on pain of illegality of any implicit decision to reject it; however, the administration to which such a request is made must decide within *a reasonable time*, which it is up to the judge to assess, if necessary, taking into account all the circumstances of the case'¹¹⁴³. The principles thus established have been applied on several occasions by the interim relief judge. For example, a seven-month investigation is not unreasonable in view of the documents submitted in support of the application to renew the passport, and in particular the fact that two other members of the applicants' family had submitted documents in support of applications also based on the loss of their passports, which had necessitated checks¹¹⁴⁴. Similarly, the absence of a decision for more than 18 months on the applicant's passport renewal application does not constitute a manifest illegality "in view of the doubts that exist as to the identity" of the person concerned¹¹⁴⁵. The same principles apply to the application for the issuance or renewal of a national identity card. The judge recalled that "it is for the administrative authorities to ensure that the documents produced in support of an application for a national identity card are of such a nature as to establish the identity and nationality of the applicant; that *a sufficiently justified doubt* in this respect may lead, without serious and manifestly unlawful infringement of a fundamental freedom, to make the issue or renewal subject to the carrying out of checks appropriate to each particular situation"¹¹⁴⁶. In this case, there were serious doubts about the authenticity of the documents produced by the applicant. In these circumstances, the judge considered that the Prefect's decision to postpone the renewal of the identity card, pending the outcome of legal proceedings in this regard, did not constitute a manifest illegality. Similarly, the reasonable time limit is not exceeded when, on 18 September 2002, the consular services had not transcribed onto the civil status registers a marriage celebrated on 28 April 2002 by a civil registrar of the Algerian Republic¹¹⁴⁷. The suspicion of a 'sham marriage' may also justify extending the time limit for examining an application for a residence certificate¹¹⁴⁸.

On the other hand, the delay, although justified, becomes excessive if it exceeds a *reasonable* length of time. This is the case, for example, if the administration is excessively late in issuing a residence permit applicant with the receipt to which he or she is entitled under the law¹¹⁴⁹. The same is true in the case of failure, for fourteen months, to enforce a judgement annulling a deportation order against a foreigner who has been habitually resident in France for more than ten years and who should therefore be granted a residence permit bearing the words

10 October 2003, *Sagnard*, no. 260867).

1139 CE, ord. 8 March 2004, *Maingueneau*, n° 265261.

1140 In this case, Article L. 613-3 of the Code de la construction et de l'habitation expressly provides that squatters cannot avail themselves of its provisions.

1141 CE, 29 March 2002, *SCI Stéphane and others, Lebon* p. 117; CE, ord. 27 November 2002, *SCI Résidence du théâtre, Lebon T.* p. 874.

1142 CE, 29 October 2003, *Société Resimmo, Lebon* p. 911. In this case, however, the threat did not appear to be sufficiently immediate for the refusal by the police authority to be considered as vitiated by a manifest illegality.

1143 CE, ord. 11 October 2001, *Tabibou, Lebon T.* p. 1133.

1144 CE, ord. 20 July 2004, *Mzimba*, n° 270440.

1145 CE, ord. 30 December 2003, *Labry*, n° 263121.

1146 CE, ord. 25 February 2004, *Ibrabime*, n° 264949.

1147 CE, ord. 18 September 2002, *Bouchakour*, No. 250340.

1148 See, confirming the decision of the first judge: CE, ord. 16 December 2002, *Ghoggal*, no. 252513. The administrative authority had decided, in view of the elements brought to its attention, which could lead it to consider that the applicant's marriage was a marriage of convenience, to continue the investigation of the interested party's file in order to decide in full knowledge of the issuance of the residence certificate he was applying for. The interim relief judge considered that such a decision did not, given all the circumstances of the case, exceed the reasonable time limit within which the administration must decide. Consequently, the absence of a final position on the request did not constitute a manifest illegality.

1149 CE, ord. 12 November 2001, *Ministre de l'Intérieur c/ Béchar, Lebon T.* p. 1132: absence of any follow-up for more than 2 years and 7 months to the administration's decision to issue a foreigner with a residence permit application receipt to which he is entitled under the law. See *a fortiori*, for a period of 3 years and 6 months: CE, 7 May 2003, *Boumaïza*, n° 250002.

"private and family life" as of right¹¹⁵⁰ .

Two decisions rendered in similar disputes, and settled in different ways, illustrate the assessment of the requirement of reasonableness or diligence in the response to a request made by a citizen. Under the terms of the first paragraph of Article 81 of the Organic Law of 27 February 2004, "The resignation of a minister is presented to the President of French Polynesia, who acknowledges it (...)". In an order of 11 April 2006, the interim relief judge affirmed "that if these provisions do not imply that the President of French Polynesia is obliged to acknowledge without delay the resignation presented by a minister and if, in order to provide for the replacement of the resigning minister and thus ensure the continuity of governmental action in the field in which this minister's competence is exercised, the President has a time limit to acknowledge a resignation which is imposed on him, this time limit cannot however exceed a *reasonable duration*". In this case, the President of French Polynesia, who received the applicant's letter of resignation on 13 March 2006, refrained from acting on it, without invoking any reason linked to the administration of French Polynesia that would justify him postponing his decision to acknowledge the applicant's resignation. The judge states "that, in these circumstances, the reasonable time available to him to draw the consequences of this resignation is obviously exceeded". His abstention, therefore, constitutes a manifest illegality¹¹⁵¹ . On the other hand, when a member of the governmental team submits his resignation two days before the vote concerning the Assembly of French Polynesia, i.e. on 11 April 2006, the refusal of the President of French Polynesia to acknowledge it the next day does not constitute a manifest illegality. In such a case, the refusal is justified and proportionate¹¹⁵² . If the free exercise of his mandate by a local elected official is affected, the infringement is not illegal.

275. It follows from the above that not every infringement of a fundamental freedom is illegal. Unlawfulness does not follow automatically from a finding that such a freedom has been infringed. The requirement that the infringement of a fundamental freedom be unlawful is all the more demanding in that the law requires not mere unlawfulness but *manifest* unlawfulness.

II. The manifest nature of the illegality

276. Article L. 521-2 of the Code of Administrative Justice requires that the illegality committed be obvious. This condition is demanding and therefore difficult to meet.

A. A clear illegality

277. Article L. 521-2 requires a 'manifestly illegal' infringement of a fundamental freedom. Generally speaking, the adjective "manifest" and the adverb "manifestly" constitute standards expressing the idea of obviousness or flagrancy¹¹⁵³ . Thus, for the juge de l'excès de pouvoir, a manifest error of assessment is "an obvious error (...) which is beyond doubt for an enlightened mind"¹¹⁵⁴ . When exercising a limited review, 'the Council of State focuses not so much on the actual importance of the error committed as on its obviousness'¹¹⁵⁵ . The formula used in Article L. 521-2 of the Code of Administrative Justice can also be compared with the "manifestly illegal" order which the civil servant may and even must disobey if it is likely to seriously compromise a public interest¹¹⁵⁶ .

1150 CE, ord. 11 June 2002, *Aït Oubba*, *Lebon T.* p. 869.

1151 CE, ord. 11 April 2006, *Tefaarere*, *Lebon* p. 197.

1152 CE, ord. 13 April 2006, *Vernaudeau*, no. 292343. Mr. Vernaudeau submitted a letter of resignation on 11 April 2006. In a letter dated 12 April 2006, the President of French Polynesia argued, in order not to immediately acknowledge Mr. Vernaudeau's resignation, that it was necessary to take it into account in order to carry out a complete reorganisation of the government and that it was necessary for public administration purposes. For the judge, "since these reasons, which are of a nature to legally allow the President of French Polynesia not to immediately acknowledge a resignation, do not appear to be devoid of any foundation and since the resignation of Mr. Vernaudeau was given, it is not necessary for the President of French Polynesia to take into account his resignation. Vernaudeau's resignation was given barely two days before the election, it does not appear that the President of French Polynesia had, on the date on which the application for interim relief was decided, disregarded the requirement that he should acknowledge the resignation of a member of the government within a reasonable time.

1153 See the analysis and the numerous examples cited in S. RIALS, *Le juge administratif français et la technique du standard*, *op. cit.* pp. 80-82, and B. PETIT, "L'évidence", *RTDciv*, 1986, pp. 485-503, esp. pp. 486-487. PETIT, "L'évidence", *RTDciv*, 1986, pp. 485-503, esp. pp. 486-487.

1154 G. BRAIBANT, unpublished conclusions on CE, Sect. 13 November 1970, *Lambert*, *AJDA* 1971, p. 53, cited in chron. D. LABETOUILLE and P. CABANES, *AJDA* 1971, p. 35.

1155 B. PACTEAU, *Le juge de l'excès de pouvoir et les motifs de l'acte administratif*, LGDJ, travaux et recherches de la Faculté de droit et de science politique de Clermont I, 1977, p. 247. See also J.-P. BOURGOIS, *L'erreur manifeste d'appréciation. La décision administrative, le juge et la force de l'évidence*, *L'espace juridique*, 1988, 341 p.

1156 Article 28 of Title I of the General Statute for Civil Servants. See A. TALLEFAIT, *Jcl. fonctions publiques*, fasc. 300 (11, 2006), n° 11. On the appreciation of this notion by the administrative judge, see B. CHERIGNY, "Ordre illégal et devoir de désobéissance dans le contentieux disciplinaire de la fonction publique civile", *RDP* 1975, pp. 867-936.

More immediately, the expression evokes Article 809 para. 1 of the new Code of Civil Procedure, which gives the civil judge of summary proceedings jurisdiction to put an end to a "manifestly illicit disturbance". When the civil judge of summary proceedings intervenes on this basis, it "must be obvious that the defendant's behaviour is contrary to morality, the law, the regulations, the convention (...). If this is not obvious, the disturbance may be unlawful, but it is not 'manifestly' unlawful"¹¹⁵⁷. A strictly identical meaning is given to the requirement of "manifestly" unlawful interference in Article L. 521-2. This condition does not mean that the interim relief judge must limit himself to a limited review, as has been argued¹¹⁵⁸, but rather that the illegality invoked must have all the characteristics of flagrancy. As Mr Martin has stated, it "must be apparent at the first sight of the interim relief judge"¹¹⁵⁹. The illegality of the infringement must be obvious; it "must in some way 'jump out at the judge'"¹¹⁶⁰.

278. The presence of this condition in Article L. 521-2 of the Code of Administrative Justice is explained by two sets of considerations.

The requirement that the illegality be manifest is justified, first of all, by the extreme brevity of the time allowed for the judge to rule. Compelled to examine the case and give a decision within 48 hours of the application being registered, the interim relief judge cannot linger over a detailed examination of the legality of the disputed act or conduct. Since the judge cannot carry out in-depth investigations, it is necessary that the illegality appears to him within the 48-hour time limit and that it is therefore manifest. As Mr. Dugrip had generally observed, "the cases submitted to the Dugrip, "the cases submitted to the judge are all the more likely to be judged quickly as their solution is certain and they are simple"¹¹⁶¹. When a case is referred to the court on the basis of Article L. 521-2, the solution must be simple and, for this, the illegality must be obvious. As a judge of extreme urgency, the summary judgment judge must be, more than any other, a judge of evidence. It is necessary that the litigious situation appears to him immediately.

The condition of 'manifest' illegality is justified, secondly, by the autonomous nature of the summary procedure. As Mr Cassia pointed out, the summary procedure under Article L. 521-1 has a certainty that Article L. 521-2 does not have: "for the summary suspension, the measure ends at the end of the day. 521-2: "in the case of interim relief, the measure ends at the latest when a panel is called upon to rule, so that any error of assessment made by the interim relief judge will be compensated for in some way when the application on the merits is examined; by comparison, since interim relief is not subject to the filing of an application in the main proceedings, the interim relief judge does not have the 'safety net' provided by the subsequent in-depth examination of the application"¹¹⁶². In the absence of security linked to the subsequent intervention of a judge of the merits, it is normal that the judge of summary jurisdiction can only use the very important powers at his disposal in cases where the administration has obviously acted irregularly. Intervening within 48 hours, he should only use his prerogatives when the illegality is not subject to the slightest discussion.

279. Thus, in the *référé-liberté* procedure, urgency has the effect of tightening the requirement of illegality. In other procedures, on the contrary, it will lead to a more flexible assessment. It is in fact an established fact, in private judicial law as in administrative litigation, that urgency always modifies the assessment to be made of the legality of an act or a situation; it is never required of an interim relief judge that he or she characterise, exactly as a judge on the merits would, a 'simple' illegality or unlawfulness. Urgency modifies the assessment of legality in two possible ways. First of all, it can make it more flexible, which corresponds to the notions of 'serious doubt' about the legality of a decision in Article L. 521-1 of the Code of Administrative Justice, and the absence of 'serious dispute' in Article 808 of the New Code of Civil Procedure. It can also have the effect of tightening the threshold of illegality, which is then embodied in the concepts of 'manifestly illegal' infringement of Article L. 521-2 of the Code of Administrative Justice, and 'manifestly unlawful disturbance' of Article 809 paragraph

¹¹⁵⁷ P. BERTIN, "Un trouble manifestement illicite: la lutte contre la vie chère", *GP* 1983, 1, p. 419.

¹¹⁵⁸ M. Deygas asserts that by the *Medrinal* order (rejecting an application for interim relief on the grounds that the contested decision is not "manifestly illegal"), the judge intended to leave "the administration a margin of appreciation, which can only be sanctioned in a "restricted" manner by the interim relief judge" (S. DEYGAS, note under CE, ord. 9 August 2001, *Medrinal, Procédures* 2001, comm. n° 239, p. 19). This reading of the *Medrinal* decision must obviously be rejected. Indeed, by referring to the requirement of manifest illegality, the judge is merely recalling - and checking - the presence of a legal condition expressly stated in Article L. 521-2. By mentioning a 'manifest' illegality, the judge is not referring to a degree of control and, more precisely, to a lesser degree of control over the legality of the contested measure. In practice, moreover, it is constant that the judge of summary proceedings does not limit himself to a restricted control of the legality of the administrative decisions which are referred to him on this basis. On the contrary, he exercises full control over the legal characterisation of the facts, assessing, for example, the reality of the risk of disturbance of public order in the face of the expulsion of squatters or the holding of a political party's summer university (see *supra*, § 273), coupled with a control of proportionality, for example over a decision to expel a foreign national (CE, Sect, 30 October 2001, *Ministre de l'Intérieur c/ Tibba, Lebon* p. 523) or on a measure to requisition striking personnel (see *supra*, § 270). The interim relief judge exercises not a minimum but a maximum control.

¹¹⁵⁹ R. MARTIN, "Les nouveaux référés administratifs", *Annales des loyers* 2002, p. 1114.

¹¹⁶⁰ P. CASSIA, *Les référés administratifs d'urgence*, LGDJ, coll. Systèmes Droit, 2003, p. 121. On the question see, by the same author, "L'examen de la légalité en référé-suspension et en référé-liberté", *RFD* 2007, pp. 45-57.

¹¹⁶¹ O. DUGRIP, *L'urgence contentieuse devant les juridictions administratives*, PUF, coll. Les grandes thèses du droit français, 1991, p. 391.

¹¹⁶² P. CASSIA, *op. cit.* p. 121. This explains why the *déféré-liberté*, which is a variant of the *référé-suspension*, is only subject to the requirement of a serious doubt on the legality of the decision.

1 of the New Code of Civil Procedure. In the first case, the illegality or unlawfulness must be apparent, probable or likely¹¹⁶³, in the second it must be obvious and certain.

It is possible to identify three levels of assessment of illegality in relation to this criterion. The first level - the least demanding - is that of apparent or probable illegality. The second level - the intermediate level - is that of 'simple' illegality, established by the court. The third level - the most demanding - is that of certainty of illegality: illegality is not open to discussion. The authors of the *leading judgments* mention, with regard to Article L. 521-2 of the Code of Administrative Justice, "certain evidence of the illegality committed"¹¹⁶⁴. Two levels thus separate the serious doubt of Article L. 521-1 and the manifest illegality of Article L. 521-2: manifest illegality is more difficult to establish than simple illegality and, *a fortiori*, more difficult to establish than serious doubt. If there is no serious doubt within the meaning of Article L. 521-1 of the Code of Administrative Justice, there can naturally be no manifest illegality within the meaning of Article L. 521-2. The judge of the summary suspension is judge of the *appearance*¹¹⁶⁵, the judge of the summary liberation is judge of *the evidence*.

If the interim relief judge finds a manifest illegality, the judge on the merits who may be called upon to rule after him will necessarily find a "simple" illegality. A manifestly illegal act is a *fortiori* an illegal act¹¹⁶⁶. Conversely, the judge of the summary judgment does not judge the substance of the law. His office consists only in suspending the execution of a decision if he has doubts about its legality. It is therefore perfectly possible that the judge in the main proceedings, who must find that a decision is illegal, will reject the application made on the merits. As President Labetoulle has pointed out, "it is not at all abnormal for the judge on the merits to rule in a different direction from that in which the interim relief judge ruled"¹¹⁶⁷. It is natural that an act whose legality is merely doubtful may, after a full investigation, not appear illegal¹¹⁶⁸. It must even be said that, in such a case, the judge on the merits does not judge *differently* from the judge of the summary proceedings; he does not condemn the solution adopted by the latter. Quite simply, he does not judge "the same thing": the former must establish an illegality and the latter only nourish a doubt. On the contrary, the judge of the summary judgment judges "the same thing" as the judge of the merits, namely an illegality: simple, in the case of the judge of the merits, qualified - because of the urgency - for the judge of the summary judgment.

280. The summary judgment judge must limit his intervention to obvious illegalsities, i.e., in view of his office, to simple illegalsities. It is not for him to rule on complex points of law, the analysis of which is incompatible with the 48-hour period allowed for ruling.

It follows that the interim relief judge cannot review the conventionality of the law serving as the legal basis for the contested act. In the *Allouache et al.* order, the applicants argued that the law of 18 November 2005 extending the state of emergency in France for a period of three months was contrary to certain provisions of the European Convention on Human Rights. The order states that 'in view of the office of the interim relief judge, a plea alleging that the law is contrary to international commitments is not, in the absence of a judicial decision to that effect, handed down either by the court hearing the main proceedings or by the court with jurisdiction to hear the case as a preliminary issue, likely to be taken into consideration'¹¹⁶⁹. This case law is nevertheless applied with a certain degree of flexibility. It is accepted that if the court hearing the main proceedings has ruled on the conventionality of a provision that is similar to the one challenged - by way of exception - before the interim relief judge, the latter is competent to review the conventionality of the disputed provision himself. Thus, in an order of 21 April 2007, the interim relief judge of the Conseil d'Etat recognised his competence to assess, in an unprecedented manner, the conventionality of Article L. 52-2 of the Electoral Code, which prohibits the publication of election results until the closure of the last polling station on the territory of the Republic¹¹⁷⁰. This relaxation is likely to temper

1163 See R. MARTIN, "Le référé, théâtre d'apparence", *D.* 1979, chron. p. 158.

1164 *G.A.J.A.* No. 118, § 11.

1165 It is a judge of "appearance and likelihood" (L. VALLEE, concl. on CE, Sect. 29 November 2002, *Communauté d'agglomération Saint-Etienne métropole*, *BDCF* 2/03, n° 28, p. 38).

1166 When a judge of the merits rules after the judge of the référé-liberté - naturally in the same sense as the latter in case of admission of the request - and annuls the contested administrative decision, the appeal lodged against the ordonnance de référé-liberté is without object. See CE, ord. 18 June 2003, *Territoire de la Polynésie française et Caisse de prévoyance sociale de la Polynésie française*, *Lebon T.* p. 877. The applicants appealed against an order dated 23 May 2003 by which the interim relief judge of the Administrative Court of Papeete, on the basis of Article L. 521-2 of the Administrative Justice Code, pronounced the suspension of two decrees of the Council of Ministers of the Territory of French Polynesia. By judgment of 10 June 2003, the Administrative Court of Papeete annulled these two decrees. Consequently, there is no need for the interim relief judge of the Council of State to rule on the appeal lodged against the order of 23 May 2003.

1167 D. LABETOULLE, "L'activité contentieuse du Conseil d'Etat en 2003", *Dr. adm.* 2004, Interview No. 1, p. 7.

1168 For an illustration, see CE, Sect. 11 July 2001, *Société Trans-Ethylène*, *Environnement* 2002, comm. n° 29, note. P.-J. BARALLE (decision of the judge of summary proceedings admitting a serious doubt as to the legality of the contested decision) and CE, 24 October 2001, *Commune de Marennes*, *Environnement* 2002, comm. n° 56, note. D. DEHARBE (decision of the judge of the merits rejecting the request to annul this decision). For a joint commentary on the two decisions, see *Dr. adm.* 2002, comm. n° 38, note C. MAUGUE.

1169 CE, ord. 9 December 2005, *Allouache and others*, *Lebon* p. 562. The exclusion of control of the conventionality of laws from the office of the interim relief judge was first established by the Council of State in the context of interim relief. See CE, 30 December 2002, *Ministre de l'aménagement c/ Carminat*, *Lebon* p. 510, *Dr. adm.* 2003, comm. n° 74, obs. M. G.; *Coll. ter.* comm. n° 55, note L. ERSTEIN; *AJDA* 2003, pp. 1065-1068, note O. LE BOT. On this topic, see B. LE BAUT-FERRARESE, "L'office du juge administratif des référés face à la règle européenne", *LPA* 25 February 2004, n° 40, pp. 4-11; T.-X. GIRARDOT, "Le retour de la loi écran devant le juge des référés. La jurisprudence *Carminat* confirmée par le juge des référés du Conseil d'Etat", *AJDA* 2006, pp. 1875-1880.

1170 CE, ord. 21 April 2007, *Société anonyme Antilles Télévision (ATV)*, n° 304961, mentioned in the Recueil *Lebon*. The interim relief judge

the rigour of the initial case law.

A similar development can be observed with regard to the possibility for the judge of the *référé-liberté* to review the legality of the regulatory act serving as a basis for the contested act. In an order of 28 May 2002, the interim relief judge agreed to review the conformity with the Constitution of the regulatory act serving as a basis for the contested individual act. He noted, incidentally, that "Article 2 of the decree of 9 January 1978 (...) is contrary neither to Article 4 of the Constitution nor to Article 10 of the European Convention on Human Rights and Fundamental Freedoms (...)"¹¹⁷¹. The question was then raised before a panel of the Council of State in the *Société Outremer Finance Limited* judgment. The government commissioner, Gilles Bachelier, wanted the interim relief judge to be able to review the legality of a regulation by way of exception. Referring to a decision of 30 August 2001 that implicitly authorised the judge of the summary suspension procedure to exercise this control¹¹⁷², the government commissioner stated that the judge of Article L. 521-2 should be able to sanction such illegality in cases where it is obvious: 'even if the judge of the *référé-liberté* must rule in an extreme emergency limited to 48 hours, which excludes in-depth research to assess the legality of a text, it seems desirable to us to reserve the hypothesis where the regulatory act on which the decision is based is so obviously illegal that it does not require any investigation'¹¹⁷³. Nevertheless, the Council of State will not rule on the issue, as the contested decision is illegal in another respect. Subsequently, a panel had to rule on a plea alleging the illegality of the regulatory act serving as the legal basis for the individual act under challenge. The contested decision, by which the director of the French Office for the Protection of Refugees and Stateless Persons refused to register the asylum application submitted by the applicant, had been taken on the basis of Article 1^{er} of the decree of 14 August 2004. The Conseil d'Etat stated "that, in view of the office of the interim relief judge, the argument based on the illegality of Article 1^{er} of the aforementioned decree of 14 August 2004 cannot be accepted"¹¹⁷⁴. By using the term "retained", the decision recognises that such a plea is *effective*. If it cannot be sanctioned in this case, it is because it is insufficiently obvious. In any event, the requirement of manifest illegality of the infringement appears difficult to meet.

B. A difficult requirement to meet

281. In order for the judge of the *référé-liberté* to pronounce a safeguard measure, the illegality must be obvious. If the illegality of the act or behaviour does not appear to be certain or if he has a simple doubt, even a serious one, as to its legality, he must reject the application submitted on the basis of Article L. 521-2 of the Administrative Justice Code. The judge is invited, because of the terms of the law, not to take any risks in this respect. If the administrative authority has not taken an unlawful position with absolute certainty, the judge of the *référé-liberté* will have to reject the application submitted by the applicant.

282. Three decisions illustrate particularly clearly the high degree of requirement resulting from the condition of manifest illegality.

Firstly, it follows from the *GIE Sport* order of 18 March 2002 that the ambiguity of a text constitutes an obstacle to the manifest nature of an illegality¹¹⁷⁵. In this case, the dispute arose from a decision by the National Football League to grant exclusive exploitation rights for the broadcasting of certain sporting competitions. *GIE Sport libre* considered that this decision had no legal basis insofar as the provisions of the Act of 16 July 1984, which, in its Articles 18-1 and 18-2, provide for the possibility of granting exclusive exploitation rights, were not applicable to radio services. The question of the legality of the contested decision was therefore conditional on the applicability of this law to broadcasting. As the interim relief judge stated, "the solution of the dispute is linked to the question of whether live radio coverage of a sports competition falls within the scope of the 'exploitation rights' provided

checked whether this restriction on the freedom of expression guaranteed by Article 10 of the European Convention on Human Rights was proportionate to the objective pursued. Previously, the conventionality of this provision had never been examined by the Council of State. It had nevertheless exercised this control over the law limiting the dissemination of opinion polls during election periods (CE, Sect., 2 June 1999, *Meyet, Lebon* p. 161; CE, 13 September 2000, *Meyet, Lebon T.* p. 1010). By analogy, the general criteria for assessing the conventionality of the restriction are transposable to the provision whose examination is submitted to the judge of summary proceedings. This is sufficient to remain within the limits of the *Carminat* case law insofar as the judge's assessment is framed by the solutions adopted by the trial judge in the same dispute. In this case, the judge of summary proceedings will take up the reasoning implemented by the Council of State in the aforementioned decisions, affirming that the restriction brought by the legislator to the publication of the electoral results, even though these are publicly proclaimed at the end of the counting operations in each polling station, "is based in particular on the concern of the legislator to avoid that the choice of the citizens is influenced in conditions likely to undermine their fundamental right to the free expression of their vote and the sincerity of the ballot. It stated "that the objective thus pursued is linked to the 'protection of the rights of others' within the meaning of the provisions of paragraph 2 of Article 10 of the Convention; that, since it consists solely of postponing the publication of election results in the press or by any means of electronic communication to the public until the last polling station in the territory of the Republic closes, this restriction is proportionate to the objective pursued".

¹¹⁷¹ CE, ord. 28 May 2002, *Les Verts, Lebon* p. 188.

¹¹⁷² CE, ord. 30 August 2001, *Djaoui, Lebon T.* p. 1100.

¹¹⁷³ G. BACHELIER, concl. on CE, 2 July 2003, *Sté Outremer Finance Limited, AJDA* 2003, p. 1782.

¹¹⁷⁴ CE, 9 March 2005, *Moinuddin, Lebon T.* p. 805, p. 921.

¹¹⁷⁵ CE, ord. 18 March 2002, *GIE Sport libre et al, Lebon* p. 106.

for by these provisions and whether the rules which, for television, derive from them are also applicable to broadcasting". Everything depended, therefore, on the scope of application of this text. Because of the ambiguity of its wording, however, it was not possible to reach an affirmative conclusion either in the sense of inclusion or exclusion. Indeed, the second paragraph of Article 18-2 of the Act states that "The seller or purchaser of this right may not oppose the broadcasting by other *audiovisual communication* services of brief extracts taken free of charge from the *images* of the transferee service(s) and freely chosen by the service that is not the transferee of the exploitation right that broadcasts them". The judge noted that "these provisions contain an ambiguity because of the simultaneous use, in the second paragraph of Article 18-2, of the terms 'audiovisual communication services' and 'images'; in view of this ambiguity, the illegality that could vitiate the National Football League's decision is not, in any case, 'obvious'. Thus, the ambiguity as to the applicable law removes the "manifest" character of the illegality invoked. The illegality is probable, and of such a nature as to give rise to serious doubt in the mind of the interim relief judge; it is not certain and cannot therefore give rise to an interim relief order.

This heightened degree of requirement for the *référé-liberté* was emphasised by the Conseil d'Etat in the *Tliba* judgment of 30 October 2001¹¹⁷⁶. The applicant, who was the subject of an expulsion order, considered that this decision was a manifestly illegal infringement of her right to lead a normal family life. After recalling in general the greater rigour of the procedure of Article L. 521-2 of the Code of Administrative Justice over that of Article L. 521-1¹¹⁷⁷, the Conseil d'Etat stated that an expulsion measure is only manifestly illegal, with regard to the right to a normal family life, "if it is justified by a *manifestly* disproportionate infringement of the aims for which the contested measure was taken". This formula refers to the *Belgacem* case law of 1991¹¹⁷⁸. Since this decision, the administrative judge has exercised a proportionality control over expulsion measures that affect the right to respect for family life of the person concerned. This involves a balancing of the benefits to public order of removing the person concerned against the disadvantages to the person's family life of enforcing the decision. In the *Tliba* judgment, the applicant had been guilty of receiving money from drug trafficking, which can be described as serious. On the other side of the scale, Ms Tliba could point to the length of her links with France, the French nationality of the members of her close family, in particular her minor child, and the apparent severance of her links with her country of origin. In light of these elements, the proportionality of the expulsion order appeared doubtful or open to discussion. Consequently, as the government commissioner Isabelle de Silva points out, the argument based on the lack of proportionality of the contested measure "could have given rise to a 'serious doubt' in the mind of the 'summary suspension' judge, and justified his suspending the execution of the expulsion pending the judgment on the merits"¹¹⁷⁹. On the other hand, due to the seriousness of the facts of which the applicant is accused, the disproportion that appears to affect the measure is not sufficiently gross or obvious to give rise to a summary judgment. "If there was any illegality, it did not appear to be manifest"¹¹⁸⁰. Consequently, the government commissioner deduced that "Ms Tliba would have met the conditions to benefit from a suspension of the decision in question, if she had invoked the provisions of Article L. 521-1, but that she cannot claim such a measure by invoking Article L. 521-2"¹¹⁸¹. The applicant could have obtained satisfaction through the summary suspension procedure; the more demanding summary release procedure is not suited to her situation. Generally speaking, it will be very difficult for a person affected by an expulsion order to demonstrate the manifest illegality of this measure with regard to his or her freedom to live as a family¹¹⁸².

Finally, mention should be made of an order of 9 January 2006 which provides guidance as to the assessment of the evidence of illegality in the event that the administrative authority fails to draw the consequences of a decision handed down by the administrative court. It is common ground that the administration commits an illegality when it refuses to execute a decision issued by the administrative court or fails to draw all the consequences of its execution. For the interim relief judge, the fact that this decision was insufficiently precise as to the consequences that flowed from it is an element to be taken into consideration in assessing the manifest nature of the illegality committed. In this case, a refusal had been made on 1^{er} July 2005 to Mrs Daaji's application for renewal of her residence permit on the grounds that, according to the findings of a public health inspector, she had ceased to meet the conditions for its granting under Article 6 of the Franco-Algerian agreement of 27 December 1968. The interim relief judge of the Rennes administrative court, seized on the basis of Article L. 521-1 of the administrative justice

1176 CE, Sect. 30 October 2001, *Ministre de l'Intérieur c/ Tliba, Lebon* p. 523.

1177 See the presentation and analysis of the formula *above*, § 40.

1178 CE, Ass., 19 April 1991, *Belgacem, Lebon* p. 152, concl. R. ABRAHAM; taking up a solution of the European Court of Human Rights (ECHR, 21 June 1988, *Berrebah v/ Netherlands*, series A, n° 138; ECHR, 18 February 1991, *Moustaquim v/ Belgium*, series A, n° 193)

1179 I. DE SILVA, concl. on CE, Sect. 30 October 2001, *Minister of the Interior c/ Tliba*, RFDA 2002, p. 333.

1180 M. GUYOMAR and P. COLLIN, chron. under the *Tliba* judgment, AJDA 2001, p. 1057.

1181 I. DE SILVA, *op. cit.* p. 333.

1182 Rejection is almost systematic for applications challenging an expulsion order on this basis (see for example CE, ord. 10 August 2001, *Ministre de l'Intérieur c/ Saddouki*, n° 236969; CE, ord. 25 April 2002, *Labhini*, n° 245547; CE, ord. 4 February 2003, *Hilario*, n° 253742). Mention should nevertheless be made of a decision of 7 August 2002 in which the interim relief judge accepted that the interference with the right to lead a normal family life was disproportionate (see CE, ord. 7 May 2002, *Ministre de l'Intérieur c/ Ouakid, Lebon* T. p. 870). In this case, the person concerned had been living in France since 1975, his parents and two sisters had acquired French nationality and he no longer had any family ties in his country of origin. Above all, the expulsion order had been issued on the basis of certain facts prior to the initiation of the expulsion procedure. The judge stated that "in view of the nature of the acts of which Mr Ouakid is accused and the willingness to reintegrate that he demonstrated during his imprisonment, as well as the conditions under which his expulsion was decided, the Minister of the Interior has, in the circumstances of the case, infringed the right of the person concerned to lead a normal family life (...) in a way that is manifestly disproportionate to the aims for which he issued the contested order".

code, suspended this decision by an order of 9 September 2005. To execute this decision, the administrative authority merely granted Ms Daaji a temporary residence permit for a period of three months, valid until 26 January 2006, while specifying that the holder was authorised to carry out a professional activity. Referred to by Ms. Daaji on the basis of Article L. 521-2 of the Administrative Justice Code, the interim relief judge of the Rennes administrative court ordered the prefect to take the measures required to execute the order of 9 September 2005. When the matter was referred to him by way of appeal, the interim relief judge of the Council of State ruled in two stages. First, he recalled the obligations imposed on the administrative authority in such a case. It indicates that when the interim relief judge suspends the execution of a decision rejecting an application for the issuance or renewal of a residence permit by a foreign national, the administration is obliged, for as long as the ordered suspension is in effect, to provide the foreign national with a temporary residence permit. The order specifies that it is also up to the administration, in view of the grounds for the suspension measure, to re-examine the applicant's situation without waiting for the decision of the judge hearing the main case, in the light of all the legal and factual circumstances on the day of the re-examination. This is the case even if the judge has not explicitly specified the obligations arising for the administration from the suspension measure he has prescribed. Secondly, the interim relief judge of the Council of State specifically ruled on the requirement of manifest illegality. He stated "that, while the administrative authority may be criticised for not having re-examined Mrs Daaji's situation to date with regard to the stipulations of Article 6(7) of the Franco-Algerian agreement of 27 December 1968 and according to the evolution of her state of health, this failure is not, in itself, a reason for the suspension, this failure to act is not, in particular because the judge of the first degree summary proceedings was not sufficiently explicit in his order of 9 September 2005 as to the obligations incumbent on the administration, constituting a manifest illegality"¹¹⁸³. Thus, the administration's failure to draw the consequences of the decision of 9 September is irregular. In the absence of the judge having indicated with sufficient precision the consequences that were imposed on it, this failure is not manifestly illegal.

283. The requirement that the illegality be manifest is therefore particularly demanding. In practice, many applications fail on this point.

This condition appears difficult to satisfy when the legislative and regulatory provisions confer broad powers on the administration. Thus, the judge of summary proceedings has ruled out the manifest illegality of the refusal to authorise the withdrawal of a municipality from a community of agglomerations¹¹⁸⁴, by highlighting the broad discretionary power that the law gives the prefect to decide. In the *Allouache et al.* order, the judge considered that, in particular because of the conditions in which urban violence developed from 27 October 2005 onwards, the suddenness of its spread, the possibility of its resurgence on the occasion of gatherings on the public highway during the end-of-year festivities, and the prevention imperative inherent in any administrative police regime it cannot validly be argued that, in deciding not to terminate the declaration of a state of emergency immediately, the Head of State, in exercising his extensive discretionary powers, took a decision that would be vitiated by manifest illegality, even though the circumstances that justified the declaration of emergency have changed significantly¹¹⁸⁵.

The condition of manifest illegality will also be excluded where the positive decision or refusal is based on grounds which appear reasonable in the light of the legal and factual circumstances of the case. Thus, a prohibition measure will not be considered manifestly unlawful if the grounds on which it is based are reasonable in the light of the circumstances of the case. This is the case, for example, of an administrative decision permanently prohibiting a person from participating in the management or supervision of bodies or institutions housing minors, because of repeated testimony and serious and corroborating evidence implicating him or her for acts of a sexual nature towards minors placed under his or her authority¹¹⁸⁶, the decision of the maritime prefect prohibiting all traffic within 10 metres of sea caves due to the risk of falling rocks¹¹⁸⁷ or the municipal decree prohibiting the opening of a sex shop, given that a nursery school and a primary school are located not far from the disputed business, on the other hand, the municipality is developing a "youth centre" near the shop, which is intended to house entertainment, information and leisure services for young people and is due to open in the coming months¹¹⁸⁸. A refusal decision is not manifestly illegal when the conditions set out in the texts do not appear to be met. Thus, the judge of summary proceedings considered that the abstention of a municipality from undertaking the repair of a road allowing access to a discotheque was not vitiated by manifest illegality¹¹⁸⁹; the refusal to organise a legislative by-election one year before the renewal of the National Assembly, since the applicable provisions prohibit the organisation of legislative by-elections in the last year of the legislature and vest the Prime Minister, in the period preceding that of the legal prohibition, with a discretionary power to set the date likely to

1183 CE, ord. 9 January 2006, *Ministre d'Etat, ministre de l'Intérieur et de l'aménagement du territoire c/ Daaji*, n° 288745, mentioned in the *Recueil Lebon*.

1184 CE, ord. 24 January 2005, *Commune de Wissous*, n° 276493; CE, ord. 2 March 2005, *Commune de Vedene*, n° 278123.

1185 CE, ord. 9 December 2005, *Allouache and others*, *Lebon* p. 562.

1186 CE, ord. 9 August 2001, *Medrinal*, *Lebon* T. p. 1127.

1187 CE, ord. 27 September 2001, *Guegueniat*, n° 238473.

1188 CE, ord. 8 June 2005, *Commune de Houilles*, *Lebon* T. p. 1036.

1189 CE, ord. 5 March 2001, *SARL Club 2000*, *Lebon* T. p. 1130.

be used to convene the electorate in good time¹¹⁹⁰ ; the refusal of entry into the territory of a foreign national who does not justify the reality of the threats to which he or she considers himself or herself exposed in the event of return to his or her country¹¹⁹¹ or the refusal to register ballot papers not bearing the full title mentioned in the declaration of candidacy filed by the list led by the representative¹¹⁹² . Similarly, a positive decision is not manifestly illegal when it is based on justifications which, in the circumstances of the case, appear appropriate, such as the withdrawal of the benefit of stateless status due to inaccurate declarations concerning the identity of its beneficiary¹¹⁹³ , the prefectural order to place a person in hospital on the basis of a detailed medical certificate¹¹⁹⁴ , the slaughter of a herd due to the presence of a cow suffering from bovine spongiform encephalopathy¹¹⁹⁵ , or the order to a gendarmerie captain by his superiors not to express himself in the media, in view of the duty of reserve imposed on military personnel¹¹⁹⁶ .

284. In practice, few manifestly unlawful infringements have been upheld by the interim relief judge. When the condition of manifestly unlawful infringement of a freedom is met, the decisions generally focus on demonstrating the grossly unlawful nature of the decision or conduct challenged. For the summary procedure to be applicable, the serious and manifestly unlawful infringement of a fundamental freedom is not enough. The applicant must also justify the urgency of the situation and, more specifically, the need for him to obtain a safeguard measure within 48 hours.

1190 CE, ord. 18 May 2001, *Meyet, Bouget, Lebon* p. 244.
1191 CE, ord. 18 April 2002, *Ministre de l'Intérieur c/ Mpia, Lebon T.* p. 873.
1192 CE, ord. 8 June 2004, *Zebdi-Ghorab*, n° 268467.
1193 CE, ord. 29 March 2002, *Bonny, Lebon* p. 119.
1194 CE, ord. 19 July 2002, *Benmedjaded*, 248798.
1195 CE, ord. 1^{er} June 2001, *Ploquin, Lebon T.* p. 1126.
1196 CE, ord. 5 February 2003, *Matelly*, n° 253871.

Chapter 2

An extreme emergency

- 285.** Urgency is the first condition for granting the order set out in Article L. 521-2 of the Code of Administrative Justice. The presence of this requirement is justified by the nature of this procedure, which constitutes an interim injunction, and by its purpose, which is to put a stop to the most serious administrative actions very quickly. In order for the pronouncement of a safeguard measure within 48 hours to be legitimate, it appeared justified that the judge's intervention be expressly conditioned by the urgency¹¹⁹⁷. Thus, the interim relief procedure is not only a rapid procedure; it is also and above all a legal remedy that can only be usefully implemented when a prejudicial situation occurs or is about to occur. The interim relief judge is only justified in fulfilling his role when there is a real emergency justifying his intervention. Admittedly, applicants who apply to the judge on this basis often lose sight of this requirement, neglect it or relegate it to second place. However, it is a particularly strict condition, and the assessment made by the judge of the summary judgment reflects, here again, the exceptionality of this procedure compared to that of the summary suspension. In the mind of the administrative judge, the condition of urgency defines as much as that relating to the presence of a fundamental freedom the scope of intervention of the summary proceedings. In its concrete application, article L. 521-2 is as much a procedure of extreme urgency as a procedure of infringement of fundamental freedoms.
- 286.** In accordance with a classic principle, the applicant must prove that this requirement is met. Article R. 522-1, which applies to all urgent interim measures, provides that the application must "*justify the urgency of the case*". Article L. 521-2, which specifically concerns interim relief, states that the judge must be seized of an application "*justified by the urgency*". Thus, it is up to the applicant to establish the reasons why the circumstances of the case make it urgent to pronounce a measure. If the grounds are insufficient on this point, too general, abstract or imprecise, the application will be rejected¹¹⁹⁸.
- 287.** Of all the conditions set out in Article L. 521-2, urgency is one of the most difficult to systematise. This difficulty is explained by the "eminently concrete and relative" nature¹¹⁹⁹ of this notion. As Professor Dugrip has pointed out, "the recognition of urgency is not based on an objective finding. It is always the result of a subjective assessment of the facts of the case in relation to the circumstances of the case, the measures requested and the time taken for the proceedings (...)"¹²⁰⁰. Therefore, it is inevitably assessed on a case-by-case basis, and in consideration of the particular circumstances of each case¹²⁰¹. A decision will, in one case, be deemed to constitute urgency and the same decision, in another case, will not be considered as such. This being the case, despite a certain and perfectly understandable empiricism, it can be observed that the judge has made real efforts to achieve a certain rationalisation of his judgements. The main characteristic of urgency, within the meaning of Article L. 521-2 of the Code of Administrative Justice, is that it is an extreme urgency, a qualified urgency, an urgency requiring the pronouncement of measures within 48 hours. General indications can be drawn from the case law regarding the criteria for characterising or excluding this particular urgency.

1197 It should nevertheless be pointed out that the procedures of *déféré-liberté* and *voie de fait*, which are also rapid procedures - at least, for the second, when it is pursued in summary proceedings - are not subject to such a requirement. First of all, urgency is not one of the conditions set out in Article 809(1) of the new Code of Civil Procedure. When he applies to the civil interim relief judge on this basis, the applicant must only state that there is imminent damage or a manifestly unlawful disturbance. It is sufficient that only one of these conditions is met to justify the powers of the interim relief judge. The Court of Cassation regularly recalls that the application of this provision is in no way subordinated to proof of the urgency of the measure requested (see for example Civ. 3^{ème}, 22 March 1983, *Bull. civ.* III, n° 83). Consequently, the victim can obtain measures to restore the situation "even though the cessation of the disturbance he or she is experiencing is not urgent" (S. GUILLON-COUDRAY, *La voie de fait administrative et le juge judiciaire*, thesis Paris II, 2002, p. 273). Urgency is not required either in the context of *déféré-liberté*, because of the particular quality of the author of the appeal. Consequently, when it is seized by the prefect on the basis of article L. 2131-6 al. 5 of the general code of the territorial communities, the president of the administrative court commits an error of law by subordinating the suspension of the contested act 'to a condition of urgency which is not required within the framework of this procedure' (CE, 11 March 2005 *Minister of the Interior, internal security and local liberties c/ Communes of Avion, Rouvroy, Drocourt and Méricourt, Lebon* p. 101).

1198 For example, in the *Lidl* order of 23 March 2001, the judge ruled out urgency on the grounds that the applicant company "merely reported 'a particularly damaging situation' without providing (...) the slightest concrete element of assessment" (CE, ord. 23 March 2001, *Société Lidl, Lebon* p. 154). For significant examples, see also: CE, ord. 21 August 2001, *Manigold*, n° 237385; CE, ord. 31 July 2002, *Kocyyigit*, n° 248716; CE, ord. 6 June 2003, *Société Nice diffusion menuiserie*, n° 257472; CE, ord. 5 July 2004, *Association des usagers des médias d'Europe*, n° 269344.

1199 R. VANDERMEEREN, "La réforme des procédures d'urgence devant le juge administratif", *AJDA* 2000, p. 711.

1200 O. DUGRIP, *L'urgence contentieuse devant les juridictions administratives*, PUF, coll. Les grandes thèses du droit français, 1991, p. 332. The same observations are made in private judicial law: 'Doctrine and case law agree that urgency is a relative concept, marked by subjectivity and empiricism (...)' (P. ESTOUP, *La pratique des procédures rapides. Référé, ordonnances sur requête, procédures d'injonction, procédures à jour fixe et abrégées*, 2^{ème} éd., Litec, 1998, p. 73).

1201 This is emphasised by the judge in various formulas, noting for example, in the *Commune de Massat* decision, that the urgency is satisfied 'in the present case' (CE, ord. 25 August 2005, *Commune de Massat, Lebon* p. 386).

Section 1. The need for intervention at 48 hours

288. Initially, the interim relief judge of the Council of State treated urgency within the meaning of Article L. 521-1 and urgency within the meaning of Article L. 521-2 of the Code of Administrative Justice in the same way. From the *Commune de Pertuis* order of 28 February 2003, the Council of State's interim relief judge affirmed the need for greater urgency in matters of interim relief. This condition cannot be considered satisfied if the situation in dispute does not require the intervention of a judge within 48 hours to put an end to it.

I. The initial lack of singularity of the concept

289. During the first two years of application of the Act of 30 June 2000, the interim relief judge treated urgency in the sense of interim relief and urgency in the sense of interim suspension in a strictly identical manner. He considered that urgency, which is referred to indiscriminately in Articles L. 521-1 and L. 521-2, should be considered in the same way in both procedures¹²⁰². Significantly, the judge of the *référé-liberté* had affirmed in an order of 15 March 2002 that the refusal by the administration to return a driving licence was "of such a nature as to make it appear that the condition of urgency laid down by both Article L. 521-1 and Article L. 521-2 has been fulfilled"¹²⁰³. The formula is all the more remarkable since, in this decision, the judge was only seized of conclusions based on Article L. 521-2 of the Code of Administrative Justice. Authoritative commentators concluded that there was a unique approach to urgency in both proceedings. Thus, the authors of the *Great judgments* affirmed that this condition, which is common to summary proceedings and interim relief, "does not seem to be assessed differently in the two"¹²⁰⁴. "At the very most, it can be assumed that it will be assessed more liberally in the case of interim relief," Collin and Guyomar wrote at¹²⁰⁵. Following the example of the interim relief judge, the authors considered that "there is hardly any reason for the urgency required for interim suspension to be different from that required for interim fundamental freedoms"¹²⁰⁶.

Consequently, the urgency was assessed in a substantially comparable manner in the two procedures, the judge being inspired, in the context of Article L. 521-2, by the criteria established on the basis of Article L. 521-1. In the context of the summary suspension procedure, the Conseil d'Etat affirmed, in the judgment of 19 January 2001, *Confédération nationale des radios libres*¹²⁰⁷, that the condition of urgency must be considered to be met "when the contested administrative decision prejudices in a sufficiently serious and immediate manner a public interest, the situation of the applicant or the interests he intends to defend". This is the case even if the contested decision "would have a purely financial purpose or repercussions and, in the event of annulment, its effects could be erased by monetary compensation". The criteria identified in this judgment, i.e. the forms and characteristics of urgency, have been taken up in substance in the context of the summary judgment¹²⁰⁸. Although urgency is most often established by the interim relief judge without any reference to the forms or characteristics of urgency, he sometimes makes express reference to the criteria established in the context of interim suspension¹²⁰⁹.

290. The case law has established a "triptych typology"¹²¹⁰ of heads of damage. The act or conduct may, in the first place, prejudice the applicant's situation. This is by far the most frequently used hypothesis in the case law. The damage may be non-material. The possibility for the applicant to obtain compensation *a posteriori* for the damage caused to him by an administrative act or behaviour does not prevent the qualification of urgency. For example, it is considered to be satisfied in the case of a refusal to register the applicant's children on the latter's passport¹²¹¹. The harm may result from the impossibility of exercising a fundamental freedom. Thus, in the *Aguillon* judgment, concerning the requisition of striking employees, the applicants could not claim any financial prejudice insofar as the prefectural decrees provided for the remuneration of the staff under the conditions usually fixed by their employer. In the present case, the prejudice stems from the fact that the

1202 On the assessment of urgency on the basis of Article L. 521-1, see J. RAYMOND, "L'urgence, condition essentielle du *référé* suspension", *JCP A* 2003, 1935.

1203 CE, ord. 15 March 2002, *Delaplace, Lebon* p. 105.

1204 *G.A.J.A.* No. 118, § 12.

1205 M. GUYOMAR and P. COLLIN, chron. under CE, Sect. 18 January 2001, *Commune de Venelles, AJDA* 2001, p. 154.

1206 N. CHAHID-NOURAI and C. LAHAMI-DEPINAY, "L'urgence devant le juge administratif: premières applications des articles L. 521-1 et L. 521-2 nouveaux du Code de justice administrative", *LP A* 12 February 2001, n° 30, p. 16.

1207 CE, Sect. 19 January 2001, *Confédération nationale des radios libres, Lebon* p. 29, *AJDA* 2001, pp. 150-153, chron. M. GUYOMAR and P. COLLIN; *RFD A* 2001, pp. 378-388, concl. L. TOUVET; *D.* 2001, pp. 1414-1418, note B. SEILLER.

1208 These methods of assessing urgency must be mentioned insofar as the *Commune de Pertuis* case law did not lead to its application being ruled out but, in practice, to adding an additional level of requirement compared with the *Confédération nationale des radios libres* judgment.

1209 Among the few decisions that have expressly referred to these criteria, see CE, 15 February 2002, *Hadda, Lebon* p. 45. In this case, the Conseil d'Etat states that, in order to characterise the urgency, the contested administrative action 'by itself causes a sufficiently serious and immediate harm to the applicant's situation'.

1210 P. CASSIA, *Les référés administratifs d'urgence*, LGDJ, coll. Systèmes Droit, 2003, p. 89.

1211 CE, ord. 4 December 2002, *Du Couëdic de Kéranant, Lebon T.* p. 875.

decrees in question force the persons concerned "to resume their professional activity immediately" and thus prevent them from exercising their right to strike¹²¹². Secondly, the harm may affect the interests that the applicant intends to defend. This hypothesis corresponds to the collective interests defended by "trade unions and professional organisations or associations for the defence of collective interests"¹²¹³. Thirdly, the situation at issue may be detrimental to a public interest. Examples of this are rare in summary suspensions¹²¹⁴, and even rarer in summary liberties, insofar as fundamental freedoms are in principle geared towards defending individual interests and not towards satisfying the general interest. However, such a hypothesis is not unthinkable, for example in the case of an infringement of the free administration of local authorities or the property rights of a public entity. In this case, the judge could characterise a situation that prejudices both the interest of the applicant and the general interest.

291. The interim relief judge requires that the damage to one of these interests is sufficiently serious and immediate.

Firstly, the harm must be "sufficiently serious". The judge understands this expression to mean damage that exceeds, by its intensity, duration or certain of its characteristics, the inconveniences that normally result from living in society. Above a certain threshold, the damage can be said to be "sufficiently serious". This criterion excludes from the scope of urgency simple inconveniences or annoyances which certainly aggravate the condition of the claimant but which do not substantially and durably jeopardise his or her situation¹²¹⁵. The condition of seriousness is met when the applicant suffers significant financial harm¹²¹⁶. Seriousness may also result from the duration of the damage, in particular in the case of excessive delay by the administration in issuing an authorisation¹²¹⁷ or in enforcing a court decision¹²¹⁸. On the other hand, the fact that the promise to return a piece of land irregularly incorporated into a golf course has not yet been honoured is not such as to reveal a situation of urgency "whereas it is clear from the investigation (...) that the applicants' land is about to be returned to them"¹²¹⁹.

Secondly, the harm must be 'immediate'. This criterion, which is temporal in nature, means that the administrative act or conduct must already be producing harmful effects or be about to produce them in the very near future. This requirement is not met when the provisions of an act will not take effect until several months after the application for interim relief has been made. Thus, in an order of 13 November 2002, the interim relief judge found that the provisions of Article L. 613-3 of the Construction and Housing Code¹²²⁰ prevented the forced execution of the requested eviction measure from being implemented before 15 March 2003. As this measure cannot be implemented before a period of several months, the urgency is not characterised, in its immediacy, on the date on which the judge rules¹²²¹. Similarly, the existence of immediacy of the damage is not satisfied when a company claims commercial damage without having requested - and consequently obtained - administrative authorisation to operate the business in question. In such a case, the commercial harm alleged by the applicant company is only possible¹²²². Similarly, when an applicant has a passport that is still valid for nine months, he does not demonstrate the urgency of obtaining an early renewal in order to travel to the Philippines, a State that only requires a passport with a minimum validity of six months to grant entry to its territory¹²²³.

292. Thus, during the initial stages of application of the reform of 30 June 2000, urgency was not considered separately depending on the procedure undertaken. Some authors nevertheless argued that a higher degree of

1212 CE, 9 December 2003, *Aguillon and others*, *Lebon* p. 497.

1213 P. CASSIA, *Les référés administratifs d'urgence*, LGDJ, coll. Systèmes Droit, 2003, p. 93.

1214 See for example CE, ord. 13 February 2003, *Joyaux*, No. 253439, referring to "the interest for students to benefit from a quality public service".

1215 Thus, a refusal of a passport does not prejudice the applicant who indicates that he or she must go to Brussels, since no passport is necessary for a French person to go to Belgium (CE, order 21 March 2001, *Rahal*, no. 231531).

1216 See for example CE, ord. 12 June 2002, *S.A.R.L. Barlive*, no. 247683. In this case, the closure of a drinking establishment had led to the dismissal of the fourteen employees of the establishment, depriving the company of most of its turnover, which it normally achieves during the summer, and threatened its existence in the short term. Under these conditions, "and even though the company could be compensated for its loss if the measure taken against it were to be annulled by the judge of excess of power, the condition of urgency to which the pronouncement of measures on the basis of Article L. 521-2 of the Code of Administrative Justice is subject must be considered as fulfilled.

1217 For example, the urgency of ordering the French Consul General in Geneva to register the applicant's children on his passport can be deduced from the nature of the dispute and the duration of the steps taken without success by the applicant with the authorities concerned for several months (CE, ord. 4 December 2002, *Du Couëdic de Kérerant*, *Lebon* T. p. 875). Similarly, as a period of two years and seven months has elapsed since the administration informed the applicant that she was entitled to a residence permit and that a receipt was to be issued to her, "the prolongation for an abnormally long period of the precarious situation thus imposed on Miss Béchar creates a situation of urgency within the meaning of Article L. 521-2 of the Code of Administrative Justice" (CE, ord. 12 November 2001, *Minister of the Interior v. Béchar*, *Lebon* T. p. 1132).

1218 Thus, the judge characterises the urgency for a refusal to bring the assistance of the public force to the execution of a judicial decision prescribing the eviction of occupants without title for more than one year (CE, ord. 21 November 2002, *Gaz de France*, *Lebon* p. 408) or more than one and a half years (CE, ord. 27 November 2002, *SCI Résidence du théâtre*, *Lebon* T. p. 874).

1219 CE, ord. 22 October 2001, *Gonidec and Brocas*, n° 239165.

1220 Which prohibits the implementation of any evictions between 1st November and 15 March of the following year.

1221 CE, ord. 13 November 2002, *Harlant*, *Lebon* T. p. 875.

1222 CE, ord. 23 March 2001, *Société Lidl*, *Lebon* p. 154.

1223 CE, ord. 22 August 2003, *Cohen*, n° 259583.

exigency could be justified by the scope of application of this procedure¹²²⁴ or the 48-hour time limit given to the judge to rule¹²²⁵. The interim relief judge of the Conseil d'Etat quickly established this solution, adding to the criteria of serious and immediate prejudice an additional degree of requirement in assessing urgency.

II. The affirmation of a particular urgency

293. In the very important *Commune de Pertuis* order of 28 February 2003¹²²⁶, the judge affirmed the existence of an emergency *within the meaning of Article L. 521-2*, i.e. a qualified emergency which, implying judicial intervention within 48 hours, is distinguished, by a greater degree of exigency, from an emergency within the meaning of Article L. 521-1. In this case, the judge was seized of a request for suspension of certain articles of the internal regulations of the municipal council of the municipality of Pertuis relating to the expression of councillors not belonging to the municipal majority. The judge stated that "in the absence of particular circumstances, the maintenance in force of the provisions of articles 27, 28 and 30 of the internal regulations of the Pertuis municipal council does not characterise an emergency situation implying, subject to the other conditions set out in article L. 521-2 being met, that a measure aimed at safeguarding a fundamental freedom must be taken within 48 hours". With this decision, the judge clearly differentiates between two emergencies, once again basing himself on the exceptional nature of the summary judgment and the greater rigour of its conditions of granting compared to the summary suspension procedure¹²²⁷. It distinguishes, on the one hand, an "ordinary" urgency that is sufficiently pressing to justify the intervention of an interim relief judge *before the judgment on the merits is delivered*¹²²⁸, and on the other hand, an imminent urgency that requires a judge to intervene *within 48 hours* or, at least, at very short notice. Unlike the interim relief procedure, the interim relief procedure is not an ancillary remedy; the urgency is not assessed in relation to a main remedy on which it would be based and which the interim relief judge would merely anticipate. As Mr Debbasch and Mr Ricci have pointed out, the condition of urgency is 'examined in itself since this summary procedure is not attached to a main action'¹²²⁹. However, urgency is not assessed in itself. Since it cannot, as in summary proceedings, be assessed in relation to the time required for the judge to intervene, urgency must necessarily be assessed in relation to another reference point, which is the 48-hour time limit given to the judge to rule¹²³⁰. In a particularly explicit manner, the interim relief judge stated that "the condition relating to urgency (...) must, with regard to Article L. 521-2 of the Code of Administrative Justice, be assessed in the light of the reference made by the legislator to the need for a measure aimed at safeguarding a fundamental freedom to be taken - subject to the other conditions laid down by the same article also being met - within 48 hours"¹²³¹. The result is a fundamental difference between the two procedures as regards the assessment of urgency. In the

1224 Even before the reform came into force, President Vandermeeren announced that urgency in the sense of the *référé-liberté*, "while raising problems of assessment comparable" to urgency in the sense of Article L. 521-1, should be "subject to a more rigorous interpretation: it will probably be necessary that the circumstances make the urgency pressing and the immediate intervention of the judge indispensable" (R. VANDERMEEREN, "La réforme des procédures d'urgence devant le juge administratif", *AJDA* 2000, p. 712). Similarly, M. Hocreitere stated that although urgency is a common condition in Articles L. 521-1 and L. 521-2 of the Code of Administrative Justice, "everything suggests that it will be examined more rigorously by the interim relief judge in view of the scope of the *référé-liberté*" (P. HOCREITERE, "Les nouvelles règles applicables au contentieux administratif de l'urbanisme", *BJDU* 2001/1, p. 4).

1225 M. Chapus considered, as early as 2001, that "urgency requires that the exercise of the summary procedure be justified by the need to intervene as promptly as necessary to put an end to an infringement of a fundamental freedom or to prevent an imminent infringement. More specifically, attention must be paid to the 48-hour time limit given to the judge to make a decision (...)" (R. CHAPUS, *Droit du contentieux administratif*, 9^{ème} éd., Montchrestien, 2001, n° 1601). M. Bachelier stated that in relation to summary proceedings, "the degree of urgency must be assessed in the light of considerations relating to the existence of the forty-eight hour time limit given to the summary proceedings judge to rule (...)" (G. BACHELIER, "Le référé-liberté", *RFDA* 2002, p. 262).

1226 CE, ord. 18 February 2003, *Commune de Pertuis*, *Lebon* p. 68, *AJDA* 2003, pp. 1171-1178, note P. CASSIA and A. BEAL; *JCP A* 2003, 1584, note J.-P. QUILLIEN.

1227 On the difference between the two procedures, see *supra*, § 40.

1228 When a case is referred to him on the basis of Article L. 521-1 of the Code of Administrative Justice, the interim relief judge verifies that the judge on the merits will not be able to rule before the contested decision has produced effects that are difficult to reverse. In the context of the summary proceedings, "it is up to the applicant to justify particular circumstances characterising the need for him or her to benefit from a provisional measure in the very short term while awaiting a jurisdictional decision ruling on the legality of the disputed decision" (CE, Sect., 14 March 2001, *Minister of the Interior v. Aneur*, *Lebon* p. 123, *AJDA* 2001, pp. 673-680, concl. I. DE SILVA) "The applicant must state that there is an "emergency justifying that, without waiting for the judgment of the application on the merits, the execution of the decision be suspended" (CE, Sect., 19 January 2001, *Confédération nationale des radios libres*, cited above). This definition of urgency is classic; it prevails in all proceedings of an ancillary nature, the purpose of which is to obtain strictly protective measures pending a judgment on the merits. For there to be urgency, it is necessary that the passage of time risks seriously prejudicing the interests of the plaintiff before the judge on the merits can ensure their protection. Otherwise, the intervention of the urgency judge would not be justified since the court ruling on the merits and in the usual manner could take the necessary measures within the required time. In this case, 'urgency arises from the need to safeguard rights and interests that are threatened while awaiting the judgment on the merits' (O. DUGRIP, *op. cit.*, p. 312).

1229 C. DEBBASCH and J.-C. RICCI, *Contentieux administratif*, 8^{ème} éd, Dalloz, coll. Précis, 2001, n° 556.

1230 In assessing urgency, the judge takes the greatest account of the 48-hour period allowed for ruling. It should be noted that in an order of 21 August 2001, the interim relief judge attached particular importance to this time limit in assessing the urgency of the application for interim relief. After quoting the text of Article L. 521-2 of the Code of Administrative Justice, the judge stated "that the conditions set out in these provisions, which are cumulative, are assessed separately; that this applies in particular to the condition relating to urgency, the scope of which is furthermore clarified by comparing it with the very short time limits that the same article imposes both on the interim relief judge to give a ruling and on the parties to lodge an appeal" (CE, order of 21 August 2001, *Manigold*, no. 237385).

1231 CE, ord. 6 February 2004, *Société Yacht club international de Saint-Laurent-du-Var*, n° 264169.

interim suspension procedure, urgency is defined as being the case if one cannot wait for the intervention of the judge on the merits. In the summary procedure, it is characterized when it is necessary for the applicant to obtain without delay a safeguard measure. The condition of urgency 'thus shifts from the situation in question to the measure requested', as Mr Debbasch put it in relation to the traditional summary proceedings¹²³². The criterion relating to the usefulness or necessity of the requested measure is an element that can be found in all emergency procedures. There is no need for a finding of urgency if the granting of a measure is not useful or necessary for the applicant. The urgency is not only that of a situation but also that of obtaining the pronouncement of a safeguard measure. Thus, in the *Gollnisch* order, the judge stated that "in view of the dual circumstance that the disciplinary proceedings are not closed and that criminal proceedings are underway, there is urgency for the interim relief judge of the Council of State to take the necessary measures to safeguard, in this case, the presumption of innocence"¹²³³. Similarly, in a case involving the withdrawal and physical detention of the applicants' identity documents, the judge stated that there was an "urgent need to provide the applicants with documents enabling them to carry out everyday activities"¹²³⁴. Conversely, there is no urgency to enjoin an administrative authority to explicitly rule on an administrative appeal that was sent to it several months earlier when the silence observed by the authority gave rise to an implicit decision of rejection and, consequently, to a position¹²³⁵. In this case, the requested measure is neither useful nor, *a fortiori*, necessary.

294. In summary, the urgency of the case must be more pressing than in summary proceedings; it must be of such a degree as to require the immediate intervention of a judge. To use the case law formulas, the circumstances of the case must characterise 'a situation of *particular urgency*'¹²³⁶, 'a situation of *imminent urgency*'¹²³⁷, in short a situation 'requiring that a measure be taken *immediately*'¹²³⁸. The summary judgment was demanding before the *Commune de Pertuis* order; it has become even more so since then.

The differentiated assessment of urgency, depending on the particularities of each procedure, is a way of proceeding that is not new. It is traditionally accepted that urgency cannot be given a single, uniform definition for all summary proceedings. On the contrary, it is considered that it is possible to identify types of urgency, which arise from the characteristics and specificities of each procedure. As Mr Clémenceau stated, urgency is characterised "if not in every summary procedure, at least in every category of summary procedure"¹²³⁹. Each summary procedure has its own definition of urgency. Depending on the situation to which a procedure must respond, urgency seems likely to be graded and to prove more or less pressing. According to Government Commissioner Chardeau, "the distinction between urgency and extreme urgency can be made in summary proceedings as in other matters, for example for the police of buildings threatening ruin"¹²⁴⁰.

A situation that is recognised as urgent in the context of interim suspension, i.e. involving intervention before the judge on the merits, will not necessarily be so in the case of interim relief, which involves immediate intervention. The urgency sufficient for the summary suspension is not necessarily sufficient for the summary release. For the interim relief judge, "the fact that, in a given case, the condition of urgency may be considered to be met for the implementation of the powers that the interim relief judge has under Articles L. 521-1 or L. 521-3 of the Code of Administrative Justice does not imply that the procedure under Article L. 521-2 may be used"¹²⁴¹. Conversely, the fact that the condition of urgency is not met under Article L. 521-2 does not prevent it from

1232 C. DEBBASCH, *Procédure administrative contentieuse et procédure civile*, LGDJ, coll. BDP, t. 38, 1962, p. 306. The Conseil d'Etat had affirmed, under the previous state of the law, that the power of the interim relief judge to order the measures provided for by the law "is subject to the condition that the said measures are of an urgent nature" (CE, Sect., 14 March 1958, *Secretary of State for Reconstruction and Housing, Lebon* p. 174, *AJDA* 1958, concl. GREVISSE, pp. 186-190).

1233 CE, ord. 14 March 2005, *Gollnisch, Lebon* p. 103.

1234 CE, ord. 2 April 2001, *Ministre de l'Intérieur c/ Consorts Marcel, Lebon* p. 167.

1235 CE, ord. 20 November 2002, *Deלוose*, n° 251803.

1236 CE, ord. 9 August 2004, *Yılmaz, Lebon T.* p. 816; CE, ord. 10 August 2005, *Diabira*, n° 283444. See also, referring to the "particular urgency" required under Article L. 521-2: CE, ord. 1^{er} March 2006, *Ministre délégué aux collectivités territoriales c/ Commune de Salies-du-Salat*, n° 290417, mentioned in the *Recueil Lebon*; CE, ord. 13 June 2007, *Soppelsa*, n° 306252, published in the *Recueil Lebon*.

1237 CE, ord. 15 October 2004, *Sabi*, n° 273110.

1238 CE, ord. 9 March 2007, *Guiot and Section française de l'Observatoire international des prisons*, n° 302182, mentioned in the *Recueil Lebon*.

1239 J. CLEMENCEAU, *Les procédures de référé et d'ordonnance sur requête*, EJVS, 1965, p. 43.

1240 J. CHARDEAU, concl. on CE, Sect. 13 July 1956, *Secretary of State for Reconstruction c/ Piéton-Guibout, AJDA* 1956, II, p. 323.

1241 CE, ord. 4 February 2004, *Commune d'Yvrac, Lebon T.* p. 828. See also CE, 16 June 2003, *Hug-Kalinkova and others, Lebon T.* p. 931. The Conseil d'Etat states that "assuming that the condition of urgency within the meaning of Article L. 521-1 of the Code of Administrative Justice is fulfilled, the interim relief judge of the Strasbourg administrative court did not commit an error of law or distort the documents in the case file by ruling that, in the absence of particular circumstances, the contested decision of the mayor of Strasbourg does not characterise a situation of urgency within the meaning of Article L. 521-2 of the Code of Administrative Justice. 521-2 of the Code of Administrative Justice implying, provided that the other conditions set out in this article are met, that a measure to safeguard a fundamental freedom must be taken within 48 hours. See also CE, ord. 9 March 2007, *Guiot and Section française de l'Observatoire international des prisons*, n° 302182, mentioned in the *Recueil Lebon*: "the fact that the condition of urgency within the meaning of article L. 521-1 of the code of administrative justice is fulfilled is not sufficient, in the absence of particular circumstances, to characterise a situation of urgency within the meaning of article L. 521-2 of the Code of Administrative Justice implying, subject to the other conditions laid down by this article being met, that a measure to safeguard a fundamental freedom must be taken within forty-eight hours.

being met under Article L. 521-11242 .

295. Urgency in the sense of the summary judgment, i.e. sufficiently serious and immediate prejudice in the delay in taking a decision, is not enough. The *Commune de Pertuis* case law has the effect of adding an *additional* level of requirement in the assessment of urgency. Thus, in her conclusions on the *Vast* ruling, Sophie Boissard points out that 'it is not enough, as in the case of interim suspension, for the measure or actions in question to be seriously and immediately prejudicial to the applicant's interests. The prejudice must *also be* such as to make it necessary to take a protective measure within the 48-hour period allowed to the judge to rule'¹²⁴³ . In his conclusions on the *Hug-Kalinkova* judgment of 16 June 2003, Stéphane Austray states that the *Commune de Pertuis* order of 28 February 2003 'draws a distinction between urgency within the meaning of Article L. 521-2, which is thus established as a more demanding concept than urgency within the meaning of Article L. 521-1 of the CJA, implying, *beyond* serious and immediate consequences for the applicant's situation or the general interest, that a measure aimed at safeguarding a fundamental freedom must be taken within a very short period of time'¹²⁴⁴ . Isabelle de Silva states, again with regard to this order, that 'urgency within the meaning of Article L. 521-2 is not an identical concept to that of urgency within the meaning of L. 521-1 and must therefore be accompanied by *additional* justifications'¹²⁴⁵ . When an application is made against a decision, the interim relief judge requires, firstly, serious and immediate harm, but also the demonstration of the need for intervention within 48 hours. In a very explicit manner, the judge of summary proceedings of the Council of State affirmed "that there is urgency to order the suspension of an administrative decision only if it is established that it prejudices in a sufficiently serious and immediate way a public interest, the situation of the author of the appeal or the interests which he intends to defend; *that in addition*, when the applicant bases his intervention not on the suspension procedure governed by article L. 521-1 of the Code of Administrative Justice but on the special protection procedure instituted by Article L. 521-2 of this code, it is up to him to justify circumstances characterising a situation of urgency which implies, subject to the other conditions laid down by Article L. 521-2 being met, that a measure aimed at safeguarding a fundamental freedom must be taken within forty-eight hours'¹²⁴⁶ or 'must be taken very quickly'¹²⁴⁷ . In order to obtain the suspension of a decision on the basis of Article L. 521-2, the existence of serious and immediate harm is a necessary but not sufficient condition.

In order to measure the urgency in the sense of the summary proceedings, the assessment of the need for urgency at 48 hours therefore comes after the assessment of the intensity and immediacy of the damage. The need for a 48-hour intervention cannot be assessed on its own; it can only be considered with regard to the effects of the litigious situation on the applicant, and the need to put an end to them in the very short term. For the interim relief judge, this is therefore not an autonomous stage in the assessment of urgency. To measure the need for intervention within 48 hours, the judge takes into consideration the harmful consequences of an act or behaviour¹²⁴⁸ . Strictly speaking, and more generally, no "stages" can be distinguished in the assessment of urgency within the meaning of Article L. 521-2. Urgency is considered as a whole, with regard to the elements that qualify it and the elements that exclude it¹²⁴⁹ .

It should be noted that the formula in the *Commune de Pertuis* case law is only mentioned and used by the interim relief judge to deny the presence of an emergency. It has never been used to positively qualify the urgency. When the urgency is satisfied, the judge does not use this formula and simply notes it. When the judge concludes that there is no urgency using this formula, it must be considered that he has assessed the effects of the measure and considered that the prejudice that the applicant may have suffered was not of a sufficient degree to justify an

1242 Sometimes, noting the absence of urgency within the meaning of Article L. 521-2, the interim relief judge invites the applicant, if he believes he has grounds, to appeal by way of interim relief. See CE, ord. 28 February 2003, *Commune de Pertuis, Lebon* p. 68; CE, ord. 19 March 2003, *Société EURL La Cour des miracles*, n° 255191; CE, ord. 23 July 2003, *Ducastel et autres*, n° 258678; CE, ord. 29 October 2003, *Société EURL 'Il était une fouace'*, n° 261304; CE, ord. 4 February 2004, *Commune d'Yvrac, Lebon T.* p. 828; CE, ord. 9 August 2004, *Yilmaz, Lebon T.* p. 816; CE, ord. 18 February 2005, *Launay and Benfdil*, n° 277579; CE, ord. 15 March 2005, *Sossou*, n° 278502; CE, ord. 6 April 2007, *Commune de Saint Gaudens*, n° 304361, mentioned in the recueil *Lebon*; CE, ord. 9 March 2007, *Guiot and Section française de l'observatoire international des prisons*, n° 302182, mentioned in the recueil *Lebon*. The opposite approach, on the other hand, is unthinkable. If there is no urgency within the meaning of Article L. 521-2, this condition cannot *a fortiori* be regarded as satisfied within the meaning of Article L. 521-1.

1243 Concl. S. BOISSARD on CE, 9 April 2004, *Vast, RFDA* 2004, p. 778.

1244 S. AUSTRAY, concl. on CE, 16 June 2003, *Hug-Kalinkova and others, BJCL* 2003/8, p. 607.

1245 Unpublished conclusions I. DE SILVA on CE, 23 January 2004, *Koffi, Lebon T.* p. 827. Underscored.

1246 CE, ord. 16 February 2005, *S.ARL Médiation et arguments*, n° 277584; CE, ord. 18 February 2005, *Launay and Benfdil*, n° 277579; CE, ord. 15 March 2005, *Sossou*, no. 278502. See in the same sense, using the expression "bases its action" and not "bases its intervention": CE, ord. 23 December 2005, *Corbel*, n° 288307; CE, ord. 5 July 2005, *Mme X.*, n° 281930.

1247 CE, ord. 7 February 2006, *Akbache*, n° 289835; CE, ord. 26 September 2006, *Saganoko*, n° 297649.

1248 Similarly, in the case of interim relief, it can only assess the need to intervene before the judge on the merits after evaluating the damage suffered. The Council of State affirms, under Article L. 521-1, that it is up to the interim relief judge to assess concretely, taking into account the justifications provided by the applicant, *whether the effects* of the disputed act *are of such a nature as to characterise an emergency* justifying that, without waiting for the judgment of the application on the merits, the execution of the decision be suspended (CE, 9 April 2004, *Ministre de l'agriculture, de l'alimentation, de la pêche et des affaires rurales c/ Olard*, no. 263508, *JCP G* 2004, IV, 2449, obs. M.-C. ROUAULT).

1249 Thus, the overall assessment of urgency can be carried out independently, i.e. by taking into account in the same reasoning only the urgency of pronouncing the requested measure and the urgency of not pronouncing it (see, for example, § 317, CE, ord. 10 August 2001, *Association "La Mosquée"*).

intervention at 48 hours. It is therefore appropriate to present the decisions in which this jurisprudence has been applied and, consequently, the situations in which the particular urgency required in the context of the summary procedure has not been considered to be satisfied.

III. The requirement of imminent urgency

296. In the context of Article L. 521-2, the Conseil d'Etat recalls "that the applicant who applies to the interim relief judge on the basis of these provisions must justify particular circumstances characterising the need for him to benefit very quickly from a measure of the kind that can be ordered on the basis of this article"¹²⁵⁰. In the context of this procedure, the "particular circumstance" is that which will make the judge's intervention urgent and justify the immediate pronouncement of a safeguard measure¹²⁵¹. It is difficult to give an account of this case law insofar as the judge proceeds by way of assertion, stating, without any further precision, that the data of the case do not characterise a particular situation. Moreover, the decisions do not make it possible to determine whether the judge excludes urgency because of sufficiently serious and immediate harm or because of urgency "within 48 hours". Moreover, the formula used by the judge is closely linked to the existence of an infringement of a fundamental freedom. It does not refer to the requirement of intervention at 48 hours but to the need to pronounce a measure to safeguard a fundamental freedom within that time. Because of the empiricism that governs the implementation of this case law, it is appropriate, in order to give an account of it, to focus on the main applications to which it has given rise and which show the greatest rigour of urgency within the meaning of Article L. 521-2 of the Code of Administrative Justice.

297. In the *Commune de Pertuis* ruling, the judge did not consider that the forthcoming publication of local newsletters was an event of such a nature as to justify ordering the mayor, within 48 hours, to include the amendment of the provisions of the rules of procedure relating to such publication on the agenda of the next municipal council¹²⁵². Similarly, in the *Hug-Kalinkova* judgment cited above, the mayor of Strasbourg refused to take note of the creation of a group of elected representatives. Before the interim relief judge of the Strasbourg administrative court, the applicants merely argued that the decision deprived them of the possibility of access to the material resources made available to political groups under the city's internal regulations. In rejecting the request for suspension of the contested decision, the judge of the first instance based himself on the fact that the applicants did not invoke "any element of such a nature as to establish the existence of a situation of urgency which does not result either from the nature and scope of the contested decision". In accordance with the conclusions of the government commissioner, the Council of State did not identify any "particular circumstances" in the situation arising from this decision. According to the government commissioner Francis Lamy, "there is nothing in the file that allows one to discern particular circumstances that would justify that, within a very short period of time, the applicants could have access to the material means granted by the internal regulations of the Strasbourg municipal council, namely a half-time secretarial office, supplies, as well as the assumption of telecommunications and mailing costs. It is conceivable that if the mayor's decision had been taken shortly before the start of an election campaign, for example, this particular circumstance would have been such as to characterise the urgency, but this was not the case here"¹²⁵³. The requirement of a "particular circumstance" thus appears particularly strict. For the interim relief judge, the decision terminating the contract for the occupation of a mooring port and granting the interested party a period of two months to vacate the site occupied, "having regard to its nature and purpose", could not, "except in special circumstances", create a situation of urgency within the meaning of Article L. 521-2¹²⁵⁴. Similarly, the mere possibility that the road allowing access to a pony club may, in the event of heavy rainfall, become difficult to use by lorries is not sufficient to intrinsically characterise the particular urgency required for the implementation of the powers conferred on the interim relief judge by Article L. 521-2 of the Code of Administrative Justice¹²⁵⁵.

The 48-hour emergency cannot in any case be characterised in a case where a public servant claims the payment

1250 CE, 23 January 2004, *Koffi, Lebon T.* p. 827; CE, ord. 18 October 2004, *Yebroni*, n° 273095.

1251 In the context of interim relief, as has been pointed out, the notion of "special circumstances" relates to the time limit for the intervention of the judge on the merits.

1252 CE, ord. 28 February 2003, *Commune de Pertuis, Lebon* p. 68. For a similar case, see CE, ord. 6 April 2007, *Commune de Saint Gaudens*, n° 304361, mentioned in the *Recueil Lebon*. The applicant, an opposition municipal councillor of the Commune of Saint-Gaudens, requested the insertion, in the April 2007 municipal bulletin, which was being prepared at the end of March, of an article criticising municipal management and announcing his candidacy in the forthcoming municipal elections. The interim relief judge of the Conseil d'Etat affirmed "that the refusal of the mayor of the Commune of Saint-Gaudens to insert this article, even though it related to communal affairs, did not characterise, in view of the monthly frequency of this review, and since no particular circumstance required, in view of the content of the text, that the readers of the bulletin be made aware of it in the days following its drafting, a situation of urgency implying, subject to the fulfilment of the other conditions set out in Article L. 521-2 are met, a measure to safeguard a fundamental freedom must be taken within forty-eight hours.

1253 S. AUSTRIA, concl. on CE, 16 June 2003, *Hug-Kalinkova and others*, *BJCL* 2003/8, p. 607.

1254 CE, ord. 6 February 2004, *Société Yacht club international de Saint-Laurent-du-Var*, n° 264169.

1255 CE, ord. 21 November 2005, *Commune de Lyon, Lebon T.* p. 1039.

of sums, of a small amount, that the administration was willing to pay him. In the *Commune d'Yvrac* case, the applicant requested payment of an undisputed sum of 252 euros, corresponding to the hours of teaching provided during the month of October 2003 on behalf of the municipal music school. The municipality had acknowledged that it owed him payment for the hours of teaching provided, and on 13 October 2003 had offered him a contract for this purpose. In the circumstances of the case, the applicant's conclusions, "having regard both to their subject matter and to the way in which they were inserted into the relations (...) between the municipality and its former agent, could not seriously be regarded as being related to a situation of urgency within the meaning of Article L. 521-2 of the Code of Administrative Justice"¹²⁵⁶.

298. Several decisions illustrate the greater rigour resulting from this case law regarding the assessment of urgency within the meaning of Article L. 521-2 of the Code of Administrative Justice. Thus, although it could be considered as sufficiently serious and immediate prejudice to the applicant's situation, a visa refusal does not create a situation of particular urgency on the sole grounds that it hinders the applicant's planned marriage¹²⁵⁷, the celebration of his wedding, the date of which has already been set¹²⁵⁸, prevents him from taking part in the university year for which he has registered¹²⁵⁹ or from getting to know his young child living in France with his partner¹²⁶⁰. On the contrary, the judge affirms that "in principle and subject to particular circumstances, the refusal to issue a visa for entry into French territory does not reveal an emergency situation that justifies the intervention at very short notice of a measure of the nature that can be ordered on the basis of Article L. 521-2 of the Code of Administrative Justice"¹²⁶¹. Similarly, while it is deemed to constitute an emergency situation within the meaning of Article L. 521-1¹²⁶², the refusal to issue¹²⁶³ or renew¹²⁶⁴ a residence permit does not, in itself, characterise a situation of imminent urgency justifying the application of Article L. 521-2 of the Code of Administrative Justice. Since the procedure provided for in Article L. 521-1 is perfectly suitable for most applications for suspension of residence permits, an applicant who decides to apply to the interim relief judge must demonstrate particular urgency, which can no longer be the simple presumed urgency of the *Ameur* ruling. A decision to refuse residence, even if it is a refusal to renew or a withdrawal, does not in itself characterise the existence of an emergency situation within the meaning of Article L. 521-2. When he applies to the interim relief judge on this basis, "the applicant must provide specific justification (other than the simple fact that the renewal is being refused) to justify recourse to this judge of extreme urgency"¹²⁶⁵. Similarly, for the judge of summary proceedings, the administrative authority's prolonged abstention from drawing the consequences of the cancellation of a deportation order "does not in itself constitute a situation of urgency within the meaning of Article L. 521-2 of the Administrative Justice Code". In order to have access to the judge of the *référé-liberté* in such a case, the applicant must demonstrate "particular circumstances" justifying such an emergency. Failing to justify such circumstances, it is up to him or her "to refer the matter to the enforcement judge on the basis of Article L. 911-4 of the Code of Administrative Justice or to request the suspension of the administration's refusal on the basis of Article L. 521-1 of the same code"¹²⁶⁶. Thus, it is first of all to the ordinary procedures that the petitioner must turn to obtain satisfaction; the *référé-liberté* is only open to him if he can justify a particular situation. Consequently, in the event of the administration's failure to draw the consequences of the cancellation of a deportation order, the administrative judge intends to "reserve Article L. 521-2 to specific cases, establishing that the administration's failure to issue the provisional permit effectively infringes a fundamental freedom, such as when it deprives the person concerned of the right to have his or her asylum application examined, or when it results in the situation of the person being disrupted, who, having previously been in a legal situation, is no longer in one as a result of the administration's negligence"¹²⁶⁷.

1256 CE, ord. 4 February 2004, *Commune d'Yvrac, Lebon T.* p. 828. The interim relief judge of the Council of State annulled for error of law the order of the first judge who had based himself, in a general way, on the fact that "the non-payment of a service rendered and the non-issuance by the employing authority of a document conditioning the receipt of a replacement income are of such a nature as to place the applicant in a situation of urgency, within the meaning of the provisions of Article L. 521-2". The Council of State's interim relief judge indicates to the petitioner, if he believes he has grounds for doing so, and if the municipality has effectively refused him, that the interim relief procedure or the interim suspension procedure may be better suited to the subject of his conclusions.

1257 CE, ord. 18 October 2004, *Yebromi*, n° 273095; CE, ord. 18 February 2005, *Launay and Benfdil*, n° 277579.

1258 CE, ord. 28 September 2005, *Nkoyock and Hazera*, n° 285505.

1259 CE, ord. 4 October 2005, *Lachat*, n° 285594.

1260 CE, ord. 23 December 2005, *Corbel*, n° 288307; CE, ord. 7 February 2006, *Akbache*, n° 289835.

1261 CE, ord. 12 February 2007, *Qudaih*, n° 301352, mentioned in the *Recueil Lebon*.

1262 CE, Section, 14 March 2001, *Ministre de l'Intérieur c/ Ameur, Lebon* p. 123, *AJDA* 2001, pp. 673-680, concl. I. DE SILVA. It should be noted that the presumption instituted only concerns refusals to renew residence permits or withdrawals of residence permits pronounced against foreigners who are legally resident in France. These measures must be considered as creating an upheaval in the foreigner's situation and therefore an emergency. The presumption does not extend to the refusal of a residence permit to a foreigner who is already in an irregular situation.

1263 CE, 4 February 2005, *Zairi*, No. 267723: contrary to what the applicant maintains, the intervention of the implicit decision by which the prefect rejected his request of 22 October 2003 to issue him with a residence permit "does not in itself characterise a situation of imminent urgency justifying the application of Article L. 521-2 of the Administrative Justice Code".

1264 CE, 23 January 2004, *Koffi, Lebon T.* p. 827.

1265 I. DE SILVA, unpublished conclusions on CE, 23 January 2004, *Koffi*.

1266 CE, 16 February 2004, *Mme Rkia Bousbaa, épouse Chetoui, Lebon T.* p. 826, *AJDA* 2004, pp. 891-893, concl.

1267 F. LAMY, concl. cited above, p. 892. The Government Commissioner refers here to the case of the *Béchar* order (see *supra*,

The greater rigour of this jurisprudence is also apparent outside the field of foreigners' litigation, particularly in matters of refusal of authorisation to occupy the public domain. Thus, in the *EURL Cour des Miracles* case of 19 March 2003, the interim relief judge affirmed that "in the absence of particular circumstances, the mayor's refusal to authorise a commercial establishment to occupy the municipal public domain with a view to installing a terrace does not characterise a situation of urgency implying, subject to the other conditions set out in Article L. 521-2 being met, that a measure aimed at safeguarding a fundamental freedom must be taken within 48 hours. The judge specified that these particular circumstances "cannot be characterised in this case by the mere proximity of the tourist season"¹²⁶⁸. There is indeed a serious and immediate prejudice¹²⁶⁹, but not the particular urgency required for the implementation of Article L. 521-2. An identical solution was given by the interim relief judge in a similar case, concerning a refusal to issue to the applicant, who runs a mobile bakery, the authorisation she had requested on 7 April 2003 to have a site on the local market. The interim relief judge stated that "this circumstance does not characterise, on the date of the present order, a situation of urgency implying, subject to the other conditions set out in Article L. 521-2 being met, that a measure aimed at safeguarding a fundamental freedom must be taken within 48 hours"¹²⁷⁰. This more rigorous assessment of urgency as understood in the context of the *référé-liberté* is also illustrated in medical litigation. Thus, in the presence of a hospital's decision to refuse to admit a sick detainee to its wards, the interim relief judge stated that while the state of health of the person concerned, "in relation to the conditions of his continued detention, may justify the urgency provided for in Article L. 521-1 of the Code of Administrative Justice, these elements do not, however, characterise urgency within the meaning of Article L. 521-2 of the same code, implying that a measure must be taken immediately"¹²⁷¹.

Beyond these fragmented and juxtaposed examples, which cannot be systematised in any way, it is possible to highlight certain general elements in the case law that lead to the positive establishment of urgency at 48 hours, or to its exclusion.

Section 2. Elements to establish urgency

299. One element appears to be decisive for the positive qualification of the imminent urgency required for the implementation of the summary judgment. This is the prior finding by the judge of a serious and manifestly illegal infringement of a fundamental freedom. Nevertheless, this hypothesis is not the only reason to characterise the urgency within the meaning of Article L. 521-2 of the Code of Administrative Justice. On very rare occasions, this condition has been deemed to be met without any infringement of a fundamental freedom.

I. Serious and manifestly unlawful interference with a fundamental freedom

300. The condition of particular urgency required for the application of Article L. 521-2 is rarely considered to be met. In practice, it can be observed that in almost all cases where this condition is met, a serious and manifestly unlawful infringement of a fundamental freedom has first been identified. When such an infringement is established, there is in principle an urgent need to put an end to it. Generally speaking, it constitutes or reveals a "special circumstance" justifying the immediate pronouncement of a safeguard measure.

301. After having noted the serious and manifestly illegal infringement of a fundamental freedom, the judge will sometimes take care, in order to qualify the urgency, to give at least summary reasons.

Firstly, he may emphasise the imminence of the damage. Thus, in the *FN IFOREL* order, the judge simply stated, without further clarification, that "in view of the planned dates of the summer university, the condition of urgency is met"¹²⁷². The order was in fact issued on 19 August 2002, for a rally to be held from 25 to 28 August 2002. The damage was therefore imminent. In the order of 25 August 2005, *Commune de Massat*, the interim relief judge noted that "in the present case, the urgency was justified by the imminence of the holding of the demonstrations that the mayor had authorised under manifestly illegal conditions"¹²⁷³. In the event that the

§ 274). It is noteworthy that, in order to assess the existence of an emergency within the meaning of Article L. 521-2, Mr Lamy refers exclusively to a situation involving an infringement of a fundamental freedom. Recalling the state of the case law on the issue, he refers not to decisions that have ruled on urgency but to orders that have found the existence of a serious and manifestly unlawful interference with a fundamental freedom.

1268 CE, ord. 19 March 2003, *Société EURL La Cour des miracles*, n° 255191.

1269 Which will later be recognised by the interim relief judge ruling on the basis of Article L. 521-1 of the Code of Administrative Justice. See *infra*, § 337.

1270 CE, ord. 29 October 2003, *Société EURL "Il était une fouace"*, n° 261304. It should be noted that prior to the *Commune de Pertuis* case law, such a situation would have been rejected on the grounds that there was no infringement of a fundamental freedom.

1271 CE, ord. 9 March 2007, *Guiot and Section française de l'observatoire international des prisons*, n° 302182, mentioned in the *Recueil Lebon*.

1272 CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL)*, *Lebon* p. 311.

1273 CE, ord. 25 August 2005, *Commune de Massat*, *Lebon* p. 386.

President of French Polynesia failed to take note of the withdrawal of a minister, thus preventing the person concerned from standing as a candidate in the elections to be held on 13 April 2006 for the Assembly of French Polynesia, the judge affirmed that 'the imminence of the electoral operations makes it possible to consider that the condition of urgency required by Article L. 521-2 of the Code of Administrative Justice has been met'¹²⁷⁴.

Secondly, the judge may also justify the urgency with regard to the importance of the damage. For example, in the *Commune de Collioure* order, a mayor had made access to the marina subject to prior authorisation. The interim relief judge stated that the urgency was satisfied "given that most of the economic activity at issue in this case is concentrated during the summer season, which has already begun"¹²⁷⁵.

Thirdly, the judge may justify the urgency by the seriousness of the effects of an act or action on the applicant's situation. Thus, in the case of a consular authority refusing to register the applicant's children on his passport, the judge states that "the urgency can be deduced both from the nature of the dispute and from the length of time the applicant has been unsuccessfully approaching the authorities concerned"¹²⁷⁶. In the *Abdallah* decision, the Council considered that the applicants justified, "because of the consequences of the orders" repossessing their property, a situation of urgency "within the meaning of Article L. 521-2"¹²⁷⁷. In the *Sulaimanov* decision, as the investigation of an application for an identity document was prolonged for a period of more than a year, the interim relief judge considered that "in view of this delay and the consequences for the applicant of this refusal", the condition of urgency must be considered to have been met¹²⁷⁸. Similarly, when the administration seriously and manifestly violates the right to asylum by obstructing the exercise of this right before the French Office for the Protection of Refugees and Stateless Persons, the judge affirms "that, taking into account on the one hand, the legislator's desire to see the situation of asylum seekers resolved rapidly, and, secondly, the fact that the applicant's state of health requires that he be recognised as a refugee status applicant, which gives him the right to universal health coverage, the urgency condition set out in Article L. 521-2 of the Code of Administrative Justice is met"¹²⁷⁹. It should also be noted that, in the event of a refusal to authorise the applicants to enter French territory on the basis of asylum, the judge affirms, after noting a serious and manifestly illegal infringement of a fundamental freedom, "that, in view of the difficulties encountered by the persons concerned to be admitted to a country other than their country of origin, the condition of urgency is fulfilled in the case in point"¹²⁸⁰.

Fourthly, after having noted the serious and manifestly illegal infringement of a fundamental freedom, it can justify the urgency with regard to the impossibility for the applicant to enjoy the benefit of his freedoms. For example, in the case of an infringement of the right to property due to a refusal to allow the police to assist, the Conseil d'Etat states, in order to characterise the urgency, "that the building in question is currently devoid of regular occupants, that the owners are deprived of the possibility of renting out these premises for a use that conforms to their intended purpose, and that the tenants are unable to dispose of the flats that they have rented out"¹²⁸¹. In the above-mentioned *Aguillon* judgment, the urgency in the circumstances of the case resulted from the impossibility for the applicants to exercise the right to strike¹²⁸². The wording of the *Vast* judgment is particularly significant. This decision concerned a note by which the mayor of a municipality had prescribed the systematic opening of letters addressed to certain members of the municipal council. After noting that this note seriously and manifestly infringed on the secrecy of correspondence and the free exercise of their mandate by local elected representatives, the judge stated: 'given the consequences that it permanently entails for the secrecy of correspondence and the conditions under which the elected representatives of the commune of Drancy exercise their mandate, it is urgent to put an end to its application'¹²⁸³. In the same way, the interim relief judge states that the threat of enforcement of an extradition decree creates a situation of urgency 'given the importance for individual freedom of the guarantees surrounding the extradition procedure'¹²⁸⁴. In all these decisions, the prior finding of a serious and manifestly illegal infringement of a fundamental freedom favours the qualification of urgency; it also explains the conciseness of the reasoning.

302. Even more remarkably, the interim relief judge will sometimes, after having established such an infringement, dispense with a demonstration of urgency. This is considered to be established by the very fact that the other conditions are met. For example, in the *Baudoin* judgment, the Conseil d'Etat simply stated, after having established the existence of a serious and manifestly illegal infringement of a fundamental freedom, that "in

1274 CE, ord. 11 April 2006, *Tefaarere*, *Lebon* p. 197.

1275 CE, ord. 2 July 2003, *Commune de Collioure*, *Lebon* T. p. 930.

1276 CE, ord. 4 December 2002, *Du Comédic de Kéranant*, *Lebon* T. p. 875.

1277 CE, 2 February 2004, *Abdallah*, *Lebon* p. 16.

1278 CE, ord. 11 March 2003, *Samagassi*, *Lebon* p. 119.

1279 CE, ord. 21 December 2004, *Luzolo Kondé*, n° 275361.

1280 CE, ord. 25 March 2003, *Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c/ Sulaimanov*, *Lebon* p. 146. See also, in similar circumstances: CE, ord. 24 October 2005, *MBIZI MPASSI*, n° 286247; CE, ord. 17 March 2006, *Saidov*, no. 291214.

1281 CE, 29 March 2002, *SCI Stéphaneur and others*, *Lebon* p. 117. Similarly, the emergency is constituted when, because of the infringement of the right of ownership, a company is deprived of the possibility of renting the premises it owns (CE, ord. 31 May 2001, *Commune d'Hyères-Palmiers*, *Lebon* p. 253). In the *Moissinac Massenat* order, the judge stated 'that cutting down or felling trees would result in changes to the state of the premises that it would not be possible to erase'. Thus, the measure aimed at enjoining the administration to refrain from carrying out these cuts or felling 'is in principle of an urgent nature' (CE, ord. 8 November 2005, *Moissinac Massenat*, *Lebon* p. 491).

1282 See *supra*, § 290.

1283 CE, 9 April 2004, *Vast*, *Lebon* p. 173.

1284 CE, ord. 29 July 2003, *Peqini*, *Lebon* p. 345.

view of the urgency, it is appropriate" to issue the injunction requested¹²⁸⁵. In the *Commune de Fauillet* judgment, after noting that the early exercise of its powers by a public establishment for inter-communal cooperation seriously and manifestly infringes the free administration of its member communes, the Conseil d'Etat merely mentioned that the latter 'are entitled to maintain that there is an urgent need to put an end to it'¹²⁸⁶. Noting the serious and manifestly illegal infringement of a fundamental freedom by a decision restricting the movement of vehicles, the judge only states "that this unjustified blockage creates a situation of urgency"¹²⁸⁷. Conversely, some formulas exclude urgency on the basis of the absence of a serious and manifestly illegal infringement of a fundamental freedom. The interim relief judge thus noted, in the *Commune de Théoule-sur-Mer* order, that "the case file does not allow (...) for a serious and manifestly illegal infringement of a fundamental freedom that would create a situation of urgency"¹²⁸⁸. Finally, after having noted the existence of a serious and manifestly unlawful infringement of a fundamental freedom, the judge sometimes pronounces a safeguard measure without simply mentioning that the urgency is satisfied¹²⁸⁹. This is then considered to be included in the situation of serious and manifestly unlawful interference.

303. If urgency can be presumed in this way, it is quite simply because the elements that characterise it within the meaning of Article L. 521-2 are implicitly contained in the serious and manifestly unlawful interference with a fundamental freedom. Firstly, the seriousness and immediacy of the harm are included in the *serious infringement of a fundamental freedom*. On the one hand, the infringement of a freedom is only recognised by the interim relief judge if it is of a current nature¹²⁹⁰. Consequently, the damage resulting from the infringement of a fundamental freedom is immediate. On the other hand, when the seriousness of the infringement of a fundamental freedom is established, the act or behaviour that is at the origin of the infringement necessarily causes serious prejudice to the applicant's situation or to the interests he intends to defend. In these circumstances, a decision seriously undermining a fundamental freedom also seriously and immediately prejudices the applicant's position. Secondly, a situation of *serious and manifestly unlawful interference with a fundamental freedom* would seem to require the immediate pronouncement of a safeguard measure as of right. Apart from certain specific hypotheses linked to the consideration of the general interest or to an emergency situation attributable to the applicant, there is always an urgent need to put an end to such an infringement without delay¹²⁹¹. Thus, by deriving the urgency from the serious and manifestly illegal infringement of a fundamental freedom, the interim relief judge does not, strictly speaking, dispense with the assessment of urgency. Since this has already been done, indirectly, at the stage of examining the other conditions, he only dispenses with re-doing this assessment, i.e. once again, and identically.

In the *Vast* and *Vadiavaloo* decisions, the Conseil d'Etat appears to have legally enshrined this reasoning. In the *Vast* decision, it censured for error of law the order in which the interim relief judge ruled out that a serious and manifestly illegal infringement of a fundamental freedom could alone give rise to a situation of urgency: In the following words: "by merely noting that the absence of particular circumstances prevented the interim relief judge from ordering a measure aimed at safeguarding a fundamental freedom *without investigating the extent to which the contested decision was likely to seriously and manifestly illegally infringe a fundamental freedom*, the interim relief judge of the Administrative Court of Cergy-Pontoise erred in law"¹²⁹². In principle, because of the cumulative nature of the conditions set out in Article L. 521-2, it is sufficient for a single condition to be missing for the judge to be exempted from examining the other conditions. In *Vast*, this rule is specifically set aside in the case of urgency. Insofar as this condition is presumed to be met in the event of a serious and manifestly unlawful infringement of a fundamental freedom, the judge cannot reject an application for interim relief on the basis of the lack of urgency without examining whether such an infringement could be characterised. In this case, the government commissioner very explicitly invited the Council of State to derive the urgency from the finding of a serious and manifestly illegal infringement of a fundamental freedom. For Ms Boissard, 'As long as the disputed note remains in force, respect for the secrecy of correspondence is not ensured within the departments of the town hall, and these repeated and characterised violations of a fundamental freedom seem to us to be sufficient in *themselves* to characterise a situation of urgency within the meaning of Article L. 521-2'¹²⁹³. In the *Vadiavaloo* decision, the judge of cassation censured, for insufficient motivation, the order in which the interim relief judge concluded that

1285 CE, 15 May 2002, *Baudoin*, n° 239487.

1286 CE, 12 June 2002, *Commune de Fauillet et autres*, *Lebon* p. 215.

1287 CE, ord. 26 November 2004, *Commune de Wingles*, n° 274226.

1288 CE, ord. 22 May 2003, *Commune de Théoule-sur-Mer*, *Lebon* p. 232. See also CE, ord. 18 October 2001, *Association groupe local cimade Montpellier*, no. 239071: the interim relief judge noted that the contested decision "does not in itself concretely and immediately affect the exercise by a specific person of a fundamental freedom within the meaning of Article L. 521-2 of the Code of Administrative Justice; that, *under these conditions*, the condition of urgency to which the pronouncement of measures on the basis of Article L. 521-2 of the Code of Administrative Justice is subject is not fulfilled.

1289 See thus CE, ord. 14 January 2005, *Bondo*, *Lebon* T. p. 915; CE, ord. 21 February 2005, *Najemi*, n° 277520.

1290 See *supra*, § 238.

1291 See J.-F. LACHAUME, *Les grandes décisions de la jurisprudence. Droit administratif*, 13^{ème} éd., PUF, 2002, p. 496; R. MARTIN, Note sous CE, 29 mars 2002, SCI Stéphaneur, *D.* 2003, p. 1116; and T. PEZ, "Le droit de propriété devant le juge administratif du référé-liberté", *RFDA* 2003, pp. 384-48. PEZ, "Le droit de propriété devant le juge administratif du référé-liberté", *RFDA* 2003, pp. 384-385.

1292 CE, 9 April 2004, *Vast*, *RFDA* 2004, pp. 778-781, concl. S. BOISSARD.

1293 S. BOISSARD, concl. cited above, p. 780. Emphasis added.

there was no urgency without assessing whether the contested decision was of a nature to cause a serious and manifestly illegal infringement of a fundamental freedom¹²⁹⁴. In this case, the administrative authority had refused to renew the applicant's residence permit. Before the first judge, the applicant argued that a return to his country of origin would have exceptionally serious consequences if he could not receive appropriate medical treatment. The interim relief judge affirmed that this circumstance was not in itself such as to establish that the requested suspension was urgent. For the Council of State, the interim relief judge did not respond to all the arguments presented by the applicants to maintain that their request was not justified by urgency and thus did not give sufficient reasons for his decision. After reviewing the case, the Council rejected the applicants' request on the basis that there was no infringement of a fundamental freedom and, consequently, without ruling on the condition of urgency.

It seems to follow from these two rulings that the judge cannot conclude that there is no urgency without having examined whether the contested measure was not a serious and manifestly illegal infringement of a fundamental freedom. However, this case law applies only in certain cases, since in many decisions the interim relief judge of the Council of State rejects the application for lack of urgency without examining the other conditions. The *Mustafaj* decision of 2 November 2004 is significant on this point. The interim relief judge of the Council of State noted that the first judge had rightly rejected an application submitted on the basis of Article L. 521-2 on the grounds that the emergency was not characterised. It states "that, in the absence of urgency, [the first judge] was obliged to reject the application without having to determine whether there was a serious and manifestly illegal infringement of a fundamental freedom"¹²⁹⁵. This solution is part of a series of decisions in which the single judge for interim relief has very clearly affirmed the autonomy and differentiation of conditions¹²⁹⁶. The question is therefore to know in which cases the judge cannot place himself on the sole ground of urgency to reject an application. How can we distinguish between cases in which the judge can reject an application for interim relief on this ground alone, and those in which, as in the *Vast* and *Vadiavaloo* judgments, he must first ensure that there is no serious and manifestly unlawful interference with a fundamental freedom? As the case law does not provide any guidance on this point, it is at most possible to put forward hypotheses in the light of the decisions handed down on this basis. It may be thought that the judge could reject an application on the sole ground of lack of urgency in three cases: firstly, if he considers that there is no serious and manifestly unlawful interference with a fundamental freedom - in this case, he does not mention this in his decision and sets aside this condition by way of pretext¹²⁹⁷; secondly, if the applicant is responsible for the urgency he alleges or has not really justified the urgency; and thirdly, when a reason of general interest is an obstacle to the pronouncement of a measure.

304. In any event, when the judge has previously found the existence of a serious and manifestly illegal infringement of a fundamental freedom, urgency has always been characterised. Can we deduce from this that urgency is not an autonomous condition or, more precisely, that it constitutes a superabundant condition when it is examined by the judge *after* the finding of a serious and manifestly illegal infringement of a fundamental freedom?

The wording of Article L. 521-2 makes urgency a condition in its own right. The law considers each of the conditions of granting separately. It thus requires that urgency be examined separately from *each of* the other conditions. Firstly, urgency is autonomous from the condition of *illegality of* the infringement. The condition relating to the illegality of the situation is distinct from the condition relating to the urgency of the situation, so that 'the irregularity of the siting of the work cannot in itself allow the condition of urgency laid down by Article L. 521-2 to be considered established'¹²⁹⁸. In a formula intended to be general in scope, the judge affirmed that "the requirement of urgency does not necessarily follow from the alleged illegality of the contested decision"¹²⁹⁹. Therefore, "the mere fact that an illegal infringement has been made [of a fundamental freedom] is not, in itself, such as to characterise the particular urgency required by Article L. 521-2 of the Code of Administrative

1294 CE, 3 October 2005, *Vadiavaloo*, n° 281998.

1295 CE, ord. 2 November 2004, *Mustafaj*, n° 273721.

1296 Very explicitly, the judge of summary proceedings declared that for the application of the provisions of Article L. 521-2 of the Code of Administrative Justice, "the condition relating to urgency must be assessed *separately* from that relating to a 'serious and manifestly illegal infringement' of a 'fundamental freedom'" (CE, order of 6 February 2004, *Société Yacht club international de Saint-Laurent-du-Var*, No. 264169). For the application of these provisions, "the conditions relating to urgency, on the one hand, and the existence of a serious and manifestly unlawful interference with a fundamental freedom, on the other, are cumulative; (...) it is thus up to the applicant to justify *in all cases* the first of these conditions (...)" (CE, order of 27 May 2004, *Hermanowicz*, no. 267831). In this case, the applicant asked the interim relief judge to order the prefect to provide assistance from the public force in order to ensure the execution of a court decision ordering the eviction of a tenant from a flat she owned. The Council of State's summary proceedings judge stated "that the fact that this assistance was requested by a bailiff on 13 June 2003 is not sufficient in itself, in the absence of details of the immediate consequences of the refusal, to characterise the condition of urgency within the meaning of the provisions of Article L. 521-2 of the Code of Administrative Justice". However, it may be thought that if the conditions relating to the existence of a serious and manifestly illegal infringement of a fundamental freedom had been met, the meaning and wording of this decision would have been different.

1297 This would coincide with the wording of the *Commune de Pertuis* order, which refers to the need, not to obtain a measure within 48 hours, but to obtain a *safeguard* measure within 48 hours.

1298 CE, ord. 21 August 2001, *Manigold*, n° 237385.

1299 CE, ord. 16 February 2005, *SARL Médiation et arguments*, No. 277584.

Justice"1300 . Secondly, the urgency is independent of the condition of *seriousness* of the infringement. After noting, in the *Lidl* order, that the contested decision seriously infringed a fundamental freedom, the interim relief judge took care to emphasise that "the implementation of the special jurisdictional protection provided for by Article L. 521-2 of the Code of Administrative Justice implies that a situation of urgency justifying the issuance of the injunction requested must be established". In the end, the urgency was not qualified, notably because the applicant was unable to demonstrate it¹³⁰¹ . Thus, urgency does not overlap with each of the other conditions considered individually.

Nor is it redundant with the other conditions considered as a whole. Indeed, urgency remains a condition in its own right of the summary procedure even when a serious and manifestly illegal infringement has been established beforehand. The superposition of conditions is in keeping with the letter of Article L. 521-2 and the purpose of this procedure. Although serious and manifestly unlawful interference is a determining factor in determining urgency, it cannot establish it as of right, in all circumstances and without taking into account the applicant's behaviour. It even seems possible to argue that the presumption of urgency resulting from a finding of serious and manifestly unlawful interference may be overturned. Nevertheless, as Ms Boissard states, "It is only if this infringement is in fact attributable to the applicant himself that the interim relief judge will be led to find that there is no urgency"¹³⁰² . Apart from taking into account the interest of the defendant, this seems to be the only case in which the presumption of urgency can be overturned when a serious and manifestly unlawful infringement has been established beforehand. It should be noted that to date, no reversal of this presumption has occurred. In any event, it is likely that even in such a case, the judge would not mention the reversal of the presumption in his decision and would dismiss the case solely on the grounds of urgency. Where the urgency is attributable to the applicant, the interim relief judge does not rule on the condition of serious and manifestly unlawful interference but rules directly on the urgency. It is hardly conceivable that he should find that there has been a serious and manifestly unlawful infringement of a fundamental freedom and then deny the applicant the right to a safeguard measure because of his failure to act or his conduct.

Although serious and manifestly unlawful interference is not required to characterise urgency, it is nevertheless the determining and almost exclusive criterion. Nevertheless, it may happen, even if this is very rare in practice, that the judge qualifies the urgency positively without having noted such an infringement.

II. The possibility of qualifying as urgent where there is no infringement of a freedom

305. On very rare occasions, the judge of the *référé-liberté* has qualified the urgency positively without having previously noted a serious and manifestly illegal infringement of a fundamental freedom, or even in the absence of such an infringement. These cases are exceptional, and in practice correspond essentially to hypotheses of presumed urgency.

306. In rare cases, the judge has recognised the urgency outside the mechanisms of presumption of urgency and without or, more precisely, before - because this element is important - qualifying the serious and manifestly illegal infringement of a fundamental freedom¹³⁰³ . In the *Aït Oubba* case, the applicant had obtained the annulment of the deportation order issued against him on the grounds that, as he had been living in France for more than ten years, he should have been granted a residence permit bearing the words "private and family life". The interim relief judge of the Council of State noted that fourteen months had passed since the judgment cancelling his deportation. Therefore, "given the reasons for this annulment, the administration's persistent failure to fully execute this judgement creates a situation of urgency within the meaning of Article L. 521-2 of the Code of Administrative Justice"¹³⁰⁴ . The judge only then examines the condition relating to the serious and manifestly illegal infringement of a fundamental freedom, which in this case is considered to be met. In the *Société Outremer Finance Limited* judgment, the Conseil d'Etat noted that "in view of the extent of the financial damage resulting, for the applicant company owning the aircraft, from its immobilisation, which prevents it from being hired out again, the condition of urgency laid down by the aforementioned Article L. 521-2 is met"¹³⁰⁵ . Here again, the administrative judge only examines the requirement of a serious and manifestly illegal infringement of a fundamental freedom, which is met. In the *Basset case*, the applicant challenged a prefectural order to close a public house for one month during the summer. After noting that a

1300 CE, ord. 10 August 2005, *Diabira*, n° 283444. See however CE, ord. 11 February 2003, *Maillois*: the interim relief judge rejected the request made on the basis of L. 521-2 on the grounds that it did not emerge from the documents in the file that the refusal was "vitiated by a manifest illegality (...) which would justify putting an end to it within the time limit provided for in this article".

1301 CE, ord. 23 March 2001, *Société Lidl, Lebon* p. 154.

1302 S. BOISSARD, unpublished conclusions on CE, 15 February 2002, *Hadda, Lebon* p. 45. See *infra*, § 310 et seq.

1303 Indeed, it may be assumed that when drafting the decision, and especially the condition of urgency, the judge takes the greatest account of the serious and manifestly unlawful infringement of a fundamental freedom that he or she later finds in the reasons for the decision.

1304 CE, ord. 11 June 2002, *Aït Oubba, Lebon T.* p. 869.

1305 CE, 2 July 2003, *Société Outremer Finance Limited, Lebon* p. 306.

large part of his turnover was generated during this period, the judge concluded that the condition of urgency set out in Article L. 521-2 was met¹³⁰⁶. In this case, the serious and manifestly illegal infringement of a fundamental freedom is considered to have been met. However, as in previous decisions, it is examined after the condition of urgency.

307. In practice, it is essentially when the judge has established a *presumption of urgency* that he or she will consider this requirement to be met even before ruling on the existence of a serious and manifestly illegal infringement of a fundamental freedom. These presumptions of urgency, established by the administrative judge in consideration of the purpose and scope of the measure in question, lead to the condition of urgency being deemed to be met in the matters concerned. These presumptions of urgency have been recognised by the judge of the *référé-liberté* in various fields, especially in the litigation of foreigners. This concerns the decision to expel a foreigner from French territory¹³⁰⁷, the refusal to allow an asylum seeker to stay temporarily¹³⁰⁸ or, in the context of the procedure for determining the State responsible for an asylum application, the decision to hand over to a foreign State¹³⁰⁹. On the other hand, as long as the judge has not declared them applicable to the interim relief procedure, the presumptions of urgency established in the context of the interim relief procedure are only applicable to this procedure. Thus, the withdrawal or refusal to renew the residence permit of a foreigner who is in a legal situation¹³¹⁰ does not constitute a presumption of urgency within the meaning of Article L. 521-2. Similarly, in all likelihood, the presumption, established on the basis of Article L. 521-1, according to which "the dissolution of a chamber of trades creates, in itself, a situation of urgency"¹³¹¹, will not apply to the *référé-liberté*. Nor can the presumptions established in summary proceedings prior to the *Commune de Pertuis* order be deemed in principle to be maintained. For example, the judge of the *référé-liberté* had recognised a presumption of urgency when a professional is deprived of his work tool or prevented from exercising his professional activity¹³¹². It is doubtful whether this will be maintained under the new law.

When the dispute on which the judge of the *référé-liberté* rules is concerned by a presumption of urgency, the judge rules on this before examining the condition relating to the serious and manifestly illegal infringement of a fundamental freedom. The judge first checks whether the presumption of urgency must not be overcome by particular circumstances in the case before him. Insofar as the presumptions of urgency thus established by the judge are simple presumptions, they are always recognised subject to the circumstances of the case. According to the case law, urgency is deemed to be satisfied "except in special circumstances". Indeed, the presumptions in no way exempt the judge from taking into account the effects of the disputed measure on the applicant's situation. They may be overturned if the administration succeeds in demonstrating the absence of urgency in the light of the particular circumstances of the case, in particular when the damage suffered by the applicant is attributable to the latter. Presumptions of urgency thus cause a reversal of the burden of proof. The respondent then takes the lead in its demonstration. In its observations in defence, the administration must put forward particular circumstances justifying that the condition of urgency is not met¹³¹³. In the absence of evidence to the contrary, urgency is established. For example, in the aforementioned *Ouakid* case, the judge noted "that the Minister of the Interior does not put forward any element that would be likely to establish that the execution of his order of 17 December 2001 pronouncing the expulsion of Mr Ouakid would not create a situation of urgency within the meaning of the provisions of Article L. 521-2 of the Code of Administrative Justice"¹³¹⁴. Similarly, for a refusal to register the applicant's application for territorial asylum, the Council notes "that the Minister of the Interior does not invoke any particular circumstances specific to the situation of Mr Hadda, who was the holder of a valid visa when he tried several times to register his application for territorial asylum"¹³¹⁵. In the absence of any evidence to the contrary, urgency is established and the judge verifies whether the serious and manifestly unlawful infringement is satisfied. In practice, it can be observed that in all the above-mentioned decisions recognising urgency within the meaning of Article L. 521-2 thanks to the mechanism of presumption of urgency, the serious and manifestly unlawful interference is qualified later in the reasons. Admittedly, the urgency results from the nature and characteristics of the act or conduct in question, and not from the serious and manifestly unlawful infringement of a fundamental freedom. But, here again, it may be thought that the characterisation of such an infringement is not an indifferent element. It would seem that the judge has never recognised the urgency without subsequently

1306 CE, ord. 16 August 2004, *Minister of the Interior, Internal Security and Local Freedoms v. Basset*, No. 271148.

1307 CE, ord. 7 May 2002, *Ministre de l'Intérieur c/ Ouakid*, *Lebon T.* p. 870. This presumption of urgency had previously been established in the context of summary suspension (see CE, 26 September 2001, *Ministre de l'Intérieur c/ Mesbahi*, *Lebon* p. 428; CE, 2 October 2002, *Hakkar*, *Lebon T.* p. 863).

1308 CE, 15 February 2002, *Hadda*, *Lebon* p. 45; CE, 3 November 2003, *Kobanda Doro*, n° 258322.

1309 CE, ord. 25 November 2003, *Ministre de l'Intérieur, de la Sécurité intérieure et des Libertés locales c/ Nikoghosyan*, *Lebon T.* p. 927.

1310 See *supra*, § 298.

1311 CE, ord. 11 July 2001, *Chambre de métiers de la Haute-Corse*, *Lebon T.* p. 1105.

1312 See CE, ord. 15 March 2002, *Delaplace*, *Lebon* p. 105: in view of the consequences for the applicant's occupation as a delivery driver, the administration's refusal to return his driving licence "is - subject to examination of the particular circumstances of the case - such as to make it appear that the condition of urgency laid down by both Article L. 521-1 and Article L. 521-2 has been met".

1313 See the rule, affirmed in the context of summary suspension: CE, 1st October 2001, *Meddah*, n° 234918.

1314 CE, ord. 7 May 2002, *Ministre de l'Intérieur c/ Ouakid*, *Lebon T.* p. 870.

1315 CE, 15 February 2002, *Hadda*, *Lebon* p. 45.

recognising in the decision (and *a fortiori* if he recognises it beforehand) the serious and manifestly illegal infringement of a fundamental freedom¹³¹⁶.

308. Urgency is linked, for the most part and almost exclusively, to the finding of a serious and manifestly illegal infringement of a fundamental freedom. It would seem that the interim relief judge has never found urgency without finding a serious and manifestly unlawful infringement of a fundamental freedom. Nevertheless, including in such a case, he may refuse to qualify the urgency if he or the parties find an element that would exclude urgency.

Section 3. Elements that exclude urgency

309. There are two elements that may prevent the qualification of urgency: on the one hand, the conduct of the applicant; on the other hand, an objective of general interest pursued by the defendant.

I. The applicant's behaviour

310. The applicant must not be the cause of the urgency he or she alleges or actually suffers. Applying the *Nemo auditur* principle to this condition, the judge considers that the emergency situation must not be attributable to the applicant's attitude. The latter must not have contributed, by his or her behaviour, to creating or aggravating the emergency situation. This case law essentially covers four distinct hypotheses.

311. First of all, the interim relief judge considers that there is no urgency to order a measure when the litigious situation results not from the actions of the administration but from the delay of the person concerned in making his request to the competent authorities. Thus, the citizen cannot invoke urgency if he has waited several months before taking the necessary steps to renew his passport with the consular administration¹³¹⁷. Urgency cannot be characterized either when the applicant requests that the administrative authority be ordered to renew his passport even though it expired more than two years ago¹³¹⁸. Similarly, a foreign national holding a temporary residence permit who waits until the last day of its validity to apply for its renewal cannot usefully invoke the urgency in which he or she has placed himself or herself. By virtue of the provisions of Article 3 of the decree of 30 June 1946 regulating the conditions of entry and residence of foreigners in France, he was obliged to submit his application during the last two months preceding the expiry of his residence permit. Thus, 'as the delay in examining his application is exclusively attributable to him, the applicant does not justify the urgency of issuing a receipt for a residence permit renewal'¹³¹⁹.

312. Secondly, when the claimant has clearly delayed acting after the occurrence of the damage of which he considers himself to be a victim, the judge will note the contradiction between this delay in bringing the matter before him and the invocation of the urgent nature of his situation¹³²⁰. Any delay or lack of diligence in contesting an administrative act or behaviour is thus turned against the claimant. The judge will refuse to qualify the urgency when the latter has accepted a situation and only contests its effects belatedly, showing "too long a delay with regard to the administrative actions of which he complains"¹³²¹. As this is a situation that the applicant could have been concerned about earlier, the credibility of the emergency situation is greatly affected. Even though the judge's intervention may have been urgent in the past, it is no longer urgent at the

¹³¹⁶ In a *Kobanda Doro* decision, the Council stated that "the refusal of provisional admission to residence in itself is sufficiently serious and immediate to affect the situation of the asylum seeker for the condition of urgency to be met, except in special circumstances" (CE, 3 November 2003, *Kobanda Doro*, no. 258322). After annulling the order that had excluded urgency in such a case, the Conseil d'Etat reviewed the case and rejected the application, due to the serious and manifestly illegal infringement of a fundamental freedom. Since it does not rule on the grounds of urgency, it cannot be determined whether or not urgency was satisfied, i.e. whether the presumption applied in full or had to be rebutted in view of the particular circumstances of the case.

¹³¹⁷ See CE, ord. 9 January 2001, *Depertthes, Lebon* p. 1. The applicant asked the interim relief judge to order the consular authority to renew his passport. The judge noted that the person concerned had been informed in March 2000 by the Haute-Marne prefecture of the condition to which the renewal of his passport was subject. Insofar as the delay in issuing this document was attributable to him, "he could not invoke the urgency of his travels abroad to request the prescription of a measure on the basis of the aforementioned Article L. 521-2 of the Administrative Justice Code".

¹³¹⁸ CE, ord. 21 March 2001, *Rabal*, n° 231531.

¹³¹⁹ CE, 8 October 2001, *Sanchez Cardoso, Lebon* T. p. 1091.

¹³²⁰ According to the terms of the jurisprudence developed under the previous law, when a 'long delay' has 'elapsed between the occurrence of the damage and the referral to the summary proceedings judge', the request no longer has the emergency character required by the texts (CE, 9 February 1972, *Entreprise Quille*, RDP 1972, p. 1278).

¹³²¹ R. DENOIX DE SAINT MARC, "Les procédures d'urgence: premier bilan", *AJDA* 2002, p. 1.

time of referral.

Thus, the applicant is not entitled, in order to establish the urgency he alleges, to refer to the imminence of the taking effect of the act he is contesting when he was notified of it one month earlier¹³²². Similarly, the applicant who refrained from contesting the unfavourable opinions issued by the Commission for Access to Administrative Documents in 1996 and 1999 cannot invoke the urgency that there would be, in 2003, to obtain communication of the documents on the basis of which the Commission issued these opinions¹³²³. For the interim relief judge, urgency is not established when an association waits more than a year before requesting the suspension of the decree deciding on its inclusion on the list of persons for whom financial transactions between France and foreign countries are subject to prior authorisation by the Minister of the Economy¹³²⁴. The judge also considered that there was no urgency to order the demolition and removal of a public structure that had been installed for two years on a plot of land belonging to a private person¹³²⁵. *A fortiori*, there is no urgency "to suspend the execution of provisions that have been in place for more than seventeen years"¹³²⁶.

However, if the passage of too much time casts doubt on the reality of the weight of the infringement on the applicant's situation, no time limit can be imposed as such¹³²⁷. The interim relief judge will also sometimes temper the rigour of this assessment when the urgency appears particularly pressing, notwithstanding the attitude of the applicant. In the *M'LAMALI* order, he agreed to qualify as urgent the situation resulting from the administration's delay in renewing the applicant's passport, even though the applicant had waited six months to inquire about the outcome of his case. Two elements were taken into consideration by the judge to qualify the urgency despite the applicant's lack of diligence: on the one hand, the fact that the applicant had applied for the renewal of his passport in good time, and on the other hand, the abnormally long time taken by the administration to examine his file, which had the effect of depriving the applicant of the possibility of using a valid identity document¹³²⁸.

313. The judge will also be reluctant to characterise the urgency "if there is a lack of a sort of 'surprise effect'"¹³²⁹. Thus, the judge refuses to qualify the urgency when a real estate company has acquired a building occupied by squatters and requests the assistance of the public force to execute a judicial decision ordering their eviction. When it acquired the building, the company was aware of the presence of squatters and could not have been unaware of the difficulties it would face in carrying out its real estate projects. In a very explicit reasoning, the judge noted that "the company, which habitually carries out a building renovation activity, could not ignore the difficulties it would face in carrying out the project for which it had made the acquisition". He deduced that, under these conditions, the applicant company "could not rely on the notion of urgency within the meaning and for the application of Article L. 521-2 of the Code of Administrative Justice"¹³³⁰. Through this formula, the administrative judge introduces into the assessment of urgency the notion of "accepted risk"¹³³¹, which until then seemed to be reserved for liability litigation¹³³².

314. Finally, it follows from this case law that urgency cannot be characterised if the applicant has placed himself in an illegal situation. This is the case when a company intends to open a business subject to the law of 5 July 1996 on the development and promotion of trade and craft industries, even though it has not requested - and consequently obtained - authorisation from the departmental commercial facilities commission. Since the applicant company was not in compliance with the provisions of this text, 'the issuing of the injunctions requested, with regard to the use made by the mayor of his powers in relation to establishments open to the public, is not, in *any event*, justified by the urgency'¹³³³. Thus, in general, 'the interim relief judge may consider that an emergency situation has not been established to justify the pronouncement of the requested measure when the applicant can raise the exception of illegitimacy of his own situation'¹³³⁴.

1322 CE, ord. 16 March 2001, *Association Radio "2 couleurs"*, *Lebon T.* p. 1134. On 23 February 2001, the association was notified of the contentious decision. It was only on 23 March 2001, i.e. only three days before the date scheduled for its entry into force, that it applied to the interim relief judge for suspension on the basis of Article L. 521-2.

1323 CE, ord. 12 May 2003, *Bidalou*, n° 256868.

1324 CE, ord. 15 December 2003, *Association secours mondial de France*, No. 262627.

1325 CE, ord. 21 August 2001, *Manigold*, n° 237385.

1326 CE, ord. 21 January 2002, *Auto-école Bergson*, n° 242051.

1327 As M. Dugrip stated under the previous law, "The fact that the situation at issue has existed for a long time does not prevent it from becoming urgent at a given moment to ask the interim relief judge for certain measures. Urgency may arise when a situation has a certain permanence, when events influence it and make immediate intervention necessary" (O. DUGRIP, *op. cit.*, p. 328). In other words, delay "cannot (...), on its own, demonstrate the absence of urgency, as a factual situation may very well extend over time and make immediate action necessary at a given moment" (*ibid.*). In the same way, M. Cossa stated that 'the age of the damage does not necessarily exclude urgency' (M. COSSA, 'L'urgence en référé', *GP* 1955, 2, p. 47).

1328 CE, ord. 26 April 2005, *Minister of the Interior, Internal Security and Local Freedoms v. M'LAMALI*, *Lebon T.* p. 1034.

1329 L. ERSTEIN, "Pragmatisme de la notion d'urgence", *Coll. ter.* 2002, chron. n° 4, p. 4.

1330 CE, ord. 3 January 2003, *Minister of the Interior, Internal Security and Local Freedoms v. Société Kerry*, *Lebon T.* p. 928, 931. See, in the same sense, CE, ord. 2 June 2005, *Société civile immobilière "63 rue d'Hautpoul"*, n° 280831.

1331 J.-P. GILLI, note under CE, ord 3 January 2003, *Minister of the Interior v. Kerry Company*, *AJDA* 2003, p. 344.

1332 See R. CHAPUS, *Droit administratif général*, t. 1, 14^{ème} éd, Montchrestien, 2000, n° 1422.

1333 CE, ord. 23 March 2001, *Société Lidl*, *Lebon* p. 154.

1334 P. SOLER-COUTEAUX, obs. under CE, ord. 13 March 2001, *Société Lidl*, *RDI* 2001, p. 277. This solution is again a transposition

In addition to the attitude of the applicant, the obstacle to a qualification of urgency may result from the general interest pursued by the defendant.

II. The general interest pursued by the defendant

315. The urgency of pronouncing a safeguard measure must be weighed against the urgency of not pronouncing this measure. This assessment is said to be "global" when the judge integrates all the interests at stake in his analysis. In certain situations, the general interest for which the defendant is responsible may be an obstacle to the characterisation of urgency.
316. Under the Act of 30 June 2000, the interim relief judge must balance the applicant's interest in obtaining the pronouncement of a measure against the interest that may exist in not pronouncing it. The principle of balancing interests was first established by the Council of State in the context of Article L. 521-1 of the Code of Administrative Justice. In the *Préfet des Alpes-Maritimes* decision of 28 February 2001¹³³⁵, the Section annulled the order of the interim relief judge who, at the request of environmental protection associations, had suspended the execution of a prefectural order authorising a company to operate a household waste storage centre on the territory of a municipality located in the Alpes-Maritimes department. The Council of State indicated that since the urgency had to be "assessed globally and objectively", it was incumbent on the interim relief judge to take into consideration not only the consequences of the disputed order on the environment, as the interested associations wished, but also, as the prefect requested, "the consequences that a suspension could have immediately on the conditions of waste disposal in the Alpes-Maritimes department". In this case, the Council confronted two general interests: the protection of public health and respect for the environment. It considers that the urgency of eliminating the waste outweighs the possible risks that the operation of the landfill could pose to the environment. The principle of an overall assessment of urgency was transposed to the summary proceedings in an order of 10 August 2001, *Association La Mosquée*. The interim relief judge used the formula of the *Préfet des Alpes-Maritimes* decision in a recital of principle, stating "that the condition of urgency set out in Article L. 521-2 of the Code of Administrative Justice must be assessed objectively and taking into account all the circumstances of each case"¹³³⁶.

It follows from this case law that the interim relief judge cannot limit his control of urgency to taking into account only the interests of the applicant. In this context, it is up to him to carry out an "urgency assessment"¹³³⁷ by comparing the urgency of the applicant to obtain the pronouncement of a safeguard measure and the urgency of the defendant to pursue his action undertaken in the general interest. By "weighing up the interests involved", the judge must "compare the damage that the applicant would suffer if the interim measure were not prescribed with the damage that would result for the author of the act, for third parties or for the general interest if this measure were prescribed. In his overall assessment of the urgency, the interim relief judge is then led to take into consideration the effects of the measure he is asked to take, and to balance them against the effects for the applicant of the contested decision or conduct"¹³³⁸. In other words, the judge is led to balance the urgency of pronouncing the safeguard measure requested against the urgency of continuing the execution of the contentious act or the administrative activity undertaken. Thus, by integrating the interest of the defendant in the assessment of urgency, this solution puts an end to the case law of the *Association de sauvegarde du Quartier Notre Dame* which prevailed under the previous state of the law¹³³⁹.

of the principles of extra-contractual liability law. In this field, "the victim who is in an illegitimate situation, because of its irregularity, is not entitled to reparation for the damage he or she suffers in this situation" (R. CHAPUS, *op. cit.*, no. 1420). The administrative judge considers that it cannot claim compensation if it has not respected the regulations applicable to it (see CE, Sect., 7 March 1980, *SARL Cinq-Sept, Lebon* p. 129, concl. J. MASSOT).

1335 CE, Sect. 28 February 2001, *Préfet des Alpes-Maritimes, Lebon* p. 110; *AJDA* 2001, p. 461, chron. M. GUYOMAR and P. COLLIN; *Coll. ter.* 2001, comm. n° 126, note T. CELERIER.

1336 CE, ord. 10 August 2001, *Association "La Mosquée" and others, Lebon* T. p. 1133. See also CE, ord. 21 November 2002, *Gaz de France, Lebon* p. 408; CE, ord. 30 October 2003, *Société Kentucky*, n° 261353.

1337 S. OVERNEY, "Le référé-suspension et le pouvoir de régulation du juge", *AJDA* 2001, p. 721.

1338 P. CASSIA, *Les référés administratifs d'urgence*, LGDJ, coll. Systèmes Droit, 2003, p. 104-105. See also B. CAVIGLIOLI, "Le recours au bilan dans l'appréciation de l'urgence", *AJDA* 2003, pp. 642-652.

1339 Before the reform of 30 June 2000, the administrative judge recognized, in opportunity, the power not to pronounce the suspension of execution of an administrative decision when the conditions stated by the texts were satisfied (CE, Ass., 13 February 1976, *Association de sauvegarde du quartier Notre-Dame à Versailles, Lebon* p. 100). When the conditions of granting were fulfilled, the pronouncement of the stay of execution was "for the judge only a simple faculty" (CE, Ass., 2 July 1982, *Lebon* p. 257). In practice, this option was used exceptionally and only very rarely (see R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd., Montchrestien, 2006, n° 1582). By establishing the principle of a balance of urgency, the *Préfet des Alpes-maritimes* judgment put an end to the possibility of not ordering the requested measure when all the conditions are met. However, the idea of transposing the case law of the *Association de sauvegarde du Quartier Notre-Dame* to the référé-liberté was considered by the doctrine during the first months of application of the reform. Based on a literal reading of Article L. 521-2 ("the interim relief judge may order"), several authors stated that this case law was likely to be applied to interim relief even though all the conditions for granting it, including urgency, would be met. Ms Rouault thus stated that "Article L. 521-2, enshrining the traditional case law in this area, provides that the judge 'may' order the measures in question. Here again, he has a discretionary power" (M.-C. ROUAULT, "La loi du 30 juin 2000 : un petit pas vers un traitement efficace de l'urgence par le juge administratif", *D.* 2001, p. 401). M. Pissaloux developed a comparable analysis: since in

The interests at stake are defined by the parties and by the elements in the file. The interim relief judge will first of all read the urgency "in the light of the justifications given in the application and the arguments presented in defence"¹³⁴⁰. But he is not limited by the arguments of the parties and may *ex officio* raise the urgency of not ordering a safeguard measure, even if this has not been opposed by the defendant. The Conseil d'Etat has accepted, on the basis of Article L. 521-1 of the Code of Administrative Justice, that the interim relief judge may carry out an assessment of urgency at the stage of the sorting procedure, i.e. take into consideration the interest in not pronouncing the measure and thus reject it for lack of urgency solely on the basis of the application¹³⁴¹. This solution is remarkable insofar as, by hypothesis, the administration was not called and therefore did not present any observations in its defence. Consequently, it could not invoke the urgency of not pronouncing the requested measure. It follows that the general interest can be taken into account *ex officio* by the interim relief judge, even though the administration did not mention it in its observations. The judge may carry out the assessment of urgency *ex officio* and deduce from the elements of the file the interest in not pronouncing the requested measure.

In some cases, the assessment of urgency overlaps to a very large extent with the assessment of the condition of manifest illegality. This explains why the judge sometimes does not examine the condition of manifest illegality and the condition of urgency separately, but compares the balance between the general interest and the infringement of fundamental freedoms against the same data. In the *Gaz de France* and *SCI Résidence du théâtre* decisions, the judge stated that in the absence of sufficient justification, the refusal to execute an eviction measure appears to be "vitiated by manifest illegality and constitutes a situation of urgency within the meaning and for the application of Article L. 521-2 of the Code of Administrative Justice"¹³⁴².

317. In practice, the confrontation of the interests of the applicant and one or more public interests may lead - in the event of opposition¹³⁴³ - to two situations. The balance can either be tilted in favour of the applicant and, as a result, justify the granting of the requested measure, or it can be tilted in favour of the respondent and thus prevent the granting of the measure. Urgency may be qualified in the first case, but is excluded in the second.

First of all, the balance will be unfavourable to the applicant if there is an overriding reason of general interest. For example, a public safety reason rules out urgency in the case of a municipal order prohibiting access to and ordering the demolition of a dilapidated and dangerous municipal building that was occupied as a place of worship by an association¹³⁴⁴. Similarly, the judge states that, taking into account all the interests involved and in particular the protection of the forest, a decree classifying the forest of Fontainebleau as a protection forest¹³⁴⁵ does not constitute an emergency situation.

Conversely, the balance will be in favour of the plaintiff if the defendant's interest does not appear sufficiently important to counterbalance the urgency of pronouncing a safeguard measure. Thus, in the case of a municipal order to close a local business, the interim relief judge stated that "as this is a measure to protect safety and hygiene, the urgency of the measures requested on the basis of Article L. 521-2 of the Code of Administrative Justice must be assessed by taking into account not only the situation of the applicant business but also the imminence of the risks that these measures are intended to prevent". The balancing of the commercial future of the company on the one hand and the prevention of health risks on the other results, in view of the circumstances of the case, in considering that the condition of urgency required by Article L. 521-2 is met¹³⁴⁶. Similarly, when a prefectural refusal to provide assistance from the public force is at issue, the interest in maintaining order does not prevent

the three urgent summary proceedings, "we find the verb 'may', which expresses a faculty", the summary proceedings judge is "in no way obliged to order the suspension of a decision, or all the urgent measures necessary to safeguard a fundamental freedom or all other useful measures depending on the hypothesis concerned. In other words, even if the legal conditions are met, namely (to stick to the two main innovations of the law) urgency and serious doubt in the case of suspension proceedings, and urgency and serious and manifestly unlawful infringement of a fundamental freedom in the case of interim relief, the interim relief judge (under ordinary law) is not in a situation of bound jurisdiction" (J.-L. PISSALOUX, "Quelques réflexions dubitatives sur les nouvelles procédures de référé administratif", *Dr. adm.* 2001, chron. n° 18, 1^{re} part, p. 10). Finally, M. Marcou stated that, "As in summary proceedings, the judge retains in summary proceedings a power of appreciation on the appropriateness of the measures ("the summary proceedings judge may order...")" (G. MARCOU, "Le référé administratif et les collectivités territoriales", *LPA* 14 May 2001, n° 95, p. 45). But in reality, the hypotheses developed are unthinkable. Insofar as the balance of interests is achieved at the stage of the overall assessment of the urgency, it radically excludes the judge from authorising himself, for whatever reason, not to pronounce a measure - especially a safeguard measure - when the conditions for granting it laid down by the legislator are cumulatively satisfied. It is no longer up to the judge to assess *the appropriateness* of granting the requested measure, as the consideration of a reason of general interest likely to oppose it has already been carried out upstream.

1340 Formula used in the context of the summary suspension. See in particular CE, Sect. 25 April 2001, *Association des habitants du littoral du Morbihan c/ Commune de Baden*, *Lebon* p. 220; CE, 26 September 2001, *Société de transports "La Mouette"*, *Lebon* T. p. 1120; CE, 7 July 2004, *Schneider*, *Lebon* T. p. 820.

1341 CE, 23 April 2003, *SARL Siminvest*, *Lebon* p. 178, *Dr. adm.* 2003, comm. n° 133, note P. CASSIA. In this case, the judge of the first degree had rejected by the procedure of sorting the request for suspension formed against a refusal of building permit. The Conseil d'Etat states that the judge for interim relief could, in order to assess the urgency, "take into consideration the reasons for the decision by which the mayor of Reims refused the applicant company the requested building permit, related to the safety of people and public health".

1342 CE, ord. 21 November 2002, *Gaz de France*, *Lebon* p. 408; CE, ord. 27 November 2002, *SCI Résidence du théâtre*, *Lebon* T. p. 874.

1343 Where all interests coincide, there is no need for a balance sheet and urgency is accepted.

1344 CE, ord. 10 August 2001, *Association "La Mosquée" and others*, *Lebon* T. p. 1133. The order also noted that the municipality had offered the association other buildings for worship.

1345 CE, ord. 13 August 2002, *Commune de La Rochette*, No. 249528.

1346 CE, ord. 14 March 2003, *Commune d'Evry*, *Lebon* T. p. 931.

the characterisation of the emergency if the threat of disturbance is not established¹³⁴⁷. In the *Commune de Collioure* order of 2 July 2003, the judge noted "that if the commune invokes the risks to safety that would result from the suspension of the aforementioned regulatory provisions, citing the incidents, which were not serious, that occurred during the summer of 2002 and were repeated in 2003, it has (...) the possibility of adopting other police measures to counter these risks; that the condition of urgency must therefore be considered to have been fulfilled"¹³⁴⁸.

As regards the drafting of the order, it should be noted that when the urgency not to order a measure is mentioned in the decision, it may be taken into account at the same time as the urgency to order the measure (which is the case in practice when the defendant's interest is paramount and must prevail)¹³⁴⁹ or afterwards¹³⁵⁰.

- 318.** The condition relating to urgency, and that concerning the serious and manifestly illegal infringement of a fundamental freedom, constitute the two conditions for granting a measure requested on the basis of Article L. 521-2 of the Administrative Justice Code. The law certainly adds a third requirement by imposing that the administration has acted in the exercise of its powers, but this condition is in practice devoid of any substance.

¹³⁴⁷ See for example CE, ord. 21 November 2002, *Gaz de France*, *Lebon* p. 408. To justify its refusal to use public force, the administration cited a current of sympathy among local residents towards the occupants of the building, claiming that this active support would threaten public order if the eviction order were enforced. In order to reject this reason, the judge noted "the weakness of the factual elements produced by the administration (...) in order to justify the threats of disturbance invoked, which could not be deduced from the mere current of sympathy aroused by the presence of a few artists' studios in the neighbourhood". See also CE, ord. 27 November 2002, *SCI Résidence du théâtre*, *Lebon* T. p. 874.

¹³⁴⁸ CE, ord. 2 July 2003, *Commune de Collioure*, *Lebon* T. p. 930.

¹³⁴⁹ In the order of *Association La Mosquée*, the interim relief judge recalled the wording of the decision of the *Préfet des Alpes Maritimes*, set out the reasons justifying not pronouncing the requested measure and deduced "that it follows from the above that the urgency does not justify pronouncing the suspension of the order of 11 June 2001 on the basis of Article L. 521-2 of the Code of Administrative Justice. If urgency was mentioned, it was only implicitly and through the sole use of the word "urgency" in the recital. The urgency to pronounce the measure was neither explicitly nor implicitly analysed. The judge places himself ex officio on the ground of the urgency of not suspending the contested measure (CE, ord. 10 August 2001, *Association 'La Mosquée' and others*, *Lebon* T. p. 1133). See, in a comparable manner: CE, ord. 13 August 2002, *Commune de La Rochette*, n° 249528; CE, ord. 14 March 2003, *Commune d'Enry*, *Lebon* T. p. 931.

¹³⁵⁰ In the *Gaz de France* order, the judge affirmed that the administration's refusal constituted for the applicant 'a situation of urgency; that however the condition of urgency set out in Article L. 521-2 of the Administrative Justice Code must be assessed taking into account not only the applicant's interests but also the public interests at stake, among which is that of maintaining public order' (CE, order of 21 November 2002, *Gaz de France*, *Lebon* p. 408). In an order of 8 November 2005, the judge first characterised the urgency of issuing the requested injunction. He then analysed the arguments developed by the administration to prevent it from doing so, based on the one hand on the fact that the applicant had been late in referring the matter to the interim relief judge and, on the other hand, on the grounds that it was necessary to avoid any delay in determining the site on which a final waste storage centre could be set up. The judge rejected these two arguments on the grounds that the applicant had shown the required diligence, and that the administration "in no way establishes how this delay would obstruct the operation of the public service for which it is responsible" (CE, ord. 8 November 2005, *Moissinac Massenat*, *Lebon* p. 491).

Chapter 3

An administration

acting in the exercise of its powers

319. Article L. 521-2 of the Code of Administrative Justice subordinates the intervention of the summary proceedings judge to the circumstance that the administration has infringed a fundamental freedom "in the exercise of its powers". Like the requirement relating to the presence of a fundamental freedom, this condition has the particularity of not only representing a condition of granting but also of conditioning the scope of intervention of the judge. The requirement of a fundamental freedom restricts the scope of application of the procedure: the condition relating to an infringement by the administration "in the exercise of its powers" should restrict the scope of competence of the interim relief judge. Both conditions are nonetheless necessary to obtain a safeguard measure requested on the basis of Article L. 521-21351. By introducing this restriction, and by prohibiting the administrative judge from intervening in this case, the members of parliament wanted to safeguard judicial competence in matters of assault. However, in its practical application, this condition is completely devoid of substance.

Section 1: A condition to safeguard administrative action

320. The law of 30 June 2000 quite unnecessarily limited the competence of the judge of the summary judgment to infringements committed by the administration in the exercise of its powers. By formulating this restriction, the legislator intended to preserve the de facto right of way by keeping its field out of reach of the administrative judge.

I. A desire to preserve the de facto route

321. The bill did not contain any direct or indirect reference to the theory of de facto assault. It did not contain any restriction on the scope of intervention of the administrative judge on this point. The situation envisaged by the bill was simple: the interim relief judge could hear *all* administrative infringements of fundamental freedoms, whether or not they were committed by the administration in the exercise of its powers. Nevertheless, "Members of Parliament (what a time they live in! They are a hundred years old) vied to preserve (which the bill did not do) this most archaic case of judicial jurisdiction, when the opportunity presented itself, if not to wring its neck, at least to begin to do away with it"¹³⁵². By prohibiting the judge of the summary judgment of liberty from hearing infringements committed by the administration outside the exercise of its powers, the members of parliament wanted to maintain the existence of the de facto assault in spite of the creation of the summary judgment of liberty, i.e. to spare or safeguard this head of judicial jurisdiction at a time when all the conditions were met for its disappearance.

322. On first reading, an amendment presented in the session by Senator Pierre Fauchon proposed to add to Article 4 of the bill that the jurisdiction of the judge of the *référé-liberté* is exercised "without prejudice to the jurisdiction recognised to the courts of the judicial order in matters of assault". The author of the amendment

1351 This condition could have been examined under the *jurisdiction* of the interim relief judge. Nevertheless, insofar as it limits the cases in which the interim relief judge can intervene, it seemed justified to mention it among the conditions for granting the order. Moreover, some decisions mention this formal requirement of Article L. 521-2 among the conditions for granting a safeguard measure. Thus, the interim relief judge affirms that the constitutional right of asylum constitutes for foreigners "a fundamental freedom for the safeguard of which the interim relief judge may, in case of urgency, order, on the basis of Article L. 521-2 of the Code of Administrative Justice, all necessary measures when, *in the exercise of its powers*, the administration has infringed it in a serious and manifestly illegal manner" (CE, ord. 2 May 2001, *Ministre de l'Intérieur c/ Dziri, Lebon* p. 227). In the *Hyacinthe* order, the judge had similarly emphasised "that it follows from the above that, *in the exercise of its powers*, the administrative authority has seriously and manifestly illegally infringed a fundamental freedom" (CE, order 12 January 2001, *Hyacinthe, Lebon* p. 12). In the *Fofana* judgment, the Council noted "that the circumstances of the case do not reveal any serious and manifestly illegal infringement of a fundamental freedom by a legal person governed by public law *in the exercise of one of its powers*" (CE, 22 May 2002, *Fofana et al., Lebon* p. 175). M. Chapus also presents this requirement among the conditions for granting Article L. 521-2 (R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd., Montchrestien, 2006, n° 1605).

1352 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd, Montchrestien, 2006, n° 1605.

felt he had to appeal to the Constitution to justify this recognition¹³⁵³. Despite the government's opposition, the amendment was adopted by the Senate without real debate. Mr Colcombet, rapporteur for the bill in the National Assembly, expressed reservations about the wording adopted by the senators. However, he in no way condemned the principle and shared the concern expressed by the latter that *de facto* assault would disappear because of the creation of the *référé-liberté*¹³⁵⁴. Consequently, he wished to affirm that the law under discussion was in no way aimed at modifying the distribution of competences - in other words, at eliminating the *de facto* procedure - but only at avoiding abusive recourse to the latter. In order to ensure, legally speaking, that the summary proceedings could not prejudice the jurisdiction of the civil judge of summary proceedings in matters of assault, the National Assembly specified, at the request of its Committee on Legal Affairs, that the administration must have acted "in the exercise of one of its powers". The reference to assault is more implicit than in the formula used by the Senate; it nonetheless pursues an identical objective, which is to 'make it clear that assault remains a judicial matter'¹³⁵⁵.

On second reading, the Senate again modified the wording by specifying that the pronouncement of a safeguard measure is exercised "without prejudice to the competences recognised to the courts of the judicial order". In order to justify the maintenance of an implicit reference to *de facto* assault, Mr Garrec specifies that "Article 4 of the bill does not call into question the distribution of competences between the two orders of jurisdiction. If the administration has acted in a field that is clearly not susceptible of being linked to the exercise of a power that is legally recognised, the theory of *de facto* assault will be applied"¹³⁵⁶. The National Assembly adopted its first wording, deeming it more precise. In this respect, Mr Colcombet indicates that "if the two assemblies have shown the same concern to remove any ambiguity as to the division of competences between the judicial and administrative jurisdictions, the drafting of the Assembly defines more precisely (...) the field of competence of each of the jurisdictions"¹³⁵⁷.

To resolve the divergence between the two chambers, it was necessary to resort to the joint committee. Agreement was reached on an implicit reference to *de facto* assault. Mr Colcombet stated that 'the wording retained by the National Assembly for the first paragraph of Article 4 had the advantage of clearly defining the respective fields of competence of the two jurisdictional orders, thus providing a full guarantee to the judicial judge that his powers in matters of assault would be respected'¹³⁵⁸. M. Garrec 'expressed his agreement with the text of the National Assembly, which excludes in the first paragraph of Article 4 any reference to assault, recalling that this was a purely jurisprudential notion'¹³⁵⁹. Thus, 'It is the more elegant amendment of the National Assembly that has prevailed. It is better, in that the law will not give its *imprimatur* to the notion of assault. It is no less appalling', says Professor Chapus¹³⁶⁰.

323. The presence of this condition in Article L. 521-2 is indeed open to criticism since it aims to maintain in positive law a head of judicial jurisdiction which has lost all justification with the creation of the summary judgment¹³⁶¹. The members of parliament, aware of the difficulties that this requirement would inevitably raise, have called on the judge to make a sort of demarcation between the 'domain' of the summary judgment and that of the *de facto* procedure¹³⁶².

II. The field of administrative assault

324. Presented by Marcel Waline as a "rather curious and difficult" concept¹³⁶³, the administrative *de facto* route is at the same time one of the "most subtle of French administrative law"¹³⁶⁴. The origins of this jurisprudential construction are very old and can be found in certain decisions of the Courts of the Ancien Régime¹³⁶⁵. Its appearance was also favoured by the application of Article 75 of the Constitution of the year

¹³⁵³ *OJ deb. Senate*, CR session 8 June 1999, pp. 3753-3754.

¹³⁵⁴ See F. COLCOMBET, Rapport AN n° 2002, p. 41: "The proximity between the wording of article 4 and the criteria for *de facto* action could therefore lead to fears that the administrative judge, through the summary procedure, would undermine the jurisprudential concept of *de facto* action".

¹³⁵⁵ F. COLCOMBET, *JO déb. AN*, CR session 14 December 1999, p. 10941. For M. Montebourg, "This clarification represents an important improvement in the admissibility of summary proceedings before the administrative court. It must not prejudice (...) the notion of *de facto* assault" (*JO déb. AN*, CR séance 14 décembre 1999, p. 10941).

¹³⁵⁶ R. GARREC, Senate Report No. 210, p. 18.

¹³⁵⁷ F. COLCOMBET, *JO déb. AN*, CR session 6 April 2000, p. 3161.

¹³⁵⁸ F. COLCOMBET and R. GARREC, Report n° 2460 (National Assembly) and 396 (Senate), p. 5.

¹³⁵⁹ F. COLCOMBET and R. GARREC, Report n° 2460 (National Assembly) and 396 (Senate), p. 4.

¹³⁶⁰ R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1605.

¹³⁶¹ See *infra* § 534 et seq.

¹³⁶² See F. COLCOMBET, *JO déb. AN*, CR session 14 December 1999, p. 10942: "in practice, I am convinced that it will be complicated and that, for some time, case law will have to define the border. Let us hope that this will happen quickly (...). We hope that the administrative court will define the limits fairly quickly and give some criteria.

¹³⁶³ M. WALINE, *Traité de droit administratif*, 9^{ème} ed, Sirey, 1963, p. 90.

¹³⁶⁴ G. VEDEL and P. DELVOLLE, *Droit administratif*, PUF, 1982, p. 151.

¹³⁶⁵ Cf. S. PETIT, *La voie de fait administrative*, PUF, coll. QSJ, 1995, p. 10: "Taking advantage of their capacity as guardians of the fundamental laws of the kingdom and of the fundamental principles of the monarchy", the parliaments of the Ancien Régime "set themselves

VIII on the guarantee of civil servants¹³⁶⁶. Nevertheless, these were only the beginnings. The real formulation of the theory of assault occurred in 1867 in the conclusions of Léon Aucoc on the *Duc d'Aumale* judgment. The illustrious government commissioner stated that when the public authority, 'under the guise of its powers, carries out an act that manifestly exceeds the limits of these powers and infringes the property or freedom of citizens, this act is nothing more than an assault, the results of which () are subject to the jurisdiction of the ordinary courts'¹³⁶⁷. These were the two criteria that are still used today to qualify an assault: an act that clearly exceeds the limits of the administration's powers and infringes on property rights or freedoms. Thereafter, the history of the concept will be "sinusoidal, cut by vogues and long slumbers"¹³⁶⁸. Alternating phases of rest and periods of intense activity, the theory of de facto rights of way will know its hour of glory in the immediate post-war period thanks to the litigation of requisitions.

325. In order to characterise an abuse of power, the case law requires, first of all, that the administration has seriously infringed a fundamental freedom or the right to property. Then, it is necessary that the administration has left the "legal" way, which is opposed to the "de facto" way. In this respect, according to a classification dating back to Maurice Hauriou, there are two categories of de facto action¹³⁶⁹. The first variant, de facto action "for lack of procedure", is constituted when the administration proceeds to the forced execution of a decision, even a regular one, without the conditions required for this purpose being met¹³⁷⁰. The second variant, the assault "by lack of right" is characterised when an administrative decision, regardless of the conditions under which it is executed, is clearly not likely to be linked to a power of the administration¹³⁷¹. The first form of abuse concerns the execution of a decision, the second its content. The requirement of an infringement by the administration "outside the exercise of its powers" is only formulated for the second variant of assault, assault by lack of right. While there may have been some hesitation on this point following the decision of the Tribunal des conflits of 12 May 1997¹³⁷², case law subsequent to the Act of 30 June 2000 has removed all uncertainty. It distinguishes very clearly between the two cases of abuse, and only formulates the requirement of an infringement that is 'manifestly unsusceptible of being linked to a power belonging to the administration' in the case of abuse due to a lack of law¹³⁷³. The legislator of 30 June 2000 intended to

up as guardians of the rights of subjects, as well as of infringements of their property or their freedom. As such, they did not hesitate to sanction acts of the executive power that harmed private interests and threatened the freedom of movement, property or personal safety. See also in this sense: E. DESGRANGES, *Essai sur la notion de voie de fait en droit administratif français*, Société française d'imprimerie et de librairie, 1937, p. 30 et seq.

1366 Under this provision, which was maintained until 1870, "Government agents, other than ministers, may only be prosecuted for acts relating to their functions by virtue of a decision of the Conseil d'Etat: in this case the prosecution takes place before the ordinary courts". The Council of State considered that the guarantee instituted could not extend to those acts of an official which had lost the nature of administrative actions (CE, 23 April 1807, *Diego Dittner*, *Lebon* p. 314; CE, 4 June 1823, *Peillon*, *Lebon* p. 405). The Court of Cassation has adopted an identical solution. See in this sense Cass, req. 2 August 1836, *Lassere*, cited by S. GUILLON-COUDRAY, *La voie de fait administrative et le juge judiciaire*, thesis Paris II, 2002, p. 12, note 3: 'Whereas L... could not be protected by Article 75 of the Constitution of the year VIII because it was not an act that fell within the powers of the mayor but an assault'.

1367 L. AUCOC, concl. on CE, 9 May 1867, *Duc d'Aumale*, *Lebon* p. 472, quoted by S. GUILLON-COUDRAY, *op. cit.*

1368 J. MOREAU, "Voie de fait", Répertoire Dalloz de contentieux administratif (1993), § 2.

1369 As M. Sainte-Rose recalled, the notion of de facto action corresponds to "two well-defined hypotheses: recourse to forced execution on the part of the Administration in unauthorised cases; the censure of quasi-existent administrative acts" (J. SAINTE-ROSE, concl. on TC, 23 October 2000, *Boussadar*, D. 2001, p. 2334). In certain cases, the de facto action will result both from the decision itself and its irregular execution (see for example TC, 8 April 1935, *Action française*, *Lebon* p. 1226, concl. JOSSE, *G.A.J.A.* n° 51).

1370 "When the ex officio enforcement of a decision is at issue, it must be verified that this enforcement is not authorised on any grounds. Failing this, and even if it were illegal, the contested execution could not be qualified as a de facto measure" (concl. J. SAINTE-ROSE, *op. cit.*, p. 2334). The administration is only authorised to carry out an execution ex officio in three cases: when a legislative text provides for it, when the execution was required by the urgency and, finally, when there was no legal procedure likely to ensure obedience to the law or to the administrative act. On these cases, see *G.A.J.A.* No. 11, § 2-5. See also the numerous examples cited by J.-M. AUBY *in* note under TC, 25 November 1963, *Commune de Saint-Just Chaleysin; Epoux Pelé* (two species), *JCP G* 1964, II, 13492.

1371 In jurisprudence, the term "voie de fait par manque de droit" has been used in various ways. It is an act or an action that does not fall within the scope of the administration's powers (TC, 13 December 1884, *Postes et Télégraphes*, *Lebon* p. 909; TC, 2 December 1902, *Lebon* p. 713, concl. ROMIEU); a power that is not possessed by the administrative authority (TC, 8 April 1935, *Action française*, *prec.*); an act that is manifestly unsusceptible of being linked to the application of a legislative or regulatory text (TC, 4 June 1940, *Société Schneider et compagnie*, *Lebon* p. 248; TC, 17 February 1947, *Consorts Perrin*, *Lebon* p. 501; TC, 17 March 1949, *Société Rivoli Sébastopol*, *Lebon* p. 594; TC, 28 February 1952, *Sieur de Kernier*, *Lebon* p. 620) or an act that is manifestly unsusceptible of being linked to the exercise of a power belonging to the administration (CE, Ass, 18 November 1949, *Cartier*, *Lebon* p. 490).

1372 In his conclusions, the government commissioner stated: "It seems to us that, in reality, the two variants of de facto assault presuppose, *one as well as the other*, that the administration has manifestly left its attributions" (J. ARRIGHI DE CASANOVA, concl. on TC 12 May 1997, *Préfet de police de Paris c/ TGI de Paris*, *RFD.A* 1997. Underlined). Messrs Chauvaux and Girardot stated that in this decision, the Court of Conflicts had unified the criteria for assault by laying down, for assault due to lack of procedure, the criterion of the manifest absence of a link with a legal power, which had been affirmed until now only for the first variety of assault (D. CHAUXAUX and T. GIRARDOT, *AJDA* 1997, pp. 581-582).

1373 See TC, 23 October 2000, *Boussadar*, *Lebon* p. 775: "Considering that there is an assault justifying, by exception to the principle of separation of administrative and judicial authorities, the competence of the courts of the judicial order only insofar as the administration either proceeded to the forced execution, under irregular conditions, of a decision, decision, even if it is in order, seriously affecting the right of property or a fundamental freedom, or has taken a decision having one or other of these effects, provided that the latter decision is itself manifestly unsusceptible of being linked to a power belonging to the administrative authority. The formula is used consistently (see for example TC, 23 May 2005, *Haut-commissaire de la République en Polynésie française c/ Président de l'Assemblée de la Polynésie française*, *Lebon* p. 659, *JCP A* 2005, act. 258, obs. M.-C. ROUAULT). In a decision of 12 December 2005, the Court of Conflicts clearly distinguished the two hypotheses, affirming "that the letter, which does not constitute the forced execution of a decision, is not either a manifestly unsusceptible measure to be attached to a power belonging to its author" (TC, 12 December 2005, High Commissioner of the Republic in French Polynesia, *Lebon* p. 659).

exclude the intervention of the administrative judge in these two cases. But in practice, the restriction instituted by the law is devoid of real scope.

Section 2. An inconsistent condition

326. The authors state that the scope of application of the summary proceedings and that of the assault are clearly differentiated and do not overlap¹³⁷⁴. There is a *division* between the two procedures, which is presented as follows: to the judicial judge *all* cases of assault, to the administrative judge all other administrative infringements of fundamental freedoms (excluding, therefore, infringements that do not have the character of assault). In view of the division thus established, no juxtaposition would be conceivable between the two procedures¹³⁷⁵.

327. In reality, it would seem that it has been concluded somewhat hastily that the judge for interim relief does not have jurisdiction to hear cases of assault. Not only does the letter of Article L. 521-2 only remove from its jurisdiction assault by lack of right. But in addition, the Conseil d'Etat has adopted a maximalist interpretation of the phrase "in the exercise of its powers", so that the jurisdiction of the judge of summary jurisdiction also extends to assaults for want of law.

I. Intervention of the interim relief judge in cases of abuse of authority due to lack of procedure

328. The parliamentarians apparently had in mind the two variants of assault and battery when they inserted in Article 4 of the bill a reference to the infringement committed by the administration "in the exercise of its powers"¹³⁷⁶. However, according to the constant jurisprudence of the Tribunal des conflits, taken up by the Conseil d'Etat and the Cour de cassation, infringement committed by the administration outside the exercise of its powers corresponds to only one variant of assault: assault due to a lack of law and does not cover the field of assault due to a lack of procedure. Thus, and without having probably intended it, the legislator has authorised the judge of the référé-liberté to deal with acts corresponding to this first variant of assault.

329. The forced execution of an administrative decision may well be irregular but nevertheless fall within the powers of the administration. Consequently, both the administrative judge and the judicial judge are competent to hear a compulsory execution measure carried out by the administration in the exercise of its powers but under irregular conditions. The judge of the référé-liberté has recognized his competence to hear this case since the *Lidl* order of 23 March 2001¹³⁷⁷. Invoking the circumstance that the Lidl company had carried out interior fittings on a commercial building in disregard of the legislation on building permits, the mayor ordered on 17 November 2000 that seals be affixed to the main entrance of the building.

As the ordinance recalls, the mayor has this power under Article L. 480-2 of the Town Planning Code. Under

¹³⁷⁴ According to Gilles Bachelier, "the law prevents the appeal to its field of application of what comes under the heading of assault" (G. BACHELIER, "Le référé-liberté", *RFD* 2002, p. 261). According to a formula taken up by many authors, the judicial judge would be competent for the most serious irregularities, those constituting assault, the administrative judge having the responsibility for all other irregularities. Thus, for M. Faure, the de facto procedure is 'reserved for cases of maximum irregularity' (B. FAURE, 'Juge administratif statuant en urgence. Référé-liberté', *Jcl. Justice administrative*, fasc. 51 (11, 2002), n° 10). According to Mrs Rouault, the référé-liberté concerns "hypotheses of serious illegalities, but not as serious as when the Administration commits an assault" (M.-C. ROUAULT, "La loi du 30 juin 2000 : un petit pas vers un traitement efficace de l'urgence par le juge administratif", *D.* 2001, p. 401). In the case of de facto assault, "the administration's behaviour requires a degree of seriousness greater than that which is sufficient for the judge of the référé-liberté to be called upon to intervene" (A. BOURREL and J. GOURDOU, *Les référés d'urgence devant le juge administratif*, L'Harmattan, coll. La justice au quotidien, 2003, p. 83). With regard to the criterion of the existence of a power, the competence of the judge of the référé-liberté would be limited to the "ordinary" illegalities, those of the judicial judge "to the illegalities which one can call extraordinary" (B. PACTEAU, *Contentieux administratif*, 6^{ème} éd., PUF, coll. Droit fondamental, 2002, n° 279).

¹³⁷⁵ The idea of concurrent jurisdiction was moreover expressly excluded by Mr. Bachelier during the first year of application of the référé-liberté. In his conclusions on the *Miss Mohamed* judgment, the government commissioner raised the question of concurrent jurisdiction of the two levels of court to put an end to an assault. He nevertheless dismisses this idea as being "neither possible nor opportune" (G. BACHELIER, concl. on TC, 19 November 2001, *Mohamed*, *D.* 2002, p. 1449). Firstly, he asserts that this solution is in no way possible in view of the letter of article L. 521-2 and the legislator's intention. Article L. 521-2 limits the intervention of the administrative judge to cases in which the administration has acted "in the exercise of its powers", which, according to the government commissioner, excludes *a contrario* its competence for cases of assault. Mr Bachelier also recalls, as was repeated during the preparatory work, that the Act of 30 June 2000 is intended to be neutral as regards the distribution of powers. Secondly, he states that the idea of concurrent jurisdiction is 'inappropriate because it is a source of confusion and would not ultimately serve the interests of litigants' (*ibid.*).

¹³⁷⁶ The legislator did not envisage, let alone wish for, an overlap of jurisdiction in the case of assault. M. Colcombet had clearly indicated that the référé-liberté should have neither the object nor the effect of "creating an overlap of jurisdiction" (F. COLCOMBET, Rapport AN n° 2002, p. 42).

¹³⁷⁷ CE, ord. 23 March 2001, *Société Lidl, Lebon* p. 154.

the first paragraph of this article, as soon as a report has been drawn up of one of the offences provided for in Article L. 480-4, including the execution of work in disregard of the legislation on building permits, the mayor may, if the judicial authority has not yet given a ruling, order the work to be stopped by means of a reasoned decree. It is specified that a copy of this order is transmitted without delay to the Public Prosecutor. According to the fourth paragraph of the same article, the mayor's order ceases to have effect if the case is dismissed or acquitted. According to the sixth paragraph of Article L. 480-2, 'when no proceedings have been instituted, the public prosecutor informs the mayor who, either ex officio or at the request of the person concerned, puts an end to the measures taken by him'. If the seventh and eighth paragraphs of Article L. 480-2 authorise the mayor to take all necessary coercive measures, including 'the affixing of seals', it is for the sole purpose of allowing 'the immediate application of the judicial decision or its order'.

In this case, the mayor made unlawful use of this power; he resorted to this compulsory execution measure outside the hypotheses in which it is authorised. A complaint was lodged by the municipality and the public prosecutor decided to dismiss the case on 23 October 2000. Under these conditions, the mayor could not legally use the power of compulsory execution granted to him by Article L. 480-2 of the Town Planning Code. Such an action undoubtedly constitutes an assault by lack of procedure. The administration has affixed seals on a private building outside the hypotheses in which this operation is authorised. This is indeed a case of forced execution of an administrative decision outside the hypotheses in which such execution is legal. This was recalled by the authors without anyone seeing it as an obstacle to the intervention of the administrative judge of summary proceedings. For the authors of the *Grand Rulings*, "the affixing of seals by a mayor on the main door of a building, in order to ensure, outside the applicable text, the execution of his order to stop construction work (...) constitutes a measure of forced execution that can be considered as an act of violence according to the case law of *Société immobilière de Saint-Jus*"¹³⁷⁸. Commenting on the same decision, President Bonichot states that Article L. 521-2 "refers, in particular, to the case of de facto assault"¹³⁷⁹. Similarly, Professor Ricci stresses that the maintenance of seals despite the dismissal of the municipality's complaint 'is a real assault'¹³⁸⁰.

330. The legitimacy of the intervention of the judge of the *référé-liberté* in case of assault due to lack of procedure results from the very letter of Article L. 521-2. Because of the wording chosen, the parliamentarians did not achieve their objective, which was to exclude the intervention of the administrative judge in all cases of assault. The established wording in no way prevents the jurisdiction of the judge in summary proceedings in these cases. On the other hand, one could seriously think that the text of article L. 521-2 would prevent the judge of the *référé-liberté* from intervening in cases of de facto assault for lack of law.

II. The intervention of the judge of summary jurisdiction in the hypotheses of assault by lack of right

331. The text of Article L. 521-2 seemed to exclude the implementation of the summary proceedings for acts constituting assault by lack of right. This hypothesis is constituted when the administration infringes a freedom outside the exercise of its powers. In the *référé-liberté*, on the other hand, the administrative authority acts "in the exercise of its powers". A relatively clear dividing line thus seemed to emerge between the two procedures, with the existence or not of a legal power as the key to the division. The de facto way by lack of right constitutes a "usurpation of power"¹³⁸¹; the administration acts outside any legal devolution of competence. The *référé-liberté* corresponds to an abuse or an excess of power; the administration acts illegally but in the exercise of a power attributed to it.

Thus, the restriction set out by the law seemed to limit the intervention of the judge of the *référé-liberté* to only those actions that do not meet the criteria of an assault by lack of right. Naturally, the administrative judge has recognised his competence to deal with actions which previous case law had refused to classify as de facto assault by lack of right, for example the issue or refusal to issue an authorisation to occupy the public domain in a non-compliant manner¹³⁸², the refusal to provide assistance from the public force¹³⁸³, the expulsion of a foreign

¹³⁷⁸ *GAJA* No. 118, § 11.

¹³⁷⁹ J.-C. BONICHOT, obs. under CE, ord. 13 March 2001, *Société Lidl*, *BJDU* 2001/2, p. 114.

¹³⁸⁰ J.-C. RICCI, "Chronique du contentieux administratif", *RGCT* 2001/18, p. 967.

¹³⁸¹ M. HAURIOU, *Précis de droit administratif et de droit public*, 12^{ème} ed., 1933, republished in Bibliothèque Dalloz, 2002, p. 25.

¹³⁸² Incompetence of the judicial jurisdiction: see C. LAVIALLE, "Voie de fait et domaine public", *RFDA* 2000, pp. 1041-1049, esp. pp. 1042-1044. Competence of the judge of the *référé-liberté*: CE, ord. 6 April 2001, *Lapere and others*, n° 232135; CE, ord. 16 September 2002, *Société EURL La Cour des miracles*, *Lebon T.* p. 314.

¹³⁸³ Incompetence of the judicial jurisdiction: Civ. 1^{ère}, 20 November 1963, *Chapelet c/ Socodimex*, *JCP G* 1964, II, 13771; TC, 28 February 1966, *Trésor public c/ Schourmann*, *Lebon p.* 826. Competence of the judge of the *référé-liberté*: CE, 29 March 2002, *SCI Stéphaneur et autres*, *Lebon p.* 117.

national¹³⁸⁴ or the refusal to issue a provisional residence permit¹³⁸⁵. In a daring manner, the judge of the *référé-liberté* has also recognised the possibility of intervening in cases corresponding to assault by lack of right. Taking a particularly broad view of the notion of infringement by the administration "in the exercise of its powers", he considers that all infringements by the administration can be considered as such, even in the absence of a legal basis.

332. In the *Marvel* order, the *référé-liberté* judge sanctioned the withdrawal of identity documents from members of a family of French nationality for no reason of public order, i.e. outside the exercise of its powers by the administration¹³⁸⁶. In the *Commune d'Hyères-les-Palmiers* case, the mayor granted any vehicle freedom of access and parking on a *private* road. Such a measure, which was not justified by considerations of public order, cannot clearly be linked to the exercise of his police powers or any other of his powers¹³⁸⁷. In the *Vast* judgment, the administrative judge considered that the mayor had acted in the exercise of his powers by ordering the systematic opening of letters addressed to certain councillors. In her conclusions, Ms Boissard stated that the contested measure 'is not unrelated' to the mayor's powers as head of department¹³⁸⁸. Ms Rouault stated that "This solution is in contradiction with the case law of the Tribunal des conflits and with the texts in force"¹³⁸⁹. In a decision of 10 December 1956, the Tribunal des conflits considered that the administration was acting *outside the exercise* of its powers when it decided to delay the delivery of certain mail¹³⁹⁰. If the fact of delaying the delivery of mail cannot be linked to the administration's powers, the order to open it is even more so. The act censured by the judge of the *référé-liberté* in the present case thus constitutes an act of fact by lack of right.

The most notable example is perhaps the *Abdallah* judgment of 2 February 2004¹³⁹¹. Seized under Article L. 521-2 of the Code of Administrative Justice, the Conseil d'Etat recognized its competence to deal with an infringement of property rights by the administration on the basis of a text that simply does not exist. The Council considers as illegal an action traditionally considered as insusceptible to be linked to the administration's powers. The case began on 17 June 1998, when the Mayotte local authority sold Mr and Mrs Abdallah a piece of land. Five years later, the Mayotte local authority intended to exercise a "right of repossession" over part of the land, relying on an order of 12 August 1927, issued for the application of the decree of 28 September 1926 regulating the domain in Madagascar¹³⁹². The Conseil d'Etat noted that the provisions invoked had necessarily been repealed by the ordinance of 12 October 1992 on the State and public authorities' domain code, applicable in the territorial collectivity of Mayotte, Article 2 of which stipulates that 'All provisions of a legislative nature, in particular those of the decree of 28 September 1926 regulating the domain in Madagascar, which are contrary to this ordinance, are repealed'. For the government commissioner, the administration was nevertheless acting in the exercise of its powers because, "given the objective pursued, the construction of sports facilities for the pupils of a neighbouring secondary school, the territorial authority of Mayotte could request the initiation of an expropriation procedure for reasons of public utility"¹³⁹³. Thus, as soon as a text recognises, even remotely, a power of the administration, it is presumed to act within the framework of its powers. Although the link between the 'right of repossession' and the expropriation procedure is, to say the least, distanced, in particular because of the rudimentary and expeditious nature of the former, it is sufficient to consider that the requirement of an infringement by the administration 'in the exercise of its powers' is satisfied. It does not matter that the administration does not have a finalised power

1384 Incompetence of the jurisdiction: TC, 3 December 1979, *Fentouci*, *Lebon* p. 579; TC, 17 January 1994, *Préfet de la région de Haute-Normandie, Préfet de la Seine-Maritime c/ Ben Ali Atia, Dr. adm.* 1994, n° 135; TC, 27 June 1994, *Madaci et Youbi*, *GP* 1994, 2, p. 571, concl. R. ABRAHAM, note S. PETIT; *JCP G* 1994, IV, 2033, obs. M.-C. ROUAULT. Competence of the administrative jurisdiction: CE, Sect. 30 October 2001, *Ministre de l'Intérieur c/ Tliba*, *Lebon* p. 523; CE, ord. 10 August 2001, *Minister of the Interior v. Saddouki*, n° 236969; CE, ord. 25 April 2002, *Labhini*, n° 245547; CE, ord. 7 May 2002, *Minister of the Interior v. Ouakid*, *Lebon* T. p. 870; CE, ord. 4 February 2003, *Hilario*, n° 253742.

1385 Incompetence of the judicial court: TC, 1^{er} March 1993, *Akiana*, *GP* 1993, 2, panor admin. p. 164; TC, 23 October 2000, *Boussadar*, prec. Competence of the judge of *référé-liberté*: CE, ord. 12 November 2001, *Ministre de l'Intérieur c/ Béchar*, *Lebon* T. p. 1132; CE, ord. 5 March 2002, *Fikry*, *Lebon* T. p. 872; CE, ord. 6 June 2003, *Benmessaoud*, n° 257429; CE, ord. 15 October 2004, *Sabi*, n° 273110.

1386 CE, ord. 2 April 2001, *Ministre de l'Intérieur c/ Consorts Marvel*, *Lebon* p. 167. The administration had justified this measure by the circumstance that, due to the absence of mention of the applicant's filiation on his birth certificate, the person concerned could no longer be considered as having French nationality.

1387 CE, ord. 10 September 2003, *Commune d'Hyères-les-Palmiers*, n° 260015.

1388 S. BOISSARD, concl. supra, p. 780. Emphasis added.

1389 M.-C. ROUAULT, note under CE, 9 April 2004, *Vast*, *JCP A* 2004, 1318, p. 628

1390 TC, 10 December 1956, *Sieurs Randon et autres*, *Lebon* p. 592, concl. GUIONIN. In the absence of any text, Mr Brunel, Prefect of the Yonne, had instructed Mr Cornevaux, Receiver General of the Post Office, to delay the delivery of Mr Randon's mail (copies of a poster criticising the ineligibility of former members of parliament who had voted for full powers for Marshal Pétain in July 1940) until the end of the election period. The Tribunal des conflits noted "that the actions of which Sieurs Brunel and Cornevaux were accused constituted an infringement of the security of postal correspondence, an essential freedom guaranteed by Article 187 of the Criminal Code, and that, as a result, they had the character of an assault and battery, giving the courts jurisdiction to rule on the harmful consequences of these actions; it follows that the Prefect was wrong to raise the dispute".

1391 CE, 2 February 2004, *Abdallah*, *Lebon* p. 16, *RFDA* 2004, pp. 772-777, concl. S. BOISSARD.

1392 Set up under the III^e Republic, this mechanism was intended to encourage, through a proactive policy, the installation of settlers ready to develop and exploit the land. The thirty-year right of repossession recognised by the decree of 28 September 1926 allowed the public authorities to easily take back control of land that had not been exploited under satisfactory conditions in order to resell it to a more enterprising buyer.

1393 S. BOISSARD, supra, p. 775.

allowing it to act in the circumstances of the case. Even though the act in question definitely constitutes a de facto action for lack of right¹³⁹⁴, the Council of State recognises its competence. "In any case", the government commissioner declared, "even if you consider that the disputed decision must be analysed as an act of aggression, we think that it would still be appropriate not to exclude the competence of the judge of the *référés-libertés* on the basis of Article L. 521-2, at least to pronounce its suspension"¹³⁹⁵.

It is certainly a broad conception of the powers belonging to the administration that has been adopted by the Council of State. It should be noted that the judges of the first instance adopt the same comprehensive approach to acts and actions falling within the scope of the administrative authority's powers¹³⁹⁶. There is every reason to believe that the administrative judge will recognise his or her competence to deal with *all the* actions traditionally considered as assaults for lack of law.

333. The *référé-liberté* can thus be implemented even though the administration does not have a regular power in the circumstances of the case. It is sufficient that the administrative authority benefits, even remotely, even potentially from a power, for Article L. 521-2 to be implemented. The justifications for this case law are easy to understand. Applied literally, the formula of Article L. 521-2 of the Code of Administrative Justice would have led the judge to refrain from coming to the aid of persons whose fundamental freedoms are disregarded by the administration without a clearly established legal title. Rather than forcing the applicant into a painful situation by opening a second proceeding before the civil judge of summary proceedings, the administrative judge prefers to order himself the necessary safeguard measures. Since no authority can relieve him, it is the Council of State which alone decides where the jurisdiction of the judge for interim relief should end. In practice, the Council of State has never declared itself incompetent on the grounds that the dispute submitted to it fell within the jurisdiction of the judicial court on the basis of de facto abuse.

On the contrary, the judge of *référé-liberté* can and does intervene in all cases of assault - at least if the person concerned applies to him and not to the judicial authority. The question is whether, with such an interpretation, infringements are likely to escape its jurisdiction. This question can reasonably be answered in the negative, because of the more flexible assessment of the rules of jurisdictional competence in summary proceedings. In this area, the court may usefully rule as soon as its jurisdiction is likely or, at least, its lack of jurisdiction is not obvious. In order for the judge to decline jurisdiction, the administration would have to have clearly acted outside the exercise of its powers (which, in the light of the conception adopted by the Conseil d'Etat, is perfectly unthinkable) and the judge's lack of jurisdiction would itself have to be manifest. In addition, beyond this double requirement, the judge would have to agree to abandon disputes on the grounds that they correspond to the classic definition of de facto action - which he is obviously not willing to do, and this for the greater benefit of the litigant¹³⁹⁷. Thus, it is difficult to see which case constituting an assault could escape the judge of *référé-liberté*. The position of the Conseil d'Etat *de facto* establishes a concurrent competence of the two orders of jurisdiction to put an end to assaults committed by public authorities.

Conclusion of Title II

334. The conditions for granting a measure requested on the basis of Article L. 521-2 of the Administrative Justice Code are particularly strict. The rigour of their wording considerably limits the possibilities of intervention by the judge of the *référé-liberté*. The three sets of conditions have been assessed differently by the Council of State. First of all, the requirement of a serious and manifestly illegal infringement of a fundamental freedom was applied literally by the judge. Moreover, it did not give the judge any latitude to attenuate or reinforce its rigour. Secondly, the condition of urgency was interpreted restrictively by the interim relief judge: it is assessed in the light of the 48-hour period allowed for ruling. Finally, the requirement that the administration acted "in the exercise of its powers" was emptied of its substance by the Council of State. This condition, which limited the scope of the judge's intervention, has been neutralised by case law interpretation. The judge thus limited his field of intervention to situations of extreme urgency and, at the same time, extended his sphere of competence to all actions usually falling under the administrative jurisdiction. By this cross-interpretation, the judge wished to deal with a larger number of measures and intended to limit his intervention to cases of

¹³⁹⁴ Cf., by comparison, Com. 25 February 1992, *Bull. civ.* IV, No. 91: an assault is constituted when the customs administration seizes goods by referring to a text not yet in force.

¹³⁹⁵ Concluding remarks by S. BOISSARD, *supra*, p. 775. See also, putting forward legal and opportunity arguments in favour of the competence of the administrative judge of the *référé-liberté* in cases of de facto assault: G. MARCHESINI, "L'application de l'article L. 522-3 du code de justice administrative dans le contentieux de la voie de fait", *AJDA* 2005, pp. 1663-1671.

¹³⁹⁶ See for example TA Montpellier, order of 27 January 2005, *Gal. AJDA* 2005, pp. 1409-1412, note J. GATE. The dispute concerned the incorporation into the public domain, in the absence of a title transfer, of plots belonging to private individuals. To establish that the right-of-way is not "manifestly insusceptible of being attached to a power belonging to the administration", the judge based himself on a public utility enquiry carried out five years earlier and dealing in particular with the incorporation of the disputed right-of-way into the public domain.

¹³⁹⁷ The latter obtains a decision a few days, or even a few hours, after filing his application, without having to start the whole procedure again before the judicial judge. In this way, the applicant avoids coming up against a declaration of lack of jurisdiction by the civil judge for interim relief or having the procedure slowed down because of a declination of jurisdiction by the prefect. On these points, see *infra*, § 555.

increased urgency. Consequently, the fundamental summary judgment can only be used in exceptional situations.

Conclusion of the first part

335. The *référé-liberté* is neither *a* procedure nor *the* procedure for infringement of fundamental freedoms. It is a procedure to remedy exceptional situations, designed to be implemented in a rare and subsidiary way.
336. The presence of a fundamental freedom conditions the intervention of the interim relief judge on the basis of Article L. 521-2. The Council of State has given a broad interpretation of this notion and defined the scope of application of this procedure in an extensive manner. Nevertheless, the *référé-liberté* procedure is designed for exceptional situations in which the administration is seriously and manifestly illegally infringing a fundamental freedom that must be stopped within 48 hours. To be able to implement this procedure, it is not enough to be in the presence of a fundamental freedom or for it to be disregarded by the administration. It is also necessary, because this is not enough, that this infringement is manifestly illegal - because not all infringements of fundamental freedoms are illegal and even less manifestly illegal - and that it is serious - because not all infringements of fundamental freedoms are serious. In addition, as a final safeguard, the applicant must demonstrate the need to obtain a safeguard within 48 hours. Because of their rigour, the conditions for implementing Article L. 521-2 do not characterise a situation of infringement of a fundamental freedom but an exceptional situation. Like the exceptional procedures of *déféré-liberté*¹³⁹⁸ and *assault*¹³⁹⁹, its purpose is to sanction only the most serious acts of public authorities¹⁴⁰⁰. In the case of a simple infringement of a freedom, in apparently illegal conditions, it is to the procedure of the *référé-suspension* that the applicant must turn - provided, of course, that a situation of urgency is justified. Although the exclusive purpose of the summary procedure is to protect fundamental freedoms, it is not the only, or even the main, emergency procedure for ensuring their protection.
337. The subsidiarity of the mechanism does not mean that the applicant must first take action through the summary proceedings procedure on pain of inadmissibility of the application lodged on the basis of Article L. 521-2. This subsidiarity means that the summary proceedings procedure is limited to the specific cases for which it was instituted. The summary suspension procedure often proves effective in cases of infringement of freedoms. It can even be said that, from a quantitative point of view, it represents the main procedure for the urgent protection of freedoms.

When he considers himself the victim of an infringement of his fundamental freedoms and has a decision that can be appealed against, the applicant should first think about applying for interim relief. Litigants and their counsels did not immediately take this into account, rushing to apply for interim relief at the slightest - real or supposed - infringement of a fundamental freedom. In a number of cases, they preferred to use Article L. 521-2, whereas it was in their interest to use Article L. 521-1. They have turned to the interim relief judge in situations where they could have obtained full satisfaction, and under easier conditions, through the interim suspension procedure. Indeed, in the event of a fundamental freedom being challenged, it is not a good strategy to rush to the interim relief judge. As President Labetoulle stated, "too many applicants and lawyers are attracted by the interim injunction in cases where it would be in their own interest to use the interim suspension procedure"¹⁴⁰¹. The referrals from the interim relief judge to the interim suspension judge mean that it is this procedure that the applicant should first think about using. This procedure fulfils its role perfectly in obtaining the suspension of a decision infringing a fundamental freedom with, if necessary, the pronouncement of an injunction.

"In many cases, the administrative act in question takes the form of a decision, implicit or explicit, and the applicant's chances of success seem to be more assured by the summary suspension procedure than by the interim relief procedure"¹⁴⁰². When there is a decision concerning a fundamental freedom, the applicant has the choice between two solutions. The simplest option is that of interim suspension: the applicant must justify the urgency of the case and put forward a means of creating a serious doubt; this is sufficient to obtain the suspension of its execution¹⁴⁰³. The most difficult route is that of interim relief: if the applicant opts for Article L. 521-2, 'he or

1398 The *déféré-liberté* was conceived as "an exceptional procedure" whose application was to be reserved "for particularly serious cases" (A. RICHARD, *JO déb. AN*, CR séance 22 janvier 1982, p. 396).

1399 Assault concerns particularly serious acts, to the extent that the administrative act is considered "distorted" (see *infra*, §§ 539-540).

1400 The *déféré-liberté* is an easier procedure to implement than the *référé-liberté* because the suspension measure is pronounced when the judge has serious doubts about the legality of an act likely to compromise the exercise of a freedom. On the other hand, it is difficult to give a clear-cut answer as to whether the *référé-liberté* procedure is more demanding or less demanding than the procedure for taking legal action. On the one hand, the latter can only be characterised - even if this only concerns assault for lack of right - when the administration has acted outside the exercise of its powers, a restrictive condition which is not formulated in the context of summary proceedings. On the other hand, the summary proceedings are subject to a condition - urgency - from which the *de facto* procedure is exempted. On the second point, the procedure for assault is less demanding; on the first, it is more demanding.

1401 D. LABETOULLE, "L'activité contentieuse du Conseil d'Etat en 2003", *Dr. adm.* 2004, Interview No. 1, p. 7.

1402 M. GUYOMAR and P. COLLIN, chron. under CE, Sect. 30 October 2001, *Minister of the Interior v. Mrs Tiba*, *AJDA* 2001, p. 1056.

1403 See for example, with regard to an infringement of trade union freedom, CE, 31 August 2001, *Fédération CFTC Santé-sociaux et autres*,

she is embarking on a much more perilous route and in any case one that is more difficult in terms of the objective pursued¹⁴⁰⁴. This is the case, for example, in the *Philippart and Lesage* case. The submissions made on the basis of Article L. 521-2 were rejected for lack of manifestly unlawful interference with a fundamental freedom¹⁴⁰⁵. Following a referral to the interim relief judge, by a request registered on 15 February 2001, the Administrative Jurisdiction Division granted, under Article L. 521-1, the injunction measure initially requested under Article L. 521-2¹⁴⁰⁶. As this is an appeal against a refusal decision, the suspension is in fact an injunction, with the interim relief judge indicating to the administration the obligations arising from its decision. Similarly, in the *Commune de Venelles* case, the applicants challenged a decision by the mayor refusing to include a question on the agenda and to convene the municipal council to discuss it. The application under Article L. 521-2 was unsuccessful, as it did not infringe a fundamental freedom¹⁴⁰⁷. Following the recommendations of the government commissioner and the invitation of the Administrative Jurisdiction Division, the applicants submitted a new application, this time on the basis of Article L. 521-1, and obtained satisfaction¹⁴⁰⁸. A particularly significant example is also provided by the long litigation of the restaurant La Cour des miracles against the refusal of the mayor of Collioure to authorise the installation of a terrace on the public domain during the summer season. The successive requests presented to the judge of the *référé-liberté* were all rejected, for lack of infringement of a fundamental freedom¹⁴⁰⁹ or of urgency¹⁴¹⁰. The applicant finally had the idea, after almost a year of proceedings and a lost tourist season, to submit an application on the basis of Article L. 521-1. The interim relief judge of the Montpellier administrative court granted his request in an order dated 2 July 2003 and issued the requested injunction. The order was confirmed by a judgment on the merits dated 20 January 2004, which became final¹⁴¹¹.

It took several years before litigants and their counsels understood the exceptional nature of the *référé-liberté* procedure and the very high standard of this procedure. During the first few years, many applications were clearly outside the scope of the judge's office. However, a change is underway¹⁴¹²; the statistics show that the number of applications for interim relief has stabilised and even decreased slightly, while the rest of the cases continue to grow, both on the merits and in interim relief.

338. Due to the strict conditions for granting the summary judgment, it is very rare that it is successful. Few applicants can prove that they are in an exceptional situation that would allow this procedure to be used. On average, the conditions for granting the procedure set out in Article L. 521-2 are only met in 5% of cases¹⁴¹³. These figures can be compared with those of the German constitutional appeal and the Spanish *amparo* appeal. For the year 1999, the success rate was 2.6% in Germany¹⁴¹⁴ and 4% in Spain¹⁴¹⁵.

Since the conditions for granting interim relief are very rarely met, the filing of an application on this basis is almost never successful. Only a very small proportion of applicants are successful in this way. In view of the small proportion of applications that meet the conditions for implementation of Article L. 521-2, the very usefulness of this procedure must be questioned. Should we not conclude that this legal remedy is useless in practice because of the low number of positive applications of it in administrative case law? One might be tempted to reach such a conclusion in view of the small number of cases in which the summary procedure is successfully applied. However, this would be to misunderstand the philosophy of this procedure. Indeed, the conditions for granting it are not trivial and are not intended to be met frequently. The *référé-liberté* procedure would be useless if it were *never* used. But in reality, it is *rarely* used. And that is precisely its purpose. The situations for which it can be used are serious and only occur in practice in very exceptional cases. When such a situation arises, the *référé-liberté* guarantees litigants a rapid and effective intervention commensurate with the gravity of the situation. In order to respond to exceptional situations, the legislator has provided for a procedure that is itself exceptional¹⁴¹⁶.

Lebon T. p. 1104.

1404 G. BACHELIER, "Le référé-liberté", *RFDA* 2002, p. 268.

1405 CE, ord. 9 February 2001, *Philippart and Lesage*, n° 230112.

1406 CE, Sect. 28 February 2001, *Philippart and Lesage*, *Lebon* p. 112.

1407 CE, Sect. 18 January 2001, Morbelli, maire de la Commune de Venelles, *Lebon* p. 18.

1408 CE, 5 March 2001, *Saez*, *Lebon* p. 117, *Coll. ter.* July 2001, pp. 4-6, concl. L. TOUVET.

1409 CE, ord. 16 September 2002, Société EURL La Cour des miracles, *Lebon T.* p. 314.

1410 CE, ord. 19 March 2003, Société EURL La Cour des miracles, n° 255191.

1411 Cf. F. LICHERE, Note sous TA Montpellier, ord. 2 July 2003, *EURL La Cour des miracles*, *LPA* 8 November 2004, n° 223, pp. 8-10.

1412 Typically, it has happened that an applicant initiates a *référé-liberté* and then, even before the judge rules, changes his mind by indicating his intention to refer the matter to the judge at a later date on the basis of Article L. 521-1 (see CE, order of 31 January 2005, *Ferreira Nobre*, No. 277028).

1413 Nevertheless, if we include the satisfaction revealed by a withdrawal or a dismissal, the number of cases in which the applicant obtains satisfaction reaches the rate of 10%. See *infra*, § 466.

1414 See A. DITTMANN, "Le recours constitutionnel en droit allemand", *CCC* no. 10, 2001, p. 77.

1415 Cf. C. RUIZ MIGUEL, "L'*amparo* constitutionnel en Espagne: droit et politique", *CCC* no. 10, 2001, p. 96.

1416 This relationship is not at all conventional. It is generally observed that the seriousness of a situation requires and justifies departing from the usual rules. In human societies, it is by departing from normality that we respond to the most serious situations.

Part II

Rapid and effective judicial protection

*"(...) the situation was serious, but what did it prove?
It proved that even more exceptional measures were needed.1417*

339. In the area of freedoms, the effectiveness of a procedure is measured by the immediacy and vigour of the judicial reaction. As Jean Rivero has pointed out, "The protection of freedoms is only effective if it ensures their effective exercise, either by preventing threats to them or, if they have been infringed, by urgently re-establishing the freedom they have been infringed"¹⁴¹⁸. In this area, "effective protection is that which, as soon as the violation has been committed, succeeds in halting its effects and restoring the rights of the person from whom they have been taken"¹⁴¹⁹. Thus, when a person is the victim of a serious and manifestly illegal infringement of his or her fundamental freedoms, the legislator wanted a judge to be able to intervene very quickly to put an end to it. The entire procedural regime of the *référé-liberté* procedure was defined with this single objective in mind¹⁴²⁰. Since the purpose of Article L. 521-2 is to "put an end to situations that infringe fundamental freedoms very quickly"¹⁴²¹, its entire system is geared towards the immediate protection of persons who are victims of liberticidal acts.

This search for efficiency justified derogating from the best established principles of administrative litigation, particularly with regard to the referral of cases to the judge, the conditions for his intervention and the powers vested in him. In view of the seriousness of the offences in question, it seemed necessary to derogate from rules which, although justified in other areas, would compromise the protection of freedoms in this case¹⁴²². The result is an atypical procedure, which in many respects escapes the traditional classifications¹⁴²³. The question of the effectiveness of the procedure and its nature are closely linked. Indeed, it is because it aims at optimal efficiency, in order to remedy immediately an unacceptable situation, that the *référé-liberté* procedure has such a particular nature. The originality of the mechanism is a consequence of the objective pursued when it was introduced. It is the importance of the rights and freedoms in question and, even more so - because the presence of a fundamental freedom is not in itself sufficient to justify a derogation from the classic principles of litigation - the seriousness of the situation that justifies the adaptation of the traditional procedural mechanisms and the strengthening of the level of protection.

340. The provisions governing the *référé-liberté* procedure are contained in the first two titles of Book V of the Code of Administrative Justice. On the other hand, the Council of State has ruled out the application of Article 6 of the European Convention on Human Rights to this procedure.

The summary application for interim relief is subject partly to the general rules applicable to all emergency applications for interim relief, and partly to specific rules, the adaptations which it benefits from being justified by the particular purpose of this procedure. First of all, by its very nature, the summary procedure is governed by the procedural rules applicable to all urgent summary procedures, which naturally include those applicable to all summary procedures¹⁴²⁴. For the definition of these rules, the option retained by the drafters of the text consisted in taking as a model the civil summary procedure, whose procedure "is reasonably simple, rapid and free of excessive formalism"¹⁴²⁵, and in adapting its principles to the specificities of administrative litigation. This approach is not unusual, insofar as private judicial law has always been a privileged source of inspiration for the

1417 A. CAMUS, *La Peste*, 1947, ed. Gallimard, coll. Folio, 1972, p. 146.

1418 J. RIVERO, "Dualité de juridictions et protection des libertés", *RFD.A* 1990, p. 736.

1419 J. RIVERO, Preface to the thesis by S. TSIKLITIRAS, *La protection effective des libertés publiques par le juge judiciaire*, LGDJ, coll. BDP, t. 155, 1991, p. XV.

1420 The term procedure is understood here in a broad sense. In accordance with the etymology of the word (*procedere*, "to go forward"), it refers to the process from the beginning of the proceedings to the end of the proceedings. This includes the introduction, investigation and judgment of appeals, the powers of the judge and the remedies available against his decisions.

1421 R. GARREC, Senate Report No. 380, p. 49.

1422 This approach was based on a precedent. Indeed, by instituting the procedure of *déféré-liberté*, the legislator had confirmed "the need to remove the protection of liberties from the common law of administrative litigation and the delays it may entail" (J. RIVERO, "Dualité de juridictions et protection des libertés", *RFD.A* 1990, p. 737).

1423 The affirmed particularities of the *référé-liberté* will justify a transversal reflection on the nature of the procedure set up. The questioning will essentially concern the type of procedure to which it belongs and the determination of the category to which it is attached within the structure of administrative litigation and the major classifications of procedural law.

1424 The rules applicable to all summary proceedings are not very well developed in the Code of Administrative Justice, since its legislative part only contains two provisions (Articles L. 511-1 and L. 511-2), and its regulatory part does not contain any articles. The rules specifically concerning urgent summary proceedings are contained in Title II of Book V. See M. COURTIN, "Référés en urgence", *Jcl. Justice administrative*, fasc. 1093 (8, 2003).

1425 P. ESTOUP, *La pratique des procédures rapides. Référés, ordonnances sur requête, procédures d'injonction, procédures à jour fixe et abrégées*, 2^{ème} éd, Litec, 1998, p. 49.

development of the rules of administrative litigation¹⁴²⁶, particularly in the field of summary proceedings¹⁴²⁷. However, the rules of civil procedure could not be transposed as they stand to administrative proceedings, because of the differences that exist with regard to "the nature of the disputes brought before the two orders of jurisdiction and the way in which they are litigated"¹⁴²⁸. These specificities have justified certain adaptations deemed necessary¹⁴²⁹. In addition to this "common law" of urgent interim relief, specific rules have been laid down for interim relief. These special rules were defined in view of the particular purpose of summary proceedings: to put an end to situations involving serious infringements of fundamental freedoms very quickly. Elements have been added to facilitate and accelerate the introduction, investigation and judgment of applications. In addition, the summary application for interim relief differs from the other emergency applications in terms of the remedies available against the decision of the first judge. From the point of view of the procedural rules, the interim relief procedure is thus doubly derogatory. First of all, it is a judicial procedure because it belongs to the category of summary proceedings. As such, it benefits from a regime that derogates from the ordinary law of litigation procedures, justified by the need to take urgency into account¹⁴³⁰. Secondly, it is a derogation within the category of summary proceedings, due to the particular rules that distinguish it from other summary proceedings.

In the *Casanovas* judgment of 28 February 2001, the Council of State ruled that the provisions of Articles 6-1 and 13 of the European Convention on Human Rights were not applicable to the *référé-liberté*. In this case, the applicant challenged the conventionality of the sorting procedure governed by Articles L. 522-3 and L. 523-1 of the Administrative Justice Code. The Section stated that these provisions, "in view of the provisional nature of the measures that may be taken by the interim relief judge, are not incompatible with the provisions" invoked¹⁴³¹. Thus, for the Council, summary proceedings do not fall within the scope of application of these provisions because of the provisional nature of the measures taken by the judge. This solution appears to be in line with established administrative and European case law, which links the application of these provisions to the definitive nature of the measures prescribed¹⁴³². This recital is based on the wording of Article L. 511-1 of the Code of Administrative Justice, according to which "The interim relief judge shall rule by means of provisional measures". The solution adopted and the reasoning behind it do not raise any difficulties with regard to interim relief and interim measures. Indeed, the measures taken on the basis of Articles L. 521-1 and L. 521-3 are undeniably provisional in nature and do not affect the substance of the law. On the other hand, its application to summary proceedings may be

1426 See B. PACTEAU, "Dualité de juridictions et dualité de procédures", *RFDA* 1990, pp. 66-70; R. CHAPUS, "De l'office du juge: contentieux administratif et nouvelle procédure civile", *EDCE* no. 29, 1977-1978, pp. 11-65; F. MELLERAY, "L'exorbitance du droit du contentieux administratif", in *L'exorbitance du droit administratif en question*, colloquium of 11 and 12 December 2003, Poitiers, LGDJ, 2004, pp. 277-310. Government Commissioner Kahn stated that "when it comes to a technique that has been tried and tested by centuries of judicial practice", the Council of State does not "disregard the principles for the sole satisfaction of asserting an independence that no one thinks of contesting" (concl. Kahn on CE, Sect., 13 May 1970, *Lebon* p. 334).

1427 Since its introduction into the administrative litigation procedure, the civil summary procedure has been an obligatory reference for the Council of State. When its implementation raises an unprecedented difficulty before the administrative court, the government commissioners turn to private judicial law to find answers. As M. Chardeau stated, "in this new area of the use of summary proceedings by the administrative courts, it is preferable to align oneself with the greater experience of the judiciary" (J. CHARDEAU, concl. on CE, Sect., 13 July 1956, *Secretary of State for Reconstruction v Piéton-Guibout*, *AJDA* 1956, II, p. 322). Similarly, M. Lasry stated that "in this new area of summary proceedings for the administrative courts, there is no doubt that your emerging jurisprudence must be aligned as far as possible with that which is the result of greater experience in the judicial courts" (concl. on CE, 15 July 1957, *Ville de Royan*, *RDP* 1958, p. 109). The government commissioners explicitly relied on private judicial law to determine the nature of the interim relief judge - an emanation of the court, and not a separate jurisdiction (concl. CHARDEAU, supra; concl. LASRY, supra), and to define the notions of 'urgency', 'serious dispute' or 'prejudice to the main issue' (concl. GREVISSE on CE, Sect., 14 March 1958, *Secrétaire d'Etat à la reconstruction et au logement*, *AJDA* 1958, II, pp. 186-190) or even recognise the possibility for the interim relief judge to reverse his initial decision in the event of new circumstances (concl. M. LONG on CE, Sect., 12 October 1956, *Suporta*, *AJDA* 1956, II, pp. 410-412).

1428 "Report of the working group of the Council of State on emergency procedures", *RFDA* 2000, p. 953. Proceedings before the civil judge for interim relief often constitute the first confrontation of antagonistic claims expressed by private persons acting in the context of the autonomy of wills. Administrative litigation, on the other hand, does not see two private interests confronting each other but concerns decisions taken in the general interest and benefiting from a presumption of legality. The administrative act or action is either the result of a prerogative of public power, or the response to a prior step taken by the citizen and provided by the public authority within the framework of a procedure determined by the law.

1429 Although the objective of the law was "to give the administrative judge ruling in urgent cases an efficiency comparable to that of the civil judge ruling in summary proceedings", the explanatory memorandum specified that this transposition had to be done "taking into account the specificities of administrative litigation".

1430 See, under the previous law, distinguishing between the "particular procedure" of summary proceedings and the "ordinary procedure before the administrative courts": CE, 19 April 1972, *Département de la Haute-Loire*, *Lebon* p. 297.

1431 CE, Sect., 28 February 2001, *Casanovas*, *Lebon* p. 108; formula taken up again in particular in CE, 19 October 2001, *SCI du Clos*, n° 234090. For a reasoning expressly declaring the plea based on the violation of conventional provisions to be inoperative, see CE, 29 October 2003, *Commune du Ferré*, n° 257586: "Considering that, having regard to the provisional nature of the measures likely to be ordered by the judge of summary proceedings, article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is not applicable to the disputed procedure; that the plea based on its violation must be rejected".

1432 The guarantees of Article 6 are intended to apply to a court that decides a "dispute". The fact of deciding the dispute is manifested by the resolution of the dispute which is the source of the proceedings. This therefore excludes non-decisive proceedings, i.e. those which do not directly seek to have the dispute concerning civil rights and obligations decided. According to the Strasbourg Court, Article 6(1) "is not applicable to proceedings of a protective nature seeking an order for interim relief. The purpose of such proceedings is to regulate a temporary situation pending a decision in the main proceedings, and they do not, therefore, seek a decision on civil rights and obligations" (ECHR, *Carreira v. Portugal*, no. 41237/98. Emphasis added). Under the previous law, the Council of State had considered, in accordance with European case law (see the references cited in B. LE BAUT-FERRARESE, "Les procédures d'urgence et le langage du droit", *RFDA* 2002, p. 312, note 197), that summary proceedings and stays of execution fell outside the scope of Article 6-1 (see respectively CE, 11 March 1996, *SCI du domaine des Figuières*, *Lebon* p. 71; and CE, 14 December 1992, *Lanson*, *Lebon* T. p. 1217, *RFDA* 1993, p. 791, conclusion S. LASVIGNES). With the *Casanovas* ruling, the Council transposed this solution to the emergency summary proceedings instituted by the law of 30 June 2000.

discussed¹⁴³³.

341. By the provisions of Article L. 521-2, "the legislator intended that the interim relief judge should be able to put an end very quickly to a serious and manifestly illegal infringement of a fundamental freedom affecting the situation of the latter or the interests it is intended to defend"¹⁴³⁴. In order to be able to intervene *very quickly*, i.e. as soon as the infringement occurs, the law has given the judge the possibility of immediate intervention. In order for the judge to be able to *put an end to* this situation, he or she has been given extensive powers that make his or her intervention very effective. The procedure put in place, based on speed and the search for efficiency, thus enables the victim of an infringement to obtain the cessation of the offending act very quickly.

¹⁴³³ In the first place, the judge of the summary judgment decides a question of law. He rules on the substance of the law. Whereas the judge of excess of power censures "ordinary" illegalities, i.e. which may be gross or obvious but are not necessarily so, the judge of interim relief only sanctions "manifest" illegalities. He rules on the substance of the law; he assesses the legality of an administrative act or action (on this point, see *supra*, §§ 277-279). Secondly, the intervention of the judge of the référé-liberté is decisive for rights and obligations of a civil nature. The judge under Article L. 521-2 is not content with temporarily adjusting the situation of the parties pending a judgment on the merits. It constitutes in itself an autonomous remedy, indifferent to and in any case not conditioned by the possible exercise of an appeal on the merits. The measures prescribed by it are of a permanent nature (see § 502 et seq. *below*). Now, European case law considers that emergency measures that make it possible to settle the dispute on the merits are directly decisive for civil rights within the meaning of Article 6 of the Convention (see ECHR, 28 June 1978, *König v. Germany*, *Cahiers de droit européen* 1979, p. 474, note by G. COHEN-JONATHAN). This provision is consequently applicable to them, as the Conseil d'Etat has ruled for the référé-précontractuel (CE, Ass. 10 June 1994, *Commune de Cabourg*, *Lebon* p. 301, concl. S. LASVIGNES) and the référé audiovisuel (CE, 25 November 1994, *Société 'La Cinq'*, *Lebon* p. 511). It would therefore be possible to reserve a different fate for the référé-liberté within the category of emergency proceedings and to subject it, like the référé précontractuel and the référé audiovisuel, to the provisions of Article 6-1.

¹⁴³⁴ CE, ord. 12 November 2005, *Association SOS racisme - touche pas à mon pote*, *Lebon* p. 496; CE, ord. 4 April 2006, *Bidalou*, n° 291948.

Title I

An opportunity for immediate intervention

342. "To be effective, the means of defending public liberties must be easy, quick and cheap"¹⁴³⁵. This oft-quoted phrase by Gaston Jèze concerns the notion of public freedom. Nevertheless, it can just as easily be applied to cases of serious and manifestly illegal infringement of the fundamental freedoms referred to in Article L. 521-2. In this case, the usefulness of the court's intervention depends above all on how easily it can be brought before it and how quickly it can react. When the applicant invokes the provisions of Article L. 521-2 and, consequently, alleges the existence of such an infringement, the law organises for his benefit easier access to justice and the very rapid delivery of a decision. The result is procedural flexibility in terms of initiating an appeal and extreme speed in terms of delivering a judgment: the investigation and judgment of applications are organised within days or even hours of the application being registered. By derogating from the ordinary procedural rules in the sense of simplification and lightening, the *référé-liberté* procedure gives litigants the means to obtain a rapid decision, in conditions that are not very restrictive and inexpensive.

Chapter 1 *An accessible judge*

343. The legislator wanted to make the *référé-liberté* an easily accessible remedy in procedural terms. When a person alleges to be the victim of a serious and manifestly unlawful infringement of his or her fundamental freedoms, the classic rules of administrative litigation procedure that are likely to hinder the exercise of an action by dissuading, slowing down or preventing the applicant from acting have been set aside or adjusted. The rules of jurisdiction and admissibility have therefore been defined with a view to facilitating the bringing of an action. As a result, on the one hand, the interim relief judge is an easily accessible judge because he is close to the applicants. It follows, secondly, that the introduction of the application is subject to more flexible rules of admissibility. In this way, the litigant has easier and therefore faster access to the judge of the *référé-liberté*. A person who considers himself to be the victim of a serious infringement of his fundamental freedoms has the possibility of very rapid access to this judge to explain his situation and assert his claims.

Section 1: A judge close to the applicant

344. Professor Drago has stated that "in matters of recourse concerning the infringement of a fundamental right", the procedure "must first of all allow access to a judge close to the citizen, to the litigant"¹⁴³⁶. The legislator of 30 June 2000 retained precisely this option by attributing this litigation to the administrative jurisdiction. The application for interim relief is brought before an administrative judge who is geographically close to the applicant.

I. An administrative judge

345. The *référé-liberté* falls within the jurisdiction of the administrative court. Only disputes falling within the usual

¹⁴³⁵ G. JEZE, "Rapport à l'Institut international de droit public", *Annuaire de l'Institut*, 1929, p. 176.

¹⁴³⁶ G. DRAGO, "Les droits fondamentaux entre juge administratif et juges constitutionnels et européens", *Dr. adm.* 2004, Etudes n° 11, p. 10.

jurisdiction of this court order are subject to the procedure of Article L. 521-2.

A. The interest of an administrative judge

346. For the applicant, the competence of the administrative court means, in the first place, the intervention of a judicial body. The applicant benefits from the assurance that his or her complaint will be examined with all the guarantees attached to the intervention of a body of this nature. Indeed, while some non-judicial mechanisms such as the Mediator of the Republic may, in certain circumstances, not be ineffective in the area of freedoms¹⁴³⁷, none of them offers guarantees equivalent to a judicial remedy¹⁴³⁸. "Progress has always been made, throughout history, in the direction from non-judicial to jurisdictional. Protections were initially non-judicial and then gradually acquired a jurisdictional character. From a historical perspective, judicial review appears to be more effective and more secure than non-judicial review"¹⁴³⁹. This form of review is in fact "the culmination of a movement to make the administration more subject to the law"¹⁴⁴⁰. No non-judicial protection technique can equal or replace the intervention of a judge. In a State governed by the rule of law, he remains "an unhoped-for and irreplaceable defender of our freedoms"¹⁴⁴¹.

The superiority of the judge in this area derives not from the personal qualities of the men performing these functions, but from the very nature of the institution that is the court. As Mr Fleiner pointed out, "A judge is only recognised by giving reasons for his decisions in a rational manner, in other words, in a way that is comprehensible to third parties. With the impartiality that is his duty, he must decide which of the arguments put forward by the parties will convince him"¹⁴⁴². It resolves the dispute submitted to it objectively and in accordance with the applicable law, and enforces compliance with it by virtue of the enforceability of its decisions. Clearly, "nowhere does an appeal offer more guarantees than before a properly and strictly judicial body"¹⁴⁴³.

347. Secondly, the competence of the administrative court offers the advantage of a judge who, through his knowledge of the administration, is better able to detect when the latter has behaved badly. If, as Dean Vedel pointed out, the problem is "to determine the judge who, technically, will be the most capable of resolving litigation problems of this or that nature"¹⁴⁴⁴, it is a fact that the administrative judge is better placed than the judicial judge to settle disputes arising from the operation of the administrative machinery. He "is technically better equipped than the latter to correctly assess the legal relevance and regularity of administrative behaviour"¹⁴⁴⁵. Judges of the judicial order are in fact in full agreement with this. Thus, Mr de Lacoste, a councillor at the Court of Cassation, stated that "when it comes to judging the administration, administrative judges are (...) infinitely better equipped than judges of the judicial order"¹⁴⁴⁶. The administrative judge owes this superior level of competence to his training and practice. By virtue of his training and professional activity, he "has a more obvious possibility of knowing than the judicial judge the organisation and functioning of public institutions and therefore what can be considered as "normal" or on the contrary "abnormal" in their behaviour"¹⁴⁴⁷. The administrative judge "is naturally a better connoisseur of the institutional or procedural

1437 On these mechanisms, see P. WACHSMANN, *Libertés publiques*, 4^{ème} éd, Dalloz, coll. Cours, 2002, p. 190 et seq. See also B. DELAUNEY, *L'amélioration des rapports entre l'administration et les administrés. Contribution à l'étude des réformes administratives entreprises depuis 1945*, LGDJ, coll. BDP, t. 172, 1993, III^e.

1438 This explains why the non-judicial trend was short-lived in France. The phenomenon developed in the 1970s and 1980s with the introduction of new and alternative techniques for protecting freedoms inspired by the Scandinavian *ombudsman* model.

Nevertheless, the enthusiasm for these new forms of control was "a bit of a fad" (C. DEBBASCH, Introduction to the colloquium "Contrôle juridictionnel et nouvelles protections", *AEAP* 1983/VI, p. 12) and in practice quickly faded. For a presentation of the phenomenon, see J. WALINE, "L'évolution du contrôle de l'administration depuis un siècle", *RDP* 1984, pp. 1327-1349; J.-C. HELIN, "La protection du citoyen contre l'administration. Réflexions sur l'évolution contemporaine des voies de la protection", *LPA* 23 November 1990, n° 141, pp. 9-17.

1439 J.-M. PONTIER, "Contrôle juridictionnel et nouvelles protections en France", *AEAP* 1983/VI, p. 60.

1440 C. DEBBASCH, *op. cit.* p. 11. The improvement consisted, first of all, in moving from an administrative control internal to the administration, i.e. from a control exercised by the administration on itself to a control entrusted to a body outside the administration. The evolution then consisted in moving from retained justice, where the judge only issues an opinion to the executive, to delegated justice, i.e. the handing over to a judge of the power to make a final decision. Finally, the judge has refined his control techniques: from a purely external control of administrative action, we have moved to an internal control of legality.

1441 J.-P. COSTA, "Le juge et les libertés", *Pouvoirs* n° 84, 1998, p. 87.

1442 T. FLEINER, "Quelques réflexions sur le discours contemporain des droits de l'homme", in *Les droits individuels et le juge en Europe. Mélanges en l'honneur de Michel Fromont*, PUS, 2001, p. 239.

1443 P. MERTENS, *Le droit de recours effectif devant les instances nationales en cas de violation d'un droit de l'homme*, Brussels, éditions de l'Université de Bruxelles, 1973, p. 75. In the same vein, Dean Favoreu pointed out that "The protection of human rights is only truly assured if it is entrusted to jurisdictions" (L. FAVOREU, "Quelques considérations sur les droits de l'homme", in *Separata del libro. Liber Amicorum Héctor Fix-Zamudio*, Secretaria de la Corte Interamericana de Derechos Humanos, 1998, p. 675). See also N. BACCOUCHE, "La justice comme nécessaire garant des libertés", in *Justice et démocratie. Entretien d'Agnesseau*, colloquium Limoges, 21-22 November 2002, Pulim, 2003, pp. 171-188.

1444 G. VEDEL, *Droit administratif*, 2^{ème} éd, PUF, 1960, p. 67.

1445 J.-C. RICCI, "Feu sur la voie de fait?", *RRJ* 1998/1, p. 11.

1446 O. de LACOSTE, Intervention to the debate in *Le contrôle juridictionnel de l'administration. Bilan critique*, colloquium of 11 and 12 May 1990 (CERAP dir.), *Economica* 1991, p. 214.

1447 M.-A. LATOURNERIE, "Réflexions sur l'évolution de la juridiction administrative française", *RFDA* 2000, p. 928.

mechanisms and practices of the administration, which are much less impenetrable for him than for his judicial counterpart"¹⁴⁴⁸. He is able to detect irregular actions of the public authority and thus make the distinction between illegal situations and those that are not: "familiar with the twists and turns of administrative action, the administrative judge can, more easily than the judicial judge, identify public decisions and behaviours that infringe on freedoms"¹⁴⁴⁹.

348. Thirdly, the administrative court, as an ordinary court, has an army of judges at its disposal to serve litigants. Its staffing levels enable it to respond quickly to complaints submitted by applicants in this field. Conversely, a constitutional court could not deal with such a massive case in satisfactory conditions. Composed of a small number of judges, these courts "are not in a position - however well intentioned they may be and however effective the filtering measures put in place - to rule on the many appeals (over five thousand each year in Spain and the FRG) lodged by individuals for infringement of their fundamental rights"¹⁴⁵⁰. The constitutional courts do not have enough staff to deal with the litigation of administrative infringements of freedoms. On the verge of asphyxiation, the constitutional court is forced to make a selection from among the thousands of appeals brought before it and, in fact, only decides on the merits of a small proportion of them¹⁴⁵¹. The situation is such "that in both countries the conditions for reducing this flow have been studied: one of the solutions recommended in Spain is to refer as many cases as possible to the administrative and judicial courts"¹⁴⁵². Also, in France, the attribution of the *référé-liberté* litigation to the administrative judge represents an appreciable guarantee for the litigant. In a classic way, the jurisdiction of this judge extends to all disputes usually devolved to the administrative court.

B. Determination of subject matter jurisdiction

349. The jurisdiction of the interim relief judge is limited to matters falling within the jurisdiction of the court on the merits¹⁴⁵³. Indeed, as the interim relief judge is only an emanation of the court, his material competence is always dependent on the court to which he belongs. In a recital of principle, the Council of State stated that "the administrative judge may only be seized of an appeal seeking the implementation of one of the procedures governed by Book V of the Code of Administrative Justice insofar as the main dispute to which the emergency measure that he is asked to prescribe is related or is likely to be related, does not manifestly escape the jurisdiction of the administrative court"¹⁴⁵⁴. In other words, and in accordance with a classic rule of procedural law, jurisdiction in summary proceedings follows jurisdiction on the merits¹⁴⁵⁵. Material jurisdiction is determined on the basis of the main dispute: that to which the application for interim relief relates or is likely to relate. This main dispute may only be a possible one; this will most often be the case in matters of interim relief, since applications made on the basis of Article L. 521-2 are not ancillary to a main action and are not conditional on the filing of an action on the merits. It is only required that in case of seizure, an administrative judge would be competent to examine the legality of the litigious situation.

It should also be remembered that the rules of jurisdiction are assessed more flexibly in the case of summary proceedings. In this field, the rule of jurisdiction is affirmed as a simple potentiality: the jurisprudence requires only that the request does not escape "manifestly" the jurisdiction of the administrative court¹⁴⁵⁶. Under these conditions, the interim relief judge does not have to consider his jurisdiction as thoroughly as in an appeal on the

1448 E. PICARD, "Dualisme juridictionnel et liberté individuelle. Le principe selon lequel l'autorité judiciaire est gardienne de la liberté individuelle", in *Le contrôle juridictionnel de l'administration. Bilan critique*, colloquium of 11 and 12 May 1990 (CERAP dir.), Economica, 1991, p. 178.

1449 J. RIVERO, "Dualité de juridictions et protection des libertés", *RFDA* 1990, p. 737.

1450 L. FAVOREU, "La notion de liberté fondamentale devant le juge administratif des référés", *D.* 2001, p. 1744.

1451 The constitutional court responds to this influx with a discretionary selection of appeals: more than 80% of the applications are rejected without a ruling on the merits of the claim. As M. Pfersmann observes, "the sub-branches of the Constitutional Court in question may decide (...) without any reasons or on the basis of entirely stereotyped reasons" (O. PFERSMANN, "Le recours direct entre protection juridique et constitutionnalité objective", *CCC* no. 10, 2001, p. 69). The selection of appeals becomes discretionary. The constitutional court chooses the applications that deserve to be examined on the basis of opportunity. Thus, in Austria, the court is "empowered, within a certain framework, to refuse to process the application at its own discretion, i.e. to 'filter' according to constitutional relevance" (G. KUSKO-STADLMAYER, "Les recours individuels devant la Cour constitutionnelle en droit constitutionnel autrichien", *CCC* no. 10, 2001, p. 82). On this topic, see S. NICOT, *La sélection des recours par la juridiction constitutionnelle*, LGDJ, 2006, 467 p.

1452 L. FAVOREU, *op. cit.* p. 1744.

1453 It should be remembered that the jurisdiction of the administrative judge for interim relief could have been limited by the requirement of an infringement of fundamental freedoms by the administration "in the exercise of its powers". Nevertheless, the wording of this provision and its interpretation by the Conseil d'Etat have led to its scope being neutralised (see *above*, § 326 et seq.).

1454 CE, 29 October 2001, *Raust, Lebon T.* p. 1090.

1455 See, under previous law: CE, 16 October 1981, *Ministre de la Défense c/ Lassus, Lebon* p. 584, *AJDA* 1981, p. 584. For civil procedure, see Civ. 18 December 1872, *D.P.* 1873, I, 129; Civ. 31 July 1889, *D.P.* 1891, I, 323; Civ. 22 October 1974, *D.S.* 1975, IR p. 7.

1456 CE, 29 October 2001, *Raust, Lebon T.* p. 1090; CE, ord. 20 January 2005, *Commune de Saint-Cyprien, Lebon T.* p. 1022. See, under the previous state of the law: C. HUGLO, *La pratique des référés administratifs devant le tribunal administratif, la Cour administrative d'appel et le Conseil d'Etat*, Litec, 1993, n° 24.

merits. He may rule on the application for interim relief as long as the possible dispute to which it relates is not manifestly foreign to the jurisdiction of the administrative court. Mere uncertainty as to the nature of the main dispute is sufficient to justify its jurisdiction. It is normally forbidden, in such a case, to oppose its lack of jurisdiction.

On the other hand, if the dispute is manifestly unsusceptible of being related to a dispute falling within the jurisdiction of the administrative court, the judge in summary proceedings must declare himself incompetent¹⁴⁵⁷. Neither urgency, nor the questioning of a fundamental freedom, nor the exercise of a power of injunction justify derogating from this rule¹⁴⁵⁸. The interim relief judge must decline jurisdiction when the dispute is definitely within the jurisdiction of the courts. Thus, he cannot hear a decision by the tax collector notifying the applicant of the continuation of proceedings against him and of the third-party notice issued to recover the penalties to which he was subject following an adjustment of registration duties¹⁴⁵⁹. Similarly, it has no jurisdiction to rule on the conditions of legality, contested by the applicant, under which the latter was subjected to incarceration and judicial supervision during the extradition proceedings initiated against him¹⁴⁶⁰. As an association for the protection of children had been mandated by the juvenile judge to carry out an investigation into the situation of a minor, the decisions taken by this body could not be detached from the legal proceedings underway and, consequently, did not fall within the jurisdiction of the interim relief judge¹⁴⁶¹. Nor can the judge hear disputes relating to the content or drafting of civil status documents¹⁴⁶² or assess the merits of an involuntary hospitalisation measure¹⁴⁶³. The judge for interim relief must also decline jurisdiction if the contested act falls under the exclusive control of the Constitutional Council¹⁴⁶⁴.

350. The competence of the administrative court is determined by reference to the rules and criteria usually applied by the Council of State¹⁴⁶⁵. Consequently, it is not limited to the acts and actions of public persons but also extends to those of legal persons under private law entrusted with a public service mission. Article 4 of the draft law merely referred to "the administration". For the sake of precision, and in order to coordinate with other texts applicable to administrative litigation¹⁴⁶⁶, the members of parliament have replaced it with the formula "legal person under public law or body under private law entrusted with the management of a public service"¹⁴⁶⁷. By using this expression in Article L. 521-2, the law simply indicates that the act or behaviour challenged in this way "must fall within the jurisdiction of the administrative court, which the legislator did not intend to extend beyond its normal limits"¹⁴⁶⁸. Therefore, if the acts and behaviour of private persons in charge of the management of a public service can fall within the jurisdiction of the judge of the *référé-liberté*, it is only if they meet the criteria set out in the case law¹⁴⁶⁹.

To identify the existence of a public person - or that of a private law body in charge of managing a public service -, the judge does not limit himself to appearances and restores their true nature to the disputed acts¹⁴⁷⁰.

1457 See for example, under the previous law: CE, 15 October 1982, *Chambre de commerce et d'industrie de Marseille*, *Lebon* p. 711.

1458 Reference should be made, by analogy, to the opinion of the Council of State of 13 March 1998, *Vindevoel* (*Lebon* p. 78) concerning the power of injunction conferred on the administrative judge by the Act of 8 February 1995. For the Section, "The power conferred by law on the administrative judge to issue injunctions, possibly accompanied by fines, against legal persons under public law or bodies under private law responsible for managing a public service, in order to ensure the execution of his decisions, does not authorise him to disregard the rules governing the division of competences between the two orders of jurisdiction".

1459 CE, 29 October 2001, *Raust*, *Lebon* T. p. 1090. Article L. 199 of the book of tax procedures provides that "In matters of registration duties (...), the competent court is the tribunal de grande instance". For the Conseil d'Etat, it follows from these provisions that "the dispute to which Mr Raust's application is likely to be linked clearly falls outside the jurisdiction of the administrative court".

1460 CE, ord. 30 January 2003, *Smaali*, n° 253668.

1461 CE, ord. 12 May 2003, *Pichaut*, n° 256729.

1462 CE, ord. 4 February 2005, *Bellarbi*, n° 277213.

1463 CE, ord. 3 March 2003, *Portmann*, n° 254625; CE, ord. 27 November 2003, *Association française contre l'abus psychiatrique*, n° 261947. On the other hand, in accordance with constant jurisprudence, it must declare itself competent to assess the regularity of this measure (CE, ord. 14 October 2004, *Arre*, n° 273047).

1464 See, for example, for a decree convening the elected members of the Conseil supérieur des Français de l'étranger: CE, ord. 22 September 2004, *Hoffer*, n° 272347 and 372378.

1465 With the uncertainties and difficulties of implementation that they may entail (see P.-L. FRIER, *Précis de droit administratif*, 2^{ème} ed., Montchrestien, 2003, n° 654 et seq.)

1466 See in particular the provisions of Book IX of the Code of Administrative Justice, resulting from the laws of 10 July 1980 and 8 February 1995.

1467 The editorial amendment was adopted on first reading by the Senate at the request of its Law Commission (*JO déb Sénat*, CR séance 8 juin 1999, p. 3753). See R. GARREC, Senate Report No. 380, p. 55.

1468 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1593. For example, it is not competent to hear an infringement attributable to a jurisdictional authority. Thus, a summons to appear before the social insurance section, which is a court, "cannot constitute a serious and manifestly illegal infringement by an administrative authority of a fundamental freedom" (CE, ord. 24 November 2004, *Winter*, n° 274484).

1469 That is to say, to be adopted by a private person in the accomplishment of the public service mission entrusted to it and in the exercise of prerogatives of public power (see CE, Ass., 31 July 1942, *Montpeurt*, *Lebon* p. 239, *GAJA* n° 56; CE, 2 April 1943, *Bouguen*, *Lebon* p. 86, *GAJA* n° 57; CE, Sect., 13 January 1961, *Magnier*, *Lebon* p. 33). See for example CE, ord. 18 March 2002, *GIE Sport libre et al.*, *Lebon* p. 106, concerning the decision by the Ligue nationale de football to grant exclusive exploitation rights for the broadcasting of certain sports competitions.

1470 The approach thus echoes the formula of President Heumann according to which "the effort of the administrative jurisdiction must tend to make reality prevail over appearances, to restore to the acts their true nature" (concl. on CE, Ass., 24 June 1960, *Société Frampar et Société France d'édition et publications*, *Lebon* p. 412).

In this way, when the act in question was taken by a private person at the behest of a public person, the administrative judge of summary proceedings recognises his or her competence to deal with it. This approach, which aims to make reality prevail over appearances, can be illustrated by the *FN IFOREL* order of 19 August 2002¹⁴⁷¹. In this case, the Annecy convention centre had been leased by the agglomeration community to a private company: the Impérial Palace company. On 8 July 2002, this company signed a rental contract with IFOREL - an association close to the FN - to organise the political party's summer university from 26 to 30 August 2002. On 5 August 2002, Impérial Palace terminated the contract after being given formal notice to do so by the President of the Communauté d'agglomération. Referred to on the basis of Article L. 521-2 of the Code of Administrative Justice, the judge of the first instance affirmed that the infringement of which the applicants were claiming arose solely from the decision to terminate the contract taken by the company Imperial Palace. Considering that he was dealing with a private law dispute, he declined jurisdiction to hear the case. On appeal, the interim relief judge of the Council of State concluded that the administrative court had jurisdiction. Although, formally, the decision to terminate the contract had been taken by a private company, it had in fact acted on the orders of the public authority. The purpose of the letters sent by the administrative authority to Imperial Palace was to prevent the execution of the reservation contract concluded between the latter and IFOREL. Consequently, according to the interim relief judge, they "*directly* caused the termination of this contract". In these conditions, the infringement of a fundamental freedom of which the applicants avail themselves "does not result from the sole decision to terminate the contract taken by Impérial Palace but from acts taken by public authorities". By going back to the source, there is indeed an administrative decision from which the dispute arises and on which the jurisdiction of the administrative court is based.

The judge of the *référé-liberté* is an administrative judge. Because of his proximity to the litigants, he is also a judge in the field.

II. A judge in the field

351. As Mr Drago has pointed out, "The fundamental rights judge is first and foremost a local judge"¹⁴⁷². In accordance with this requirement, applications for interim relief fall in principle within the jurisdiction of administrative court judges.

352. The interim relief judge is an accessible administrative judge because he is geographically close to the applicants. He is not distanced by distance - as may be the case with certain courts in constitutional *amparo* proceedings - from the people whose freedoms he is charged with protecting. This proximity contributes to facilitating access to this procedure and gives the judges of the first instance a place of the first order in the system for safeguarding fundamental freedoms.

The system set up by the law of 30 June 2000 is in fact centred on the role of the judge of the first degree. The interim relief judge of the administrative court represents the pillar of the system; it is on him that the effective guarantee of fundamental freedoms rests in the first place. Admittedly, this privileged role of the administrative courts might at first sight seem trivial insofar as it is part of the usual organisational structure of the administrative jurisdiction. Indeed, since their creation in 1953, the administrative courts have been the court of first instance in administrative disputes. Also, by attributing in principle to the administrative courts the hearing of applications based on Article L. 521-2 of the Code of Administrative Justice, the summary proceedings simply follow the general pattern on this point. That said, the solution adopted is not as classic as it may seem at first sight. It reflects a confidence, if not new, at least recent, in the ability of administrative courts to intervene effectively and urgently when freedoms are at stake.

In this respect, it should be recalled that the authorities have long doubted the capacity of administrative judges of first instance to take on major disputes involving freedoms in an emergency. This apprehension is even consubstantial with the history of the administrative courts, since it appears from their creation in 1953 to replace the prefecture councils. The decree of 30 September 1953 establishing the administrative courts provides in the second paragraph of Article 9 that the latter are prohibited from issuing a stay of execution of a decision concerning "the maintenance of order, security and public tranquillity". As President Labetoulle pointed out, this reservation considerably limited the capacity of the young administrative courts to protect the exercise of freedoms insofar as these decisions "are, by their very nature, those that can most directly affect the exercise of public freedoms; they are also those whose annulment, when it is pronounced after a written investigation lasting several months, is most likely to remain platonic. In this area more than in any other, the judge should be able to intervene preventively and conservatively, before the infringement of freedom is complete"¹⁴⁷³. The administrative courts were deprived

1471 CE, ord. 19 August 2002, Front national et Institut de formation des élus locaux (IFOREL), *Lebon* p. 311.

1472 G. DRAGO, "Les droits fondamentaux entre juge administratif et juges constitutionnels et européens", *Dr. adm.* 2004, Etudes n° 11, p. 10.

1473 D. LABETOUILLE, Conclusion of the colloquium *Le juge administratif et les libertés publiques*, RFDA 2003, p. 1120. In order not to deprive litigants of all guarantees, the Council ruled that its own jurisdiction in matters of suspension of execution had not been transferred to

of the right to intervene in these matters for three decades. It was not until the decree of 27 January 1983 that the prohibition, reiterated by the decree of 28 January 1969 and codified in Article R. 96 para. 2 of the Code of Administrative Courts, was finally abolished. This abolition is part of a series of reforms by which the legislator has recognised the legitimacy of the administrative courts to intervene urgently in the field of freedoms. The change began with the law of 2 March 1982 which, by instituting the *déféré-liberté*, "recognises both the legitimacy of the administrative court to suspend the execution of an administrative decision affecting the field of freedoms and its capacity to do so within a very short time"¹⁴⁷⁴. The next step was taken with the law of 10 January 1990, which assigned litigation concerning deportation to the administrative courts. This text "definitively gave credence to the idea that the administrative court of first instance, seized of decisions concerning public order, could, including in mass litigation, intervene in an emergency and according to procedural methods (single judge, oral hearing) that were not imagined in its hands"¹⁴⁷⁵. The law of 30 June 2000 completes this evolution and is the last act of the process. Without the reforms undertaken in this respect since the early 1980s, the central place now given to administrative courts in the protection of freedoms would have been unthinkable.

353. In the context of this procedure, the application for interim relief must be brought before the court that would have jurisdiction *in the first instance* if an appeal on the merits were lodged. Thus, the request presented on the basis of Article L. 521-2 of the Code of Administrative Justice can never be submitted directly to a judge of appeal or cassation, whatever the existing links with proceedings pending before these judges. This particularity of the *déféré-liberté* compared to the *déféré-suspension* is explained and justified by the autonomous character of this procedure.

Indeed, the summary judgment constitutes an accessory remedy. The application based on Article L. 521-1 must, because of its link with an application for annulment or reversal, be brought before the court hearing the merits of these claims. When an administrative court of appeal is seized, in the context of an appeal against an administrative court judgment, of such conclusions for annulment or reversal, an application for suspension based on the provisions of Article L. 521-1 may be presented or renewed before it. Similarly, if the main appeal is the subject of an appeal in cassation, the Council of State may hear an application for interim suspension submitted for the first time or renewed before it.

These principles are not applicable to the summary judgment. Insofar as it is not subject to the existence of submissions on the merits, the application made on the basis of Article L. 521-2 is autonomous in nature. As a result, even if an unrelated case is pending before a court of appeal or cassation, "this application can only be brought before the court with jurisdiction at first instance, which may be either an administrative court or the Council of State"¹⁴⁷⁶. This has two consequences concerning the lodging of an appeal on the basis of Article L. 521-2 of the Code of Administrative Justice. On the one hand, the plaintiff cannot act initially before the Council of State if the dispute does not fall within the jurisdiction of this court as a first and last resort. The fact that the Council of State, as a judge of cassation, hears a dispute that is not completely unrelated to the application does not make it possible to act directly before it by way of summary proceedings. On the other hand, the applicant can never act directly before an administrative court of appeal, even if proceedings not completely unrelated to the subject matter of the application are pending before that court¹⁴⁷⁷. In the *Bonny* case cited above, the applicant asked the interim relief judge of the Paris Administrative Court of Appeal to order the French Office for the Protection of Refugees and Stateless Persons to recognise him as a stateless person and the Prefect of Val d'Oise to issue him a residence permit. In application of the principles set out above, the Conseil d'Etat declared that the court did not have jurisdiction to hear these applications submitted on the basis of Article L. 521-2: the applications submitted by Mr Bonny "fell within the jurisdiction of an administrative court at first instance, even though they were related to proceedings pending before the Paris Administrative Court of Appeal".

354. Jurisdiction to hear an application for interim relief at first instance is therefore shared between the administrative courts and the Council of State. The determination of the competent court is assessed, once again, with regard to the main dispute, which may only be a possible one. The application must be brought before the court that would have jurisdiction in the first instance if an appeal on the merits were to be

the administrative courts. It therefore remained competent to rule, at first and last instance, on applications for a stay of execution which the courts could not hear (see CE, Ass., 23 July 1974, *Ferrandiz Gil Ortega, Lebon* p. 477). With this ruling, the Council of State thus created 'a singular dissociation of competences (or if one prefers, an unusual division of labour)' (R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd., Montchrestien, 2006, no. 1551) between the administrative courts and the Council of State: the former ruled on appeals for annulment referred to them; the Council of State on applications for a stay of execution of the decisions in question.

1474 D. LABETOUILLE, *op. cit.* p. 1121.

1475 D. LABETOUILLE, *op. cit.* p. 1122. It should be remembered that when this reform was adopted, the legislator had once again expressed a lack of confidence in the administrative courts, considering that they did not offer sufficient guarantees to those subject to legal proceedings (see *above*, § 19).

1476 CE, ord. 29 March 2002, *Bonny, Lebon* p. 119.

1477 It should be noted that the administrative court cannot hear an appeal against a summary judgment, since this is the responsibility of the judge responsible for summary proceedings at the Council of State. If an administrative court of appeal is wrongly seized of an appeal against an order made by a judge of the first instance, it must forward the appeal file to the Council of State's legal secretariat (see § 509 *below*).

lodged¹⁴⁷⁸. Thus, "a request for the implementation of the summary procedure instituted by Article L. 521-2 of the Code of Administrative Justice falls under the jurisdiction of the judge who has competence to hear either the action for annulment lodged against the administrative act contested in the framework of the summary procedure, or the action likely to be lodged following an action of the administration falling within the scope of the provisions of Article L. 521-2"¹⁴⁷⁹. In application of these principles, the interim relief judge of the Council of State intervenes only in cases usually falling within the first and last resort competence of the Council of State¹⁴⁸⁰. Failing this, the dispute is referred to the interim relief judge of the administrative court¹⁴⁸¹.

The case law again requires only a mere appearance of jurisdiction. Where the dispute is not manifestly insusceptible of being connected with the jurisdiction of the court seized, the simple possibility of the court's jurisdiction on the merits must benefit the applicant. On the other hand, where the dispute is manifestly not susceptible of being connected with the jurisdiction of the court seized, the judge of the *référé-liberté* must oppose his incompetence. However, he is not obliged to transmit this request to the competent judge. By way of derogation from the provisions of Title V of Book III of the Code of Administrative Justice, Article R. 522-8-1 provides that "the interim relief judge who intends to decline the jurisdiction of the court shall reject the conclusions referred to him by way of an order".

The rules concerning the jurisdiction of the summary judgment judge are of a relatively classic nature with regard to the principles usually governing contentious administrative procedure. On the other hand, in order to facilitate the introduction of the application for interim relief, particularly noteworthy adaptations have been made to the rules of reviewability.

Section 2. Facilitating the submission of applications

355. In order to enable the applicant for interim relief to apply to the administrative court without hindrance as soon as a serious infringement of a fundamental freedom occurs, the legislator has considerably relaxed the conditions of admissibility. While certain classic requirements have been maintained, others are assessed more flexibly in this context when they are not purely and simply set aside. As a result, "the *référé-liberté* is characterised by a significant liberalism in terms of admissibility"¹⁴⁸². Access to the court is considerably simplified and accelerated.

I. A simplification of the formalism in the presentation of the application

356. According to Article R. 522-1 of the Code of Administrative Justice, the judge of the *référé-liberté* is seized by means of a request. Article R. 522-3 provides that the application and the envelope containing it must be marked "référé"¹⁴⁸³. Compliance with this formality is not prescribed on pain of inadmissibility of the application, but is merely intended to draw the attention of the court registry to the presence of an urgent application for interim relief and to be treated as such¹⁴⁸⁴. Its omission exposes the applicant at most to the risk of a less rapid processing of his application, which he will not be able to complain about later.

357. The application must be reasoned. In accordance with the general rule of Article R. 411-1, it must contain a statement of the facts and means as well as the conclusions submitted to the judge¹⁴⁸⁵. More specifically,

¹⁴⁷⁸ The urgency does not justify derogating from the provisions usually governing the distribution of competences within the administrative jurisdiction: "the powers conferred on the judge of summary proceedings by Book V of the Code of Administrative Justice are exercised in compliance with the general rules of competence within the administrative jurisdiction" (CE, order 29 March 2002, *Bonny, Lebon* p. 119).

¹⁴⁷⁹ CE, ord. 11 April 2006, *Tefaarere, Lebon* p. 197.

¹⁴⁸⁰ CE, ord. 28 September 2001, *Caillat et autres*, n° 238534; CE, ord. 31 October 2001, *Syndicat CFTC des agents du Centre national de la fonction publique territoriale*, No. 239555.

¹⁴⁸¹ Thus, the interim relief judge of the Council of State is not competent to hear at first instance an application against an abstention by the director of the Centre national de la fonction publique territoriale (CE, ord. 31 October 2001, *Syndicat CFTC des agents du Centre national de la fonction publique territoriale*, No. 239555), an individual decision taken by a sports federation in the exercise of public authority (CE, ord. 28 September 2001, *Caillat et al.*, No. 238534; CE, ord. 19 December 2003, *Hypeau*, n° 262817), a measure by which the prefectural authority grants or refuses the assistance of the public force for the eviction of the occupants of a building (CE, ord. 18 July 2003, *S.A.R.L. Le Picadilly*, n° 258569) or the prefectural decree including a municipality in a community of municipalities (CE, ord. 24 February 2005, *Commune of Fugeret*, n° 277956).

¹⁴⁸² P. CASSIA, *Les référés administratifs d'urgence*, LGDJ, coll. Systèmes Droit, 2003, p. 44.

¹⁴⁸³ The same article traditionally provides that "where it is sent by post, it shall be sent by registered post".

¹⁴⁸⁴ Although the judge may note that an application does not bear the mention provided for by this provision (see, for example, CE, order of 8 August 2003, *Syndicat de la magistrature*, no. 259217), this absence is in no way sanctioned in terms of admissibility.

¹⁴⁸⁵ According to this provision, the application must also contain the elements necessary to identify the applicant (name and address).

Article R. 522-1 requires the applicant for interim relief to "justify the urgency of the case". In his application, the applicant must therefore put forward all the elements that justify the need to obtain the pronouncement of a safeguard measure in a very short time. In this respect, the reasoning of the application is of paramount importance, since it determines whether the application is referred to a public hearing or is immediately rejected by the screening procedure. Consequently, it is up to the applicant to submit a complete file to the judge of the *référé-liberté* as soon as the appeal is registered. The application must be accompanied by appropriate justifications and include an argument demonstrating the existence of manifest illegality, extreme urgency and a serious infringement of a fundamental freedom. The file must be complete as soon as the application is lodged; an applicant who reserves arguments for further proceedings risks an immediate rejection of his application without an investigation¹⁴⁸⁶.

358. In order to facilitate and accelerate the lodging of the application, the legislator wanted applications for interim relief to be free of any financial burden or constraint for the applicant. Consequently, applications submitted on the basis of Article L. 521-2 are not subject to any stamp duty and benefit from a general exemption from the ministry of a lawyer.

The exemption from stamp duty, provided for in Article L. 522-2 of the Code of Administrative Justice, was a notable feature of urgent summary proceedings when the Act of 30 June 2000 was adopted¹⁴⁸⁷. This specificity disappeared with the ordinance of 22 December 2003 abolishing the stamp duty formality for all litigation¹⁴⁸⁸.

On the other hand, the general exemption from the requirement to be represented by a lawyer is an exception, of which only the summary procedure for release is eligible. Only applications for a safeguard measure, because of the particular importance of speedy recourse to the judge in this area, have been exempted from the requirement to be represented by a lawyer¹⁴⁸⁹. The exemption is valid both before the court of first instance and before the appeal court. It does not, however, extend to appeals in cassation. When a case is referred to the interim relief judge of the Council of State at first and last instance or on appeal, applicants benefit from a free duty service provided by the *Ordre des avocats aux Conseils* (Bar Association) for the oral phase of the proceedings (and only from that time onwards)¹⁴⁹⁰.

Before the administrative courts or the Council of State, applications submitted without a lawyer sometimes require the judge to make an effort to interpret the applicant's conclusions. When the petitioner states that he or she is applying to the interim relief judge by way of a '*référé-liberté*', without indicating the legal basis for his or her application, the application must be considered as having been submitted on the basis of Article L. 521-2 of the Code of Administrative Justice¹⁴⁹¹. This power to interpret the terms of the application may not go so far as to distort the conclusions submitted. Thus, when an application is expressly based on Article L. 521-2 of the Code of Administrative Justice and invokes means based on the fact that the contested decision seriously and clearly illegally infringes a fundamental freedom, it must be considered as an application for interim relief, even though the applicant is simultaneously lodging an appeal on grounds of excess of power against this decision and is only asking the interim relief judge to suspend its execution¹⁴⁹². Similarly, the judge distorted the applicant's conclusions by

It must be in writing and signed by the applicant.

1486 See *infra*, §§ 404-410.

1487 The working group had stressed that the stamp duty formality provided for by Article 1089 B of the General Tax Code 'was incompatible with the extreme urgency that could mark certain applications' (Report of the Council of State working group on emergency procedures', *RFDA* 2000, p. 950). Following the example of the solution adopted in the case of border deportation orders (CE, Sect, avis, 18 February 1994, *Chabbi, Lebon* p. 80), the working group had proposed exempting applications submitted to the administrative judge in an emergency from stamp duty. The parliamentarians followed the working group's conclusions "with a view to avoiding any step likely to slow down the examination of the request for the pronouncement of emergency measures" (F. COLCOMBET, Rapport AN n° 2002, p. 54). The procedure for discharging this right appeared to be "incompatible with the rapid processing of emergency situations by the administrative judge" (R. GARREC, Senate Report, No. 380, p. 66).

1488 Ordinance no. 2003-1235 of 22 December 2003 was adopted as part of the law of 2 July 2003 empowering the Government to simplify the law, Article 3 of which provided that "all provisions likely to organise free access to administrative justice for those subject to the law" would be adopted by ordinance (cf. B. Pacteau, "Le contentieux administratif, affranchi du droit de timbre" (Administrative Litigation, freed from stamp duty), *RFDA* 2003, pp. 89-92). Establishing a "toll jurisdiction" (R. CHAPUS, *Droit du contentieux administratif*, 9^{ème} éd., Montchrestien, 2001, n° 613), the stamp duty was questionable in its very principle. It also represented a useless formality because it did not act as a deterrent (unlike the fine for abusive recourse under Article R. 741-12 or the obligation for the losing party to pay the costs incurred to the winner). This formality also had the disadvantage of unnecessarily overloading the court registries, which were obliged to send the applicant a request to regularise the application submitted without a stamp.

1489 The first paragraph of Article R. 522-5 provides that "applications for the interim relief judge to prescribe a measure pursuant to Article L. 521-2 are exempt from the requirement to be represented by a lawyer". Its second paragraph provides, in accordance with the consistent case law of the Conseil d'Etat (CE, Sect., 12 October 1956, *Saporta, Lebon* p. 366), that other applications benefit from such an exemption only if they are related to disputes for which this ministry is not compulsory. Thus, the summary proceedings are exempted from the ministry of lawyer only if the main action is itself exempted from this requirement.

1490 The system in place is well established. As soon as the judge has decided to put the application under investigation and to convene a hearing, the Bureau des référés informs the applicant by fax, telephone or e-mail that an *avocat aux Conseils* is available to represent him free of charge at the public hearing. If the applicant wishes to benefit from this service, he or she simply needs to contact the *Ordre des avocats aux Conseils*, which will put him or her in touch with a lawyer at the Council of State who will defend his or her interests for the rest of the proceedings and represent him or her at the summary hearing.

1491 CE, ord. 21 August 2004, *Rousselle*, n° 271370.

1492 CE, 4 February 2005, *Minister of the Interior, Internal Security and Local Freedoms v. Rezaï*, no. 270407. The Conseil d'Etat affirmed that

interpreting an application for annulment as an application based on Article L. 521-2, for the simple reason that this application bore the mention 'absolute urgency'¹⁴⁹³.

359. The Council of State has exempted the applicant from certain formalities beyond those provided for by the law when compliance with them was deemed incompatible with the requirement of speedy access to the courts.

The administrative judge thus exempted the applicants from the obligation laid down in Article L. 600-3 of the Town Planning Code to notify the author of the decision and the holder of the authorisation of appeals lodged against decisions relating to the occupation or use of land governed by the Town Planning Code¹⁴⁹⁴.

Similarly, the formalities concerning compulsory prior administrative appeals have been adapted to the urgency. Traditionally, case law seemed to distinguish between autonomous procedures and accessory procedures, exempting only the former from the formality¹⁴⁹⁵. Called upon to rule on the question in the context of Article L. 521-1, the Conseil d'Etat ruled that the interim suspension procedure is open with regard to the initial act, provided that the prior appeal has been lodged - an element which it is up to the applicant to prove - but without the need for it to have already given rise to a decision confirming or overturning - expressly or tacitly - the administration's initial position¹⁴⁹⁶. The exemption is *a fortiori* valid in the context of the référé-liberté insofar as this legal remedy has an autonomous character. The interim relief judge of the Council of State implicitly recognised the principle in the *Soltani* order of 10 February 2004¹⁴⁹⁷. Mr Soltani, a prisoner at the Villeneuve-lès-Maguelonne detention centre, was challenging a disciplinary sanction imposed on him by the regional director of the prison administration. However, it follows from Article D. 250-5 of the Code of Criminal Procedure that a prisoner wishing to bring a case before a judge concerning the legality of a disciplinary sanction must first file an administrative appeal with the regional director of prison services. Under the previous law, a stay of execution was inadmissible until the administration had ruled on the application¹⁴⁹⁸. In the *Soltani* decision, the interim relief judge of the Council of State did not oppose any inadmissibility, implicitly exempting the applicant from having to file an administrative appeal before filing an application for interim relief. The exemption from the requirement to file a prior administrative appeal in the case of interim relief was subsequently explicitly confirmed in an order of 26 July 2007. The case concerned tax litigation and, more specifically, the provisions of Article L. 281-1 of the Book of Tax Procedures, from which it follows that a taxpayer who intends to contest the recovery of taxes charged to him must, before bringing the matter before the tax judge, submit a claim to the competent head of department. In this order, the interim relief judge of the Conseil d'Etat states that these provisions "do not prevent the interim relief judge from being directly seized, on the basis of Article L. 521-2 of the Code of Administrative Justice *and in the absence of any claim* or appeal for annulment against the acts of prosecution taken with a view to this recovery, of a request for the pronouncement of one of the safeguard measures that this provision empowers him to take"¹⁴⁹⁹.

360. Finally, the flexibility of the summary application for interim relief is due to the autonomous nature of the action. Indeed, the summary judgment is not attached to a main action. It does not constitute an accessory to a legal action. Consequently, the plaintiff can act while no main action is being brought before the judge on the merits. As recalled in the *Bonny* order of 29 March 2002, "the admissibility of an application based on Article L. 521-2 is not subject to the existence of submissions on the merits"¹⁵⁰⁰. Consequently, an interim relief judge erred in law when he ruled that the submissions made on the basis of Article L. 521-2 were inadmissible because they were not preceded by an application on the merits¹⁵⁰¹.

the interim relief judge had distorted the conclusions by considering that the applicant had intended to refer the matter to him on the basis of Article L. 521-1 of the Administrative Justice Code.

1493 CE, 23 May 2001, *Bandoïn*, *Lebon T.* p. 1135.

1494 CE, 9 May 2001, *Delivet and Samzun*, concl. S. AUSTRY, obs. L. TOUVET, *BJDU* 2001/4, pp. 287-292. Under the previous law, it had been judged that the request for a stay of execution had to be the subject of this notification (CAA Nancy, 19 October 1995, *SCI du Rouillon*, *BJDU* 1995/6, p. 481, concl. PIETRI; CAA Lyon, 13 February 1996, *Bussaud and others*, *BJDU* 1996/1, p. 57, concl. GAILLETON). Considerations relating to the effectiveness of emergency procedures have justified the abandonment of this case law. The 15-day time limit provided for in Article L. 600-3 of the Urban Planning Code appeared to be incompatible with the obligation on the interim relief judge to rule 'as soon as possible' in the context of the interim suspension procedure, and within 48 hours in the case of the interim release procedure.

1495 The classic case law on summary proceedings allowed an applicant to refrain from complying with this obligation of compulsory prior appeal. However, the situation was different for the stay of execution: the judge declared the application inadmissible when the administration had not yet ruled on the prior appeal at the date of the ruling on the conclusions of the stay (CE, 25 February 1988, *Association le Foyer israélite*, *Lebon* p. 956).

1496 CE, Sect. 12 October 2001, *Société des Produits Roche*, *Lebon* p. 463. Here again, considerations relating to the useful effect of the procedures have justified abandoning the traditional case law. Indeed, since the public authority has a period of time, often quite long, to examine the administrative appeal addressed to it, and since the latter has no suspensive effect, maintaining the previous solution would have reduced or eliminated the very usefulness of an application for interim relief in these cases.

1497 CE, ord. 10 February 2004, *Minister of Justice v Soltani*, No 264182, *JCP G* 2004, 10125, note E. MASSAT.

1498 CE, opinion 29 December 1999, *Lebouche*, *Lebon* p. 426.

1499 CE, ord. 26 July 2007, *Renoult*, n° 307710.

1500 CE, ord. 29 March 2002, *Bonny*, *Lebon* p. 119.

1501 CE, 4 February 2005, *Zairi*, n° 267723.

II. Admissibility rules concerning the applicant and the time limit for action

361. The rules of admissibility concerning the applicant and the time limit for taking action are subject to contrasting assessments. The interest in acting is assessed in the classic way in relation to ordinary proceedings, i.e. broadly. The rules of representation are applied with the same liberalism as in other summary proceedings. On the other hand, the judge in summary proceedings shows great flexibility in assessing the time limit for taking action.

A. A classic assessment of the interest to act

362. In order to have direct access to the court, it is essential that the victim of an infringement be able to initiate proceedings to protect his or her freedoms. This requirement implies that the functions of beneficiary and holder of fundamental freedoms are combined in his hands. According to a commonly accepted presentation, the "beneficiary" is the person to whom a norm of fundamental freedom is attributed, and the "holder" is the person or body empowered to bring an action before the judicial body responsible for sanctioning its violation. As Mr Pfersmann has pointed out, these two functions "are conceptually distinct and a wide variety of articulations between them are conceivable (...)"¹⁵⁰². While their combination is desirable, it is not systematic. Indeed, these two functions are sometimes strictly dissociated in procedures for the protection of liberties. Thus, in the context of *déféré-liberté*, the triggering of the control is entrusted to the prefectural authority and depends on its sole initiative. Individuals have never been recognised as having an interest in acting in this procedure¹⁵⁰³. Conversely, the functions of beneficiary and holder are combined in the procedure of Article L. 521-2, thus giving individuals the means to take the initiative themselves to protect themselves against liberticidal administrative actions. However, the requirement of an interest in acting does not disappear.

In fact, in summary proceedings as in other contentious procedures, the applicant must show an interest in acting¹⁵⁰⁴. He or she must justify an interest in asking the judge for a safeguard measure. As if he or she were filing an appeal on the merits, the applicant must assert a direct and personal interest giving him or her standing to act. The court ensures that this requirement is met by checking whether the applicant can be affected by the effects of the act or behaviour he or she is criticising. If not, the application is not admissible. Thus, the judge considers that a person who does not reside in the departments concerned by the state of emergency is not affected by the effects of this measure and, consequently, lacks an interest in acting¹⁵⁰⁵. Only those who are affected by the disputed act or behaviour may apply to the interim relief judge.

363. Without being, by hypothesis, directly and personally affected by the effects of an administrative act, the representative of the State may nevertheless have an interest in referring to the administrative judge the acts

1502 L. FAVOREU et alii, *Droit des libertés fondamentales*, 3^{ème} éd, Dalloz, coll. Précis, 2005, n° 114.

1503 In this respect, the *déféré-liberté* is a recourse that can be described as 'closed'. The prefect alone is empowered to refer the act and to accompany his request with an application for *déféré-liberté*: 'it is up to the representative of the State to implement the procedure provided for (...) either *proprio motu*, or on referral by the natural or legal person who considers himself to be injured' (TA Versailles, ord. 1^{er} April 1982, *Wantiez, Lebon* p. 480; CE, ord. 22 November 1984, *Lebon* p. 382). In its wording resulting from the law of 8 February 1995, article L. 27 of the code of administrative courts and administrative courts of appeal seemed to extend the benefit of this procedure to private individuals (see, interpreting this provision in this sense: R. CHAPUS, *Droit du contentieux administratif*, 7^{ème} éd, Montchrestien, 1998, p. 1025; D. CHABANOL, "Un printemps procédural pour la juridiction administrative?", *AJDA* 1995, p. 388; P. ROLLAND, *La protection des libertés en France*, Dalloz, coll. Connaissance du droit, 1995, p. 89). However, placed in the context of the Act of 2 March 1982 to which it refers, Article L. 27 was not interpreted by the president of the Administrative Jurisdiction Division as giving individuals access to this procedure. Referring to the preparatory works, the president of the Administrative Jurisdiction Division affirmed that in codifying this provision, the legislator had in no way intended to extend its scope of application to ordinary citizens (CE, ord. 8 June 1995, *Hoarau, AJDA* 1995, p. 508, chronic. J.-H. STAHL and D. CHAUVAUUX). Thus, private individuals do not have access to the *déféré-liberté* judge; they can only ask the prefect to exercise a *déféré* and to accompany it with a request on the basis of article 2131-6 al. 5 of the general code of territorial communities. In the event of the prefect's refusal, no legal recourse is available to the constituent. The decision to refer is a matter for the sovereign power of appreciation of the authority which is in charge of it and, consequently, cannot be contested before the administrative judge (CE, Sect., 25 January 1991, *Brasseur, Lebon* p. 23, concl. B. STIRN).

1504 As M. Chapus reminds us, "The requirement of an interest giving standing to act is at the very top of the list of conditions of admissibility" and "There is no need, in this respect, to distinguish according to the nature of the dispute" (R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd., Montchrestien, 2006, n° 563).

1505 CE, ord. 9 December 2005, *Allouache and others, Lebon* p. 562. In a petition filed on the basis of Article L. 521-2 of the Administrative Justice Code, several applicants, including Mr Julien-Laferrière, asked the interim relief judge of the Council of State to order the suspension of the state of emergency or, failing that, to enjoin the President of the Republic to issue a decree putting an end to the measure. The interim relief judge affirmed "that however broad the interest may be in challenging before the administrative judge the measures deciding to apply the state of emergency regime to a given territory, as well as subsequent decisions having an impact on the maintenance in force of this regime, a person who, on the date of referral to the judge, does not usually reside within the geographical area of application of the provisions relating to the state of emergency, does not justify a sufficient interest in challenging its maintenance in force; it follows that M. Julien-Laferrière, a professor at the University of Paris Sud, on secondment abroad for a period exceeding the date on which the state of emergency came into effect as provided for by the law, does not have sufficient interest to bring the matter before the interim relief judge of the Council of State in this case.

of the decentralised authorities that seriously infringe liberties. The question arose as to whether this interest could give him standing to act under Article L. 521-2 of the Administrative Justice Code.

It is clear that the parliamentarians wanted, at the insistence of the Senate, to exclude this possibility. While the bill expressly provided for the possibility for the State representative to refer a request for interim relief to the interim relief judge, the senators wanted, and obtained, the deletion of this provision. The text presented by the government recognised the possibility for the prefect to submit a request on this basis when the infringement of a fundamental freedom was "caused by a local authority or a local public establishment". This wording was deleted by the Senate at first reading, on the proposal of its rapporteur. Two arguments were put forward by Mr Garrec¹⁵⁰⁶. On the one hand, the intervention of the State representative, even in a subsidiary capacity, was deemed unnecessary since the victims of a serious and manifestly illegal infringement of a fundamental freedom would not fail to have recourse to the interim relief judge on their own initiative. On the other hand, echoing the concerns expressed by local elected officials, Mr. Garrec maintained that opening up summary proceedings to the prefect risked considerably increasing the control exercised by the latter over the decentralised authorities, to the point of upsetting the institutional balance established by the Act of 2 March 1982. At the request of the government, the deputies reinstated the prefect's recourse by putting forward three considerations: firstly, the constitutional mission of administrative control of territorial authorities entrusted to the prefect by Article 72 of the Constitution; secondly, the fact that the référé-liberté would not 'duplicate' the déféré-liberté already available to the prefect. Finally, the Minister of Justice added, 'It would be paradoxical for the prefect, who fulfils a mission of general interest, not to have an instrument open to private individuals'¹⁵⁰⁷. With each assembly holding to its own position¹⁵⁰⁸, the joint committee was to meet to resolve the divergence, and in the end the deputies bowed to the Senate's determination¹⁵⁰⁹.

However, the text finally adopted does not expressly exclude the prefect's interest in acting. As Mr Marcou points out, the law 'does not establish a link between the status of author of the application addressed to the judge and that of victim of the infringement of a fundamental freedom'¹⁵¹⁰. Consequently, the administrative judge was able, without betraying the letter of Article L. 521-2, to recognise the prefect's interest in acting in matters of summary proceedings. It was in the order of 20 July 2001, *Commune de Mandelieu-la-Napoule*, that the Conseil d'Etat's interim relief judge was called upon to rule for the first time on this issue. The appellant municipality argued that the existence of the déféré-liberté was an obstacle to the introduction of a request by the prefect by way of Article L. 521-2. The interim relief judge did not raise any inadmissibility and agreed to hear the appeal submitted by the State representative on this basis. In so doing, the Council of State's judge of summary proceedings "has for the first time implicitly accepted that the prefect may file a summary application against an act of a local authority"¹⁵¹¹. In the silence of the text, the representative of the State does have an interest giving him the right to act under the référé-liberté procedure. The interim relief judge does not discriminate according to the status of the applicant. The prefect may, as would an ordinary litigant, bring an application for interim relief - but only, in view of the status of its author, against acts of local authorities and their public establishments.

364. Finally, it should be noted that the extreme speed with which the judge rules does not in any way prevent interventions by third parties. In application of the criteria set out in the general law of administrative litigation, the intervener must justify an interest in having the conclusions of the author of the appeal granted¹⁵¹² or, on the contrary, in having them rejected¹⁵¹³. In order to be admissible, an intervention must contain submissions by which the intervener joins in those made by one or other of the parties to the proceedings. The intervention cannot be admitted where the person concerned merely endorses the pleas in the application without associating himself, before the hearing is closed, with the submissions of one of the parties¹⁵¹⁴.

1506 See R. GARREC, Senate Report No. 380, pp. 55-56; *JO déb. Sénat*, CR séance 8 juin 1999, p. 3741 and p. 3754.

1507 E. GUIGOU, *JO déb. AN*, CR session 14 December 1999, p. 10942.

1508 The Senate again removes the prefect's interest in acting (*JO déb. Sénat*, CR séance 22 February 2000, p. 869); the National Assembly reinstates the provision in its initial wording (*JO déb. AN*, CR séance 6 April 2000, pp. 3161-3162).

1509 See F. COLCOMBET and R. GARREC, Report n° 2460 (National Assembly) and n° 396 (Senate), p. 4.

1510 G. MARCOU, "Le référé administratif et les collectivités territoriales", *LPA* 14 May 2001, n° 95, p. 44.

1511 P. CASSIA and A. BEAL, "Les nouveaux référés administratifs. Bilan de jurisprudence (1^{er} March-31 August 2001)", *JCP G* 2001, I, 365, p. 2192.

1512 The judge of the référé-liberté thus admits the intervention of associations whose object is the respect and defence of the right of foreigners, such as the GISTI (CE, ord. 12 January 2001, *Hyacinthe, Lebon* p. 12) or the Tiberius Claudius association (CE, ord. 10 April 2001, *Merzouk, Lebon* T. p. 1135; CE, ord. 25 November 2003, *Ministre de l'Intérieur, de la Sécurité intérieure et des Libertés locales c/ M. Nikoghosyan, Lebon* T. p. 927; CE, 15 July 2004, *Doudaev*, n° 265822). In the *Stéphaur* decision, the Conseil d'Etat accepted the intervention of the Confédération générale du logement-Fédération départementale des Bouches-du-Rhône, whose social purpose is to defend tenants (CE, 29 March 2002, *SCI Stéphaur et autres, Lebon* p. 117). On the intervention of the Air Lib works council, see CE, ord. 10 February 2003, *Société d'exploitation AOM-Air-liberté*, n° 254029.

1513 See for example CE, ord. 9 December 2005, *Allouache et al.* In view of the fact that Mr Bidalou is a citizen domiciled in a department that has experienced urban violence, the purpose of which is to put an end to the state of emergency, he has an interest in having his intervention admitted.

1514 CE, ord. 9 December 2005, *Allouache and others, Lebon* p. 562; CE, ord. 11 April 2006, *Tefaarere, Lebon* p. 197.

B. A liberal assessment of the representation rules

365. In urgent summary proceedings, the administrative judge applies with a certain liberalism the rules relating to the representation of legal persons. In proceedings on the merits, applicants representing a legal person are in principle required to produce authorisation to act on behalf of the legal person in accordance with the rules laid down by law or by the statute of the legal person. These rules are applied with less rigour in urgent summary proceedings. In view of the nature of these actions, the Council of State allows the representative of a legal person to take part in the proceedings without prior authorisation by the deliberative body. Thus, the mayor may submit an application for interim relief on behalf of his municipality even if he has not obtained an authorisation to act from his municipal council¹⁵¹⁵. The president of a general council may bring an action on behalf of the department without having to seek authorisation from the deliberative assembly¹⁵¹⁶. The same principles apply to applications by legal persons under private law. In view of the special features of the summary procedure, appeals may be lodged by representatives of the applicant legal persons without deliberation by their collegiate bodies¹⁵¹⁷.
366. The liberalism that characterises the assessment of the rules of representation nevertheless has irreducible limits. The interim relief judge cannot disregard the best established principles of legal representation. With regard to the representation of natural persons, the judge thus recalled that the sole status of partner in a civil solidarity pact does not confer a mandate to act on behalf of the son of his partner¹⁵¹⁸. With regard to the representation of the State before the administrative courts, it was ruled, in accordance with previous case law¹⁵¹⁹, that the provisions relating to the representation of the State by ministers were applicable to summary proceedings. As a result, the prefect is not entitled to represent him before the Council of State. The appeal lodged by the representative of the State is inadmissible when the Minister of the Interior, having been informed of its introduction, did not appropriate the terms¹⁵²⁰. Lastly, it should be noted that, on a more anecdotal basis, the interim relief judge of the Strasbourg administrative court declared inadmissible a request for interim relief "insofar as it was presented in the name and on behalf of the dog Kaya", specifying that "only natural or legal persons may take legal action"¹⁵²¹. As animals do not have legal personality, their owners must act in their personal name.

C. A flexible assessment of the time limit for action

1515 CE, Sect. 18 January 2001, *Morbelli, maire de la Commune de Venelles*, *Lebon* p. 18. Mr Morbelli wished to appeal against the order of the interim relief judge of the administrative court of Marseilles, which had ordered him to convene his municipal council to discuss issues relating to intercommunality. The mayor had no standing to appeal in his personal name, and he appeared to be inadmissible to act in the name of the municipality: the general authorisation to act in justice that had been given to him by the municipal council on the basis of Article L. 2122-22, 16° of the General Code of Territorial Authorities had been abrogated on 10 July 2000 and he could not claim any specific authorisation. The Conseil d'Etat nevertheless accepted his appeal. After citing the text of Articles L. 521-2 and L. 523-1 of the Code of Administrative Justice, the Division based this solution on the nature of this procedure and the brevity of the appeal period. The Council thus highlights, on the one hand, "the very nature of the summary proceedings opened up by the aforementioned provisions of the Code of Administrative Justice, which can only be brought in cases of urgency and, by virtue of Article L. 511-1 of the same code, only allow measures of a provisional nature to be taken"; on the other hand, "the brevity of the time limit for bringing an appeal to the Council of State against an order made on the basis of these provisions". See, in the same sense: CE, ord. 22 May 2003, *Commune de Théoule-sur-Mer*, *Lebon* p. 232: "having regard to the characteristics of the summary procedure, the mayor is entitled to appeal against a summary order in the name of the commune, without having to justify an authorisation by the municipal council". Under the previous law, the Council of State had considered that "it results from the very nature of the summary proceedings, which can only be brought in cases of urgency and which cannot prejudice the principal", that the mayor could act notwithstanding the absence of authorisation from the municipal council (CE, Sect., 28 November 1980, *Ville de Paris c/ Etablissements Roth*, *Lebon* p. 446, concl. J.-P. COSTA).

1516 CE, ord. 29 April 2004, *Département du Var*, n° 266902.

1517 CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL)*, *Lebon* p. 311. The judge of the summary suspension has also admitted that the president of an association could act on the authorisation of the board of directors, even though under the statutes, only a deliberation of the general assembly could give this authorisation (CE, 13 November 2002, *Association Alliance pour les droits de la vie*, *Lebon* p. 393, *AJDA* 2002, pp. 1506-1512, concl. D. CHAUVAUX).

1518 CE, ord. 11 February 2003, *Maillot*, *Lebon* T. p. 914.

1519 CE, 14 February 1964, *Société anonyme Produits chimiques Péchiney Saint-Gobain*, *Lebon* p. 112.

1520 CE, ord. 7 May 2003, *Préfet de l'Hérault*, n° 256208. On the other hand, inadmissibility is covered when the Minister of the Interior appropriates the appeal petition filed by the prefect (CE, ord. 26 April 2005, *Minister of the Interior, Internal Security and Local Freedoms c/ M'LAMALI*, *Lebon* T. p. 1034).

1521 TA Strasbourg, ord. 23 March 2002, *Welsch*, n° 0201013, cited by P. CASSIA, "Le chien dans l'espace public municipal" (1^{ère} partie), *LPA* 12 August 2003, p. 9, note 137 (concerning the euthanasia of the animal).

367. Article R. 421-1 of the Code of Administrative Justice provides that "Except in matters of public works, the court may only be seized by way of appeal against a *decision*, and this within *two months of the notification or publication of the contested decision*"¹⁵²². Does the requirement to lodge an appeal within two months apply to applications lodged on the basis of Article L. 521-2 of the Code of Administrative Justice? Insofar as the judge of the *référé-liberté* is the judge of situations, and not the judge of acts, three hypotheses must be distinguished.
368. The first hypothesis concerns appeals against *conduct of the administrative authority* in the absence of a prior decision. Insofar as Article R. 421-1 of the Code of Administrative Justice refers only to appeals against "decisions", this type of application does not fall within the scope of this provision and, consequently, the appeal may be lodged without any time limit. The interim relief judge of the Council of State accepted the principle as early as the *Marcel* order of 2 April 2001. In a petition registered at the registry of the Marseille administrative court on 7 March 2001, the applicants challenged the withdrawal of an identity document on 7 November 2000, against which no proceedings on the merits had been brought before the administrative court. The applicants waited more than two months after the summary procedure came into force to challenge the effects of this action. Neither the judge of the first instance¹⁵²³ nor the judge of appeal¹⁵²⁴ saw this as a ground for inadmissibility. The admissibility of the request was not contested by the administration.
369. The second hypothesis is more delicate; it concerns appeals against *a situation arising from a decision* and, more precisely, from a refusal decision. On the one hand, the situation at issue does not appear to be independent of the decision in question. On the other hand, the applicant is not formally challenging an administrative decision and, in this respect, seems to escape the rule of Article R. 421-1 of the Code of Administrative Justice. Favoursing this second consideration, the case law is moving towards admitting the admissibility of the appeal despite the expiry of the time limit for contentious appeal. The *La Cour des miracles* order of 16 September 2002 provides an interesting illustration in this respect. By a decision dated 1^{er} February 2002, the mayor of the municipality had refused to allow the restaurant owner to install a terrace on the public domain. In the absence of an appeal, this decision became final at the end of the two-month period following its notification. By a request presented to the judge of the *référé-liberté* of the administrative court of Montpellier at the beginning of August 2002, the restaurant asked that the municipality of Collioure be enjoined to authorise the installation of the said terrace. It should be noted that the request was not made against the refusal of 1^{er} February 2002 but, more generally, against a specific situation resulting from the failure to issue a permit. The judge of the summary proceedings of the administrative court of Montpellier did not rule that the application was inadmissible and called the parties to a public hearing. The judge of appeal for the interim relief order did not raise any further objections to admissibility and examined whether the conditions for granting permission had been met. When examining the condition of infringement of a fundamental freedom, he observed incidentally that the applicant company "did not challenge in due time, before the judge of excess of power, the refusal of its request of 1^{er} February 2002 to be authorised to install such a terrace". Nevertheless, he does not consider this long delay as a reason for inadmissibility: the request is rejected as ill-founded, and not as inadmissible¹⁵²⁵. It therefore seems possible to deduce from this order that an appeal against a situation arising from a decision is not bound by any time limit.
370. The third and final hypothesis concerns appeals against *a specific decision*. The case law on this point has been evolving.

Initially, the interim relief judge intended to apply Article R. 421-1 in this regard. The *Zbary* judgment seemed to implicitly enshrine this solution. However, the reasoning used by the Conseil d'Etat did not make it possible to determine with certainty whether the inadmissibility of the applicant in this case resulted from the exclusive nature of the procedure under Article 22 bis of the Ordinance of 2 November 1945 on deportation or from the fact that the time limit for appeal had been exceeded¹⁵²⁶. A clearer solution was adopted in an order of 20 March 2003, relating to an expulsion order contested by means of the *référé-liberté* procedure. During the hearing of 10 March 2003, the interim relief judge of the administrative court of Nice informed the parties that a plea relating to the lateness of the application could be raised *ex officio*. After inviting the parties' observations, the interim relief judge based his decision on the fact that the order of 25 September 2002 ordering the applicant's expulsion had been notified to him on 28 November 2002 and had become final in the absence of any challenge within the time limit for contentious appeal. The applicant appealed against this rejection order to the interim relief judge of the Council of State. The latter confirmed the order of the first judge and rejected the appeal request according to the sorting

1522 See Y. PITARD, "Introduction de l'instance. Délais", *Jel. Justice administrative*, fasc. 43 (2002). It should be noted that the judge of the assault does not lock the exercise of an action in any time limit. The judge of the *déféré-liberté* can also be seized without condition of time, but it is necessary that the appeal on the merits on which it is grafted was introduced within the time limit of contentious appeal. As this is an accessory appeal, its regime is in fact conditioned by the rules applicable to the main proceedings. A *déféré-liberté* lodged after the time limit for contentious appeal has expired, and in the absence of an appeal lodged within this time limit, is therefore inadmissible.

1523 TA Marseille, order of 9 March 2001, *Consorts Marcel*, n° 0101294.

1524 CE, ord. 2 April 2001, *Ministre de l'Intérieur c/ Consorts Marcel, Lebon* p. 167.

1525 CE, ord. 16 September 2002, *Société EURL La Cour des miracles, Lebon* T. p. 314.

1526 On this decision, see *infra*, § 375.

procedure of Article L. 522-31527 . Case law has thus established the obligation to act within two months of notification or publication when the applicant for interim relief challenges a specific decision.

However, this solution was later abandoned. The reversal resulted from an order of 7 July 2007, *Aslantas*¹⁵²⁸ . Admittedly, this order does not concern the time limit for appeal under ordinary law, but the special time limit provided for in the litigation of refusals of residence accompanied by an obligation to leave French territory (OQTF)¹⁵²⁹ . However, the formula used by the interim relief judge is sufficiently broad to give this solution a general scope and make it applicable to any application submitted on the basis of Article L. 521-2. In this case, the applicant was refused residence with an obligation to leave French territory within one month, by decision of the Prefect of Oise dated 9 January 2007. This decision was notified to the interested party on 24 January 2007. However, the latter did not exercise her right under Article L. 512-1 of the Code on the Entry and Stay of Foreigners and the Right to Asylum to request the annulment of the decision. Arrested on 14 June 2007, she was placed in detention with a view to enforcing the prefectural decision and applied to the interim relief judge of the Amiens administrative court. In rejecting the application before him, the judge decided that, since the interested party had been notified of the order on 24 January 2007, she was too late to request its suspension. The interim relief judge of the Council of State, hearing the appeal, stated that in rejecting the application as inadmissible, the first judge had erred in law. Using a general formula, he declared that a foreigner who has not applied, within the time limit for appeal that is open to him under Article L. 512-1 of the Code on the Entry and Residence of Foreigners and the Right to Asylum, the annulment of the decision to leave French territory within a period of one month, "cannot, by this very fact, be deemed inadmissible as late when, placed in detention with a view to the automatic enforcement of the decision, he or she applies to the administrative interim relief judge, ruling on the basis of Article L. 521-2 of the Administrative Justice Code, the suspension of this decision, since *his application for interim relief is not subject to the condition that the decision he is contesting should have been previously referred to the annulment judge, nor to a time limit*. As a result, no time limit for appeal can be validly set against the author of an application for interim relief¹⁵³⁰ . The general rule of Article R. 421-1 of the Code of Administrative Justice is set aside for appeals lodged on this basis.

III. A coherent articulation with other court proceedings

371. In the event of an administrative infringement of a fundamental freedom, the individual has several jurisdictional mechanisms at his or her disposal to combat the prejudicial effects of the acts and actions of the public authorities. The *référé-liberté* is one of these mechanisms, but other procedures can also be used in this case, even if their primary and exclusive purpose is not to safeguard fundamental freedoms. How, then, is the coexistence between the procedure of Article L. 521-2 and the other legal remedies available against a given act or behaviour organised?

Generally speaking, several combinations are possible in the event of concurrent actions between the same parties¹⁵³¹ . As these are rarely defined by the law, it is most often up to the judge to organise the modalities. Three solutions are then conceivable: accumulation, option or hierarchy. Firstly, the judge may allow the accumulation of actions. In this case, the judge authorises the claimant to claim the benefit of several actions simultaneously. The judge may also impose an option on the claimant, either by forcing the claimant to choose between the various procedures available to him or by requiring him to use the most suitable procedure. Finally, the judge may allow the claimant to make one of the actions subsidiary. In this case, although the claimant brings several actions at the same time, he does not ask for each of them to be granted, but only for them to be admitted alternatively¹⁵³² .

With regard to the *référé-liberté*, the Conseil d'Etat has excluded the latter possibility: it does not recognise the possibility for the applicant to present alternative conclusions. On the other hand, it does not in principle impose any option between the remedies. The Council of State has rejected the principle of a "parallel summary proceedings exception"¹⁵³³ and has accepted the possibility of combining a summary proceedings procedure with another legal action. This principle only applies in the specific case where the said action has suspensive effect as

1527 CE, order 20 March 2003, *Sabli*, n° 255216.

1528 CE, order. 7 July 2007, *Aslantas*, n° 307133.

1529 Time limit set at one month by Article 512-1 of the Code on the Entry and Residence of Foreigners and the Right of Asylum.

1530 At least in terms of admissibility. On the other hand, at the stage of examining the conditions of granting, a delay in acting will most often be sanctioned as revealing a lack of urgency (see *supra*, § 312).

1531 As Mrs Bussy-Arnaud indicates, two elements characterise the concurrence of legal actions between the same parties: on the one hand, the actions in question arise from the same factual situation; on the other hand, they oppose the same plaintiff to the same defendant (F. BUSSY-DUNAUD, *Le concours d'actions en justice entre les mêmes parties. L'étendue de la faculté de choix du plaideur*, LGDJ, coll. BDprivé, t. 201, 1988, spe. p. 32). In administrative litigation, such a situation arises when a given act or action can be challenged by the litigant by means of different procedures.

1532 This last hypothesis constitutes an intermediate position between cumulation and option: it is close to cumulation in that the claimant simultaneously implements different actions, but differs from it in that the examination of one is conditional on the rejection of the other, so that they cannot be accepted simultaneously.

1533 See P. YOLKA, "Vers une exception de référé parallèle?", *AJDA* 2004, p. 57.

of right. The Council of State also allows an applicant to lodge several appeals simultaneously; the only requirement is that each of these appeals must be lodged in a separate application.

A. The limited scope of the parallel remedy exception

372. When a procedure has been specially made available to litigants to combat the effects of a certain act or behaviour, the summary proceedings procedure is not closed to them. The administrative judge has excluded in principle the application of the mechanism of the exception of parallel recourse in matters of summary proceedings¹⁵³⁴. This is only applicable in the case of an appeal to which the law automatically attaches a suspensive effect.

1. The principle: the right to cumulate

373. It follows from the case law rendered on the basis of Article L. 521-2 that a *référé-liberté* may be initiated even though the applicant has a specific procedure for challenging the effects of a given act or conduct.

Thus, despite the existence of the summary suspension procedure, specially instituted to obtain the suspension of the execution of administrative decisions, the applicant may seek and obtain the pronouncement of this measure on the basis of Article L. 521-2 of the Administrative Justice Code. As early as the *Djalout* order of 27 March 2001, the interim relief judge of the Council of State admitted that the interim relief procedure could be used to obtain a suspension measure despite the existence of the procedure under Article L. 521-1. The solution is based on the distinct nature of the summary suspension procedure compared to the summary release procedure. In a recital of principle, the interim relief judge of the Council of State states "that the procedure governed by Article L. 521-2 of the aforementioned Code is *distinct from that instituted by Article L. 521-1* of the same code, which allows the author of an appeal for annulment or reversal of an administrative decision to ask the interim relief judge to suspend the execution of this decision, or of some of its effects, when this is justified by urgency and when a plea is made that creates, in the state of the investigation, a serious doubt as to the legality of the decision". He deduced "that Article L. 521-2 can thus be implemented, even though the applicant could just as easily bring an action under Article L. 521-1"¹⁵³⁵. The possibility that an application for suspension may succeed under the specific procedure of Article L. 521-1 does not prevent the use of the more difficult procedure of *référé-liberté*.

Similarly, and notwithstanding the procedure specially opened to him by Articles L. 911-4 and L. 911-5 of the Code of Administrative Justice, the petitioner is admissible to challenge by way of summary proceedings the total or partial non-enforcement of a decision rendered by an administrative court. The principle was accepted in the *Kaigisiz* order of 8 November 2001¹⁵³⁶. In support of a particularly explicit wording, the interim relief judge confirmed in a subsequent order that if the non-execution of a decision "is normally governed by Articles L. 911-4 and L. 911-5 of the Administrative Justice Code, it is possible that the court will not be able to enforce it. 911-5 of the Code of Administrative Justice, the existence of these procedures does not, in itself, prevent the interested party from submitting to the interim relief judge a request that he order an emergency measure on the basis of Article L. 521-2 of the Code of Administrative Justice, provided that all the conditions laid down by this text for its implementation are met"¹⁵³⁷.

Lastly, there is nothing to prevent the application of the *référé-liberté* in contractual matters. As the Council of State has rejected the principle of the exception of parallel recourse in summary proceedings, the existence of the pre-contractual summary proceedings does not represent an obstacle to the introduction of an application on the basis of Article L. 521-2 of the Administrative Justice Code. There is nothing to prevent the use of the *référé-liberté* at the stage of the award of the contract and at the stage of its performance. During the award of the contract, a company that has been excluded from the procedure could usefully invoke an infringement of free competition. The interim relief judge accepted the principle in an order dated 12 April 2006¹⁵³⁸. The company

1534 When applied by the judge, the concept of the exception of parallel recourse leads to the refusal to accept the recourse of a litigant who has a specific legal remedy enabling him to obtain at least equivalent, if not identical, satisfaction (see J. TERCINET, "Le retour de l'exception de recours parallèle", *RFDA* 1993, pp. 705-720).

1535 CE, ord. 27 March 2001, *Ministre de l'Intérieur c/ Djalout*, *Lebon* p. 158.

1536 CE, ord. 8 November 2001, *Kaigisiz*, *Lebon* p. 545.

1537 CE, ord. 9 January 2006, *Ministre d'Etat, ministre de l'Intérieur et de l'aménagement du territoire c/ Daaji*, n° 288745, mentioned in the *Recueil Lebon*. Article L. 521-2 can thus be used to obtain proper enforcement of a decision handed down by the administrative court. Within the limits of the powers of the judge of the *référé-liberté*, the measures requested may be identical to those that would be part of an application for the enforcement of a judicial decision.

1538 CE, ord. 12 April 2006, *Société Pau Loisirs*, n° 292255.

Pau Loisirs, which operated the municipal casino in Pau, saw its application rejected in favour of a competing company during the renewal of the contract to operate the establishment. Alleging an infringement of the freedom of enterprise, the applicant company asked the interim relief judge to suspend the new operating contracts. The application was not inadmissible at first instance or on appeal. Although the interim relief judge of the Council of State rejected the request for lack of urgency, he nevertheless accepted in principle the use of the interim relief procedure in this matter. This procedure could also be used at the stage of contract execution. As President Vandermeeren points out, "it is difficult to see, for example, what principle would prohibit the holder of a public contract from making a useful application for interim relief against a decision of the contracting public authority imposing penalties that are manifestly unjustified and the size of which would seriously affect the cash flow, if not the survival, of the company"¹⁵³⁹. In general, the doctrine is unanimous in recognising the possibility of implementing the summary procedure in contractual matters¹⁵⁴⁰.

In principle, the existence of a special legal remedy does not prevent the exercise of a *référé-liberté*. However, this is not the case when the law has attached a suspensive effect to this appeal.

2. The exception: the obligation to use the suspensive appeal

374. The mechanism of the exception of parallel recourse finds application in the very precise hypothesis in which the recourse specially instituted by the law benefits from a suspensive effect. In such a case, the lodging of the appeal is sufficient in itself to obtain as of right the suspension of the effects of the contested act. Insofar as this legal remedy is very advantageous for the applicant, it exhausts his possibilities of addressing the judge to assert his claims. Consequently, the applicant is denied access to the summary proceedings and is obliged to use the remedy of suspensive effect. The interim relief judge has expressly affirmed this principle with regard to prefectoral deportation orders¹⁵⁴¹.

375. After initially reserving the question¹⁵⁴², the interim relief judge then expressly excluded the application of the interim relief procedure in border deportation cases¹⁵⁴³. This solution is based on the characteristics of the procedure provided for in Article 22 bis of the Order of 2 November 1945 and, in particular, the suspensive effect of the appeal. Indeed, article 22 bis organises a specific channel for challenging deportation orders; "the existence of this specific channel of appeal, with the suspensive effect attached to it, prevents a deportation decision from being the subject of a request for suspension before the interim relief judge, either on the basis of article L. 521-1 of the Code of Administrative Justice or under the specific protection procedure instituted by article L. 521-2 of this code"¹⁵⁴⁴. The exclusion concerns both the deportation order and the measures by which it is enforced. In the latter case, it is only if there is a change in the legal or factual circumstances between the deportation decision and its enforcement that the person concerned can usefully take action by way of summary proceedings. The interim relief judge very clearly summarised the applicable principles in a *Bondo* order of 14 January 2005. He declared that a deportation order "is not in principle subject to the summary proceedings instituted by Book V of the Code of Administrative Justice". In the event that the judge is seized simultaneously of submissions against the deportation order and submissions against the separate decision determining the country of return, this rule applies to the deportation order as well as to the separate decision determining the country of return. However, "the particular mechanism for challenging a deportation order as described does not prevent the intervention of the interim relief judge in cases where the measures by which such an order is enforced have effects which, due to changes in the legal or factual circumstances since the order was issued, exceed the framework normally involved in its enforcement"¹⁵⁴⁵.

If there are no changes in the legal or factual circumstances since the order deciding on the applicant's

1539 R. VANDERMEEREN, "Les procédures d'urgence devant le juge administratif en matière de contrats publics à la veille de l'entrée en vigueur de la loi du 30 juin 2000", *BJDCP* n° 13, 2000, p. 396.

1540 See J. GOURDOU and P. TERNEYRE, "Le référé précontractuel administratif au lendemain de la réforme législative des procédures d'urgence", *CJEG* No. 575, 2001, pp. 135-147, spe. p. 141; D. BAILLEUL, "Les référés 'suspension' et 'liberté' au secours du référé précontractuel ?", *Contrats et marchés publics* 2002, chron. No. 8; F. LLORENS and P. SOLER-COUTEAUX, "Le référé précontractuel, laissé pour compte de la réforme des procédures d'urgence", *Contrats et marchés publics* 2002, Repères n° 3.

1541 Despite the absence of contentious application in other areas, it seems nevertheless possible to state that the rule has a more general scope and concerns all administrative decisions that have suspensive effect as of right in case of appeal. See *Pratique du contentieux administratif* Dalloz (October 2002), n° 290-75 et seq.

1542 CE, ord. 26 January 2001, *Gunes, Lebon* p. 38.

1543 CE, 21 November 2001, *Zhary, Lebon T.* p. 1125; CE, ord. 9 December 2002, *Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c/ Negmari*, n° 252338; CE, ord. 27 January 2003, *Amraoui*, n° 253601; CE, ord. 14 May 2003, *Méliani, Lebon T.* p. 913; CE, ord. 29 September 2004, *Préfet de la Marne, Lebon T.* p. 829; CE, ord. 14 January 2005, *Bondo, Lebon T.* p. 915; CE, ord. 14 April 2005, *Benbebar*, n° 279340; CE, ord. 25 May 2005, *Madzabou*, n° 280607; CE, ord. 26 May 2005, *Ahamadi*, n° 280690.

1544 CE, ord. 14 May 2003, *Méliani, Lebon T.* p. 913.

1545 CE, ord. 14 January 2005, *Bondo, Lebon T.* p. 915.

deportation was issued, the application lodged on the basis of Article L. 521-2 is rejected¹⁵⁴⁶. However, the person concerned regains access to the *référé-liberté* procedure in the event of a change in circumstances. This may result from a decision by the Conseil d'Etat annulling a deportation order for violation of Article 3 of the European Convention on Human Rights, on the grounds that the applicant is particularly threatened and runs risks to her safety if she returns to her country of origin¹⁵⁴⁷. The change in circumstances may also result from the birth of a child when the applicant's wife is of French nationality. In fact, in its wording resulting from Article 36 of the Act of 26 November 2003, Article 25 of the Order of 2 November 1945 (now Article L. 511-4, 6° of the Code of Entry and Residence of Foreigners in France) prevents a foreigner who is the father of a minor child residing in France and over whom he exercises parental authority from being subject to a deportation order¹⁵⁴⁸.

In general, the judge of summary proceedings excludes the application of the mechanism of the exception of parallel appeal in the framework of Article L. 521-2. In principle, i.e. in the absence of suspensive effect, he admits the exercise of a summary application for interim relief in the field governed by a special procedure. An application for interim relief may also be made at the same time as another legal remedy. The Council of State requires only that the different applications be presented in separate petitions.

B. The possibility of cumulating actions: the requirement of separate applications

376. The applicant for interim relief may bring several actions simultaneously or successively against a given act or behaviour. In the absence of provisions to the contrary, it is in fact possible for applicants to act on several grounds and, in particular, to act at the same time by means of the summary suspension and the interim relief procedure. As Mr Chapus states, 'It is not clear (...) why the litigant could not try his luck on two fronts by bringing before the judge both a petition for suspension (based on Article L. 521-1) and a petition to safeguard a fundamental freedom. This means that there must be no 'parallel emergency procedure exception' in this area'¹⁵⁴⁹. The interim relief judge does not rule that two applications are inadmissible when they are lodged with him on the same day: one based on Article L. 521-1, the other on Article L. 521-2¹⁵⁵⁰. A *référé-liberté* may be initiated at the same time as a *référé-suspension*. Similarly, the summary judgment and the action for enforcement of *res judicata* may be brought simultaneously. The fact of having brought an action before the enforcement judge on the basis of Article L. 911-4 does not prevent the interested party from submitting to the summary judgment judge an application for an injunction intended to remedy the persistent non-enforcement of the *res judicata*¹⁵⁵¹.

¹⁵⁴⁶ See in particular CE, ord. 14 April 2005, *Benbehar*, n° 279340; CE, ord. 29 September 2004, *Préfet de la Marne, Lebon T.* p. 829; CE, ord. 25 May 2005, *Madzabou*, n° 280607.

¹⁵⁴⁷ CE, ord. 14 January 2005, *Bondo, Lebon T.* p. 915, *AJDA* 2005, pp. 1360-1363, note. O. LECUCQ. Under these conditions, the judge of summary proceedings stated, "the fin de non-recevoir based on the impossibility of challenging the execution of a deportation order following the procedure of article L. 521-2 of the administrative justice code must, in this case, be set aside".

¹⁵⁴⁸ CE, ord. 21 February 2005, *Najemi*, n° 277520. In this case, the person concerned was the subject of a deportation order on 7 October 2004, of which he was notified on 1^{er} February 2005. On 21 December 2004, his wife gave birth to a child. The applicant recognised the child given birth to by his wife in wedlock at the civil registry office. The birth of the child constituted a change in circumstances that allowed the applicant to usefully apply to the interim relief judge. Under the law prior to the Act of 26 November 2003, the interim relief judge had not considered as a change in circumstances the birth of a child born to foreign parents on French soil and recognised by the interested party at the civil status office (CE, order of 27 January 2003, *Amraoui*, n° 253601).

¹⁵⁴⁹ R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1608.

¹⁵⁵⁰ Thus, on 21 March 2001, Mr. Meyet had lodged two applications for interim relief, one on the basis of Article L. 521-1 of the Administrative Justice Code, the other on the basis of Article L. 521-2. The Council of State's interim relief judge did not consider this double referral as a reason for inadmissibility; he ruled on both applications the following day (see respectively, for the interim suspension and the interim release: CE, ord. 22 March 2001, *Meyet, Lebon T.* p. 1130; CE, ord. 22 March 2001, *Meyet*, n° 231631). Similarly, on 11 May 2005, Mr Rondeau lodged two applications before the interim relief judge of the Conseil d'Etat with a view to obtaining the suspension of a decree of 20 April 2005. The first application developed conclusions based on Article L. 521-1, the second on the basis of Article L. 521-2. The interim relief judge ruled on both applications on 16 May 2005. In a first order, he suspended the execution of the contested decree on the basis of Article L. 521-1 (CE, order 16 May 2005, *Rondeau, Lebon T.* p. 1027). In a second order, it considered that there was no need to rule on the conclusions, tending to the same ends, presented on the basis of Article L. 521-2 (CE, ord. 16 May 2005, *Rondeau*, n° 280423). For a similar case, see, on two applications registered on 17 May 2005: CE, ord. 27 May 2005, *Mme Touria YX*, n° 280612 (suspending on the basis of Article L. 521-1 the execution of the contested decision) and CE, ord. 27 May 2005, *Mme Touria YX n° 280613* (rejecting, for lack of purpose, the application for interim release).

¹⁵⁵¹ CE, 11 June 2002, *M. Aït Oubba, Lebon T.* p. 869. Unlike the first instance judge, who had declared the application inadmissible, the Conseil d'Etat considered that the two procedures were not mutually exclusive. It stated that "although, in order to obtain enforcement of the judgment of 28 March 2001, Mr Aït Oubba had referred the matter to the administrative court under the procedure provided for in Article L. 911-4 of the Code of Administrative Justice - a procedure which, to date, has been unsuccessful - this circumstance was not in itself an obstacle to the interested party submitting to the interim relief judge a request that he order an emergency measure on the basis of Article L. 521-2 of the Code of Administrative Justice".

377. If an application for interim relief can be joined with an application on another basis and, conversely, if an interim relief application can be filed in addition to another appeal, the judge requires that these combined actions be filed in separate applications. In other words, the conclusions presented to the judge of the summary proceedings must be based solely on Article L. 521-2 of the Code of Administrative Justice. The application for interim relief may not contain submissions from another procedure.

During the first few weeks of application of the reform of 30 June 2000, the interim relief judge was sometimes seized, in a single application, of conclusions seeking the combined or alternative application of the interim measures for freedom and suspension. Initially, he agreed to hear these applications. On three occasions, in the cases of *Association Promouvoir*¹⁵⁵², *Philippart et Lesage*¹⁵⁵³ and *Perrier*¹⁵⁵⁴, it accepted that a person could apply to it for both procedures by means of a single application. Judges of the first instance have also agreed to hear applications with combined grounds¹⁵⁵⁵. This possibility contributed to the flexibility sought by the legislator in this area. However, the solution was fraught with difficulties which soon justified its abandonment. After rejecting the submissions made by Mr Philippart and Mr Lesage under Article L. 521-2 and putting the submissions made on the basis of Article L. 521-1 under examination, the interim relief judge decided to refer the case to the Administrative Jurisdiction Division in order to settle in a formal hearing the question of the cumulation of interim relief submissions within the same application¹⁵⁵⁶.

For the government commissioner Didier Chauvaux, the coexistence of the two summary proceedings within the same application risks causing insoluble difficulties for the administrative judge because of the procedural differences between the two appeals. The first difficulty arises from the difference in the time limit for judgment: 48 hours for the interim relief measure, as soon as possible for the interim suspension measure. Unless the judge considers that he or she can reject the application for interim relief without investigation, the judge must hold a hearing within 48 hours. If the application is not granted on this basis, the investigation will have to be extended and a new hearing may have to be scheduled in the context of the interim suspension procedure. The second difficulty arises from the difference in the remedies available against the decision given by the first judge after a public hearing. The decision rendered on the basis of Article L. 521-2 can be challenged by way of appeal, the order pronounced by the interim relief judge by way of cassation. Consequently, "if the judge rules in the same decision taken after a public hearing on applications under both forms of summary proceedings - which he will most often do if he has been seized by a single application - an appeal to the Council of State will be dealt with partly by a panel and partly by the president of the section"¹⁵⁵⁷. In view of the procedural differences between the two summary proceedings, Mr Chauvaux considered that allowing the applicant to present, in the same application, conclusions relating to Article L. 521-1 and Article L. 521-2 would result in an unacceptable degree of complication. He therefore proposed to establish 'the simple rule that a request for suspension and a request for interim release must not coexist in the same application'¹⁵⁵⁸. In accordance with the conclusions of the government commissioner, the Section expressly excluded the possibility of cumulation. After noting that applications made to the interim relief judge on the basis of Article L. 521-1 are presented, investigated, judged and, where applicable, appealed according to rules that are distinct from those applicable to applications made on

1552 The applicant association requested, on the basis of Article L. 521-1, the suspension of a decision which, according to it, was revealed by a press agency dispatch and, on the basis of Article L. 521-2, to enjoin the Minister of Culture and Communication to include the film "Baise-moi" on the list of pornographic films within 48 hours and to proceed, before 1^{er} February 2001, with the administrative seizure of the film's videograms. The interim relief judge first examined the conclusions for suspension and declared them inadmissible because the association could not prove the existence of any express or implicit decision. The judge then rules on the conclusions presented under Article L. 521-2 (CE, ord. 31 January 2001, *Association Promouvoir*, *Lebon T.* p. 525).

1553 In a request registered with the Secretariat of the Litigation Chamber on 8 February 2001, the applicants sought, primarily on the basis of Article L. 521-2, to suspend the decision of the National Council of the Order of Dental Surgeons refusing to allow them to set up in a building where a colleague was already practising, and to order the Council of the Order to grant them authorisation to practise their profession in this building. In the alternative, they requested that the same decision be taken on the basis of Article L. 521-1. In an order of 9 February 2001, the interim relief judge rejected the conclusions presented under Article L. 521-2 on the grounds that there was no manifestly illegal infringement of a fundamental freedom. In the same order, he specified that with regard to the submissions made on the basis of Article L. 521-1, 'the interim relief judge should stay the proceedings until their investigation has been carried out under the conditions provided for in Article L. 522-1'. It adds that a ruling will be given on the conclusions tending to the application of Article L. 761-1 "at the same time as on the conclusions presented on the basis of Article L. 521-1 of the Code of Administrative Justice" (CE, order of 9 February 2001, *Philippart and Lesage*, n^o 230112).

1554 In a petition filed on 15 February 2001, the applicant asked the interim relief judge of the Council of State to rule "based on both Articles L. 521-1 and L. 521-2 of the Administrative Justice Code". The interim relief judge rules the same day on the conclusions presented under Article L. 521-2. In the absence of infringement of a fundamental freedom, the judge rejects these conclusions in application of the sorting procedure of Article L. 522-3 (CE, ord. 15 February 2001, *Perrier*, n^o 230318). Concerning the submissions made on the basis of Article L. 521-1 and those seeking the application of Article L. 761-1, the order uses the formula of the *Philippart and Lesage* order of 9 February. The conclusions based on Article L. 521-1 will be judged after investigation on 14 March 2001 (CE, order 14 March 2001, *Perrier*, n^o 230318).

1555 In an order of 27 February 2001, the interim relief judge of the Lille Administrative Court had, on the basis of Article L. 521-1, suspended the decision of the Prefect of Nord refusing to issue the applicant a provisional residence permit (Article 1^{er} of the order) and, on the basis of Article L. 521-2, enjoined the Prefect of Nord to issue a provisional residence permit (Article 2). The Minister of the Interior asked the Council of State to quash Article 1^{er} of the ordinance and to annul Article 2. The application is considered as constituting a main appeal in cassation; the Council declares the appeal conclusions inadmissible and rules on the cassation conclusions (CE, 16 March 2001, *Minister of the Interior v. Glory Okoko*, *Lebon T.* p. 1092).

1556 CE, Sect. 28 February 2001, *Philippart et Lesage*, *Lebon* p. 112, *RFDA* 2001, pp. 390-398, concl. D. CHAUVAUX.

1557 D. CHAUVAUX, concl. *supra*, p. 392.

1558 D. CHAUVAUX, concl. *supra*, p. 392.

the basis of Article L. 521-2, the Council states that these applications cannot be presented simultaneously in the same application. Consequently, it rejects as inadmissible the submissions made by the applicants in the alternative¹⁵⁵⁹. This case law, subsequently confirmed at¹⁵⁶⁰, has a general scope. Thus, the Conseil d'Etat considers that an application for interim relief cannot contain conclusions based on Article L. 521-3 of the Code of Administrative Justice¹⁵⁶¹. Similarly, and the solution is valid for interim relief, the application for interim suspension cannot contain conclusions based on Article L. 551-11562.

378. Where the interim relief judge nevertheless receives an application containing submissions under Article L. 521-2 and submissions under another procedure, it is for him to determine the main basis of the application and not to dismiss the application as inadmissible¹⁵⁶³. The court must rule on the main claims and reject the subsidiary ones. Insofar as the interim relief judge is obliged to rule on all the submissions before him, he must expressly declare inadmissible the submissions made in the alternative and may not reject them by way of prejudice¹⁵⁶⁴.

Where the applicant has expressly indicated that one of the claims is of a subsidiary nature, the court shall rule on the main claim¹⁵⁶⁵. Where the applicant has not clearly specified the main ground invoked, it is up to the interim relief judge to specify the scope of the application in the light of all the elements of assessment available to him¹⁵⁶⁶. In the aforementioned *SNUDI-FO du Maine-et-Loire* decision, the judge specifies that the "terms of the conclusions", "the whole of the argumentation"¹⁵⁶⁷ or "the fact that no application for annulment or reversal of an administrative decision has been submitted"¹⁵⁶⁸ constitute criteria for interpreting the application.

379. Finally, it should be noted that when an application for interim relief and an application for interim suspension submitted to the Council of State concern the same dispute, it is possible for the interim relief judge to combine them and rule on them in a single decision¹⁵⁶⁹. Such a possibility is, of course, excluded for the interim relief judge of the first instance, since the conclusions presented under Article L. 521-2 and those introduced on the basis of Article L. 521-2 do not come under the same appeal procedures. Joinder is possible only before the interim relief judge of the Council of State, insofar as his decisions are by hypothesis not subject to appeal.

IV. The extended scope of challengeable acts and conduct

380. The judge of the *référé-liberté* is a judge of legal situations. A comprehensive definition of the measures that can be appealed against allows him to hear all forms of administrative infringements of fundamental freedoms,

¹⁵⁵⁹ This solution is in line with the well-established case law of the Council of State. In fact, although case law generally allows applicants to submit several heads of claim in the same application, this possibility is limited in the case of claims that must be examined and judged in different ways. See for example CE, 6 April 1962, *Société technique des appareils centrifuges industriels*, *Lebon* p. 255: the Conseil d'Etat declares inadmissible the conclusions for the purpose of compensation attached to a petition contesting the enforceability of a tax, on the grounds that appeals for compensation "are investigated and judged by the administrative court according to forms different from those provided for the investigation and judgement of proceedings instituted in matters of direct contributions".

¹⁵⁶⁰ CE, ord. 10 April 2001, *Syndicat national unifié des directeurs, des instituteurs, des professeurs des écoles de l'enseignement public Force ouvrière (SNUDI-FO) du Maine-et-Loire*, *Lebon* T. p. 1090; CE, ord. 5 August 2003, *Association des fonctionnaires reclassés de France Télécom*, n° 259184; CE, ord. 7 August 2003, *Gharmoul*, n° 259242.

¹⁵⁶¹ CE, 8 October 2001, *Sanches Cardoso*, *Lebon* T. p. 1091; CE, 6 March 2002, *Société des pétroles Shell*, *Lebon* T. p. 852.

¹⁵⁶² CE, 29 July 2002, *Ville de Nice*, *Lebon* p. 299, *Contrats et marchés publics* 2002, comm. n° 229, note J.-P. PIETRI; *BCMP* n° 20, 2003, pp. 7-12, note B. GONAND; *Coll. ter.* 2002, comm. n° 241, note T. CELERIER; *AJDA* 2002, pp. 926-828, note J.-D. DREYFUS.

¹⁵⁶³ CE, 27 August 2001, *Abdonlaye*, no. 236164. The interim relief judge erred in law by basing his decision, in order to reject all the submissions in the application, on the fact that the application included submissions based on Article L. 521-1 and submissions based on Article L. 521-2.

¹⁵⁶⁴ CE, 6 March 2002, *Société des pétroles Shell*, *Lebon* T. p. 852.

¹⁵⁶⁵ In their application of 8 February 2001, Mr Philippart and Mr Lesage had indicated that the conclusions presented on the basis of Article L. 521-1 were subsidiary in nature. Consequently, the Conseil d'Etat rejected as inadmissible the conclusions presented on this basis (CE, Sect., 28 February 2001, *Philippart and Lesage*, *Lebon* p. 112).

¹⁵⁶⁶ CE, ord. 10 April 2001, *Syndicat national unifié des directeurs, des instituteurs, des professeurs des écoles de l'enseignement public Force ouvrière (SNUDI-FO) du Maine-et-Loire*, *Lebon* T. p. 1090; CE, 27 August 2001, *Abdonlaye*, n° 236164; CE, 29 July 2002, *Ville de Nice*, *Lebon* p. 299.

¹⁵⁶⁷ See CE, ord. 5 August 2003, *Association des fonctionnaires reclassés de France Télécom*, No. 259184. On the one hand, the applicant mentions the serious and immediate infringement, 'within the meaning of Article L. 521-2 of the Code of Administrative Justice', of the freedom to work. But on the other hand, her request, entitled "suspension of the right to work", mentions that the double condition relating to urgency and the existence of a means likely to create a serious doubt on the legality of the decision whose suspension she is requesting is met. In view of the arguments as a whole, the application must be interpreted as comprising, primarily, conclusions based on Article L. 521-1 and, secondarily, conclusions based on Article L. 521-2. See, conversely, CE, ord. 7 August 2003, *Gharmoul*, n° 259242: the applicant, who maintains the existence of an infringement of two fundamental freedoms, and lodges an appeal after the rejection of his application by the first judge, must be regarded as relying on the provisions of Article L. 521-2.

¹⁵⁶⁸ The *référé-liberté* is an autonomous appeal, the *référé-suspension* an accessory appeal. In the absence of a main application for annulment or reversal, the applicant is deemed to be acting on the basis of Article L. 521-2 (CE, ord. 10 April 2001, *SNUDI-FO du Maine-et-Loire*, cited above). Conversely, the qualification of summary suspension is preferred when the applicant has filed an action for annulment against the decision whose suspension he or she is seeking by way of summary proceedings (CE, order of 4 August 2003, *Association Agora*, no. 259110).

¹⁵⁶⁹ See for example: CE, ord. 7 September 2001, *Fédération nationale des syndicats du personnel des industries électriques et gazière CFTEC*, n° 237915 and n° 237916; CE, ord. 2 December 2002, *Pez*, n° 2252157 and 2252158; CE, ord. 22 September 2004, *Hoffer*, n° 272347 and 372378

whatever their origin. This broad approach covers in particular the hypothesis where, by its negligence or abstention, the administration allows an infringement to occur in relations between private persons.

A. The summary judgment judge, judge of legal situations

381. The legislator wanted to open the courtroom of the interim relief judge to any measure likely to infringe a fundamental freedom without any restriction. For the Council of State's working group, the aim was to give access to the administrative judge even "in situations where easily identifiable administrative decisions are not at issue"¹⁵⁷⁰. Thus, all disturbances arising from public authority, all ways in which public authorities act or behave are subject to the *référé-liberté* procedure. The infringement may result from any normative or material activity of the public authority. Indeed, Article L. 521-2 refers, in a general way, without precision or limitation, to the "infringement" of a fundamental freedom. It therefore requires a *situation of* infringement, without reference to its origin or form. This lack of precision is significant. By not specifying "what may result from the infringement", the legislator's silence "speaks volumes: it means the absence of restrictions"¹⁵⁷¹. Anything that arises from the administration's activity or inactivity may be the subject of an application for interim relief without coming up against the traditional requirement of a prior decision.

Provided that it is the administration's doing, absolutely anything that infringes a fundamental freedom can be submitted to the judge of the *référé-liberté*. This notable feature of Article L. 521-2 was widely emphasised during the parliamentary debates. Mr Colcombet stated that this procedure should make it possible "to respond to *situations* where an administrative decision liable to be suspended is not at issue, but rather actions, inertia or administrative behaviour likely to harm the applicants"¹⁵⁷². M. Garrec also noted that the judge could intervene "when a fundamental freedom is threatened by a decision or de facto action by the public authority"¹⁵⁷³. Similarly, the Minister of Justice had stressed that the *référé-liberté* could be exercised against "any act or behaviour of the administration"¹⁵⁷⁴.

Article L. 521-2 provides a comprehensive definition of the scope of measures that may be referred to the court. The court opens its courtroom to any applicant challenging a situation having a legal character or effects. For classical authors, the legal situation designated the particular position of a subject of law in relation to the legal order; it corresponded, in substance, to all the rights and obligations recognised to a person¹⁵⁷⁵. The notion is understood here from the point of view of the objective order, the legal reality resulting from one or more administrative acts or actions.

382. The possibility of challenging simple behaviour has a major advantage for the applicant, as it exempts him or her from having to produce a decision prior to lodging an appeal.

Indeed, it is known that according to a traditional rule of the contentious administrative procedure, "Any dispute submitted to the judge must first have been the subject of a position taken by the qualified authority"¹⁵⁷⁶. Now set out in Article R. 421-1 of the Code of Administrative Justice, this requirement is expressed through the adage "no decision, no action". It means that the judge must only be able to be called upon in the presence of a born and current dispute, which is attested to by the existence of an explicit or implicit decision by the administration. When a decision exists, the citizen can immediately file an appeal before the administrative court. Otherwise, it is up to him to bring about the birth of a decision by addressing a request to the public person which will provoke a position. The decision comes into being as soon as the administration gives an explicit reply. In the absence of an express position within two months of the request, the administration's silence constitutes an implicit decision to reject. Thus, when the administration has not formally taken a position, the requirement of a prior decision condemns the litigant to wait for a period of two months before being able to bring an action before the administrative court. This rule is therefore incompatible with the need for speed in bringing cases before the court in the event of a serious infringement of fundamental freedoms.

Indeed, when such an infringement occurs, the victim must be able to appeal to the courts without delay in order to safeguard his or her freedoms. When the applicant does not have a prior decision, it is not possible to

1570 "Report of the working group of the Council of State on emergency procedures", *RFDA* 2000, p. 947.

1571 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1593.

1572 F. COLCOMBET, Rapport AN n° 2002, p. 40. Emphasis added.

1573 R. GARREC, Senate Report No. 380, p. 29.

1574 E. GUIGOU, *JO déb. AN*, CR session 14 December 1999, p. 10942.

1575 See in particular: G. JEZE, *Les principes généraux du droit administratif*, 3^{ème} ed., Marcel Giard, 1925, pp. 10-24; A. de LAUBADERE, *Traité élémentaire de droit administratif*, t. 1, 2^{ème} ed., LGDJ, 1957, pp. 17-20; G. SCELLE, *Cours de principes du droit public (Principles of public law)*, *DES droit public (Public law)*, 1944-1945, Les cours de droit (Law courses), pp. 121 et seq.

1576 C. GABOLDE, *Procédure des tribunaux administratifs et des cours administratives d'appel*, 6^{ème} ed, Dalloz, 1997, p. 55.

impose on him a two-month waiting period before he can usefully apply to the judge. To oppose the respect of this rule would deprive the appeal of its interest and would condemn the interested party to a late and purely platonic satisfaction. Also, insofar as the rule of Article R. 421-1 represents an obstacle to immediate intervention by the judge, the legislator has purely and simply exempted the applicant from this formality. The result is that "the special protection procedure instituted by Article L. 521-2 (...) may be applied independently of any appeal against a decision"¹⁵⁷⁷. The implementation of the provisions of Article L. 521-2 is in no way conditional on the existence of an administrative decision. The applicant may therefore act *without delay* as soon as an infringement occurs. In any event, even in the absence of a prior decision, he or she has the possibility of *immediately applying* to the interim relief judge.

This is a notable feature of the *référé-liberté* and an important advantage over the *référé-suspension* procedure in the case of infringement of a fundamental freedom. Admittedly, many summary proceedings are exempt from the requirement of a prior decision - the exemption is expressly provided for in the case of summary proceedings for conservatorship (Article L. 521-3), summary proceedings for a statement of facts (R. 531-1) and summary proceedings for instruction (R. 531-2) - but the exemption results from the very nature of these summary proceedings, which are in no way intended to paralyse the effects of an act or action by the public authority. On the other hand, since the purpose of the summary proceedings is to neutralise the effects of a decision, the very economy of this procedure presupposes the existence of an administrative decision. It is necessarily with a view to counteracting the effects of such a decision that the applicant submits conclusions in this regard on the basis of Article L. 521-1. When, in the absence of a decision, the applicant is unable to act by way of summary suspension and, by extension, by way of interim relief, the judge may invite him or her to refer the matter to him or her by way of the interim relief procedure¹⁵⁷⁸. It should be noted that the judicial judge also has an extensive conception of the scope of measures that can be challenged on the basis of *de facto* action: "An action, an operation, a behaviour or a decision of the administration may be sufficient"¹⁵⁷⁹.

In the context of Article L. 521-2, the situation in dispute may first of all result from one or more administrative decisions. The applicant may challenge positive decisions of an individual nature¹⁵⁸⁰ or regulations¹⁵⁸¹, but also negative decisions¹⁵⁸². A decision may be revealed when it is implemented¹⁵⁸³. The judge has recognised that it may result from contacts between a specific person and the administration, even if the person in question is not

1577 CE, 21 November 2001, *Zbary, Lebon T.* p. 1125; CE, ord. 27 January 2003, *Amraoui*, n° 253601.

1578 In the *Meyet* order of 20 December 2005, the judge indicated that "respect for the rights of which Mr Meyet avails himself is likely to be ensured by the implementation of Article L. 521-2 of the Code of Administrative Justice which, unlike Article L. 521-1, does not require that the particular procedure for safeguarding fundamental freedoms that it institutes be necessarily linked to the challenge of an administrative decision and opens up the possibility of criticising an action by an authority. 521-1, does not require that the particular procedure for safeguarding fundamental freedoms that it instituted be necessarily linked to the challenge of an administrative decision and opens up the possibility of criticising an action by an administrative authority provided that all the conditions laid down by this article are met" (CE, order of 20 December 2005, *Meyet*, no. 288253).

1579 S. PETIT, *La voie de fait administrative*, PUF, coll. QJSJ, 1995, p. 41. See R. ODENT, *Contentieux administratif*, Les cours de droit, IEP Paris, fasc. I, 1981, p. 540.

1580 For example, the prefectural order fixing the country of destination for the execution of a judicial interdiction measure (CE, ord. 27 March 2001, *Ministre de l'Intérieur c/ Djalout, Lebon p.* 158); the prefectural order pronouncing the immobilisation of transport vehicles (CE, ord. 9 April 2001, *Belrose et autres, Lebon T.* p. 1126); the ministerial order pronouncing the expulsion of a foreign national (CE, Sect, 30 October 2001, *Minister of the Interior v. Tliba, Lebon p.* 523; CE, ord. 10 August 2001, *Ministre de l'Intérieur c/ Saddouki*, n° 236969); the prohibition on the applicant's participation in the management and supervision of holiday and leisure centres for minors (CE, ord. 9 August 2001, *Medrinal, Lebon T.* p. 1127).

1581 For example, the municipal order regulating access and traffic in an industrial zone (CE, ord. 5 July 2001, *Commune de Montreuil-Bellay*, n° 235387); the municipal order prohibiting access to a communal building and ordering its removal (CE, ord. 10 August 2001, *Association 'La Mosquée' and others, Lebon T.* p. 1133); the prefectural decree prohibiting navigation in a delimited perimeter (CE, ord. 27 September 2001, *Guegueniat*, n° 238473); the note by which a mayor instructs the municipality's mail service to open all letters addressed to certain municipal councillors (CE, 9 April 2004, *Vast, Lebon p.* 173); a municipal decree regulating the conditions of access of ships to a marina (CE, ord. 2 July 2003, *Commune de Collioure, Lebon T.* p. 930).

1582 For example, the refusal to make a municipal hall available to the applicant (CE, ord. 2 March 2001, *Dauphine*, No. 230798); to register a child in a school (CE, ord. 9 July 2001, *Boc*, No. 235696); to allocate a site on the public domain hosting the Foire du Trône (CE, ord. 6 April 2001, *Lapere et al.*, No. 232135); to convene a municipal council (CE, Sect, 18 January 2001, *Morbelli, maire de la Commune de Venelles, Lebon p.* 18); to register the applicant's children on the latter's passport (CE, ord. 4 December 2002, *Du Couëdic de Kéranant, Lebon T.* p. 875); to issue a national identity card (CE, ord. 11 March 2003, *Samagassi, Lebon p.* 119) or to authorise a foreign national to enter French territory (CE, ord. 25 March 2003, *Minister of the Interior, Internal Security and Local Freedoms v. Sulaimanov, Lebon p.* 146). It should be noted that when the working group's preliminary draft was presented to the government, and the bill submitted to parliament, the possibility of challenging negative decisions was an important advantage of the *référé-liberté* procedure over the *référé-suspension* procedure. Indeed, traditional case law precluded a stay of execution of a negative decision (on the *Amoros* case law, see *supra*, § 7). In the absence of provisions to the contrary in the bill, it was not intended that this should be different under the new suspension regime. However, this advantage disappeared after the adoption of an amendment expressly authorising the interim relief judge to suspend the execution of a rejection decision. This reversal of the *Amoros* case law was to take effect on 1^{er} January 2001 when the reform came into force. It was nevertheless brought forward by a few days by the Council of State in order to show that the abandonment of the *Amoros* case law was a consequence of the law of 8 February 1995, which gave the administrative judge a power of injunction to enforce his decisions (CE, Sect., 20 December 2000, *Onatah, Lebon p.* 643, *RFD.A* 2001, pp. 371-377, concl. F. LAMY; *AJDA* 2001, p. 146, chron. M. GUYOMAR and P. COLLIN).

1583 Thus, the decision to grant exclusive exploitation rights for the broadcasting of sports competitions is, according to the judge of summary proceedings, 'revealed' by a deliberation of the board of directors of the National Football League triggering a tender procedure for the marketing of these rights, and by the tender itself (CE, ord. 18 March 2002, *GIE Sport libre and others, Lebon p.* 106). Case law had accepted this principle in the past. As M. Chapus points out, 'when an administrative authority proceeds to award a contract, one is entitled to assume that it has taken the decision to contract' (R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd., Montchrestien, 2006, n° 646).

subsequently included among the applicants¹⁵⁸⁴.

The litigious situation may also arise from administrative behaviour, i.e. conduct which, without necessarily modifying the legal order, will nevertheless affect the personal position of the beneficiary of a freedom. Any conduct or operation of the administration may be the subject of a summary judgment if it expresses a will to do or not to do or reflects a negligence or a deficiency on its part. The administrative behaviour subject to summary proceedings may thus be positive or negative. The applicant may first of all challenge actions or behaviour, such as the withdrawal - and then the material retention - of national identity cards and passports of family members¹⁵⁸⁵; the material retention of a residence permit¹⁵⁸⁶; the fact that a public establishment for inter-municipal cooperation intervenes in the competences of its member municipalities¹⁵⁸⁷; the removal by a municipality, during road and pavement repair work, of access to premises used as garages or warehouses and the placing of bollards preventing access to these premises¹⁵⁸⁸; the execution of repair and development work on a private road¹⁵⁸⁹; the installation of a grit chamber - a device intended to ensure the proper functioning of the rainwater drainage system - on a strip of land belonging to a private individual¹⁵⁹⁰; the incorporation of a private parcel into a golf course managed by a public entity¹⁵⁹¹; the retention of an aircraft¹⁵⁹²; the performance of a medical procedure¹⁵⁹³. On the other hand, the claimant may challenge the administration's failure to act or to perform a certain action: registering a film on the list of pornographic films¹⁵⁹⁴, taking measures to promote access to housing¹⁵⁹⁵, referring a law to the Constitutional Council¹⁵⁹⁶, putting an end to the state of emergency¹⁵⁹⁷, providing assistance from the public force¹⁵⁹⁸, undertaking work to repair a road leading to a discotheque¹⁵⁹⁹, guarantee pluralism on the private channel Canal +¹⁶⁰⁰, convene voters to hold partial legislative elections¹⁶⁰¹, install a doctor in his position as a hospital practitioner¹⁶⁰² or acknowledge the resignation of a minister in the government of French Polynesia¹⁶⁰³.

The judge of the *référé-liberté* could accept to deal with preparatory acts¹⁶⁰⁴. A judge of the *référé*s considered that a decision of a propaganda commission, normally not subject to appeal¹⁶⁰⁵, could be challenged by the way of article L. 521-2 of the administrative justice code¹⁶⁰⁶.

1584 See CE, ord. 27 May 2005, *Section française de l'observatoire international des prisons et autres*, *Lebon* p. 232, *AJDA* 2005, pp. 1579-1582, note A. RAINAUD. In this case, the judge noted that none of the applicants had submitted a request to the Minister of Justice for authorisation to hold a debate on the Treaty establishing a Constitution for Europe in a specific prison. Nevertheless, the investigation showed that in the context of regular contacts between the director of the prison administration and the president of the association "Dès maintenant", which specialises in prison issues, the holding of debates on this subject was envisaged at the beginning of March. The judge stated "that the contacts made in this regard were not successful, which led to the creation of an implicit decision to reject". Thus, it is from the impossibility for this association - which will not be a party to the appeal - to win the case with the director of the prison administration that the decision of refusal tacitly arises. The implicit decision to reject results from the failure of these contacts. After an effort of analysis, the judge identifies the existence of an administrative decision subject to appeal. It is noteworthy that the decision is the result of mere "contacts" and, even more so, that these contacts did not involve any of the appellants. This non-formal conception of the concept of decision deserves to be emphasised, although it is not new (see J. MASSOT, "Décisions non formalisées et contrôle du juge de l'excès de pouvoir", *L'Etat de droit. Mélanges en l'honneur de Guy Braibant*, Dalloz, 1996, pp. 521-540).

1585 CE, ord. 2 April 2001, *Ministre de l'Intérieur c/ Consorts Marcel*, *Lebon* p. 167.

1586 CE, ord. 8 November 2001, *Kaigisiz*, *Lebon* p. 545.

1587 CE, 12 June 2002, *Commune de Fauillet et autres*, *Lebon* p. 215.

1588 CE, ord. 31 May 2001, *Commune d'Hyères-les-Palmiers*, *Lebon* p. 253.

1589 CE, ord. 20 July 2001, *Commune de Mandelieu-la-Napoule*, *Lebon* p. 388.

1590 CE, ord. 21 August 2001, *Manigold*, n° 237385.

1591 CE, ord. 22 October 2001, *Gonidec and Brocas*, n° 239165.

1592 CE, 2 July 2003, *Sié Outremer Finance Limited*, *AJDA* 2003, pp. 1780-1785, concl. G. Bachelier. The applicant company challenged the immobilisation of an aircraft by the public establishment Aéroports de Paris. To justify the admissibility of the appeal, the government commissioner stated that "the summary judgment is not subordinated to the challenge of the legality of a decision and can be implemented in order to put an end to a given situation" (concl. préc., p. 1783. Underscored).

1593 CE, ord. 16 July 2001, *Feuillatay*, *Lebon* p. 309.

1594 CE, ord. 31 January 2001, *Association Promouvoir*, *Lebon T.* p. 525. The same request, presented on the basis of Article L. 521-1 of the Code of Administrative Justice, was declared inadmissible for lack of evidence of a decision by the applicant association (same order).

1595 CE, ord. 3 May 2002, *Association de réinsertion sociale du Limousin et autres*, *Lebon* p. 168: the decision refers to "the actions" of the prefect.

1596 CE, ord. 7 November 2001, *Tabaka*, *Lebon T.* p. 789, 1125. The applicant does not contest a *refusal* by the President of the Republic to refer the matter to the Constitutional Council insofar as the Head of State has neither explicitly nor implicitly taken a position. He contests an *absence of referral*. The interim relief judge refers to "the fact that the President of the Republic *refrained from* using the option he has under the second paragraph of Article 61 of the Constitution to refer a law to the Constitutional Council".

1597 CE, ord. 9 December 2005, *Allouache and others*, *Lebon* p. 562.

1598 CE, 29 March 2002, *SCI Stéphaneur and others*, *Lebon* p. 117.

1599 CE, ord. 5 March 2001, *SARL Club 2000*, *Lebon T.* p. 1130.

1600 CE, ord. 24 February 2001, *Tibéri*, *Lebon* p. 85.

1601 CE, ord. 18 May 2001, *Meyet, Bouget*, *Lebon* p. 244.

1602 CE, ord. 13 May 2002, *Centre hospitalier de Valence c/ Nouri*, n° 246551.

1603 CE, ord. 11 April 2006, *Tefaarere*, *Lebon* p. 197.

1604 See in this sense R. VANDERMEEREN, "Les procédures d'urgence devant le juge administratif en matière de contrats publics à la veille de l'entrée en vigueur de la loi du 30 juin 2000", *BJDCP* No. 13, 2000, p. 398: "the new safeguard mechanism serves to protect the interested parties, not only with regard to decisive administrative acts, but also with regard to behaviour by the public authorities that is not of this nature (preparatory acts, material actions, abstentions from acting)".

1605 These decisions cannot be detached from the electoral operations as a whole. According to a constant jurisprudence, their possible irregularity can only be invoked in support of a request directed against the said electoral operations (CE, Sect., 17 October 1986, *Elections cantonales de Sevrin*, *Lebon* p. 233).

1606 TA Châlons-en-Champagne, 25 March 2004, *Mme Gabrielle N'Guyen c/ Commission de propagande de Reims* 6, n° 04-458, *AJDA* 2004,

383. In a quite singular way, the judge of the *référé-liberté* is not interested in the act or behaviour considered in isolation but focuses on the legal situation to which it gives rise. He considers this situation as a whole made up of a set of acts and, where applicable, actions or abstentions. In the event of an appeal against a decision, it focuses its review on the situation arising from that decision. Thus, in an order of 18 October 2001, he stated, for example, that the applicant association "is not entitled to request the annulment of the order of the interim relief judge of Montpellier rejecting its request that an injunction with a fine be issued, pursuant to Article L. 521-2 of the Code of Administrative Justice, in order to put an end to *the situation resulting from the decision* of the mayor of Castelnau-le-Lez"¹⁶⁰⁷. In other words, the judge of the *référé-liberté* is a judge of legal situations and not a judge of acts. He takes into account all the data of a legal situation; he considers all the legal effects resulting from the administration's will without necessarily stopping at a specific act. He can then, unlike the judge of the excess of power or the judge of the summary judgment, apprehend a legal situation in its globality¹⁶⁰⁸.

In the *Tibéri* case, the interim relief judge of the Council of State examined the case in the light of the recommendations, press releases and position statements of the Conseil supérieur de l'audiovisuel, which together characterised "the situation submitted to the interim relief judge in this case"¹⁶⁰⁹. In the *Aguillon* judgment of 9 December 2003¹⁶¹⁰, the applicants formally challenged an order dated 21 November which, ordering the requisition of striking employees for a period of seven days, ceased to have effect on 28 November, the day on which the appeal in cassation was lodged with the Council of State. The decision challenged before the first judge having exhausted its effects, the Council of State would have declared the appeal inadmissible if the appeal had been lodged under Article L. 521-1. But the judge of the *référé-liberté*, judge of legal situations, accepts to hear the appeal. Although the decision formally challenged before the judge of the first instance ceased to produce its effects, these were nevertheless renewed in strictly identical terms, and for a new ten-day period, by a decision dated 28 November. This second decision, which is effective on the day the judge rules, was certainly not challenged in the first instance. Nevertheless, it maintains the legal situation resulting from the first decision and is in line with it. The Conseil d'Etat therefore took into consideration the entire situation at issue: it did not refer to the 21 November or 28 November order in isolation, but chose to refer more broadly to the "orders in question". In order to admit the admissibility of an application lodged on the basis of Article L. 521-2, the only thing that matters is that a legal situation has been established and is still in existence on the day the interim relief judge is called upon to rule.

384. Indeed, although the field of acts and behaviour that may be appealed is broad, it cannot be accepted that any act, action or abstention may be referred to the judge of the *référé-liberté*. The measure challenged before him must, whatever its nature, have legal effects, implications or repercussions.

Thus, a simple intention cannot give rise to the initiation of a *référé-liberté*. A simple wish, which in itself has no impact, cannot be pursued under Article L. 521-2 of the Administrative Justice Code. In the *Meyet* order of 22 March 2001, the judge stated that "by expressing the wish that the members of his Government should not at the same time hold office as mayors, the Prime Minister has not enacted any rule of positive law and has not infringed any fundamental freedom"¹⁶¹¹. By referring to the enactment of a rule of positive law, the interim relief judge indirectly requires that the contested measure be prejudicial. If there is no legal impact, the contested measure is inadmissible¹⁶¹². In the same sense, the judge affirmed that the administrative acts or actions referred to in the provisions of Article L. 521-2 do not include "statements by which a member of the Government defines before one or other parliamentary assembly the orientations of his action". It follows from this that the remarks made by the Minister of the Interior before the National Assembly on the subject of the measures of expulsion from the territory that he intends to take or have taken against foreign nationals who have been convicted of participating in certain urban violence 'are not, in themselves, subject to the procedure instituted by Article L. 521-2 of the Code of Administrative Justice'¹⁶¹³. In the same sense, the acts covered by these provisions do not include "a declaration by which the President of the Republic defines for public opinion the policy guidelines he intends to

p. 742, obs. S. BRONDEL.

¹⁶⁰⁷ CE, ord. 18 October 2001, Association groupe local Cimade Montpellier, n° 239071.

¹⁶⁰⁸ This is not possible with a review of a specific decision. As President Woehrling pointed out, "the rule according to which any appeal must be made against a prior decision obliges one to crystallize the dispute on a specific act, artificially cut off from its context, whereas it is often a set of closely linked administrative behaviours that constitutes the source of the dispute" (J.-M. WOEHLING, "Réflexions sur une crise : la juridiction administrative à la croisée des chemins", in *Service public et libertés, Mélanges offerts au professeur Robert-Edouard Charlier*, éditions de l'Université et de l'enseignement moderne, 1981, p. 349).

¹⁶⁰⁹ CE, ord. 24 February 2001, *Tibéri*, *Lebon* p. 85.

¹⁶¹⁰ CE, 9 December 2003, *Aguillon and others*, *Lebon* p. 497.

¹⁶¹¹ CE, ord. 22 March 2001, *Meyet*, *Lebon* T. p. 1130. See also *supra* CE, ord. 18 October 2001, *Association groupe local cimade Montpellier*, n° 239071.

¹⁶¹² It is true that the interim relief judge rejects the application as "ill-founded". Nevertheless, in the context of the sorting procedure, the court understands this concept to mean an application that is not likely to succeed for any reason whatsoever, which may relate to the merits but also to jurisdiction or admissibility. See *infra*, §§ 406-407.

¹⁶¹³ CE, ord. 12 November 2005, Association SOS racisme - touche pas à mon pote, *Lebon* 496.

follow". Consequently, the statements made by the Head of State during his televised address on 31 March 2006, concerning the promulgation and conditions for implementing and amending the Equal Opportunities Act, "are clearly not subject to the procedure instituted by Article L. 521-2 of the Administrative Justice Code"¹⁶¹⁴.

In application of this same requirement, the citizen who challenges a refusal and not an abstention cannot usefully act in the absence of a position taken by the administrative authority on his situation. The applicant who challenges a refusal, and not an abstention of the administration, must produce an express or implicit decision of refusal in support of his appeal. According to the interim relief judge, the investigation and judgment of applications submitted on the basis of Article L. 521-2 cannot replace the investigation and pronouncement of an administrative decision. In cases where the infringement of a fundamental freedom results, according to the applicant, from the administration's refusal to grant a request, "the applicant is only entitled to rely on such an infringement if he or she is able to justify before the interim relief judge the very existence of a decision rejecting the request"¹⁶¹⁵. These principles are applicable, for example, to the issue of identity documents, as illustrated by an order of 13 September 2004. In two separate applications registered respectively at the Conseil d'Etat's legal secretariat on 27 and 31 August 2004, two applicants asked the interim relief judge to suspend a 'decision' by the consular authorities in Dakar refusing to issue them a French national identity card and passport. However, the interested parties did not produce any explicit or implicit decision of rejection in support of their request. Under these conditions, 'the interim relief judge cannot, in any event, accept such conclusions in cases where the applicants do not justify the existence of the refusal that was made to requests addressed to the administrative authority in this regard'¹⁶¹⁶.

In any case, the court can only intervene if a dispute has arisen and is still pending. In other words, the petitioner can only usefully file an appeal if he or she can justify a *dispute*, the existence of which may be revealed both by a decision and by the behaviour of the public authority. Otherwise, the applicant will not be admissible to bring an action before the administrative court, even on the basis of Article L. 521-2. Thus, in a *Titaou* order of 5 October 2006, the interim relief judge affirmed that if the maintenance in force of a measure to remove a foreigner from the national territory is likely to affect the exercise of the freedom of all persons to live with their family, "The judge of summary proceedings can only be regularly seized of a dispute arising on this point insofar as the dispute is validly linked either by the occurrence of an act attributable to the administration, or by the intervention of an express decision or a decision implicitly born because of the expiry of the time limit given to the administrative authority to take it"¹⁶¹⁷.

Finally, the legal situation must exist on the day the court is seized or called upon to rule. The disappearance of its effects will lead the judge to oppose, according to the moment at which it occurs, an inadmissibility (if the object of the litigation disappears before the introduction of the request)¹⁶¹⁸ or a non-lieu à statuer (if it disappears after the introduction of the request but before the pronouncement of the judgement)¹⁶¹⁹. The same requirement logically applies to the procedures of the *voie de fait*¹⁶²⁰ and the *déféré-liberté*¹⁶²¹. This limit appears classic and perfectly legitimate. It does not in any way restrict the scope of measures that may be appealed. The comprehensive approach adopted and, more specifically, the possibility of challenging the administration's failures and abstentions, has enabled the administrative judge to give an indirect horizontal dimension to fundamental freedoms

B. The possibility of challenging negative actions as a lever for an indirect horizontal effect of fundamental freedoms

385. When the administration is subject to an obligation to promote or ensure respect for fundamental freedoms between private persons or, more generally, not to hinder these freedoms by its abstention, Article L. 521-2

¹⁶¹⁴ CE, ord. 4 April 2006, *Bidalou*, n° 291948.

¹⁶¹⁵ CE, ord. 7 November 2003, SA d'habitations à loyer modéré trois vallées, *Lebon T.* p. 911.

¹⁶¹⁶ CE, ord. 13 September 2004, *Salif X. and Yayah X.* n° 271609 and 271707.

¹⁶¹⁷ CE, ord. 6 October 2006, *Titaou*, n° 297932.

¹⁶¹⁸ See for example CE, ord. 12 November 2004, *Uluoz*, no. 274010. By a petition registered at the administrative court registry on 27 October 2004, the applicant requested the suspension of a decision of 1^{er} October 2004 by which the Minister of Employment and Social Cohesion authorised his dismissal. This decision had been notified to him on 19 October 2004 by his employer, and should therefore be considered as having been fully executed on that date. As a result, the first instance interim relief judge was right to reject this request as pointless and therefore inadmissible.

¹⁶¹⁹ See for example CE, ord. 2 November 2001, *SNC Costes*, n° 239617.

¹⁶²⁰ As Mrs. Le Foyer de Costil points out, "as soon as an alleged assault has ceased at the time of the hearing, and the same rule applies to any manifestly unlawful disturbance, the summary proceedings judge must note that the disturbance has ceased and that there is no need for summary proceedings without investigating or saying whether the said disturbance was or was not unlawful" (H. LE FOYER DE COSTIL, "Le vol d'aigle du juge des référés", in *Etudes offertes à Pierre Bellet*, Litec, 1991, p. 344-145. See the examples cited by the author on pp. 345-346).

¹⁶²¹ If the decision has been fully executed, the claim is no longer relevant. See TA Rennes, order 28 April 1985, *Préfet du Finistère c/ Conseil général* (cited by R. ETIEN, *RDJ* 1988, p. 754, note 79), concerning a decision granting a subsidy that had actually been paid at the time the act was transmitted to the prefecture.

makes it possible for these freedoms to have an indirect horizontal effect through the intermediary of the public authority. It is possible to speak of a *horizontal* effect, insofar as the dispute primarily concerns two private persons and, more precisely, the infringement by a private person of the fundamental freedoms of another natural or legal person. It is an *indirect* effect insofar as it does not operate directly between private persons, but through the interposition of a third public person.

This effect is made possible when three elements come together. First, a private person not entrusted with the management of a public service infringes, by his action (or abstention), the interests and fundamental freedoms of another person. Secondly, an administrative authority has an obligation to act to put an end to the infringement or the offending conduct; it must be possible to identify an obligation on the part of the public authority to act within the framework of its "public powers to control and guarantee fundamental freedoms"¹⁶²². Finally, the public authority refrains (or refuses) to act.

This indirect horizontal effect is therefore very largely conditional on the existence of an obligation to act on the part of the public authority. The interposition of a public person who owes an obligation to act is indispensable for the realisation of this effect. In the absence of such an obligation, the indirect horizontal effect cannot be applied¹⁶²³. It is important to specify that if such an effect is made possible in the context of summary proceedings, it is *only* thanks to the possibility offered to the litigant to challenge the failures and abstentions of the administrative authority and not, as has been argued, because of the choice of the expression "fundamental freedom"¹⁶²⁴.

386. The indirect horizontal effect was first manifested in the *Tibéri* order of 24 February 2001¹⁶²⁵. The circumstances that gave rise to this decision are well known. On the occasion of the campaign for the 2001 municipal elections, the private television channel Canal + planned to organise a "duel" between the two main candidates for the mayor of Paris, Philippe Seguin and Bertrand Delanoé. Jean Tibéri, the outgoing mayor of the city but who did not obtain the nomination of his party, is not invited to participate in this televised duel. Mr Tibéri believes that Canal +'s decision to exclude him from the debate violates the requirement of pluralism in the expression of currents of thought and opinion. As the administrative court was not competent to deal with infringements of fundamental freedoms by private broadcasters, Mr Tibéri could not bring an application for interim relief against Canal +, a legal person governed by private law not responsible for managing a public service. In order to circumvent this obstacle, the application was lodged against the Conseil supérieur de l'audiovisuel (CSA), an independent administrative authority statutorily responsible for ensuring that pluralism is respected on national television channels¹⁶²⁶. The applicant's argument can be summarised in two propositions. On the one hand, respect for pluralism requires the CSA to order Canal + either to extend the scope of the debate to all the candidates for the Paris mayor's office, or to abandon the debate altogether. On the other hand, the failure of the Conseil supérieur de l'audiovisuel to act undermines pluralism and justifies the judge ordering it to issue this injunction to Canal +. When the matter was referred to him on the basis of Article L. 521-2 of the Code of Administrative Justice, the interim relief judge of the Council of State did not raise the issue of inadmissibility and ruled on the request.

In so doing, the order "recognises the existence of the horizontal effects of fundamental rights and freedoms in that it obliges a private person - Canal + - to respect the rights of another private person, Mr Tibéri"¹⁶²⁷. By recognising its jurisdiction, the interim relief judge accepts that a private person may invoke before his court the violation of a fundamental freedom by another private person, provided that he is able to hide behind a public person playing the role of regulator. The scope of this decision is therefore important. It means that "with the référé-liberté procedure, and provided that an intermediary legal person under public law can be found, it will be

1622 B. PACTEAU, *Contentieux administratif*, 6^{ème} éd, PUF, coll. Droit fondamental, 2002, n° 278.

1623 See CE, 22 May 2002, *Fofana and others, Lebon* p. 175. The applicants, tenants of unhealthy housing belonging to private individuals, requested that the municipality be ordered to provide them with replacement housing until the housing they occupied was rehabilitated. As the public authority was not legally obliged to provide them with replacement housing in such circumstances, the Council of State did not find any serious and manifestly illegal infringement of a fundamental freedom "by a legal person governed by public law acting in the exercise of one of its powers".

1624 M. Brenet argued that "The use of the concept of fundamental freedom offers the advantage of extending the effects of the summary procedure by allowing citizens to protect themselves in the vertical relations they have with the public authority but also in the horizontal relations they can establish with other private persons" (F. BRENET, "La notion de liberté fondamentale au sens de l'article L. 521-2 du CJA", *RDP* 2003, p. 1568). M. Brenet gives the choice of this expression a scope that it clearly does not have. Not only would a strictly identical effect have been possible with the expression "public freedom" or "essential freedom". But in addition, there is nothing to exclude that such an effect can also be deployed in the context of summary proceedings, provided that the applicant has a decision to challenge. In this case, in fact, the suspension of a negative decision is accompanied by the pronouncement of an injunction of execution (see CE, 11 June 2002, *SARL Camping d'Or, Lebon* T. p. 933, directing the author of a référé-conservatoire towards the procedures of référé-suspension and référé-liberté to obtain the expulsion of occupants without title).

1625 CE, ord. 24 February 2001, *Tibéri, Lebon* p. 85, *JCP G* 2001, I, 318, chron. C. BOITEAU; *D.* 2001, pp. 1748-1751, note R. GHEVONTIAN; *RFD-A* 2001, pp. 629-649, note B. MALIGNER; *Com. com. électr.* 2001, comm. n° 51, obs. G. DECOCQ and A. LEPAGE.

1626 The law of 30 September 1986 entrusted the Conseil supérieur de l'audiovisuel with the task of ensuring compliance with the principles defined in its articles 1^{er} and 3, which include equal treatment and the expression of pluralism of thought and opinion.

1627 L. FAVOREU, "La notion de liberté fondamentale devant le juge administratif des référés", *D.* 2001, p. 1741.

possible to obtain respect for fundamental rights and freedoms in relations between private persons"¹⁶²⁸. Contrary to what is sometimes maintained¹⁶²⁹, the judge of *référé-liberté* does not impose any obligation on a private person - he could not in any case do so, unless he disregards the rules governing the division of competences between the two jurisdictional orders. The obligations defined by the interim relief judge are not addressed to the private company Canal + but to the CSA. The interim relief judge sets out in detail the measures that the public authority must take, in the interests of pluralism, to settle the dispute involving Canal +, but he does not, as such, issue any injunction to Canal +.

387. Another application of the indirect horizontal effect of fundamental freedoms can be found in the *Stéphaur* case law¹⁶³⁰. The three elements necessary for the deployment of this effect are found there. Firstly, a private person infringes, by his action, the fundamental freedoms of a third party: a private person irregularly occupies the property of an owner, infringing the latter's freedom to dispose of his property (and the tenant's freedom to dispose of the leased property). Secondly, the administrative authority is obliged to act to put an end to the infringement: when the judicial authority has noted the irregularity of the occupation without title and ordered the eviction of the squatter, the prefect, in the absence of risks of major disturbances to public order, is obliged to provide the assistance of the public force to enforce this decision¹⁶³¹. Finally, the administration refrains from acting: the prefectural authority refuses or refrains from providing the assistance of the public force.

This case law was inaugurated with the *Stéphaur* judgment of 29 March 2002. Owners and tenants who were victims of a squat had obtained a decision from the civil judge of summary proceedings ordering the eviction of the occupants without title. As the prefect refrained from providing assistance from the public force, the interested parties had referred the matter to the judge of the *référé-liberté* and obtained the pronouncement of a safeguard measure. It should be noted that by retaining jurisdiction in this dispute and ordering the police authority to provide assistance from the public force, the administrative judge in no way disregards the prerogatives of the judicial authority. Surprisingly, one author has argued that "By ordering the execution of a decision of the judicial judge, the administrative judge emancipates himself from the rules of distribution of competences between administrative and judicial jurisdictions"¹⁶³². This reading of the *Stéphaur* case law is reprehensible because, by ordering the administrative authority to execute a court decision, the administrative judge in no way encroaches on the powers of the judicial court. He does not intervene directly in a private law dispute. He does not come to retry, after a civil court, a dispute between two private persons. By agreeing to hear cases of abstention or refusal - administrative - to execute a judicial decision, it comes on the contrary to reinforce the effectiveness of the latter and to guarantee its correct execution by the administration. Far from undermining the separation of powers or authorities, the administrative judge on the contrary reinforces it by his intervention¹⁶³³.

388. Thanks to a significant reduction in the rules governing the initiation of proceedings, the victim of a possible infringement of his or her fundamental freedoms has very easy and, consequently, very rapid access to the interim relief judge. With the same objective of immediate repression of serious infringements of fundamental

¹⁶²⁸ R. GHEVONTIAN, *op. cit.*, p. 1751. On this theme, see D. RIBES, *L'Etat protecteur des droits fondamentaux. Recherche en droit comparé sur les effets des droits fondamentaux entre personnes privées*, Aix-en-Provence thesis, 2005, 500 p.

¹⁶²⁹ M. Maligner affirms that the judge imposes "on a private person, who is not, moreover, responsible for "the management of a public service" to adopt a determined attitude" (B. MALIGNER, *op. cit.*, p. 644). Similarly, Mr Faure maintains that it is "noteworthy that this order allows the judge of the *référé-liberté* to issue an injunction in the form of an obligation of result to a legal person under private law not entrusted with a public service mission, Canal +, insofar as the latter is a stakeholder with the CSA" (B. FAURE, "Juge administratif statuant en urgence. *Référé-liberté*", *Jel. Justice administrative*, fasc. 51 (11, 2002), n° 56).

¹⁶³⁰ CE, 29 March 2002, *SCI Stéphaur et autres, Lebon* p. 117, *AJDA* 2003, pp. 345-349, note P. GROSIEUX. On the numerous applications to which this case law has given rise, see the references cited *above*, § 273.

¹⁶³¹ See *supra*, § 273.

¹⁶³² P. GROSIEUX, *op. cit.* p. 349.

¹⁶³³ As the Constitutional Council has stated, the administration must execute and respect judicial decisions; it cannot disregard this obligation without undermining the separation of powers proclaimed in Article 16 of the Declaration of the Rights of Man and of the Citizen (see *above*, § 273). By recalling this obligation and ensuring that the separation of powers is respected, the administrative judge guarantees the proper execution of the court's decisions by the public authorities. Prior to the introduction of the *référé-liberté* system, landlords who had received an eviction order had no legal means of effectively combating the administration's refusal to act or abstention. While such a refusal is intended to be exceptional, it was observed that the administration very frequently refused to assist in the enforcement of decisions ordering the eviction of unentitled occupants at the request of the owner. Each year, only 2,000 of the 30,000 requests for assistance from the public force are granted (R. CHAPUS, *Droit administratif général*, t. 1, 14^{ème} éd., Montchrestien, 2000, n° 1512). In this case, "it is ultimately the administration that decides whether the authority of *res judicata* should be respected" (L. FAVOREU, "Rapport français (Droit public interne)", in *L'effectivité des décisions de justice. Travaux de l'Association Henri Capitant* (Journées françaises), 17-21 May 1985, t. XXXVI, Economica, 1987, p. 610). The owners who were victims of squatting had no choice but to request that the administration be ordered to pay compensation. In the case of a legal refusal - because it was justified by a real threat to public order - the administration was liable without fault, for breach of equality before public charges (*Couëtus* case law, enshrined in Article 16 of the Law of 9 July 1991: see *supra*, § 273). In the event of an illegal refusal - in the absence of proven disturbance of public order - the administration's failure to act could give rise to liability on the grounds of gross negligence (see, for example, CE, 7 November 1984, *Horel, Syndic Société Hélio Cachan, Dr. adm.* 1985, n° 541; CE, 2 December 1987, *S.A. Anodistation, JCP G* 1988, IV, 88). Now having an effective and rapid means of action, the victims of squatting can force the administration to intervene to stop the infringement of property rights. In doing so, the administrative judge participates in the respect of the principle of separation of powers which, in constitutional jurisprudence, implies in particular that the administration executes the decisions of justice without having to assess their appropriateness.

freedoms, the interim relief judge is obliged to examine and judge with extreme celerity the applications submitted to him on this basis.

Chapter 2

A speedy judge

389. In ordinary proceedings, the investigation and judgment of appeals are subject to complex rules and binding formalities designed to counterbalance the imbalance between the parties involved. These requirements, in particular the written nature of the procedure and the intervention of a panel, enable the court to give a decision in complete serenity after a full investigation and a thorough examination of the case. This formalism represents a guarantee of good justice for the litigant. Nevertheless, compliance with these rules takes time and necessarily slows down the course of the proceedings. In the event of a serious infringement of a fundamental freedom, the objective of speedy litigation is difficult to reconcile with the usual formalism of the investigation and judgment of applications. A legal remedy whose purpose is to suppress serious infringements of fundamental freedoms as soon as they occur cannot tolerate the slightest procedural heaviness. It was therefore necessary to define a procedural regime adapted to the objective of immediately safeguarding freedoms.

The procedure for interim relief is organised in such a way that it is possible to obtain a decision within days or even hours of the application being made. Everything has been designed to ensure that applications submitted on this basis are processed extremely quickly. The application is examined by a single judge who decides in a streamlined procedure. The interim relief judge immediately rejects applications that are doomed to fail and decides within 48 hours on those that merit further examination. Thus, as Mr Chapus points out, the procedure instituted bears "the mark of the concern that the proceedings (at first instance and on appeal) should be completed as quickly as possible, to the extent that it appears to be more than an emergency procedure: a procedure of extreme urgency"¹⁶³⁴.

Section 1. The single judge as an indispensable instrument of expedition

390. The use of the single-judge formula is essential to ensure the speed of the proceedings and guarantee very rapid processing of the applications. Therefore, the interim relief judge is a magistrate ruling alone and without the conclusions of a government commissioner.

I. The need for a single judge

391. The desire to move quickly - or very quickly in the case of applications for interim relief - has led the legislator to depart from the traditional principle of collegiality. The examination of the case by a single judge is the first factor in speeding up the proceedings.

392. Collegiality has always been the rule in administrative litigation law¹⁶³⁵. Today, this requirement is one of the principles set out in the preliminary title of the Code of Administrative Justice, Article L.3 of which states that "Judgments are rendered in collegiality". This principle is based on the idea and even the observation that a panel of judges offers litigants greater guarantees in terms of the quality, independence and authority of

1634 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1592.

1635 See C. BOITEAU, "Le juge unique en droit administratif", *RFDA* 1996, pp. 10-28; B. PACTEAU, "Le juge unique dans les juridictions administratives. Le point de vue de la doctrine", *GP* 1998, 1, pp. 177-182; C. CHEVALLIER-GOVERS, "Le président du tribunal administratif au secours de la célérité de la justice administrative", *GP* 2000, 1, pp. 1030-1047; M. RONCIERE, "Le juge unique dans la juridiction administrative: de l'exception à la généralisation", *LPA* 26 July 1995, pp. 18-20; M. PAILLET, "Le juge administratif, juge unique", in *Les juges uniques, dispersion ou réorganisation du contentieux?*, Colloque des IEJ (C. BOLZE et P. PEDROT dir.), Toulon, 19-20 May 1995, Dalloz, 1996, pp. 93-112; M. RIGAUD, *Le juge unique en droit administratif au regard des garanties de bonne justice*, thesis Toulon, 2002, 369 p.; M. NAUDET-SENECHAL, *Le juge unique. Essai d'une théorie générale*, thesis Paris II, 2000, 774 p.; R. D'HAEM, *Le juge unique administratif*, thesis Paris II, 2001, 841 p.

justice¹⁶³⁶. However, the principle is not absolute¹⁶³⁷. It is subject to exceptions justified either by the simplicity of the issue to be dealt with or by the need for rapid judicial intervention¹⁶³⁸.

393. In view of the number of staff available to the administrative justice system and the volume of cases referred to it each year, the needs of urgent cases require a single judge in the field of summary proceedings¹⁶³⁹. Insofar as it makes the handling of urgent cases more cumbersome, recourse to a panel of judges is a source of lengthening procedures. Therefore, in order to move quickly, "we must save the time of the collegiality"¹⁶⁴⁰. As Mr Drago pointed out, "the intervention of a single judge, ruling without procedure, is an almost fundamental condition" for the speed of the procedure¹⁶⁴¹. In the past, this requirement led to the introduction of a single judge in certain cases requiring very rapid intervention. The principle of a single judge had thus been adopted for the *déféré-liberté*, the deportation dispute, the *référé-précontractuel* or the provisional suspension procedure organised by Article L. 10 of the Code of Administrative Tribunals and Administrative Courts of Appeal¹⁶⁴². As regards summary proceedings governed by Book V of the Code of Administrative Justice, the legislator has generalised the single-judge formula in accordance with the guidelines defined by the Council of State working group¹⁶⁴³. It should be noted that even in the absence of a legal regime common to all summary proceedings, the single-judge solution would in any case have been applied to summary proceedings. Since the legislator wanted applications relating to the existence of a serious and manifestly unlawful infringement of a fundamental freedom to be judged within 48 hours, the principle of a

1636 By encouraging the exchange of opinions and the confrontation of points of view, collegiality first of all ensures the quality of the decision made. Through the deliberation it induces, it reduces the risk of error and limits the weight of personal prejudices. The adage "one judge, unjust judge" is a counterpoint to the fear of personalizing the judicial function. Montesquieu stated that "such a magistrate can only take place in despotic government" (MONTESQUIEU, *De l'esprit des lois*, 1748, Book VI, Chapter VII). Secondly, collegiality guarantees the independence of judges. As Professor Pacteau explains, "collegiality, at least as it is conceived in France, i.e. in conjunction with the confidentiality of the opinions expressed and the anonymity of the votes cast, helps to guarantee greater personal independence for the judge" (B. PACTEAU, *op. cit.*, p. 178. Underlined). It represents, for the judges who are in charge of settling administrative disputes "a condition of their independence in their relations with the most powerful and most constant of their litigants, i.e. with the administration" (R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} éd., Montchrestien, 2006, n° 53). Finally, collegiality confers a symbolic authority on the sentence pronounced. It "gives a particular dimension to the judicial decision. It is the arm of justice that decides the dispute and not the will of a single man who may be given over to his passions, weaknesses and prejudices (...) it accentuates the mythical function of justice considered to be detached from the individual" (T.-S. RENOUX, "Le Conseil constitutionnel et la collégialité", in *Les juges uniques: dispersion ou réorganisation du contentieux*, *op. cit.*) These last two elements are all the more valuable in administrative litigation since it is the public authority itself that is being judged: "In view of the nature of the disputes involving the administration, a collegiate body is better able to guarantee the independence of the judges and ensure the authority of the decision" (C. CHEVALLIER-GOVERS, *op. cit.*, p. 1046). This explains why, in the field of contentious administrative procedure, "for a long time, there was unanimity according to a thinking fundamentally hostile to the single judge, a judge ruling and above all, deliberating alone, therefore *a priori* less and less well" (B. PACTEAU, *op. cit.*, p. 177. Underlined). The institution has been the subject of definitive condemnations by the most eminent figures in administrative jurisdiction. President Odent thus declared that "The solution of the single judge, which may seem expedient in administrative litigation, is a detestable solution (...)" (R. ODENT, *Contentieux administratif*, Les cours de droit, fasc. III, IEP de Paris, 1981, p. 970). This hostility explains the late appearance of the single judge in administrative litigation. Of the 25 cases where a single judge has been introduced in the history of administrative litigation - some of which have since been abolished - 20 were introduced in the 1980s and 1990s, with the last decade seeing a very marked acceleration (see R. D'HAEM, *op. cit.*, summary table, p. 13).

1637 Article L. 3 of the Code of Administrative Justice expressly reserves the possibility of legislative derogation from the principle. These derogations are possible insofar as collegiality does not constitute a supra-legislative requirement (cf. M. RIGAUD, *op. cit.*). No constitutional or European standard is therefore opposed to the institution of a single judge. The Constitutional Council refused to enshrine a constitutional principle of collegiality (CC, no. 75-56 DC, 23 July 1975, *Rec.* p. 22). In 1990, it did not criticise the institution of a single judge to deal with cases of deportation (CC, no. 89-266 DC, 9 January 1990, *Rec.* p. 15). Nor did it criticise what became the Act of 8 February 1995, which developed the single-judge system in administrative litigation (CC, no. 95-360 DC, 2 February 1995, *Rec.* p. 195). The same applies to European law. As M. Pacteau points out, "The case law of the European Court of Human Rights, which is often so quick to identify the best judicial guarantees, has not (...) imposed any principles, however specific or partial, of collegiate jurisdiction" (B. PACTEAU, *op. cit.*, p. 179).

1638 To use Professor Normand's formula, recourse to a single judge is necessary "when there is no time to lose" and "when there is no point in wasting time" (J. NORMAND, "Le juge unique et l'urgence", in *Les juges uniques, dispersion ou réorganisation du contentieux?*) The single-judge formula is necessary in order to be able to rule urgently on questions that cannot wait - the hypothesis that interests us here; it is sufficient when it is a question of settling simple questions (e.g. establishing a withdrawal). This second hypothesis of a single judge stems from the idea that there is no need to convene a panel to deal with applications that do not raise the slightest legal difficulty and for which the intervention of a panel is perfectly superfluous. The Act of 8 February 1995 significantly expanded this possibility. Following this text, "it was estimated that between 10 and 20% of first instance cases could be resolved in this way" (A. BOURREL and J. GOURDOU, *Les référés d'urgence devant le juge administratif*, L'Harmattan, coll. La justice au quotidien, 2003, p. 12).

1639 Urgency does not, in itself, require a single judge. It does impose it in relation to the number of staff available to our justice system. Although a panel can intervene in conditions of great speed (see the examples cited *above*, § 6), its meeting nevertheless leads to the mobilisation of magistrates to the detriment of cases judged according to the ordinary rules.

1640 J.-F. BURGELIN, J.-M. COULON and M.-A. FRISON-ROCHE, "Le juge des référés au regard des principes procéduraux", *D.* 1995, p. 72.

1641 R. DRAGO, "La procédure de référé devant le Conseil d'Etat", *RDP* 1953, p. 304.

1642 On the other hand, the suspension of execution under ordinary law had to be pronounced by a panel, the single judge being competent only to reject the request for suspension. M. Chapus had rightly criticised this rule: "The requirement that the judgement of applications for a stay of execution be made by a panel exaggerates the seriousness of the suspension of the execution of an administrative decision. (...). As regards administrative decisions, the principle (at least) of judgment by a single judge would be more appropriate, since it is a matter of taking a measure that is both urgent and provisional" (R. CHAPUS, "Le juge administratif face à l'urgence", in *L'administration et son juge*, PUF, coll. Doctrine juridique, 1999, p. 290). As for the interim relief judge, he or she certainly intervened as a single judge, but his or her powers were very limited.

1643 See "Report of the Council of State's working group on emergency procedures", *RFDA* 2000, p. 949: "despite the guarantees provided by collegiality, the working group considered that only a single judge was capable of dealing with certain requests from litigants in an emergency. The concern to unify procedures led the working group to entrust, in all cases, the powers of emergency intervention of the administrative judge to this single judge, qualified as a "judge of summary proceedings".

judge ruling alone was naturally imposed in this area.

II. The status of interim relief judge

394. The interim relief judge is a single, experienced judge. As he exercises a strictly jurisdictional function, he is naturally subject to the requirement of impartiality.

A. A single, experienced judge

395. The interim relief judge is a single judge. He rules alone and by means of an order without hearing a government commissioner¹⁶⁴⁴. Article L. 522-1 paragraph 3 of the Code of Administrative Justice provides that in the absence of referral to a panel, "the hearing shall take place without the conclusions of the Government Commissioner". The exemption of the government commissioner concerns both the judge of the first degree and the judge of the Council of State for interim relief. When it hears an application submitted on the basis of Article L. 521-2 by way of appeal, the interim relief judge of the Council of State rules without the government commissioner's conclusions, contrary to what has been stated on this point¹⁶⁴⁵.

The weakening of the guarantees provided to litigants by the absence of a government commissioner and collegiality was tempered by the requirement of a minimum grade and experience. Members of parliament required the judge called upon to rule alone to have some experience of litigation. In the course of the legislative procedure, the condition of competence and experience was introduced at first reading by the National Assembly. The deputies intended to entrust the implementation of the reform to judges who, having experience in handling cases and proceedings, would not be afraid to assume the full extent of their new responsibilities¹⁶⁴⁶. Article L. 511-2 of the Code of Administrative Justice therefore reserves the status of interim relief judge to the presidents of administrative courts and to the judges they appoint for this purpose who, unless they are absent or prevented from attending, have a minimum of two years' seniority and have attained at least the rank of first councillor. The orders do not have to mention the delegation that the interim relief judge has received from the president of the administrative court¹⁶⁴⁷. A magistrate who has not attained the rank of first councillor is entitled to rule as an interim relief judge in the event of the absence or impediment of those of his or her colleagues who meet the double condition of age and seniority laid down by Article L. 511-2¹⁶⁴⁸. For disputes falling within the jurisdiction of the Council of State on appeal or at first and last instance, the capacity of judge of summary proceedings is vested in the president of the litigation division as well as in the councillors of state that he appoints for this purpose. In the early days of the reform, only the deputy presidents of the Administrative Jurisdiction Division performed this task on a full-time basis alongside the president of the Administrative Jurisdiction Division. Once the acclimatisation phase had been completed and the main procedural difficulties had been resolved, other councillors, especially the presidents of the subdivisions, were involved in the exercise of the function of interim relief judge. There are no special features of the summary procedure for the distribution of cases within a court. Applications submitted on the basis of Article L. 521-2 are distributed among the various judges in the same way as other applications for interim relief. At the Council of State, no interim relief judge deals specifically with applications made on this basis. Nevertheless, it can be observed that a significant proportion of applications are handled by the president of the Administrative Jurisdiction Division himself.

1644 However, the interim relief judge is not an isolated judge. In addition to the possibility, which is always open to him, of referring the case to a panel, there are three elements that rule out any isolation of the judge hearing the application for interim measures. Firstly, the judge has every opportunity, in the event of difficulty, to consult his colleagues informally. In practice, it is not uncommon for the judge to informally inform his colleagues of the hesitations encountered in a case and thus exchange views before taking a decision. Secondly, he or she can benefit from the assistance of judicial assistants and, at the Council of State, from the services of the Documentation Centre for research and decision drafting. Thirdly, a weekly meeting of the interim relief judges, which precedes that of the *troika*, makes it possible to decide on common lines of solution. Every Tuesday, this meeting brings together the president and the three deputy presidents of the Administrative Jurisdiction Division (who are four of the five permanent interim relief judges), joined on this occasion by the fifth interim relief judge of the week. This weekly and institutionalised meeting promotes harmonisation of the case law in this area. On these different elements, see B. GENEVOIS, "Interview with Franck Moderne and Pierre Delvolvé", *RFD-A* 2007, p. 2; B. STIRN, "Juge des référés, un nouveau métier pour le juge administratif", in *Juger l'administration, administrer la justice. Mélanges en l'honneur de Daniel Labetoulle*, Dalloz, 2007, pp. 795-801, esp. pp. 799-801.

1645 See J. GOURDOU, "Juge des référés. Organisation. Dispositions générales", *Jcl. Justice administrative*, fasc. 50 (5, 2002), n° 52: "When he is however called upon to rule on appeal on a measure taken in summary proceedings (in particular in matters of summary proceedings), the president of the litigation division, in the silence of the texts, gives his decision after hearing the submissions".

1646 *OJ deb. AN*, CR session 14 December 1999, p. 10940.

1647 CE, ord. 20 July 2004, *Mzimba*, n° 270044. The decision specifies that the mentions of jurisdictional decisions are authentic until proven otherwise. Consequently, the mention, in an order, of the status of the magistrate who issued it as an interim relief judge is sufficient, in the absence of any *prima facie* evidence to the contrary, to establish that magistrate's status.

1648 CE, ord. 20 January 2005, *Commune de Saint-Cyprien*, *Lebon T.* p. 1022.

396. Although the interim relief judge is in principle a magistrate ruling alone, the collegiality and the government commissioner may nevertheless reappear in the case of a complex matter or a matter of principle. The interim relief judge is not a separate court but merely an offshoot of the court to which he belongs. Consequently, it is always possible for him to relinquish jurisdiction over a case and refer it to the panel¹⁶⁴⁹. The decision to refer the case back cannot be discussed¹⁶⁵⁰. The interim relief judge of the Council of State¹⁶⁵¹ refers a case when faced with a complex legal problem concerning, in particular, the conditions for granting interim relief¹⁶⁵² or its procedural regime¹⁶⁵³, thus confirming the practice of leaving the settlement of questions of principle to the panels¹⁶⁵⁴. The referral may also be used to give more solemnity to the reaffirmation of a constant jurisprudence that has been ignored by the administration¹⁶⁵⁵. In the event of a referral to a panel, the latter decides after hearing a government commissioner¹⁶⁵⁶.

B. The impartiality of the interim relief judge and the question of cumulating functions

397. The question arose as to whether an administrative judge could deal with the same case successively in his capacity as a judge of the merits and then as a judge of interim relief and, conversely, in his capacity as a judge of interim relief and then as a judge of the merits. The Council of State concluded, in the context of the summary proceedings, that the two functions were compatible. It ruled in the same way on the question of combining the functions of an interim relief judge with those of a judge hearing an application for legal aid.

398. In the context of Article L. 521-1 of the Code of Administrative Justice, the Council of State had to determine whether a judge who had been part of the panel of judges annulling an administrative decision could subsequently rule, as an interim relief judge, on the application for suspension of the decision taken following

¹⁶⁴⁹ The interim relief judge does not constitute an autonomous court separate from the court. He is merely a formation of the court to which he belongs and which delegates to him its competence to rule with the required speed. Also a constant jurisprudence recognizes him the faculty to refer "to the Administrative Court the judgement of the requests which seem to him to present serious difficulties and susceptible of a serious discussion" (CE, Sect. 13 July 1956, *Secretary of State for Reconstruction v Piéton-Guibout*, *Lebon* p. 338, concl. J. CHARDEAU, *RDP* 1957, pp. 296-300, note by M. Waline; *AJDA* 1956, II, pp. 321-324, concl. BRAIBANT; CE, 15 July 1957, *Ville de Royan*, concl. LASRY, *RDP* 1958, pp. 109-126; CE, 30 March 1984, *Société Coignet Pacifique*, *Lebon* T. p. 715). The Council of State analyses in the same way the intervention of the judge of summary proceedings of the Council of State (CE 21 February 1958, *Syndicat intercommunal pour l'alimentation en eau potable de la région de Breuillet*, *Lebon* p. 120). This possibility of referral is of general scope even if the Code of Administrative Justice only expressly mentions it in relation to the Council of State (Article R. 611-20). It has, for example, been applied to the procedures of the référé-précontractuel (CE, 19 March 1997, *SA Entreprise générale de terrassements et de travaux publics et autre*, *Lebon* T. p. 1003) and of deportation (CE, 28 December 1992, *Préfet du Rhône c/ Aslan*, *Lebon* T. p. 983 and p. 1180). Similarly, in civil matters, the president of the court has the power to refer the case in summary proceedings to the collegiate court at a hearing whose date he sets (Article 487 of the new Code of Civil Procedure).

¹⁶⁵⁰ The Conseil d'Etat considers "that the assessment made by the President of the Tribunal is not likely to be challenged before the judge of appeal" (CE, Sect. 13 July 1956, *Secrétaire d'Etat à la reconstruction c/ Piéton-Guibout*, op. cit.). The president of the court has a "discretionary power to decide whether he will rule himself, or through a delegate, or whether he will not rather refer the summary judgment to the whole court" (M. WALINE, op. cit., p. 299). In other words, the referral constitutes a simple measure of administration of justice that cannot be appealed to the judge of appeal or cassation. This rule is of general application (see, for the litigation of deportation, CE, 10 December 1997, *Préfet de police*, n° 170529). On the other hand, the decision taken by the panel following this referral will logically be subject to the same appeal procedures as if it had been taken by the single judge.

¹⁶⁵¹ Referral to a panel remains exceptional before the courts of first instance. Certain decisions of the judge of summary proceedings of the Council of State nevertheless mention that the contested first instance jurisdictional decision was not rendered by a single judge but by the administrative court ruling in collegial formation. See thus CE, ord. 8 March 2001, *Risque*, *Lebon* T. p. 1130; CE, ord. 19 June 2002, *Hoffer*, n° 247884.

¹⁶⁵² See for example CE, Sect. 18 January 2001, *Morbelli, maire de la Commune de Venelles*, *Lebon* p. 18. The interim relief judge of the Council of State decided to refer the case to a panel to clarify the concept of fundamental freedom. The government commissioner noted that "the interim relief judge decided, as soon as the application was registered and in view of the questions it raised, that it would be examined by the Litigation Division the following day" (concl. L. TOUVET, *RFDA* 2001, p. 380). See also, concerning the requirement of manifest illegality: CE, Sect. 30 October 2001, *Ministre de l'Intérieur c/ Tliba*, *Lebon* p. 523.

¹⁶⁵³ Cf. CE, Sect. 28 February 2001, *Philippart and Lesage*, *Lebon* p. 112, concerning the possibility of having conclusions based on distinct grounds coexist in the same application.

¹⁶⁵⁴ See B. GENEVOIS, 'Sur la hiérarchie des décisions du Conseil d'Etat statuant au contentieux', in *Mélanges René Chapus*, Montchrestien, 1992, p. 249: 'In recent times, although the president of the Administrative Jurisdiction Division has his own jurisdictional powers, he nevertheless leaves the judgement of questions of principle to the Division or the Assembly, as the case may be.'

¹⁶⁵⁵ See for example, reminding the administrative authority of the binding nature of decisions taken by the interim relief judge: CE, Sect. 5 November 2003, *Association pour la protection des animaux sauvages et autres, Association Convention vie et nature pour une écologie radicale et autre* (2 species), *Lebon* p. 444.

¹⁶⁵⁶ Pleadings in separate cases may, where appropriate, be joined. Although, under Article L. 7 of the Code of Administrative Justice, submissions must be made in each case, they may nevertheless be joined where necessary, particularly in cases of urgency. It is up to the Government Commissioner, in such a case, to clearly distinguish the solutions he recommends for each of the disputes. See, for example, the conclusions of Mr. Touvet in the *Commune de Venelles* judgment, concerning an interim relief order, read the same day (CE, Sect., 18 January 2001), and the *Confédération nationale des radios libres* judgment, concerning an interim suspension order, read the following day (CE, Sect., 19 January 2001).

this annulment¹⁶⁵⁷. The Council of State concluded in the affirmative insofar as the cause of the dispute is simply not the same in each of the two hypotheses: on the merits and in summary proceedings, the judge does not rule on the same administrative act. In these conditions, the Council states, no legislative or regulatory provision or principle prevents the same judge from hearing the application on the merits and the application for interim relief in succession. Strictly speaking, this does not mean that the same judge is responsible for the same case. As the question arises in the same way for the summary proceedings procedure, the solution found under Article L. 521-1 must be applied in full to Article L. 521-2.

The second case is more delicate insofar as it concerns cumulation, i.e. the successive intervention of the same judge, in two different capacities, on a given case. The Council of State has accepted the cumulation of functions for the summary proceedings procedure. In the opinion *Commune de Rogerville* of 12 May 2004, the Council first of all recalls the office of the judge of the summary proceedings: "Seized on the basis of Article L. 521-1 of the Code of administrative justice of a request tending to pronounce, on a provisional and conservatory basis, the suspension of an administrative decision, the judge of the summary proceedings proceeds as quickly as possible to a brief investigation - distinct from that in the light of which the judge seized of the main case will rule (...)". It then states: "Having regard to the nature of the office thus assigned to the interim relief judge - and subject to the case where it would appear, particularly in view of the very terms of the order, that going beyond what this office necessarily implies, he would have prejudged the outcome of the dispute - the mere fact that a judge has ruled on an application for suspension of the execution of an administrative decision is not, in itself, such as to prevent him from ruling subsequently on the application as judge of the main proceedings."¹⁶⁵⁸. The reasoning of the opinion strictly limits the scope of the solution to the procedure of interim suspension: "it certainly does not settle the case of interim release, taking into account in particular the fact that the judge must then assess the existence of a serious and manifestly illegal infringement, without the intermediary of "serious doubt"¹⁶⁵⁹. Nevertheless, hypotheses can be developed in consideration of the reservation, formulated by the Council of State, concerning the case where the judge of summary proceedings prejudices the outcome of the litigation¹⁶⁶⁰. It seems possible to distinguish two distinct hypotheses. The first is where the interim relief judge has rejected the application for lack of serious and manifestly unlawful interference with a fundamental freedom. In this case, he has not taken a position on the merits of the law. If an appeal is lodged with the main court, there is nothing to prevent the judge who ruled in the summary proceedings from sitting on the panel. The second situation is where the interim relief judge has either found that there is a manifestly unlawful infringement of a fundamental freedom or has found that there is a manifest illegality but has rejected the application on the grounds that another of the conditions for granting it has not been met. In this case, the interim relief judge has dealt with the substance of the law; the reservation in the *Commune de Rogerville* opinion is fully applicable. If an appeal on the merits has been lodged in the case, the principle of impartiality prevents the judge who heard the application for interim relief from being part of the panel that will hear it.

399. The Council of State has adopted the principles of the *Commune de Rogerville* opinion in the case of the combination of the functions of an interim relief judge and those of a judge hearing an application for legal aid. It reserves the hypothesis that, in his decision on legal aid, the interim relief judge would have prejudged the outcome of the dispute¹⁶⁶¹. However, compared to the previous decisions, the question arises in different terms, since the decision on an application for legal aid is an administrative decision and not a judicial one¹⁶⁶²

1657 CE, 9 April 2004, *Olard*, *AJDA* 2004, pp. 1429-1430, note S. HUL.

1658 CE, Sect. 12 May 2004, *Commune de Rogerville*, *Lebon* p. 223; *RFD* 2004, pp. 723-732, concl. E. GLAISSER; *AJDA* 2004, pp. 1354-1358, chron. C. LANDAIS and F. LENICA; *JCP A* 2004, 1392, note S. HUL; *LPA* 18 October 2004, chron. F. MELLERAY; *RDP* 2005, p. 547, note C. GUETTIER; *Procédures* 2004, n° 166, note S. DEYGAS; see also K. BUTERI, "La participation du juge des référés à la formation de jugement au fond", *D.* 2004, pp. 2586-2588. Before the Council of State issued this opinion, the Bordeaux administrative court of appeal, called upon to rule on the question, had concluded that the two functions were incompatible (CAA Bordeaux, 18 November 2003, *AJDA* 2004, concl. J.-L. REY; *LPA* 22 August 2005, no. 166, pp. 6-11, note C. MORLOT-DEHAN). This solution was criticised by an administrative magistrate (D. LANZ, "Quelques réflexions d'un praticien à propos d'un arrêt de la cour administrative d'appel de Bordeaux", *AJDA* 2004, pp. 521-526).

1659 C. LANDAIS and F. LENICA, above, p. 1356.

1660 For an application of the principles in matters of summary proceedings, see CE, 2 November 2005, *M. and Mme Fayant*, *Lebon* p. 466, *AJDA* 2006, pp. 327-332, note P. CASSIA. The Conseil d'Etat affirms "that, having regard to the nature of the office of the interim relief judge called upon to rule on a request for suspension of an administrative decision, the circumstance that the same judge is subsequently called upon to rule on a new request for suspension of the same decision is, in itself, without bearing on the regularity of the order ruling on this request, subject to the case where it appears that, going beyond what this office necessarily implies, he would have prejudged the outcome of the dispute". In an order dated 25 February 2005, the interim relief judge had rejected the request for suspension of a building permit on the grounds of inadmissibility, while indicating to the applicant that the conditions for granting the permit had been met. When a new request was submitted, accompanied by documents attesting to its admissibility, the same interim relief judge ordered the suspension of the contested building permit on 17 March 2005, based on the same elements as those set out in his previous order. Consequently, "by indicating in advance the solution that could be reserved for a new request for suspension", the interim relief judge "must be considered to have disregarded the principle of impartiality". This solution is perfectly transposable to interim relief. If the interim relief judge rejects an application on the grounds of inadmissibility, while indicating to the applicant that the conditions for granting a safeguard measure have been met, his decision will be vitiated by the requirement of impartiality.

1661 CE, Sect. 12 May 2004, *Hakkar*, *Lebon* p. 224; *RFD* 2004, pp. 713-722, concl. I de SILVA, pp. 723-731, note E. GLASER; *AJDA* 2005, pp. 1354-1357, chron. C. LANDAIS and F. LENICA; *RDP* 2005, pp. 543-547, note C. GUETTIER.

1662 CE, 22 January 2003, *Issa M'Trengonani*, *AJDA* 2003, p. 1182.

. Moreover, as Mr Cassia has pointed out, it seems preferable that the judge in the interim relief procedure should himself decide the question of admission to legal aid *in the interim relief order*, and not in two successive decisions: "It does not seem to be good justice for a judge, even the president of a court, to decide on the granting of legal aid before ruling on the interim relief application. The latter must be processed within 48 hours, whereas the urgency referred to in the 1991 Act in the processing of applications for provisional legal aid is not so precisely defined. Consequently, it would be appropriate for the president of the administrative court to decide, on the occasion of the order for interim relief, on the provisional admission to legal aid"¹⁶⁶³

When hearing an application submitted on the basis of Article L. 521-2 of the Code of Administrative Justice, the first function of the single judge for interim relief is to *sort out the applications*. Applications without interest are dismissed by a summary procedure, without investigation or hearing. Applications that are not dismissed at this stage are examined as a matter of extreme urgency and judged within 48 hours.

Section 2. Rejection of unsuccessful applications without investigation

400. The interim relief judge immediately rejects the applications that have no obvious chance of success. The sorting order is made without an instruction and on the basis of the application alone. It can be challenged by way of an appeal to the Supreme Court.

I. The existence of a preliminary filter: the procedure for sorting requests

401. The working group of the Council of State "accepted from the outset that there should be a 'filtering' at the very beginning of the procedure that would lead to a distinction being made between applications that would be examined under the urgent procedure, because the connotation of urgency is obvious, because the application is serious, because it is admissible, and then, on the other hand, there would be applications that would not be marked by urgency or that would not be admissible or would be devoid of seriousness"¹⁶⁶⁴. The first task of the interim relief judge is therefore to identify immediately which applications are worthy of consideration and which, on the face of the application, are clearly doomed to failure. Upon receipt of the applications, the judge must distinguish between those that have merit and those that have no chance of success. During the preparatory work, the Minister of Justice stated that 'sorting out the urgency (...) will be the first function of the urgency judge. He or she will have to determine, in an initial examination, those applications which, for reasons of urgency, jurisdiction, admissibility or merits, will clearly have no chance of success"¹⁶⁶⁵. The parliamentarians were convinced of the need for such a mechanism¹⁶⁶⁶. It was designed on the basis of existing procedures that have proved effective in cases where the application is clearly doomed to failure¹⁶⁶⁷.

402. Depending on its interest, the application submitted to the interim relief judge on the basis of Article L. 521-2 may, like any emergency application, be judged according to two different procedures. Applications that are sufficiently serious to warrant further investigation will be heard by both parties and judged after a public hearing. This first hypothesis corresponds to the common law procedure: that of Article L. 522-1 of the Code of Administrative Justice. On the other hand, applications that are clearly doomed to failure and do not merit the judge's time are judged without an investigation or hearing. This second hypothesis corresponds to the derogatory procedure, known as the "sorting" procedure: that of Article L. 522-3.

Thus, when an application reaches the interim relief judge, he is faced with an *alternative*. He must choose the basis on which he will make his decision: Article L. 522-1 if the application is serious, Article L. 522-3 if the

¹⁶⁶³ P. CASSIA, "Le juge administratif des référés et le principe d'impartialité", *D.* 2005, pp. 1182-1191 (1^{ère} part) and pp. 1252-1256 (2nd part), spe p. 1253.

¹⁶⁶⁴ D. LABETOUILLE, "La genèse de la loi du 30 juin 2000", in *Le nouveau juge administratif des référés. Réflexions sur la réforme opérée par la loi du 30 juin 2000*, colloquium 6 December 2000 (P. WACHSMANN ed.), Strasbourg, PUS, 2002, p. 21-22.

¹⁶⁶⁵ E. GUIGOU, *JO déb. AN*, CR session 14 December 1999, p. 10930.

¹⁶⁶⁶ Sorting out the cases makes it possible to settle immediately "the cases whose fate is certain" (F. COLCOMBET, Rapport AN n° 2002, p. 55) and thus to avoid "that the judge of summary proceedings is confronted with an influx of ill-founded or non-urgent requests" (R. GARREC, Rapport Sénat n° 380, p. 69). Few dissenting voices have been heard. It should nevertheless be noted that Mr Sutour had expressed reservations about the removal of "the possibility of debating in public the existence of the urgency of a situation or the existence of a serious doubt, or even the infringement of a fundamental freedom (...)" (S. SUTOUR, *JO déb. Sénat*, CR séance 23 février 2000, p. 866).

¹⁶⁶⁷ For example, Articles R. 611-8 and R. 222-1 of the Code of Administrative Justice respectively provide for the dispensation of investigations and the judgment of cases by presidential order. Similarly, Article 35-3 of the Rome Convention of 4 November 1950 stipulates that the European Court of Human Rights shall reject an individual application that is "manifestly ill-founded or abusive".

application has no chance of success. He decides either to launch the adversarial investigation or to reject the application by a sorting order. These are two exclusive procedures; the choice to resort to one or the other is irreversible, as the Conseil d'Etat stated in the *SARL Les Belles demeures du Cap-Ferrat* judgment. In a recital of principle, the section laid down the rule that the ordinary law summary procedure mentioned in Article L. 522-1 was distinct from the sorting order procedure organised by Article L. 522-3. It drew the conclusion that, when the interim relief judge initiates an ordinary law procedure by launching the adversarial debate between the parties or by summoning them to a public hearing, it is no longer possible for him or her to change his or her mind and finally reject the application by a sorting order¹⁶⁶⁸. When an application is referred to the interim relief judge, he may either use the ordinary law procedure or the triage order procedure. When the application is registered, the judge must choose which procedure to follow without switching from one to the other. If he makes the first choice, it is impossible for him to change party later. "The interim relief judge must, in short, decide promptly whether to reject the application by a "triage" order. If not, he must then launch the entire adversarial procedure"¹⁶⁶⁹. Once the judge has launched the adversarial procedure and convened a hearing, the parties know that they will be able to exchange their arguments within the time limits authorised by the urgency. They do not run the risk of seeing the public hearing cancelled at the last moment, even though they may have reserved part of their arguments for the oral procedure.

403. From the point of view of the proper administration of justice, screening is very important because it enables the court to quickly dispose of applications for which dismissal is immediately certain and inevitable. By authorising the court to filter applications according to their interest, it avoids unnecessary congestion of the courts with applications that have no chance of succeeding. Indeed, if the judge wanted to deal with all applications in depth, he or she would not be able to rule in 48 hours on those that really involve a serious and manifestly unlawful infringement of a fundamental freedom. By sparing the judge a useless waste of time for applications that are not relevant, this procedure encourages the judge to intervene quickly in cases that really justify it.

This 'safety valve'¹⁶⁷⁰ is particularly necessary in the context of the *référé-liberté* procedure. Since this is the most attractive procedure of all, it is naturally the one to which the greatest number of applications that are manifestly ill-founded or not urgent converge. Relying on the scope of the judge's powers and the prospect of a decision being handed down within a very short period of time, applicants find it difficult to resist the temptation to lodge their appeal on the basis of Article L. 521-2, even if this means frequently referring to the judge applications that he or she is clearly not intended to deal with. However, the summary application procedure is a procedure which, in order to remain effective, must allow the judge to intervene within a few hours to, if necessary, put an end to the serious and manifestly illegal infringement of a fundamental freedom. More than any other, the interim relief judge must be able to use an appropriate procedure to dismiss the many pointless applications with which he or she is confronted, and to concentrate only on those that really merit in-depth examination. If it were no longer able to rule within 48 hours, the procedure set up by Article L. 521-2 would lose what constitutes one of its major interests and what ensures its effectiveness to a large extent. As the government commissioners have emphasised, by enabling the interim relief judge to concentrate his or her efforts on applications that are genuinely likely to correspond to a situation of serious and manifestly unlawful infringement of a fundamental freedom, sorting "is in no way a deviation from the system, but rather the condition for its survival"¹⁶⁷¹. It prevents the popularity of this procedure from "undermining the examination of serious applications"¹⁶⁷².

II. The implementation of sorting

¹⁶⁶⁸ CE, Sect. 26 February 2003, *SARL Les belles demeures du Cap-Ferrat*, *Lebon* p. 65, *AJDA* 2003, pp. 498-500, chron. F. DONNAT and D. CASAS; *JCP G* 2003, 10094, note J. DUVAL and V. GUINOT. GUINOT. The ruling was confirmed in particular by CE, 23 April 2003, *Commune de Roquebrune-cap-Martin*, *Lebon T.* p. 912, 913, *Constr. urb.* 2003, comm. n° 192, note N. ROUSSEAU. The solution adopted constitutes a reversal compared to the Breucq decision of 16 February 2001 (CE, 16, February 2001, *Breucq*, *Lebon T.* p. 1092, *RFDA* 2001, pp. 669-672, concl. D. CHAUVAUX). In this decision, the Council of State considered "that the interim relief judge could apply the sorting procedure, even though he had initiated the adversarial procedure by communicating the application to the defendant". This solution was justified for reasons of convenience: some administrative courts had in fact chosen to entrust the registry with the task of initiating the procedure under Article L. 522-1 even before a magistrate examined the case; they nevertheless reserved the possibility of subsequently using the procedure under Article L. 522-3 and ruling by means of a sorting order. The abandonment of this decision was justified by the terms used in the relevant provisions of the Code of Administrative Justice. Article L. 522-3 provides that the judge may make a triage order if he or she considers, "in the light of the application", that it is unsuccessful. This provision clearly shows that the legislator did not intend to allow the interim relief judge to gradually form a conviction about the chances of success of the application. He has to decide from the outset even though no adversarial proceedings have yet begun. Moreover, it would be rather odd if the interim relief judge had to wait for the statement of defence to realise that the application clearly has no chance of success. If he cannot say that the conditions for a sorting procedure have been met, then he must immediately and definitively abandon it.

¹⁶⁶⁹ F. DONNAT and D. CASAS, *op. cit.* p. 499.

¹⁶⁷⁰ I. DE SILVA, concl. on CE, Sect. 30 October 2001, *Minister of the Interior c/ Tliba*, *RFDA* 2002, p. 332.

¹⁶⁷¹ *Ibid.*

¹⁶⁷² D. CHAUVAUX, concl. on CE, Sect. 28 February 2001, *Philippart and Lesage*, p. 392.

404. Under the terms of Article L. 522-3 of the Code of Administrative Justice, the sorting procedure can be implemented in two distinct cases: on the one hand, when "the request is not urgent in nature", and on the other hand, when it appears "obvious, in view of the request, that it does not fall within the jurisdiction of the administrative court, that it is inadmissible or that it is ill-founded".

405. The first case concerns the lack of urgency. The law does not require that the lack of urgency be "manifest"¹⁶⁷³. This ground for rejection consequently gives the interim relief judge considerable leeway. Although it is less frequently used than the second ground for dismissal, there are nevertheless many applications. For example, since the drug testing system at the French high school in Bangkok had functioned during the school year without giving rise to any difficulties, the interim relief judge considered that "the indication, in a note from the headmaster dated 3 September 2001, that this system would be renewed during the 2001-2002 school year cannot be considered as creating a situation of urgency"¹⁶⁷⁴. Similarly, there is no urgency to suspend the execution of provisions that have been in place for more than 17 years¹⁶⁷⁵. The judge may reject an application on this basis if the applicant's arguments on urgency are insufficiently convincing¹⁶⁷⁶.

The judge takes a broad view of this reason for sorting. First of all, it concerns applications that are not urgent in nature. But it also covers, more broadly, applications that do not require immediate intervention by the court. This is the case, in particular, of appeals against decisions that have exhausted their effects and are therefore inadmissible. Thus, in an *Oulai Doué* order, the interim relief judge of the Council of State noted that the order challenged before the first judge had ceased to produce its effects on the day the appeal request was lodged. Instead of rejecting the appeal request as manifestly inadmissible, the judge stated that it should be rejected as not satisfying the condition of urgency set out in Article L. 521-2 of the Administrative Justice Code¹⁶⁷⁷. The Conseil d'Etat has affirmed, in the context of interim relief, that the interim relief judge does not commit an error of law by rejecting an application for lack of urgency "even though he could have decided that there was no need to rule on the application"¹⁶⁷⁸.

406. The second sorting hypothesis concerns claims that do not fall within the jurisdiction of the administrative court, are inadmissible or ill-founded. In accordance with the letter of Article L. 522-3, this hypothesis can only be applied if the jurisdictional incompetence, the inadmissibility of the application or the irrelevance of the argumentation meet the condition of obviousness¹⁶⁷⁹. The case law relating to interim relief offers a variety of applications of these three grounds for rejection.

Thus, an appeal against a judicial decision¹⁶⁸⁰, a government act¹⁶⁸¹, an individual measure relating to the granting of a retirement benefit under a scheme run by the Caisse nationale d'assurance vieillesse¹⁶⁸², or the decision of the president of the National Assembly recording the adjournment of the work of this assembly¹⁶⁸³, clearly does not fall within the jurisdiction of the administrative court. Similarly, the Court clearly does not have jurisdiction over a dispute concerning the conditions under which the applicant was subjected to incarceration and judicial supervision during the extradition procedure initiated against him¹⁶⁸⁴. While Article L. 522-3 limits this first ground of review to applications that do not fall within the jurisdiction of the "administrative court", the interim relief judge of the Conseil d'Etat has allowed it to be used for applications that, although falling within the jurisdiction of the administrative court system, have nevertheless been brought before an administrative court that

1673 See however the order mentioning, in order to implement the sorting procedure, that it is "obvious that the condition of urgency provided for in Article L. 521-2 of the Code of Administrative Justice is not met": CE, ord. 30 March 2001, *Schoettl*, no. 231963.

1674 CE, ord. 10 September 2001, *Hartmann*, n° 238020. For other applications, see in particular CE, ord. 2 September 2002, *Sopena*, n° 249944; CE, ord. 21 January 2003, *Commune des Angles*, n° 253421; CE, ord. 6 November 2003, *Société coordination en véhicules accidentés et en pièces de remploi*, n° 261489; CE, ord. 7 April 2003, *Saez*, n° 266279; CE, ord. 16 February 2005, *SARL Médiation et arguments*, n° 277584; CE, ord. 9 March 2006, *SEL AFA mandataires judiciaires associés*, n° 290642.

1675 CE, ord. 21 January 2002, *Auto-école Bergson*, n° 242051.

1676 CE, ord. 12 July 2001, *M'Hamdi*, No. 248507.

1677 CE, ord. 16 April 2002, *Oulai Doué*, n° 245140. See in the same sense: CE, ord. 26 April 2004, *Souloumiac*, n° 266849. The request, registered on 23 April 2004 at the Secretariat of the Litigation Division of the Council of State, sought to enjoin the administration to authorise the applicant to take the tests for a competition organised on 20 April. The application was found to be inadmissible. The judge nevertheless rejected it on the grounds that it was not urgent.

1678 CE, 30 December 2002, *Urban, Lebon T.* p. 864.

1679 The draft law limited the condition of obviousness to the third hypothesis of rejection: the ill-founded request. The Senate wished it to be extended to the second - inadmissibility (R. GARREC, Senate Report No. 380, p. 69; *JO déb. Sénat*, CR séance 8 juin 1999, p. 3755) and the National Assembly to the first - incompetence (F. COLCOMBET, Rapport AN No. 2002, p. 56; *JO déb. AN*, CR session 14 December 1999, p. 10944).

1680 The rule applies irrespective of the court involved. It may be a decision by a general administrative court (CE, ord. 11 June 2003, *Rousselle*, n° 257494; CE, ord. 30 June 2003, *Lecomte*, n° 257914; CE, ord. 29 June 2005, *Portier*, n° 281928), a special administrative court (CE, ord. 11 December 2003, *Allag*, No. 262549; decision of the Refugee Appeals Board), a criminal court (CE, ord. 3 April 2001, *Murat*, No. 232012; CE, ord. 14 August 2003, *Castelli*, n° 259457) or a civil court (CE, ord. 28 February 2005, *Vuillet*, n° 277999).

1681 CE, ord. 7 November 2001, *Tabaka*, n° 239761 (concerning the abstention of the President of the Republic to refer a law to the Constitutional Council for examination of its constitutionality); CE, ord. 14 March 2003, *Brussollet*, no. 25510 (decree of the President of the Republic tending to submit two constitutional bills to the Parliament meeting in congress); CE, ord. 8 September 2005, *Gaiffe*, no. 284832 (request to enjoin the government to table a bill before one or other of the assemblies that make up the Parliament).

1682 CE, ord. 31 December 2002, *Bakayoko*, n° 252977.

1683 CE, ord. 9 April 2002, *Catsiapis*, n° 244924.

1684 CE, ord. 30 January 2003, *Smaali*, n° 253668.

does not have jurisdiction to hear them¹⁶⁸⁵.

With regard to manifestly inadmissible applications, the interim relief judge has, for example, qualified as such an application for the annulment of an administrative decision and an application for an injunction which would have the same effects as an annulment¹⁶⁸⁶.

Finally, the concept of manifestly ill-founded application is understood in a particularly broad way by the interim relief judge. It includes, first of all, applications that do not meet one or more of the conditions for granting an application set out in Article L. 521-2¹⁶⁸⁷, for example because no infringement of a fundamental freedom¹⁶⁸⁸, no serious infringement¹⁶⁸⁹ or no manifest illegality¹⁶⁹⁰ can be found. But this concept covers more generally applications which, for whatever reason, are not likely to succeed. This is the case of applications which are based on elements which are lacking in fact¹⁶⁹¹ or which are not based on any means¹⁶⁹². More surprisingly, applications which cannot succeed for reasons of jurisdiction or admissibility, and therefore fall under the two previous headings¹⁶⁹³, may also be considered ill-founded.

407. Thus, the court uses the ground of lack of urgency or manifestly ill-founded nature of the application in a very flexible way. When the court rejects an application on the grounds of admissibility or jurisdiction, it can be deduced with certainty that the application was inadmissible or did not fall within the jurisdiction of the administrative court. On the other hand, when the application is rejected on the grounds of lack of urgency or manifestly ill-founded nature, the precise reason for rejection cannot be determined with precision. The court is entitled to reject as urgent or ill-founded an application that was in any case inadmissible. In ordinary litigation, the court first decides whether there is no need to adjudicate; it then assesses its competence, the admissibility of the application and, where appropriate, its merits. This pattern does not apply in the context of the sorting process. Although this ground for dismissal should be reserved for applications that do not meet the substantive conditions set out in Article L. 521-2, the court sometimes dismisses an inadmissible application as unfounded. Admittedly, since examples are rare, orthodox applications are the most numerous. Nevertheless, these few decisions obscure the division between the substantive rules, the rules of jurisdiction and the rules of admissibility to the detriment of overall consistency.

408. Within the administrative jurisdiction, the procedure for sorting out Article L. 522-3 can first of all be implemented by the judge seized in the first instance, whether it is the interim relief judge of the administrative court or the interim relief judge of the Council of State. The assessment to be made for the application of this provision "depends on the nature of the legal and factual elements of which the interim relief judge is aware"¹⁶⁹⁴. This means that the assessment made by the judge depends on the arguments developed by the applicant in support of his or her request; an insufficiently precise and convincing statement of reasons exposes its author to an immediate rejection.

Article L. 522-3 can also be used by the judge of appeal for interim relief. In implementing this provision, it is up to him to "take into account the elements gathered by the judge of first instance" in the written and oral

¹⁶⁸⁵ CE, ord. 13 May 2003, *Castelli*, no. 256745: "Considering that if the administrative court is not manifestly incompetent to deal with Mr Castell's request, on the other hand, it does not fall within the competence of the Council of State in the first and last instance and must therefore be rejected in accordance with the sorting procedure provided for in Article L. 522-3 of the Code of Administrative Justice". See, in the same sense: CE, ord. 18 July 2003, *SARL Le Picadilly*, no. 258569.

¹⁶⁸⁶ CE, ord. 1^{er} March 2001, *Paturel, Lebon T.* p. 1134.

¹⁶⁸⁷ An ill-founded application is, *strictly speaking*, one that does not meet the conditions for the implementation of this procedure. In the *Perrier* order, the judge stated "that as the conditions for implementing Article L. 521-2 of the Code of Administrative Justice are clearly not met, the corresponding conclusions must be rejected by application of Article L. 522-3 of the same code" (CE, order of 15 February 2001, *Perrier*, no. 230318).

¹⁶⁸⁸ CE, ord. 15 February 2001, *Perrier*, n° 230318; CE, ord. 6 April 2001, *Lapere and others*, n° 232135 (refusal to allocate a site on the public domain); CE, ord. 3 April 2001, *Soriano and others, Lebon T.* p. 1128 (disturbances observed in the operation of the public education service); CE, ord. 4 July 2001, *Cazorla*, n° 235371 (refusal to enrol a child in the school chosen by the parents and proposal to enrol him in a school closer to their home, in accordance with the legislation in force); CE, ord. 12 September 2001, *Langard*, n° 238106; CE, ord. 18 October 2001, *Syndicat départemental INTERCO 33 CFDT*, No. 239082; CE, ord. 19 November 2001, *Commune de Escueilens et Saint-Just de Bellengard*, no. 240174 (concerning the decision of the general council to cut down several plane trees on the territory of the commune); CE, ord. 26 March 2002, *Société Route Logistique Transports, Lebon p.* 114; CE, ord. 18 July 2003, *Burdeau*, n° 258560.

¹⁶⁸⁹ CE, ord. 18 May 2001, *Meyet, Bouget, Lebon p.* 244; CE, ord. 5 March 2002, *Fikry, Lebon T.* p. 872.

¹⁶⁹⁰ CE, ord. 26 January 2001, *Gunes, Lebon p.* 38; CE, ord. 9 February 2001, *Fauvet, Lebon p.* 55; CE, ord. 13 April 2001, *Yabiaoui*, n° 232542; CE, ord. 18 May 2001, *Meyet, Bouget, Lebon p.* 244; CE, ord. 9 August 2001, *Medrinal, Lebon T.* p. 1127; CE, ord. 20 August 2002, *Société Lido plage*, n° 249723; CE, ord. 6 September 2002, *Tetaabi*, n° 250120; CE, ord. 18 September 2002, *Bouhakour*, n° 250340; CE, ord. 21 February 2003, *Maillot, Lebon T.* p. 914; CE, ord. 9 May 2003, *Marques Meireles*, n° 256595; CE, ord. 20 April 2004, *Ba*, n° 266647; CE, ord. 8 June 2004, *Fritch*, n° 268460; CE, ord. 8 June 2004, *Zebdi-Ghorab*, n° 268467.

¹⁶⁹¹ CE, ord. 15 January 2001, *Charlery-Adele, Lebon p.* 14.

¹⁶⁹² CE, ord. 28 May 2002, *Génération écologie*, n° 247329.

¹⁶⁹³ For example, the judge considers as ill-founded the request to suspend the effect of a judgment rendered by a social security court (CE, ord. 29 November 2002, *Association des entraîneurs de chevaux de course et autre*, n° 251921) when it is clear that such a request does not fall within the competence of the administrative court.

¹⁶⁹⁴ CE, ord. 15 January 2001, *Charlery-Adele, Lebon p.* 14; CE, ord. 26 January 2001, *Gunes, Lebon p.* 38; CE, ord. 9 February 2001, *Fauvet, Lebon p.* 55; CE, ord. 8 February 2001, *Guillou, Lebon T.* p. 1129; CE, ord. 30 March 2001, *Schoettl*, n° 231963; CE, ord. 21 March 2001, *Rabal*, n° 231531; CE, ord. 2 March 2001, *Dauphine*, n° 230798; CE, ord. 18 October 2001, *Association groupe local cimade Montpellier*, n° 239071; CE, ord. 22 October 2001, *Gonidec et Brocas*, n° 239165; CE, ord. 6 September 2002, *Tetaabi*, n° 250120.

adversarial procedure that he has initiated¹⁶⁹⁵. It may thus reject as manifestly inadmissible an appeal lodged with the Council of State after the deadline¹⁶⁹⁶ or when the decision challenged before the first judge has exhausted its effects¹⁶⁹⁷. It may also dismiss as manifestly ill-founded an appeal request¹⁶⁹⁸.

409. When the application submitted to the judge falls within the scope of the sorting procedure, Article L. 522-3 organises a "simplified procedure"¹⁶⁹⁹ without an investigation or hearing. The implementation of this provision renders inapplicable, by virtue of Article R. 522-10 of the Code of Administrative Justice, Articles R. 522-4 (obligation to notify the application to the defendant), R. 522-6 (obligation to summon the parties to the hearing) and R. 611-7 (obligation to communicate in advance the public policy grounds raised by the judge). Moreover, in accordance with Article R. 522-2, the judge does not have to invite the applicants to make any regularisation¹⁷⁰⁰. The judge does not have to wait for the production of a supplementary submission announced by the applicant¹⁷⁰¹. By allowing the court to dispense with an adversarial hearing and a public hearing, Article L. 522-3 allows a decision - which is assumed to be a rejection - to be handed down within a very short time. This is the whole point of sorting, in that it is easy and quick to use¹⁷⁰². It also shows the urgent need for litigants to give the most convincing reasons for their application at the written procedure stage, as this wording is a precondition for the organisation of an adversarial hearing and an oral procedure on the basis of Article L. 522-11⁷⁰³.

Sometimes the interim relief judge implements the sorting procedure without mentioning the text of Article L. 522-3 or the conditions of its application. In such a case, recourse to the sorting procedure is deduced from the fact that the parties were not summoned to a hearing¹⁷⁰⁴. When the judge does not implement the procedure of Article L. 522-1, it is necessarily that he applies the procedure of Article L. 522-3. In this respect, the Council of State does not censure the decision that implements the sorting procedure without mentioning Article L. 522-3¹⁷⁰⁵.

410. Insofar as it was an important condition for the success of the reform of 30 June 2000, Article L. 522-3 was presented by President Labetoulle as a provision "to be handled without complex"¹⁷⁰⁶. Before the judges of the first instance, one out of two applications for interim relief is rejected by this means¹⁷⁰⁷. Generally

¹⁶⁹⁵ See decisions cited in previous note. For example, in the order of 22 October 2001, *Gonidec and Brocas*, the appeal judge expressly relied on the results of the public hearing held before the first judge. In rejecting the application, 'it follows from the investigation and in particular from the statements made at the public hearing held by the interim relief judge of the Caen administrative court by the president of the mixed syndicate, that the applicants' land is about to be returned to them'.

¹⁶⁹⁶ CE, ord. 16 May 2002, *Auto-école SOS permis*, No. 246813.

¹⁶⁹⁷ CE, ord. 29 October 2001, *S.A.R.L. Objectif*, n° 239443.

¹⁶⁹⁸ CE, ord. 22 March 2001, *Commune d'Éragny-sur-Oise, Lebon T.* p. 1134; CE, ord. 10 April 2001, *Syndicat national unifié des directeurs, des instituteurs, des professeurs des écoles de l'enseignement public Force Ouvrière (SNUDI-FO) du Maine-et-Loire, Lebon T.* p. 1090; CE, ord. 9 July 2001, *Boc*, No. 235696 (applicants manifestly ill-founded in requesting the annulment of the order by which the first judge dismissed their claims for an injunction which would have effects identical in every respect to an annulment); CE, ord. 23 May 2001, *Jacques VII*, No. 233941.

¹⁶⁹⁹ CE, ord. 12 January 2001, *Hyacinthe, Lebon* p. 12; CE, 28 December 2001, *Lodama*, n° 232132.

¹⁷⁰⁰ In the case of an application for interim relief that is inadmissible and can be rectified, and contrary to what the general rules of procedure imply, the court is not obliged to invite the applicant to rectify the situation. By virtue of Article R. 522-2, the application of Article R. 612-1 obliging the court to invite the author of an inadmissible application to regularise it when this proves possible is expressly excluded in this matter.

¹⁷⁰¹ In view of the 48-hour time limit within which the judge of appeal for interim relief must rule, "the fact that the application before him announces the production of an amplifying memorandum does not prevent him from ruling without waiting for this production" (CE, order of 3 January 2003, *Belminar and others*, no. 253045). Thus, there is no reason for the interim relief judge of the Conseil d'Etat, in view of the time limit available to him to rule on the appeal, to defer his decision until the statement of case announced by the application has been produced (CE, ord. 20 June 2003, *Pascal*, no. 257827; CE, ord. 5 September 2003, *Keller*, no. 259991; CE, ord. 7 July 2004, *Abdullah*, no. 269571; CE, ord. 8 July 2004, *Dia*, no. 269651; CE, ord. 13 October 2004, *Merabet*, n° 273068). According to the wording of Article L. 522-3, it rules "in view of the application".

¹⁷⁰² The judge may, in application of the sorting procedure of Article L. 522-3, reject an application on the same day as it is lodged (see for example CE, ord. 15 February 2001, *Perrier*, n° 230318).

¹⁷⁰³ The judge sometimes expressly relies on the weakness of the argument developed by the applicant to reject his application under the sorting procedure. See for example CE, ord. 10 January 2002, *Massa*, No. 241746, noting that "the applicant establishes neither the urgency nor the existence of any serious infringement of one of the fundamental freedoms referred to in Article L. 521-2".

¹⁷⁰⁴ See e.g. CE, ord. 29 April 2002, *Joana*, n° 245658.

¹⁷⁰⁵ See, on the basis of Article L. 521-1 of the Code of Administrative Justice: CE, 23 April 2003, *S.A.R.L. Siminvest, Lebon* p. 178, *Dr. adm.* 2003, comm. n° 133, note P. CASSIA. M. Cassia had wished that the obligation to deduce the implementation of the sorting of the absence of convocation to the hearing did not apply to the summary proceedings: "Indeed, for this summary proceedings, the application of the sorting procedure closes the normal way of appeal and leads the applicant to seize, if necessary, the judge of cassation. However, if Article L. 522-3 is not mentioned in the rejection order, it seems contrary not only to Article L. 522-1 but also to the requirement of clarity and legal certainty to oblige the applicant to deduce from the absence of a summons to a public hearing and the silence of the order that the latter must be referred, if need be, to the judge of cassation, and not to the judge of appeal. The interim relief judge cannot fail to mention the text he has applied, as the letter of notification of orders is not intended to make up for his failure to do so" (*op. cit.*, p. 37).

¹⁷⁰⁶ D. LABETOULLE, "La genèse de la loi du 30 juin 2000", *op. cit.*, p. 22.

¹⁷⁰⁷ The rate of rejection by the screening procedure was 48.8% in 2001, 54.9% in 2002, 54.4% in 2003, 54.2% in 2004 and 58% in 2005. See Annex 2. While this rate could be expected to decrease over the years, it has increased for the référé-liberté procedure. This situation is all the more noteworthy in that, for all emergency applications for interim relief, the number of cases in which sorting is used has decreased and stabilised at a rate of between 20 and 25% (see, for the Administrative Court of Marseille, the figures cited by G. FERULLA in "Le trié-liberté FERULLA in "Le tri", *RRJ* 2003/5 *L'actualité des procédures d'urgence*, p. 3064: 45% in 2001, 30% in 2002 and 21% in 2003). Thus, the

speaking, the sorting process is not very popular with litigants and their lawyers¹⁷⁰⁸. It is true that this procedure is expeditious and, in the absence of a public hearing, weakens the guarantees to which the applicant is usually entitled. In addition, it deprives the applicant for interim relief of the possibility of appealing to the interim relief judge of the Council of State, as only the cassation procedure is open against the sorting orders. However, these disadvantages must be put into perspective. On the one hand, it does not deprive the applicant of any guarantee insofar as the sorting procedure must, under Article L. 522-3, give rise to a *reasoned* rejection order. As Collin and Guyomar state, recourse to this procedure "does not exempt the interim relief judge from a thorough study of the application"¹⁷⁰⁹. The examination of the applicant's arguments must appear in the grounds of the decision and a simple assertion without specific explanation must be considered insufficient. On the other hand, the screening procedure may be favourable to the applicant in several ways. First of all, depending on the grounds for the rejection, the applicant may, within a shorter period of time than in an interim procedure followed by a hearing, submit a new application¹⁷¹⁰. Even in the worst case, where no regularisation is possible, a dismissal without an investigation will have the merit of not exposing the applicant to a request for reimbursement of the opponent's unrecoverable costs. Lastly, by sparing the judge unnecessary time, it allows him to intervene with the required speed in cases where a reaction is really necessary within 48 hours. In any event, any error made by the court of first instance in implementing the sorting procedure can be rectified before the Council of State.

III. Appeals against sorting orders

411. The sorting orders of the interim relief judge of an administrative court may be challenged by way of cassation. The control exercised by the Council of State may result in the challenged order being challenged.

A. The appeal procedure

412. The cassation procedure is the only one open against the orders to sort out Article L. 522-3, including in cases where the application was lodged before the first judge on the basis of Article L. 521-2 of the Code of Administrative Justice. In the *Casanovas* judgment of 28 February 2001, the Conseil d'Etat stated that "the order by which the interim relief judge rejects an application using the power given to him by Article L. 522-3 can only be appealed to the Conseil d'Etat, without it being necessary to distinguish whether the application before the judge was submitted on the basis of Article L. 521-1 or Article L. 521-2"¹⁷¹¹. Indeed, Article L. 523-1, which defines the jurisdiction of the Council of State in matters of urgent interim relief, provides that the sorting orders "are given in the last resort". It does not distinguish according to the summary proceedings initiated. Consequently, this provision, which is common to all procedures governed by Title II of Book V, is applicable to summary proceedings. Sorting orders may only be appealed to the Supreme Court, in derogation of the provisions of Article L. 523-1, paragraph 2, which provides for the principle of an appeal against interim relief orders. When the applicant files an "appeal" against a sorting order, the Conseil d'Etat requalifies his request as an appeal to the Supreme Court¹⁷¹². The administrative court of appeal hearing an appeal against a sorting order must refer the appeal to the Council of State and not reject it as manifestly inadmissible¹⁷¹³.

Article L. 523-1 sets a time limit of 15 days for lodging an appeal in cassation. The time limit runs from the

situation of the *référé-liberté* is unusual in this respect, since the sorting procedure under Article L. 522-3, which was designed as a derogation, is tending to become the standard procedure for applications lodged on the basis of Article L. 521-2. From a quantitative point of view, the rule that is becoming established in the practice of administrative courts is the judgment without investigation or hearing of half of the applications for interim relief.

1708 For a critical presentation of this procedure, see P. MOUKOKO, "La procédure de tri before le juge des référés", *JCP G* 2006, II, 10100.

1709 M. GUYOMAR and P. COLLIN, chron. under CE, Sect. 30 October 2001, *Minister of the Interior v. Mrs Tliba*, *AJDA* 2001, p. 1056.

1710 The order of rejection, with its reasons, will indicate the problem which arises, and will allow the applicant to remedy it if necessary. On the same day that the application is rejected on the grounds of inadmissibility, the applicant may submit a new application, for example by reformulating his or her submissions. There is no time limit. From a practical point of view, the effects are more or less the same as if the interim relief judge had invited him to regularise the application. He can also submit a new, better reasoned application. If the application is rejected for lack of urgency, it is sometimes possible to establish this better in a new application with appropriate explanations and justifications.

1711 CE, Sect. 28 February 2001, *Casanovas, Lebon* p. 108.

1712 Cf. CE, Sect. 28 February 2001, *Casanovas, Lebon* p. 108; CE, 16 May 2001, *Mafille*, n° 231197; CE, 28 May 2001, *Raut, Lebon T.* p. 1126; CE, 7 May 2003, *Boumaïza*, n° 250002. The reclassification of the appeal as an appeal does not require an order from the interim relief judge declining jurisdiction to hear it. The act by which the president of the Administrative Jurisdiction Division redirects this application to a sub-section, within the framework of his powers under Article R. 822-1, constitutes a measure of administration of justice which does not have to be reasoned (*Casanovas* judgment cited above).

1713 See, on the basis of Article L. 521-1: CE, 21 November 2001, *Akriche, Lebon T.* p. 1093. The date to be used to determine the admissibility of the appeal in cassation is the date of its registration with the secretariat of the court which, not being seized of the case, transmits the file (same decision).

date of regular notification of the decision¹⁷¹⁴. In accordance with previous case law on summary proceedings¹⁷¹⁵, this is a clear time limit¹⁷¹⁶, which may be increased by the time limits for distance¹⁷¹⁷. In accordance with the rules governing cassation proceedings before the Council of State, the appellant must appoint an *avocat aux Conseils*¹⁷¹⁸. The application must still have a purpose on the date of its submission to the Council of State¹⁷¹⁹. In support of his appeal, the appellant must criticise an element on which the contested order was based¹⁷²⁰. In accordance with the usual rules, the appeal is examined only if it is not rejected at the stage of the preliminary admission procedure.

Once again, the jurisdiction of the judge of cassation in summary proceedings is traditionally vested in the collegial formations of the Council of State: the sub-sections together in principle, a sub-section ruling alone when the appeal is rejected according to the admission procedure¹⁷²¹, and the Section when a case offers the opportunity to set out the main lines of the case law. Article R. 523-2 gives the judge of cassation a period of one month to decide, and not 48 hours as required at first instance and on appeal¹⁷²².

B. The purpose and scope of the cassation review

413. The judge of cassation controls, according to the expression of Professor Pacteau, "the manner in which it was judged", and "what was judged"¹⁷²³.

1. The external regularity of the order

414. With regard to the external regularity of the decision, the judge of cassation ensures that the first judge complies with procedural requirements - which are necessarily reduced since, in the case of interim relief, the judge of cassation only deals with sorting orders - and the presentation of the judgment. For example, the

1714 In the event of notification of a summary order by fax, the transmission report, if it is not contested, starts the time limit for appealing against this order (CE, 18 December 2002, *Minister of the Interior, Internal Security and Local Liberties c/ SARL Le Méditerranée*, *Lebon T.* p. 851). In the presence of an error of notification in the time limits for appeal, the common law time limit of two months runs instead of the special time limit of 15 days (CE, 28 February 1996, *Société LVM*, n° 154358).

1715 CE, 18 November 1991, *Pérouchon, LPA* 11 December 1991, p. 4, concl. O. FOUQUET.

1716 CE, 23 May 2001, *Bandoïn, Lebon T.* p. 1135. In this case, the appeal was registered with the Council of State's legal secretariat on 12 April against an order notified to the applicant on 27 March. As the application was not declared inadmissible, it can be deduced that the time limit for appeal is a clear one. See, in the context of other urgent summary proceedings: CE, 28 May 2001, *Société Codiam, Lebon T.* p. 1136 (for a summary order); CE, 5 November 2001, *Minister of the Interior*, no. 235496 (for a summary suspension).

1717 Article R. 811-5 of the Code of Administrative Justice provides that "The additional time limits for distance provided for in Articles 643 and 644 of the New Code of Civil Procedure are added to the time limits normally imposed". Article 643 states: "When the application is brought before a court whose seat is in metropolitan France, the time limits for appearance, appeal, opposition, appeal for review and appeal to the Supreme Court are increased by: 1° one month for persons who live in an overseas department or territory; 2° two months for those who live abroad. The Conseil d'Etat has applied the time limit for distance to an appeal in cassation against a summary order (CE, 29 November 2002, *Arakino, Lebon* p. 422: appeal registered on 3 June 2002 against a sorting order made by the judge of the administrative court of Papeete on 26 April 2002).

1718 The exemption of a lawyer provided for by Article R. 522-5 does not apply at this stage. In the absence of a provision to the contrary, the general rule of Article R. 821-3 applies. If the appellant fails to meet this requirement, his application is rejected as inadmissible (CE, 28 February 2001, *Catsiapis*, n° 229458; CE, 25 April 2001, *Pause*, n° 230315; CE, 16 May 2001, *Mafille*, n° 231197; CE, 15 June 2001, *Mairan*, n° 233437; CE, 15 June 2001, *Tauraatua*, n° 233755; CE, 15 June 2001, *Hoffer*, n° 233163; CE, 15 June 2001, *Hoffer*, n° 233164; CE, 15 June 2001, *Société Théâtre de fortune*, n° 232604; CE, 19 October 2001, *SCI du Clos*, n° 234090), unless a regularisation occurs after the appeal has been lodged (CE, 16 March 2001, *Brun and others*, n° 2311003).

1719 See for example CE, 16 March 2001, *Brun et al.* Before the judge of the first instance, the applicants asked the interim relief judge to order the electoral propaganda commission not to distribute the circulars and ballot papers of the two extreme right-wing candidates. As these two candidates had obtained an insufficient number of votes in the first round of voting to be able to stand in the second round, the appeal lodged against the sorting order rejecting their request became moot. See also CE, 29 July 2002, *Talhouarne*, no. 247222. The applicant had asked the interim relief judge to suspend the prefectural order ordering his requisition from 18 to 20 May 2002. The appeal against the order rejecting his request was registered with the Council of State's legal secretariat on 24 May 2002. The suspension of the order having become irrelevant, the application is inadmissible. Finally, see EC, 27 March 2006, *Ezgenyaosu*, No. 284546: the applicant having been re-routed to his country of origin, the appeal, directed against the order by which the interim relief judge refused to order the police authorities to allow him to continue his flight to Finland, has lost its purpose.

1720 In the *Lodama* case, the appellant argued that the prefect's refusal had manifestly infringed a fundamental freedom. The government commissioner noted that "this argument is not operative insofar as the interim relief judge did not base his order on this point but only on the absence of urgency" (unpublished concl. E. PRADA-BORDENAVE on CE, 28 December 2001, n° 232132).

1721 See however, judged by a sub-section ruling alone: CE, 15 May 2002, *Bandoïn*, n° 239487 (annulment of the contested order and issuance of an injunction).

1722 See however, largely exceeding this deadline: CE, 2 July 2003, *Société Outremer Finance Limited, Lebon* p. 306 (the judge of cassation rules on 2 July 2003 on an appeal registered on 26 February 2003); CE, 27 July 2006, *Makiese*, n° 278122 (the judge of cassation cancels an order of first instance made one and a half years earlier).

1723 B. PACTEAU, *Contentieux administratif*, 7^{ème} ed., PUF, coll. Droit fondamental, 2005, n° 360 and s.

Conseil d'Etat notes the irregularity of a sorting order that is issued after the organisation of an adversarial investigation¹⁷²⁴ or does not mention certain conclusions presented by the applicant¹⁷²⁵.

As regards the requirement to state reasons, the Supreme Court has not taken a position in a recital of principle. Article L. 522-3 requires the interim relief judge to give reasons for his decision, which excludes stereotyped reasons or those that are too general in nature. As Mr Chauvaux pointed out, "It would be difficult to accept summary reasons consisting in stating without further explanation that the disputed measure is not manifestly illegal. In our view (...) the judge will have to give a fairly full statement of reasons for his decision. And a more detailed statement of reasons gives greater scope to the grounds for appeal"¹⁷²⁶. The judge must set out and analyse the argumentation of the application correctly. The reasons for the decision must indicate in detail the elements that justify the rejection of the application. In general, "The judge of cassation must be able to appreciate the reasoning that led the judge of the summary judgment to consider that the act or conduct at issue cannot constitute a serious and manifestly illegal infringement of a fundamental freedom"¹⁷²⁷. Logically, the judge of cassation cannot require the interim relief judge to provide a fuller statement of reasons than that given by the applicant¹⁷²⁸.

2. The internal regularity of the order

415. With regard to the internal regularity of the decision, the only grounds for censure by the judge of cassation are misrepresentation of the facts and error of law. This solution has been found on the basis of Article L. 521-11729 and applied to the référé-liberté.

416. The Council of State does not control the assessment of the facts. The interim relief judge makes a sovereign assessment of the circumstances of the case with regard to the urgency¹⁷³⁰ and the serious infringement of a fundamental freedom¹⁷³¹. The assessment will be sanctioned only if it constitutes a distortion, i.e. a serious error of assessment of the meaning of an act or a fact making this interpretation incompatible with the act or fact in question. For example, when the prefect informed the applicant that he would grant her application for a residence permit subject to the conclusions of the customary preliminary investigation, the interim relief judge distorted the facts of the case by not considering this declaration as a decision creating rights¹⁷³². Similarly, the judge distorted the documents in the case file by describing a decision to reject the application as a waiting reply¹⁷³³.

417. With regard to errors of law¹⁷³⁴, the Council of State checks the correctness of the legal reasoning and approach underlying the sorting order. The question is whether the judge of cassation can sanction any flaw in the reasoning of the interim relief judge or whether, following the example of the solution adopted in the context of interim suspension, he should limit his review to flagrant errors. In other words, should it exercise

1724 CE, 8 October 2001, *Sanches Cardoso, Lebon T.* p. 1091: "the interim relief judge, seized of an application based on Article L. 521-1 or Article L. 521-2, cannot legally render a decision on the basis of the provisions of Article L. 522-3 after having carried out the adversarial procedure and held the public hearing mentioned respectively in the first and second paragraphs of Article L. 522-1".

1725 CE, 6 March 2002, *Société des pétroles Shell, Lebon T.* p. 852; CE, 12 June 2002, *Commune de Fauillet et autres, Lebon* p. 215.

1726 D. CHAUVAUX, concl. on CE, 16 February 2001, *Breucq, RFD A* 2001, p. 672.

1727 P. CASSIA, "Le contrôle de cassation sur les référés administratifs. Bilan de jurisprudence (1^{er} January-11 July 2001)", *Dr. adm.* 2001, chron. n° 19, p. 14.

1728 See, in the context of summary suspension, regarding the condition of urgency: CE, Sect. 25 April 2001, *Association des habitants du littoral du Morbihan c/ Commune de Baden, Lebon* p. 220.

1729 See CE, 16, February 2001, *Breucq, Lebon T.* p. 1092, *RFD A* 2001, pp. 669-672, concl. D. CHAUVAUX. The Council stated that "in ruling, by the contested order, that it was clear that the application was ill-founded, the interim relief judge, who did not commit an error of law, made a sovereign assessment of the circumstances of the case, which was not tainted by a distortion of the documents in the file submitted to him and which is not open to discussion before the court of cassation.

1730 See, for example, CE, 9 July 2001, *Landry*, No. 234809: "in considering that Mr Landry does not justify the urgency of his reinstatement within the Nantes urban motorbike unit, the interim relief judge made a sovereign assessment of the circumstances of the case, which is not tainted by a distortion of the documents in the file submitted to him and which is not open to discussion before the judge of cassation". See, in the same sense: CE, 28 December 2001, *Lodama*, n° 232132; CE, 6 March 2002, *Société des pétroles Shell, Lebon T.* p. 852; CE, 25 October 2002, *Chiapello*, n° 249569; CE, 25 October 2002, *Nould Masseglia*, n° 249568.

1731 See CE, 25 October 2002, *Bongiovanni, Syndicat CFDT Intero de l'Hérault*, No. 244289. The interim relief judge considered that the decision to transfer the applicant could not be considered as seriously infringing a fundamental freedom. The Conseil d'Etat states that "in so doing, the interim relief judge, who did not commit an error of law, made a sovereign assessment of the circumstances of the case which, in the absence of distortion, is not open to discussion before the judge of cassation". See also CE, 8 March 2002, *Région Languedoc-Roussillon*, No. 236587: "In noting that the irregular functioning of a mixed syndicate and the impossibility for a region to withdraw from it did not seriously and manifestly illegally infringe the right of the Languedoc-Roussillon region to administer itself freely, the first judge, who did not commit an error of law, "made a sovereign assessment of the documents in the case file, which, in the absence of distortion of these documents, is not open to discussion before the judge of cassation".

1732 CE, 7 May 2003, *Boumaïza*, n° 250002.

1733 CE, 10 October 2003, *Association Capselle et autres*, n° 251562. See also, CE, 9 February 2005, *SARL 'Lou Marseillon'*, n° 272196.

1734 The plea of error of law being inoperative when it is directed against an overabundant reason (CE, 6 March 2002, *Société des pétroles Shell, Lebon T.* p. 852; CE, 15 July 2004, *Dondaen*, n° 265822).

a limited or normal review of the sorting orders? The answer to this question is conditioned by the question of the judge's office. Since the judge responsible for interim relief exercises a lesser role, the Council of State exercises a limited review of his orders; since the judge responsible for the merits of the case exercises a normal role, the judge of cassation exercises a normal review of his decisions.

The interim suspension judge is required to establish an appearance of illegality, not a definite illegality. Drawing the consequences of this office limited to appearance or likelihood, the court of cassation has established, in the context of Article L. 521-1, the principle of a review of retained or restricted error of law. It does not exercise an ordinary, i.e. thorough, review of errors of law comparable to that exercised over judgments on the merits. In order to respect the office of the interim relief judge, which is limited by the concept of "serious doubt", since the ruling of principle by the *Communauté d'agglomération Saint-Etienne Métropole*, it has only sanctioned flagrant errors of law¹⁷³⁵. In other words, it only reviews 'manifest' errors of law¹⁷³⁶. As Mr Cassia points out, the principle of a limited review seems to imply that 'the Council of State will no longer review in cassation the interpretation made by the first judge of a legislative or regulatory provision - unless the plea is inoperative or falls within the scope of the law'¹⁷³⁷.

In her conclusions on the *Abdallah* case, Ms Boissard argued for an application of the case law of the *Communauté urbaine Saint-Etienne métropole* to the référé-liberté. She indicated that this review was even more justified on this basis. "Indeed, in this case, the judge must identify a manifest illegality and not merely detect a means of raising a serious doubt about the legality of an administrative measure. Therefore, when the judge is not convinced of the existence of a manifest illegality, his reasoning should, in our opinion, only be censured on the grounds of error of law in a case where the documents in the file and the arguments of the applicants would, on the contrary, establish the existence of a flagrant illegality"¹⁷³⁸. Nevertheless, this solution can be discussed insofar as the office of the judge of the référé-liberté is in no way comparable to that of the judge of the référé-suspension. When he intervenes on the basis of Article L. 521-2 of the Code of Administrative Justice, the interim relief judge is a judge of evidence. He can only use his powers in the presence of a certain, proven and indisputable illegality. As far as the assessment of the legality of an act or action is concerned, the office of the interim relief judge is that of a judge of the merits¹⁷³⁹, which tends to justify the exercise by the judge of cassation of a normal control over his decisions. Moreover, as Mr Cassia points out, the boundary between normal review and limited review by the court of cassation is difficult to draw, and does not prevent the court of cassation from deciding questions of principle in summary proceedings¹⁷⁴⁰.

When it intervenes in the context of a summary judgment order, the Conseil d'Etat does not mention the "office of the interim relief judge" referred to by the judge of cassation in the context of Article L. 521-1 since the *Communauté urbaine Saint-Etienne Métropole* judgment. It does not 'withhold' its review; it refuses to 'save' a possible error of law by the interim relief judge on the grounds that it would be insufficiently obvious to be sanctioned in summary proceedings. When it hears a sorting order made on the basis of Article L. 521-2, the judge of cassation censures the error of law committed by the first judge, whether or not it is flagrant. The case law illustrates the extent of the review carried out on this basis. Firstly, the court of cassation sanctions errors of law committed by the interim relief judge in the interpretation and application of the conditions for granting the allowance set out in Article L. 521-2. Thus, it censures the error of law that the first judge committed: "by considering that a refusal to grant tenure could not, "whatever the reasons", seriously and manifestly illegally infringe a fundamental freedom"¹⁷⁴¹; by stating in principle that the retention of a protected employee accused of moral harassment was not likely to compromise any fundamental freedom linked to labour law¹⁷⁴² or by considering that, given the existence of an appeal procedure with suspensive effect against the decision to deport the person concerned, the

1735 CE, Sect. 29 November 2002, *Communauté d'agglomération Saint-Etienne Métropole*, *Lebon* p. 421, *BDCF* 2/03, n° 28, pp. 36-43, concl. L. VALLEE; *AJDA* 2003, pp. 278-279, chron. F. DONNAT and D. CASAS. The Conseil d'Etat had initially opted for a thorough review of the error of law, which did not take into account the particular nature of the office of the judge of the summary suspension (see CE, Sect., 16 May 2001, *Minister of the Economy, Finance and Industry v. Rival*, *Lebon* p. 243, *AJDA* 2001, pp. 643-648, chron. M. GUYOMAR and P. COLLIN).

1736 L. VALLEE, concl. supra, p. 40. By exercising a "minimum" control over the error of law, the judge recognises a kind of right to error for the judge of the summary judgment. Thus, the judge of cassation refuses to censure for error of law two decisions considering, with regard to an identical plea based on the fact that Article L. 111-6 of the town planning code did not give the mayor the power to oppose a request for definitive connection to the electricity networks of a caravan, one that this means was capable of creating a serious doubt (CE, 5 April 2004, *Commune de Pertuis*, *Lebon* p. 156), and the other that this means was not capable of creating a serious doubt (CE, 12, December 2003, *Cancy*, n° 257794).

1737 P. CASSIA, note under CE, 9 December 2003, *Aguillon and others*, *AJDA* 2004, p. 318.

1738 S. BOISSARD, concl. on CE, 2 February 2004, *Abdallah*, *RFD* 2004, p. 775. Another element could be taken into consideration in the sense of a restricted control: in the procedures of common law, the Council of State does not control the assessment made by the judge on the existence of a manifest error of assessment committed by the administration (CE, Sect., 18 November 1994, *Société "Clichy Dépannage"*, *Lebon* p. 505: in rejecting the plea of manifest error of assessment, the administrative court of appeal makes a sovereign assessment of the facts of the case which, in the absence of distortion of the facts of the case, is not likely to be discussed before the judge of cassation). Since the judge of the référé-liberté can only exercise his powers in the event of a 'manifest' illegality, one might, by analogy, wish to extend to the procedure of Article L. 521-2 the solution found for the 'manifest' error of assessment. However, this would be to confuse the difference between the two concepts: in ordinary law procedures, the manifest character is that of the error of assessment; on the basis of Article L. 521-2, this character is attached to the illegality committed.

1739 See supra, §§ 278-279.

1740 See P. CASSIA, supra note, p. 319, and the examples cited by the author in note 65.

1741 CE, Sect. 28 February 2001, *Casanovas*, *Lebon* p. 108.

1742 CE, 4 October 2004, *Société Mona Lisa investissements et autres*, *Lebon* p. 362.

urgency did not justify ordering the measure requested by the applicant, aimed at enjoining the administrative authority to register his application for territorial asylum¹⁷⁴³. The review of the error of law exercised on the correct application of the conditions of granting sometimes borders on the review of the assessment¹⁷⁴⁴. For example, in the *Aguillon* judgment, the judge of cassation censured the erroneous assessment made by the judge concerning the proportionality of a measure excessively restricting the right to strike with regard to the objective of protecting public health. The Conseil d'Etat considers that the judge erred in law by not considering this measure as a serious and manifestly illegal infringement of the right to strike¹⁷⁴⁵. Secondly, and more generally, the judge of cassation sanctions the reasoning defects committed by the judge of summary proceedings in the interpretation of the applicable texts. In the *Stéphaur* judgment, he censured the application, in the circumstances of the case, of the moratorium provided for by the provisions of Article L. 613-3 of the Construction and Housing Code¹⁷⁴⁶. The interim relief judge also erred in law by considering that foreign minors cannot rely on the stipulations of Article 8 of the European Convention on Human Rights¹⁷⁴⁷ or by stating that the refusal of the Minister of Justice to lend France's assistance in ensuring the return of a child taken abroad by one of his parents constitutes an act concerning the conduct of international relations that is not subject to any judicial review¹⁷⁴⁸. The error in the interpretation of the applicable texts may also concern the rules of jurisdiction. Thus, the Conseil d'Etat notes that the jurisdiction attributed to the refugee appeal commission does not include disputes relating to the refusal of the Director General of the French Office for the Protection of Refugees and Stateless Persons to register an asylum application. Consequently, these disputes must be brought before the administrative court under ordinary law; the interim relief judge erred in law by declaring himself incompetent to hear them¹⁷⁴⁹.

C. The judgment of the judge of cassation

418. After examining the grounds of appeal, the judge of cassation admits the appeal or dismisses it.

The Council of State rejects the appeal if no grounds for cassation are founded. When a plea is well-founded, a rejection may nevertheless occur when the circumstances of the case allow the judge of cassation to proceed with a substitution of grounds, the substitution being made on the basis of constant facts. Thus, in the *Soares dos Santos* judgment, the Council stated that since the conclusions submitted to the first judge exceeded the jurisdiction of the interim relief judge, "this ground, which does not imply an assessment of any factual circumstances, must be substituted for the one retained by the contested order, the operative part of which it justifies"¹⁷⁵⁰. In the *Fofana* judgment, the Conseil d'Etat, in order to reject an appeal against a sorting order made in the matter of interim relief, substituted the reasoning of the interim relief judge with that of the fact that the circumstances of the case do not reveal any serious and manifestly illegal infringement of a fundamental freedom by a legal person under public law in the exercise of one of its powers¹⁷⁵¹. In the *Arakino* judgment of 29 November 2002, the Conseil d'Etat substituted grounds in order not to decide whether the right to education constitutes a fundamental freedom. The judge of the *référé-liberté* had rejected the request for suspension of a permanent exclusion measure taken by a high school with regard to a student of the establishment. Noting an infringement of the right to education, which he described as a fundamental freedom, the judge dismissed all the legal arguments raised against the contested decision. In order not to have to rule on the existence of a fundamental freedom, the Council affirmed "that a measure of exclusion of a pupil from a high school for disciplinary reasons cannot be considered as infringing a fundamental freedom; thus, Mr Arakino's request did not fall within the scope of the fundamental freedom. Arakino's request did not fall within the scope of Article L. 521-2 of the Code of Administrative Justice; that this reason, which does not imply an assessment of any factual circumstances, must be substituted for those retained by the contested order, the operative part of which it legally justifies"¹⁷⁵².

1743 CE, 15 February 2002, *Hadda, Lebon* p. 45. See, in the same sense: CE, 3 November 2003, *Kobanda Doro*, n° 258322.

1744 This is in line with the position adopted by the government commissioner Didier Chauvaux during the first applications of the reform of 30 June 2000. In a general formula, he stated: "We would hesitate to state that, overall, the court of first instance makes a sovereign assessment when it considers that an infringement of a fundamental freedom is not manifestly illegal" (D. CHAUVVAUX, concl. on CE, 16 February 2001, *Breucq, RFDA* 2001, p. 672).

1745 CE, 9 December 2003, *Aguillon and others, Lebon* p. 497.

1746 CE, 29 March 2002, *SCI Stéphaur and others, Lebon* p. 117. Article L. 613-3 specifies that the moratorium on the execution of eviction measures is not applicable when the persons whose eviction has been ordered have entered the premises by deed. In this case, it was not disputed that the squatters had entered the premises by de facto action. By relying on the fact that the refusal to provide assistance by the public force was not manifestly illegal "in view of the period during which it occurred", the interim relief judge incorrectly applied the provisions of Article L. 613-3 and vitiated his order with an error of law.

1747 CE, 6 December 2004, *El Akrae*, n° 265917.

1748 CE, 4 February 2005, *Karrer, Lebon T.* p. 1033. It disregards the case law of the Council of State according to which actions that may be taken on the basis of the stipulations of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction do not constitute acts of government (CE, 30 June 1999, *Guichard, Lebon* p. 218).

1749 CE, 9 March 2005, *Moinuddin, Lebon T.* p. 805, p. 921.

1750 CE, 8 August 2001, *Soares dos Santos*, n° 234589.

1751 CE, 22 May 2002, *Fofana and others, Lebon* p. 175.

1752 CE, 29 November 2002, *Arakino, Lebon* p. 422.

Where a plea is well-founded, the judge of cassation may annul the sorting order in part or in full¹⁷⁵³. In the case of interim relief, the Council of State *systematically* refers to the case in the interests of the proper administration of justice, as permitted by Article L. 821-21754. This is understandable in view of the fact that the issues in question must be resolved as quickly as possible. This solution avoids delaying the procedure by referring it to a new judge.

419. If the application passes the screening filter, i.e. is of sufficiently serious interest, it is put forward for investigation and judged within 48 hours after a public hearing¹⁷⁵⁵.

Section 3. The 48-hour adjudication of claims of serious interest

420. The legislator has required that applications for interim relief be decided within 48 hours if they are not rejected at the screening stage. Taking the utmost account of this requirement, the judge rules on the merits of the application within a few days of its submission, after an adversarial hearing and a public hearing. When the serious and manifestly illegal infringement of a fundamental freedom is proven, the interim relief judge has the possibility of accelerating the taking effect of his decision.

I. A 48-hour deadline for judgment

421. Because of the seriousness of the situations that the summary proceedings procedure is designed to combat, the law requires the judge to examine the applications submitted to him on this basis within 48 hours. The setting of such a short deadline for judgment requires a radical acceleration of the pace of the investigation.

A. Brevity dictated by the gravity of the situation

422. The assessment of the time limit within which a court must give its decision depends on the nature and particularities of each case¹⁷⁵⁶. Where the public authority is accused of seriously and manifestly unlawfully infringing fundamental freedoms, the time limit for deciding appeals must be as short as possible¹⁷⁵⁷. In practice, it can be observed that the seriousness of the situation very often justifies an obligation to rule within an extremely short time. Thus, when the president of the administrative court is seized of an act suspected of compromising the exercise of a public or individual freedom, the law requires him or her to rule within 48

¹⁷⁵³ For an annulment of the entire sorting order, see CE, 12 June 2002, *Commune de Fauillet et autres, Lebon* p. 215, *AJDA* 2002, pp. 590-592, chron. F. DONNAT and D. CASAS. The interim relief judge of the administrative court had omitted to refer to certain conclusions presented before him. The Supreme Court could, as usual, have limited itself to a partial cassation insofar as the rest of the claimants' submissions were correctly and completely cited. Nevertheless, the full cassation was retained, for two reasons. Firstly, the omission concerned the applicants' *main* submissions: an element likely to aggravate the scope of the irregularity in question, and therefore to widen the possible scope of the cassation. On the other hand, a full cassation would have made it possible to deal fully with the interesting legal issue of the case (see F. DONNAT and D. CASAS, *supra* note, p. 591).

¹⁷⁵⁴ Only one case was not referred to after cassation, but this solution was justified by the particular circumstances of the case. The administrative court had interpreted the application for annulment submitted to it as a request for the implementation of the provisions of Article L. 521-2. After annulling the decision of the interim relief judge who had wrongly ruled on this request, the Council naturally had to refer the case to the administrative court ruling on the merits (CE, 23 May 2001, *Baudoin, Lebon T.* p. 1135).

¹⁷⁵⁵ As a rule, the interim relief judge decides on the sorting of the case within one day. If he chooses this option, he will in principle give his decision the following day. If he opts for a public hearing, he launches the adversarial investigation on the same day by giving the timetable for the proceedings to the interim relief office, which will communicate it to the parties, indicating the deadlines for filing and replying. When the interim relief judge chooses this route and summons the administration, the latter knows that the application has not been rejected under Article L. 522-3 and, consequently, that a serious problem is likely to arise. It therefore takes the necessary steps, organising its defence and sometimes even satisfying the applicant before the hearing (see *infra*, §§ 468-471).

¹⁷⁵⁶ On the elements to be taken into consideration to determine the reasonable duration of the trial for each type of litigation, see M.-A. FRISON-ROCHE, "Les droits fondamentaux des justiciables au regard du temps dans la procédure", in *Le temps dans la procédure* (J.-M. COULON and M.-A. FRISON-ROCHE dir.), Dalloz, 1996, pp. 11-23, special pp. 11-12.

¹⁷⁵⁷ The need for a very rapid, even immediate reaction led, at the time of the decentralisation laws, to the idea of a suspensive effect for appeals in the area of freedoms. President Chabanol stated that "suspensive appeals appear to be the only means, in these matters, of effectively preserving public freedoms" (D. CHABANOL, "Décentralisation et juge administratif", *AJDA* 1983, p. 73). This proposal, which stemmed from a desire to put an immediate end to an infringement of freedoms, was too comprehensive to be retained, since almost all administrative litigation could be considered as involving freedoms.

hours (Article L. 2131-6 al. 5 of the general code of local authorities). Similarly, when a private individual alleges the existence of an administrative assault, the civil judge of summary proceedings is obliged to rule within days, or even hours, following the introduction of the request.

In the *référé-liberté*, the legislator was not content to invite the judge in a general way to rule quickly or within a short time. In a manner that is both precise and directive, it has itself assessed, *in abstracto*, what the time limit for the judge's intervention should be when a person considers himself to be the victim of a serious and manifestly unlawful infringement of his fundamental freedoms. Considering that in such a case, the situation at issue could not last, at most, beyond the two days following the submission of the application, it added to Article L. 521-2 the sentence according to which "The interim relief judge shall rule within 48 hours".

This obligation did not appear in the bill presented by the government. The text did not impose a specific time limit for the judge of the *référé-liberté*: the latter was only invited by the general provision of Article 1^{er} (now Article L. 511-1) to rule "as soon as possible". On first reading, the Senate adopted an amendment requiring the interim relief judge of the Council of State to rule within 48 hours in his capacity as judge of appeal for interim relief¹⁷⁵⁸. In order to coordinate with the time limit for appeals, and to maintain the analogy with the *déféré-liberté*, the obligation was extended to the judge of first instance on the second reading¹⁷⁵⁹.

The setting of a time limit for judgment and, even more so, of such a short time limit for judgment, is particularly noteworthy. Not only does it derogate from the rule that the judge is in principle sovereign in determining the duration of the investigation and judgment of a case¹⁷⁶⁰ but, in addition, the time limit set is remarkably short¹⁷⁶¹. As Mr Chapus pointed out, "the fact that it is set specifically in this procedure and by a legislative provision is quite significant of the way in which the summary procedure is conceived"¹⁷⁶². For Messrs Cassia and Béal, it "is one of the manifestations, probably the most symbolic, of the exceptional nature of the procedure provided for by Article L. 521-2"¹⁷⁶³.

423. What authority does the judge have over the time limit for judgment set by the law? Strictly speaking, the time limits set by the legislator must logically be considered mandatory. However, in the absence of a sanction expressly provided for by the law, the administrative judge only recognises them as indicative or incentive.

The Council of State considers that the setting of a time limit for judgment is never binding and that the judge is never obliged to rule before its expiry. "Despite the legislator's wish to see the case judged urgently within the time limit provided for by the texts, the judge recognises that he or she has the sovereign power not to give judgment within the time limit, thus giving precedence to his or her assessment of urgency over that of the legislator, when he or she does not ignore it purely and simply"¹⁷⁶⁴. This constant position of the administrative judge¹⁷⁶⁵ is found in the context of the *référé-liberté*. Initially, however, the interim relief judge seemed to

¹⁷⁵⁸ *OJ Senate Debate*, CR session 8 June 1999, p. 3755.

¹⁷⁵⁹ *JO déb. Sénat*, CR séance 22 février 2000, p. 869. The government supported the adoption of this amendment, judging that the proposal was "coherent both from the point of view of the text under discussion, since this time limit is already provided for the appeal judge, and with regard to the prefectural referral in matters of freedoms which results from the decentralisation laws" (E. GUIGOU, *JO déb. Sénat*, CR séance 22 février 2000, p. 863).

¹⁷⁶⁰ Usually, the texts governing the procedure before the administrative courts do not set any time limit for them to decide on the appeals before them. In principle, the administrative court has a discretionary power to determine the date of appeal to the roll. The cases in which the legislator sets a time limit within which the court must decide the case and give judgment are therefore an exception. As M. Dugrip observes, "the legislator imposes time limits on the judge only with the greatest reserve" (O. DUGRIP, *L'urgence contentieuse devant les juridictions administratives*, PUF, coll. Les grandes thèses du droit français, 1991, p. 31). When they exist, these time limits may vary in length, from several months to a few hours. Pursuant to Article 7 of the Act of 17 July 1978, the administrative judge must rule within six months from the registration of the request when it is seized of a contentious appeal against a refusal to communicate an administrative document (see note D. CHABANOL under seven species of the TA Lyon, 30 April and 7 May 1981, *AJDA* 1982, p. 94; and TA Lyon, 7 January 1982, *Bertin v. Minister of Defence*, *AJDA* 1982, p. 523, note H. MAISL). In the context of the *référé-précontractuel*, Article L. 551-1 of the Code of Administrative Justice gives the judge a period of 20 days to render his decision (see C. BERGEAL, "Référé en matière de passation des contrats et marchés", *Jel. Justice administrative*, fasc. 55 (11, 2001), n° 54). The president of the administrative court must rule within 15 days on appeals against express or tacit decisions taken by municipalities on requests for compensation for damage suffered in the event of requisition following disasters or catastrophes (see O. DUGRIP, *op. cit.*, p. 31). In electoral matters, time limits are often limited to a few days. Thus, a uniform time limit of 3 days is imposed on the administrative judge to rule on the regularity of the preparatory operations for the election and on the results of the elections to the deliberative bodies of the local authorities (see O. DUGRIP, *op. cit.*, pp. 33-37).

¹⁷⁶¹ Litigation subject to such a short deadline is rare. The most important one, from a quantitative point of view, is that of deportation, in which the judge must rule within 48 hours "from the time of registration of the application at the court registry" (Article R. 776-9 of the Administrative Justice Code). Other procedures should also be mentioned. Representing a very small part of the litigation, they correspond to certain requests introduced by the prefectural authority (*déféré-liberté*, *déféré-urbanisme* of article L. 421-9 of the code of town planning, *déféré-défense nationale*) or by the mayors of the municipalities of Paris, Lyon and Marseille (on these procedures, see R. D'HAEM, *Le juge unique administratif*, thesis Paris II, 2001, pp. 96-107).

¹⁷⁶² R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1592.

¹⁷⁶³ P. CASSIA and A. BEAL, note under CE, ord. 18 February 2003, *Commune de Pertuis*, *AJDA* 2003, p. 1174.

¹⁷⁶⁴ O. DUGRIP, *op. cit.* p. 74.

¹⁷⁶⁵ The case law is old (see for example CE, Sect., 1^{er} February 1946, *Roux, Lebon* p. 30) and applied in all disputes. Thus, the Conseil d'Etat considers that a judgment given after the expiry of the one-month period prescribed to the administrative court under Article L. 421-9 of the Town Planning Code to rule on requests for a stay of execution of a building permit is not vitiated by irregularity (CE, 22 April 1988, *Comité de sauvegarde du patrimoine du pays de Montpellier, Lebon* T. p. 956). Similarly, exceeding the 20-day time limit given to the judge of the *référé-précontractuel* to rule does not entail either the judge's relinquishment of jurisdiction (CE, Sect., 3 November 1995, *District de l'agglomération nancéienne, Lebon* p. 391) or the irregularity of his decision (CE, 2 July 1999, *SA Bouygues, Lebon* p. 941). As for the 48-hour time limit given to

recognise the imperative nature of the 48-hour time limit for ruling. In an order of 30 January 2001, he stated that the date of receipt of the complete file of the appeal application "constitutes the starting point of the time limit set for the Council of State to rule"¹⁷⁶⁶. The reference to the starting point of the time limit seemed to imply recognition of its binding force. Indeed, mentioning the computation of a time limit only makes sense if the judge recognises its legal authority and considers himself bound by its observance. The interim relief judge of the Council of State confirmed this interpretation in a decision of 27 September 2001. He stated that "the judge of the summary proceedings of the administrative court of Rennes (...) was seized on the basis of the aforementioned provisions of Article L. 521-2 of the Code of Administrative Justice, which implied that he had to give a ruling within 48 hours (...)"¹⁷⁶⁷. This solution was even enshrined by a collegiate body since, in a judgment of 27 July 2001, the Council affirmed that the law "required the interim relief judge to rule within 48 hours"¹⁷⁶⁸. Recognition of the binding nature of the time limit for judgment was in keeping with the letter of the text and the legislator's intention. In particular, the Minister of Justice had stated that the 48-hour time limit would be "counted" not, as the Senate's Committee on Legislation wished, once the emergency judge had made the selection, but from the registration of the application¹⁷⁶⁹. Here again, the reference to the rules for calculating the time limit only makes sense if the latter is binding. However, the judge subsequently expressly considered that the time limit set out in Article L. 521-2 was indicative. Using the classic formulas, it states that this time limit is "not prescribed on pain of nullity"¹⁷⁷⁰ or "is not imposed on pain of the judge being relieved of jurisdiction or of the nullity of the decision given"¹⁷⁷¹.

As Mr Dugrip has shown, the arguments put forward to explain or justify this case law hardly stand up to analysis. The refusal to recognise the binding force of statutory time limits is "in contradiction with the letter and spirit of the texts"¹⁷⁷². Firstly, the setting of a time limit for judgment would be incompatible with the discretionary power of the judge to direct the investigation¹⁷⁷³. This being the case, the existence of a fixed time limit for judgment does not affect the judge's power to direct the investigation and to assess when the case is ready for trial: it only presupposes that the administrative judge takes the necessary measures, in accordance with the texts, to ensure that the case is ready for trial at the time desired by the legislator. Secondly, the time limit for judgment would only have authority in cases where its expiry entails consequences, i.e. when the law has expressly provided for a sanction in the event of exceeding the time limit¹⁷⁷⁴. Otherwise, the Conseil d'Etat considers that "it is (...) a simple time limit"¹⁷⁷⁵. It should nevertheless be noted that the legal rule setting the time limit has real legal substance even though the legislator has not provided for a penalty; this only reinforces the effectiveness of the legal time limit but is in no way a condition of its legal nature. Thirdly, the priority listing of certain categories of cases has the effect of delaying the judgment of other disputes. Here again, it should be pointed out that such an effect, however regrettable it may be, does not justify neutralising the provision by which the legislator intended to establish priority in the listing of these cases. The legal arguments developed by the Council of State to deny the binding force of the time limits for judgment are thus somewhat weak. In spite of this, the administrative judge considers that the legal time limits for judgment have no impact¹⁷⁷⁶.

This being the case, although it only recognises the indicative authority of the time limits set by the legislator, the administrative judge is particularly sensitive to them and endeavours, as far as possible, to observe them¹⁷⁷⁷.

the deportation judge, since it is considered as indicative, it is not prescribed on pain of nullity of the decision (CE, 6 July 1980, *Préfet des Hauts-de-Seine c/ Korchi, Lebon* T. p. 778 and 904).

1766 CE, ord. 30 January 2001, *Tauratua*, n° 229418.

1767 CE, ord. 27 September 2001, *Guegueniat*, n° 238473.

1768 CE, 27 July 2001, *Haddad*, n° 231889.

1769 E. GUIGOU, *JO déb. Sénat*, CR séance 22 février 2000, p. 869.

1770 CE, ord. 19 June 2002, *Hoffer*, n° 247884.

1771 CE, order of 6 September 2002, *Tetaabi*, no. 250120. The applicant is not entitled to argue that the contested order is "null and void" because it was made a few minutes after the expiry of the 48-hour period from the registration of her application.

1772 O. DUGRIP, *op. cit.*, p. 74.

1773 See in this sense CE, 18 November 1983, *Delord et al*, quoted by O. DUGRIP, *op. cit.* p. 74. The Conseil d'Etat states that "it is up to the administrative court (...) to conduct the investigation of the case and to assess when the case is ready; consequently, the argument that the administrative court (...) should have ruled before the expiry of the one-month period set by the aforementioned legislative provision (...) cannot in any case be accepted".

1774 When it is provided for, the sanction takes the form either of the court being relieved of jurisdiction or of the implicit granting of the requested measure. In the first case, if the time limit is exceeded, the court is relieved of jurisdiction in favour of a higher court, which will then rule as the court of first resort on the dispute (see O. DUGRIP, *op. cit.*, pp. 83-84). The second type of sanction consists in attaching an effect to the judge's silence, i.e. to provoke an implicit judgment. Failure to comply with the time-limit may result in implicit acceptance of the applicant's request (cf. O. DUGRIP, *op. cit.*, pp. 82-83) or, more rarely, implicit rejection of the request. This is the case with the silence observed by the judge of the tax summary proceedings. The judge must decide on the value of the guarantees offered by the taxpayer within a month. If the judge does not rule within this time limit, he is relieved of jurisdiction and the application is rejected (O. DUGRIP, *op. cit.*, pp. 187-188).

1775 Concl. THERY on CE, 31 January 1975, *Union régionale de Rouen de la CGC*, *AJDA* 1975, p. 448.

1776 The expiry of the time limit, jurisdictional inertia and the judge's silence have no significance. Exceeding the time limit does not exhaust the judge's jurisdictional power unless otherwise provided for by the texts. When these do not attach any consequences to the expiry of the time limit, the solution of the dispute is suspended until the intervention of the judgment which, alone, will put an end to the proceedings. Having all the time necessary to render its decision, the judge, after the deadline, remains competent to rule (CE, 2 February 1972, *Election des délégués du Collège I des étudiants à l'UER d'odontologie de l'Université de Lille II*, *Lebon* p. 105; CE, 23 May 1980, *Lemaire*, *Lebon* p. 241). The court to which the case is referred makes a regular decision even though the time limit mentioned in the text has expired.

1777 Particularly significant is the note of 31 January 1990, addressed by President Marceau Long to the judges of the administrative courts concerning the procedure for deportation. The Vice-President of the Council of State stated "that compliance with the obligation imposed by the legislator to rule within an 'extremely short' period of time is one of the criteria on which the effectiveness of the administrative court will be judged. It is therefore of the utmost importance that this deadline be met" (note quoted by J.-P. DENIZET in "Les reconduites à

This desire is reflected in the framework of Article L. 521-2 of the Code of Administrative Justice, as the summary proceedings judge makes it a point of honour to rule within an extremely short period of time on the applications submitted to him on this basis. When the circumstances require a very rapid intervention by the interim relief judge, he or she generally respects the 48-hour time limit given to him or her to rule. In any case, the examination of an application never exceeds a few days. At the level of the judges of the first instance, the average time for judgment is around five days. The majority of applications are processed in less than three days. The applicant is guaranteed to receive a response to his or her application within a week at the latest. This speed of intervention is a guarantee of the efficiency of the procedure. For the judge, the obligation to give a decision within an extremely short time after the application has been registered means that applications submitted on this basis must be examined as a matter of extreme urgency.

B. Adaptations dictated by the need for extreme speed

424. In order for the judge of the référé-liberté to be able to rule very quickly and on the basis of a complete file, it is up to him to organise an effective investigation in a very short period of time. Forced to rule within 48 hours, he cannot sacrifice the quality of his information or disregard the requirements of contradiction. As Mr Gohin states, "contradiction and urgency are not to be set against each other but rather reconciled"¹⁷⁷⁸. Article L. 5 of the Code of Administrative Justice, which enshrines the principle of adversarial proceedings, expressly states that "the requirements of contradiction are adapted to those of urgency". The summary judgment judge must examine the applications in compliance with this principle, which implies recognising and organising a right of information and reply to the parties.

425. In order to reconcile these conflicting requirements, the Council of State's working group considered that "certain applications can only be dealt with as a matter of extreme urgency if a public hearing is held during which the parties' arguments are compared"¹⁷⁷⁹. Also, Article L. 522-1 paragraph 1 of the Code of Administrative Justice introduces the necessary flexibility by providing that the judge rules "at the end of a written *or oral* adversarial procedure". The oral procedure makes it possible to combine the information of the judge and the parties with the speed of the investigation. It makes it possible "to respect the adversarial nature of the procedure more quickly than any written procedure and to inform the judge more fully about the measure to be taken"¹⁷⁸⁰. The introduction of oral proceedings is a remarkable innovation in this area¹⁷⁸¹; it encourages the judge to intervene with all the necessary speed.

426. The only requirement for him prior to the hearing is to communicate the application initiating proceedings to the defendant¹⁷⁸². For the rest, the hearing can take place exclusively at the hearing. As a result, once the application has been admitted and communicated to the defendant, the hearing can then be purely oral.

la frontière", *LPA* 14 March 2001, n° 52, p. 12). On the other hand, there is a real hostility on the part of the administrative judge with regard to the time limits for judgment, which it is objectively impossible to respect without sacrificing the quality of the decision. This is evidenced by the welcome given to Article L. 421-9 of the Town Planning Code, which provided for the extension of the accelerated stay procedure to requests for a stay of execution submitted by the State, municipalities or public establishments for inter-municipal cooperation. President Labetoulle judged this provision to be 'unrealistic': 'How can a court, seized of conclusions relating to a building permit, be able, in 48 hours, to have the text of the land use plan against which it will have to assess the legality of the permit, carry out an adversarial investigation which, in this field, by the nature of things, requires time, and finally form a conviction? The time limit (...) of 48 hours is, in this field, completely incompatible with good justice' (D. LABETOUILLE, 'Le contentieux du nouveau droit de l'urbanisme: analyse prospective', in *Le nouveau droit de l'urbanisme*, Sirey, 1984, pp. 101-122, special pp. 118-119). Unsurprisingly, the president of the Litigation Division considered that this provision had 'neither the object nor the effect of modifying the conditions laid down by article 3, paragraph 4' of the law of 2 March 1982 and thus refused to apply this procedure to requests for a stay of execution presented by the prefects in this matter (CE, ord. 10 January 1985, *Préfet de Poitou-Charentes*, *AJDA* 1985, p. 366, note H. PERINET-MARQUET).

1778 O. GOHIN, *La contradiction dans la procédure administrative contentieuse*, LGDJ, 1988, p. 258.

1779 "Report of the working group of the Council of State on emergency procedures", *RFDA* 2000, p. 950.

1780 Ibid.

1781 Under the previous law, it was deplorable that, very often, the administrative judge of summary proceedings ruled "in the evening in the secrecy of his chambers with two or three written documents that had been exchanged by the parties" (A. LYON-CAEN, *Intervention in the debate "Le justiciable, le juge administratif et le temps"*, in *Le juge administratif à l'aube du XXI^e siècle*, PUG, 1995, p. 338). Indeed, in contentious administrative procedure, the part played by orality remained marginal, including in emergency procedures, despite its successful introduction in the litigation of deportation (see V. HAIM, "L'écrit et le principe du contradictoire dans la procédure administrative contentieuse", *AJDA* 1996, pp. 715-720). For a critique of the exclusively written nature of the procedure, which, in particular, cuts the judge off from any physical contact with the applicants, see A. MARION (pseudonym), "Du mauvais fonctionnement de la juridiction administrative et de quelques moyens d'y remédier", *Pouvoirs* no. 46, 1988, pp. 21-34, special p. 33.

1782 According to a jurisprudential formula that has been repeated many times, "the summary order is made following a particular procedure adapted to the nature of the request and the need to ensure a rapid decision" (CE, 19 April 1972, *Département de la Haute-Loire*, *Lebon* p. 297). It follows, for the Council of State, that the transmission of the application to the defendant is sufficient to guarantee the adversarial nature of the procedure. The interim relief judge is not required to communicate to the applicant the observations presented by the defendant in response to the notification of the application. See, in the same sense: CE, 9 March 1979, *Ferga*, *Lebon* T. p. 889; CE, 15 February 1989, *Port autonome de Dunkerque*, *Lebon* T. p. 899; CE, 1^{er} October 1993, *Office national interprofessionnel du lait et des produits laitiers*, *Lebon* T. p. 952.

The investigation begins with the exchange of written submissions; it continues, sometimes to a very large extent, at the hearing. However, even if the proportion of oral hearings has increased considerably, the written word has not disappeared completely from the procedure. Not only can the act of referral only be carried out by means of a written application, but it must also be sent to the administration before the public hearing is held. Consequently, it cannot be said, as has been argued, that the procedure set up by the Act of 30 June 2000 "may be entirely oral"¹⁷⁸³. Finally, it should be noted that the judge must rule solely on the basis of "the parties' submissions and the elements gathered during the public hearing"; in view of the 48-hour time limit for ruling, he or she cannot order an expert opinion suggested by one of the parties¹⁷⁸⁴.

II. An express instruction

427. Once the hearing has been scheduled and the parties have been summoned, an exchange of written submissions will usually precede the hearing. The hearing is only closed at the end of the hearing.

A. The preliminary phase of the investigation

428. When the interim relief judge considers that the application deserves to be examined, i.e. that it has not been rejected by the screening procedure, he sets the date and time of the public hearing in the light of the application, and after having obtained additional information from the applicant or his lawyer, if necessary. The judge also determines other elements of the procedure, such as the deadlines for the production of pleadings. This scheduling of the proceedings is new for the administrative court¹⁷⁸⁵. It ensures the legibility of the procedure and the information of the parties that were sought by the Council of State working group¹⁷⁸⁶. Litigants can know when their case will be settled and, when they allege a violation of a fundamental freedom, when the judge will be able to put an end to it if the conditions for granting it are met.

429. Once the procedural timetable has been established, two formalities must be completed.

Firstly, Article R. 522-4 requires the interim relief judge to notify the defendant immediately of the application and to set the shortest possible time limit for response. There is an obligation in principle to communicate the application initiating proceedings and to set a time limit for a response. No measure can be regularly prescribed without the defendant having been notified and given the opportunity to present his observations (which he will do, if necessary, at the hearing). The requirements of contradiction are satisfied by the mere transmission of the application¹⁷⁸⁷, which, in view of the urgency, is done by fax. On the other hand, the judge may not rule before the expiry of the period given to the defendant to produce his observations¹⁷⁸⁸. Article R. 522-4 provides that the time limits set must be "strictly observed", failing which the application is disregarded without formal notice¹⁷⁸⁹.

Secondly, Article R. 522-6 provides that "the parties shall be summoned to the hearing without delay and by any means". In practice, the parties are summoned to the hearing¹⁷⁹⁰ by fax and telephone¹⁷⁹¹. In view of the

1783 M. FOULETIER, "La loi du 30 juin 2000 relative au référé devant les juridictions administratives", *RFDA* 2000, p. 978. As Professor Richer points out, "the purely oral procedure would be the one in which the appearance alone brings the case before the judge, the means are presented and discussed at the hearing, the judgment is read at the hearing" (L. RICHER, "L'instance de référé d'urgence", *RFDA* 2002, p. 270).

1784 CE, ord. 25 April 2002, *Société Saria Industries, Lebon* p. 155. Such a measure is clearly incompatible with the extreme brevity of the time limit for judgment set out in Article L. 521-2.

1785 The decree of 29 May 1997 gave the administrative courts the possibility of indicating to the parties, as soon as the application was lodged, the planned date for the hearing. However, this was still only a simple option for the judge, the parties remaining in uncertainty when the judge did not make use of it (see Articles R. 611-11 and R. 611-18 of the Code of Administrative Justice).

1786 Wishing to make the course of proceedings more transparent for claimants, the working group had "stressed the importance for litigants of knowing the date on which the dispute will be examined by the court and the date on which the decision will be handed down. This need for information is particularly felt in the field of emergency proceedings" (Report, p. 944).

1787 See *supra*, § 426.

1788 As the judge of the *déféré-liberté* had affirmed, "it is only at the expiration of this time that he can, notwithstanding the absence of such observations, regularly rule" (CE, ord. 13 July 1999, *Commune de Monétier-les-Bains, Lebon* p. 246).

1789 Thus, in the *Caze* order, the judge could usefully rule even though the administration had not produced any written observations and was not represented at the hearing (CE, ord. 22 March 2002, *Ministre de la Justice cf. Caze, Lebon T.* p. 852).

1790 As Article R. 522-6 only refers to the "parties", third parties, and in particular interveners, do not have to be summoned to the hearing. The interim relief judge is nevertheless free to summon any interested person to the hearing. In the *Tibéri* case, he thus summoned to the hearing not only the parties directly involved in the dispute, Jean Tibéri and the Conseil supérieur de l'audiovisuel, but also the persons indirectly interested in the resolution of the dispute: Canal + (the channel organising the televised duel) and the two candidates invited by the channel to take part (Mr Seguin and Mr Delanoë). The latter, who were not present at the hearing, had stated in their written submissions that they were relying on the wisdom of the Conseil d'Etat (CE, ord. 24 February 2001, *Tibéri, Lebon* p. 85).

1791 These informal procedures have been introduced into administrative litigation thanks to the litigation on deportation. Article R. 776-10 of the Code of Administrative Justice states that "the parties must be notified by all means of the date, time and place of the hearing". The possibility of a summons by telephone had been accepted in the context of this procedure (CE, 31 March 1999, *Ba, Lebon T.* p. 829).

48-hour time limit given to the judge to rule, the parties are not entitled to complain about the shortness of the time limits set for them. Thus, the administration may validly be summoned for a hearing to be held the day after the summons¹⁷⁹². Similarly, the applicant cannot invoke the violation of the adversarial principle when the judge decides to hold a hearing the day after the application was lodged¹⁷⁹³. The Council of State has held that the appeal judge could summon the defendant to a hearing to be held that very afternoon¹⁷⁹⁴. Although the extreme brevity of the time limit for convening the hearing has no bearing on the legality of a procedure in which the judge must give a ruling within 48 hours, it is nonetheless imperative that the parties be regularly convened to the hearing¹⁷⁹⁵.

430. According to Article R. 522-7 of the Code of Administrative Justice, the case is ready to be judged as soon as the application has been notified to the defendant and the parties have been summoned to the public hearing. Once the application has been sent to the defendant so that he or she can reply to it, the interim relief judge is not obliged to communicate to the applicant the observations presented in defence¹⁷⁹⁶. However, if the judge decides to communicate the statement of defence, even though he is not obliged to do so, the shortness of the time the claimant may have had to reply has no influence on the regularity of the procedure¹⁷⁹⁷. The judge is thus free to go beyond the minimum requirement of communicating the application to the defendants and, although he is not obliged to do so, to transmit to each party the pleadings communicated by the other party before the public hearing¹⁷⁹⁸. The procedure is regular regardless of the time taken by the defendant administration to produce its written observations¹⁷⁹⁹ since, in any event, it is not obliged to produce written observations and may develop its entire argument at the hearing¹⁸⁰⁰.

In practice, however, the administration usually respects the time limits set by the interlocutory office for producing its written observations. It thus gives the applicant the opportunity to read them and, if necessary, to

¹⁷⁹² CE, ord. 22 March 2002, *Ministre de la Justice c/ Caze, Lebon T.* p. 852. In view of the subject of the application before it and the time limit within which it had to rule, the first judge correctly applied the provisions of Article R. 222-6 by communicating the applicant's application to the Nantes detention centre on 5 March 2002, and accompanying this communication with the indication that a hearing would take place on 6 March 2002 at 4pm. The judge specified that "it was up to the administration to make all necessary arrangements to ensure his defence". As its absence from the hearing was exclusively attributable to it, it could not usefully argue that the contested order had been made following an irregular procedure. It should be noted that under the previous law, the case law relating to summary proceedings regarded a two-day period granted to the defendant to reply to the application as insufficient (CE, 28 April 1989, *GP* 21 July 1989, p. 3). The same was true in the case of a stay of execution, where the two-day time limit for summoning the defendant could not be reduced to a shorter period, regardless of the urgency (CE, 11 May 1977, *Melki, Dr. adm.* 1977, n° 236; *RDP* 1978, p. 293). Litigation concerning deportation will once again overturn these rules. In view of the extreme brevity of the time limit given to the judge to rule, the Conseil d'Etat has, for example, admitted that the administration could be summoned the day before for the following day (CE, 14 February 1992, *Vaz, Lebon T.* p. 982 and 1179; CE, 31 March 1999, *Ba*, cited above).

¹⁷⁹³ CE, ord. 10 October 2003, *Sagnard*, no. 260867. The case was referred to the interim relief judge of the administrative court on 18 September 2003, who held a public hearing on 19 September and ruled at the end of the hearing. Before the appeal judge, the applicant argued that he had not been able to respond to the brief of the Prefect of Police and that he had been notified of the hearing only the day before, and had not been able to attend. The interim relief judge of the Conseil d'Etat stated that since the interested party had been informed of the date and time of the public hearing, "it was up to him to attend in order to take cognisance of the observations presented on the same day by the Prefect of Police and to discuss them before the interim relief judge; that, having failed to do so, he is not entitled to argue that the adversarial nature of the procedure was disregarded".

¹⁷⁹⁴ The interim relief judge of the administrative court of Cergy-Pontoise had, on a petition for interim relief filed by Mr. Haddad, annulled a decision taken by the president of the University of Paris VIII. The appeal lodged by the public institution was communicated to Mr. Haddad, who was summoned by fax on 24 January 2001 at 9:47 a.m., for the hearing scheduled for the same day at 4:00 p.m. The appeal judge annulled the first judge's order (CE, order 24 January 2001, *Université Paris VIII Vincennes Saint-Denis, Lebon* p. 37). Challenging this order by way of opposition, Mr. Haddad questioned the brevity of the time he had been given to present his observations. The Conseil d'Etat rejected this argument: "given the provisions of Article L. 523-1 of the Code of Administrative Justice, which required the interim relief judge to rule within 48 hours, the argument that the principle of adversarial proceedings had been disregarded must be rejected" (CE, 27 July 2001, *Haddad*, no. 231889).

¹⁷⁹⁵ The interim relief judge of the Council of State sanctioned the failure to convene a central administration. See CE, ord. 28 August 2002, *Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c/ Koujdil, Lebon T.* p. 851. The application submitted by Mr. Koujdil to the interim relief judge of the Lyon administrative court sought, inter alia, to suspend the execution of an order by the Minister of the Interior ordering his expulsion from French territory. The interim relief judge noted that "it is common ground that the order of 13 August 2002 granting this request was issued without the Minister being called into question; that it was thus issued on the basis of an irregular procedure and that the Minister is justified in requesting its annulment for this reason".

¹⁷⁹⁶ CE, ord. 3 June 2005, *Olzibat, Lebon T.* p. 776, p. 920: the interim relief judge of the Conseil d'Etat noted that the application had been communicated to the defendant "as required by the first paragraph of Article R. 522-6 of the Code; that the parties were summoned to the summary hearing in accordance with the requirements of the second paragraph of the same article; that the first judge closed the investigation at the end of the hearing; that, under these conditions, the principle of the adversarial nature of the procedure was satisfied even though the applicant had not received communication of the prefect's statement of defence prior to the summary hearing.

¹⁷⁹⁷ CE, 22 March 1999, *Soudain, Lebon* p. 87. Indeed, there would be no sense in sanctioning the interim relief judge who, in the interest of the applicant, proceeded with an optional communication.

¹⁷⁹⁸ The transmission is done by fax and under the guidance of the Bureau des référés.

¹⁷⁹⁹ Cf. CE, ord. 22 March 2001, *Commune d'Eragny-sur-Oise, Lebon T.* p. 1134. The judge states "that, having regard to the time limit set for the interim relief judge to give a ruling, referred to in application of Article L. 521-2 of the Code of Administrative Justice, the fact that the prefect of Val-d'Oise's defence brief reached the court in the form of a fax and at the beginning of the public hearing at which both the applicant commune of Eragny-sur-Oise, to which the brief was communicated on the spot, were represented, is not relevant to the case, and the prefect, is not, whatever the time limit given by the judge to the prefect to produce, of such a nature as to undermine the adversarial nature of the procedure followed before the interim relief judge.

¹⁸⁰⁰ See for example CE, ord. 9 January 2001, *Deperthes, Lebon* p. 1. The administration had not produced any observations in its defence but, on the day of the hearing, the representative of the Ministry of the Interior produced a decree of 13 January 1947 giving a legal basis to the contested decision. The interim relief judge based himself on this text to conclude that there was no manifest illegality.

reply to them before the hearing is held. It has been observed that during the very short time available before the hearing, the parties can exchange several written submissions; it is not uncommon for them to produce and reply to the opposing party's arguments within a few hours. This makes it possible to complete the investigation before the summary hearing, so that the judge and the parties are better informed. The importance of the written phase in the course of the hearing should not therefore be neglected or underestimated in comparison with the revolution represented by the introduction of oral proceedings. This phase does not disappear: it is not purely formal and remains of real importance. It is systematically supplemented by an oral phase, since the law obliges the interim relief judge to hold a hearing when the application has not been rejected by the screening procedure.

B. The oral phase of the hearing

431. The Council of State's working group had indicated that "a public hearing will be required whenever the interim relief judge has to rule in extreme urgency"¹⁸⁰¹. Thus, Article L. 522-1 paragraph 2 of the Code of Administrative Justice makes a public hearing mandatory when the judge intervenes under Article L. 521-2. By obliging the interim relief judge to hold a hearing when he or she hears an application for interim relief¹⁸⁰², Article L. 522-1 derogates from the principle according to which the interim relief judge "is always free to assess, for each application referred to him or her, whether it is necessary to summon the parties and hear them"¹⁸⁰³. This hearing must be held in public pursuant to Article L.6 of the Code of Administrative Justice¹⁸⁰⁴. Failure to respect this public nature of the hearing would result in the irregularity of the subsequent order.

432. The public hearing is an integral part of the investigation. Article R. 522-8 of the Code of Administrative Justice provides that the investigation is closed, at the earliest, at the *end of* the hearing¹⁸⁰⁵. Consequently, the parties have every opportunity to present arguments, produce documents and clarify or reformulate their conclusions.

At the summary judgment hearing, "the parties may put forward any plea in law or in fact"¹⁸⁰⁶. The parties may present entirely new arguments, i.e. those that had not been developed or even mentioned in the written pleadings¹⁸⁰⁷. The solution finally adopted by the judge may therefore be based on arguments that emerged at the hearing. Factual arguments may also be presented for the first time during the hearing: "as long as they relate to facts prior to the administrative decisions criticised, elements may usefully be produced before the judge to be debated in the presence of both parties, even though the administration was not aware of them before taking these decisions"¹⁸⁰⁸. In the *Sulaimanov* case, the applicants were thus able to provide details of the risks of persecution to which they were exposed in their country during the summary proceedings, and to dispel the doubts that the administration had raised regarding their Chechen origin.

The parties may also produce additional documents during the hearing, regardless of their volume or relevance. In the *Tibéri* case, the interim relief judge asked, during the hearing, that the document specifying the technical details of the programme proposed by Canal + to Jean Tibéri be added to the file and asked the deputy to the interim relief office that this document be immediately communicated to the parties present at the hearing¹⁸⁰⁹.

1801 "Report of the working group of the Council of State on emergency procedures", *RFDA* 2000, p. 950.

1802 The rule also applies to suspension proceedings. However, summary proceedings are excluded (CE, 24 June 2002, *Département de la Seine-Maritime, Lebon T.* p. 851, *RDI* 2002, pp. 406-407, note J.-D.D.).

1803 CE, 19 February 1965, *Souris, Lebon T.* p. 1017. It should be noted that by way of derogation from this principle, the Conseil d'Etat had imposed an obligation to hold a hearing in the procedures of the référé-précontractuel (CE, 10 June 1994, *Commune de Cabourg, Lebon* p. 301, concl. S. LASVIGNES) and of the référé audiovisuel (CE, 25 November 1994, *Société La Cinq, Lebon* p. 511) because of the importance of the measures that could be ordered and the rapidity of the judge's intervention.

1804 See however, holding a hearing in camera in order to preserve the privacy of the applicant suffering from a serious neurological disorder: TA Marseille, order of 22 January 2004, *Ms X*, no. 04427/0. Article 57 of Law No. 2004-1343 on the simplification of the law expressly provided for recourse to this possibility by inserting an Article L. 731-1 into the legislative part of the Code of Administrative Justice, worded as follows "By way of derogation from the provisions of Article L. 6, the president of the court may, exceptionally, decide that the hearing will take place or continue without the presence of the public, if the protection of public order or respect for the privacy of individuals or secrets protected by law so requires.

1805 In ordinary law proceedings, the investigation is in principle closed, at the latest, three clear days *before* the hearing (Article R. 613-2 of the Code of Administrative Justice). It is therefore closed at the time of the oral phase (Article R. 613-11). The importance given to oral proceedings in urgent summary proceedings results from the postponement of the date of closure of the investigation compared with the ordinary rules.

1806 CE, ord. 20 January 2005, *Commune de Saint-Cyprien, Lebon T.* p. 1022. For the procedure for challenging deportation orders, see: CE, 28 October 1991, *Aoulad Haj, Lebon T.* p. 1141; CE, 29 November 1991, *Préfet de l'Aisne c/ Strykowski, Lebon T.* p. 1118.

1807 This is a radical departure from the rules usually applicable to contentious administrative proceedings. Indeed, in the procedures of common law, it is constant jurisprudence that no legislative or regulatory provision, nor any general principle of law imposes to the administrative judge to analyze the oral observations which are presented at the public hearing (CE, 22 December 1965, *Vialle, Lebon* p. 705).

1808 CE, ord. 25 March 2003, Minister of the Interior, Internal Security and Local Freedoms v. Sulaimanov, *Lebon* p. 146.

1809 See P. CASSIA A. BEAL, "La nouvelle procédure applicable devant le juge administratif des référés. Bilan de jurisprudence (1^{er} January-28 February 2001)", *JCP G* 2001, I, 317, p. 929.

Finally, the hearing allows the parties to clarify their conclusions. This allows the petitioner to reformulate his initial conclusions in order to avoid a dismissal based on the disregard of the provisions of Article L. 511-1 of the Code of Administrative Justice. The applicant can thus indicate that his conclusions for the purposes of an injunction must be considered as seeking to have the administrative authority not issue the requested visas, but to re-examine the visa application¹⁸¹⁰. The applicant may also clarify his or her submissions, for example by specifying that the application for a stay of execution of the contested order should be understood as seeking its annulment¹⁸¹¹. The applicant may abandon certain submissions, for example those seeking an advance payment¹⁸¹². He may also add new submissions¹⁸¹³.

433. Public hearings are conducted without any particular formalism, in a spirit similar to civil procedure¹⁸¹⁴.

There is no solemnity to the proceedings. Generally, the interim relief judge summarises the case, hears the parties and, if necessary, asks them for any additional information in order to have the fullest possible knowledge of the case. The parties - if they are present - can in turn express themselves and exchange their observations in real time. They are able to respond informally to the interlocutory judge's questions and to state their respective positions orally. Each party can reply without delay to the other's arguments; the judge confronts their positions. The debates held during the public hearing enable the judge to clarify the material aspects of the case in a concrete manner and thus obtain additional information to that contained in the written submissions. Any useful or interested person may be heard by the interim relief judge. In the *Tibéri* case, for example, he noted that "Canal + had made it known, both in various letters prior to the summary hearing and during the hearing, that Mr Tibéri and Mr Contassot would be able to speak the next day, at the same time (...)"¹⁸¹⁵. The judge sometimes mentions that elements were clarified, completed¹⁸¹⁶ or confirmed¹⁸¹⁷ at the hearing. He may also note that the hearing did not provide any new information compared to that contained in the written submissions¹⁸¹⁸. The judge may expressly rely on the clarifications given by the administration during the public hearing to exclude the serious and manifestly illegal infringement of a fundamental freedom¹⁸¹⁹.

434. The requirements of contradiction are imposed at the stage of the public hearing by virtue of the provisions of Articles L. 5 and L. 522-1 of the Code of Administrative Justice. "The judge must therefore only take into consideration the information of which the parties present before him have been aware and have been able to debate in complete equality"¹⁸²⁰.

The appeal judge checks that all the elements introduced into the debates "were the subject of contradictory exchanges during the written procedure or at the public hearing"¹⁸²¹. The procedure is irregular if a document produced by a party during the hearing is taken into consideration without the order or the minutes of the hearing mentioning that this document was communicated to the other party during the oral phase of the procedure so that it could contest the statements made¹⁸²². The communication of documents at the hearing is valid even if

1810 CE, ord. 18 February 2005, *Launay and Benfdil*, n° 277579; CE, ord. 25 March 2005, *Soumbou*, n° 278823

1811 CE, ord. 6 January 2005, *Landu-Diambu*, n° 276105.

1812 CE, ord. 14 March 2005, *Gollnisch*, *Lebon* p. 103.

1813 See for example: CE, ord. 27 May 2005, *Section française de l'observatoire international des prisons et autres*, *Lebon* p. 232. During the summary proceedings hearing, the applicants specified that, in addition to suspending the contested decision of the Minister of Justice, they were requesting that the Minister reconsider the possibility of authorising the organisation of debates on the "European Constitution" in prisons in the light of the grounds for the order of the summary proceedings judge.

1814 See the report of the hearing of 24 February 2001, in the *Tibéri* case, by B. MALIGNER (note to *RFDA* 2001, special issue, p. 644). On this theme, see also G. GOUDOUIN, "L'oralité dans la procédure de référé", *RFDA* 2007, pp. 68-72; J. RAYMOND, "Le rôle de l'audience dans la procédure du référé suspension", *JCP A* 2005, 1054.

1815 CE, ord. 24 February 2001, *Tibéri*, *Lebon* p. 85.

1816 CE, ord. 12 November 2001, *Ministre de l'Intérieur c/ Farhoud*, *Lebon T.* p. 1126: "according to the indications collected during the investigation, and in particular during the public hearing (...)". CE, ord. 27 November 2002, *SCI Résidence du théâtre*, *Lebon T.* p. 874: "it emerges from the documents in the file as well as from the elements collected during the public hearing (...)". CE, ord. 10 August 2001, *Association "La Mosquée" and others*, *Lebon T.* p. 1133: "it emerges from the documents in the file as well as from the hearing held by the judge of the Council of State (...)".

1817 CE, ord. 2 November 2001, *SNC Costes*, n° 239617: "as confirmed by the summary hearing, the decision of the President of the Centre dated 17 October 2001 has ceased to have effect". CE, ord. 14 March 2003, *Commune d'Evry*, *Lebon T.* p. 931: "as noted by the interim relief judge of the administrative court of Versailles, and as confirmed by the debates held during the hearing (...)". CE, ord. 22 May 2003, *Commune de Théoule-sur-Mer*, *Lebon* p. 232: "it was further confirmed at the oral hearing before the Council of State (...)". CE, ord. 17 December 2003, *EURL Ecosphère and SARL Général services applications*, *Lebon* p. 519: "as indicated by the Minister in his defence brief and confirmed by the explanations given during the public hearing (...)".

1818 In the *Lidl* order, the judge noted that the applicant company had alleged the existence of an emergency 'without providing, in particular during the hearing of 22 March 2001, the slightest concrete element of assessment' (CE, order of 23 March 2001, *Société Lidl*, *Lebon* p. 154).

1819 See for example CE, ord. 4 September 2003, *Thanattikul*, *Lebon T.* p. 928.

1820 A. PLANTEY and F.-C. BERNARD, *La preuve devant le juge administratif*, *Economica*, 2003, n° 410.

1821 CE, ord. 22 May 2003, *Commune de Théoule-sur-mer*, *Lebon* p. 232.

1822 CE, ord. 26 March 2002, *Société Route Logistique Transports*, *Lebon* p. 114. The judge cannot validly base his solution on a document that was not communicated before the hearing or during the debates.

the party concerned is absent¹⁸²³. The presence of the parties and their lawyers at the public hearing is therefore crucial. As the hearing is prolonged and sometimes even takes place for the most part during the hearing, a party that does not take the trouble to attend the hearing runs the risk of having new documents and arguments submitted without being able to reply. If this happens, the party must bear the consequences. In the absence of any defence by the administration, the applicant's allegations will be deemed to be established. Thus, in the above-mentioned *Caze* case, in the absence of any defence by the administration, the first judge ruled solely on the basis of the applicant's allegations, which could suggest that the detention centre where he was being held had withheld letters that he intended to send to various administrative or judicial authorities or that had been sent to him by such authorities¹⁸²⁴.

Article R. 522-9 obliges the judge to invite the parties to comment on the public policy grounds that he or she has identified ex officio. He may fulfil this obligation at the hearing but the communication must then be mentioned in the decision. The procedure is irregular when the judge limits himself to basing his decision on the fact that the conclusions submitted to him exceed the scope of the powers conferred on him by law and does not inform the parties that the order seems likely to be based on a plea raised ex officio¹⁸²⁵. The investigation can only be closed at the end of the hearing.

C. Closing the case

435. At the end of the hearing, three hypotheses are envisaged by Article R. 522-8 of the Code of Administrative Justice¹⁸²⁶.

436. Firstly, if he considers that the investigation should continue before him, the interim relief judge may decide to refer the case to another hearing. Given the very short period of time available to him to rule, this possibility is rarely used by the interim relief judge. In practice, this procedure will be used when the documents in the file are insufficient to rule on the case as it stands, or if factual elements need to be clarified before the decision is made. Thus, in the *Commune de Montreuil-Bellay* case, the judge decided, after the public hearing of 9 November 2001, which was held in the morning, to continue the investigation and to order a new hearing. That same afternoon, the missing documents were produced by the municipality and the claimants. A new hearing was held on 12 November 2001, taking into account the additional documents submitted by the parties¹⁸²⁷. The purpose of referring the case to another hearing may also be to hear the applicant retained by the administration. In the *Ngamissimi* case, for example, the very purpose of the application was to keep the applicant in the waiting zone. The remand was decided in order to allow the judge to hear the applicant at a new hearing¹⁸²⁸.

437. Secondly, if the judge considers that the investigation should continue between the parties, he may defer the closure of the investigation and authorise the protagonists to exchange additional information. This procedure is particularly flexible: it allows the judge "to defer the closure of the investigation to a later date of which he shall notify the parties by any means. In the latter case, the additional information filed after the hearing and before the close of the investigation may be sent directly to the other parties, provided that the party filing the additional information can prove to the judge that it has taken the necessary steps" (Article R. 522-8, paragraph 1). In order to speed up the procedure, the parties may exchange documents and statements of case directly with each other during this extension phase, subject to providing the judge with proof of their diligence¹⁸²⁹. This possibility of closing the investigation after the hearing is useful when the judge wants to obtain

1823 On the basis of Article L. 521-1, the Conseil d'Etat affirmed that the interim relief judge does not commit an irregularity "by basing himself on elements that were brought by one of the parties during the public hearing and of which the other party could not have been aware because it was not present or represented at the hearing" (CE, 29 January 2003, *Société Chourgnoz SAS*, RDI 2003, p. 384, obs. A. R.-I.).

1824 CE, ord. 22 March 2002, *Ministre de la Justice c/ Caze, Lebon T.* p. 852. See also CE, 15 May 2002, *Bandoïn*, n° 239487. The applicant, who was placed in a hospital on an involuntary basis, claimed to have been denied the possibility of sending mail and communicating with the administrative and judicial authorities. As the administration did not submit any observations, the existence of this prohibition is deemed to be established.

1825 For a summary suspension, see CE, 27 July 2001, *Société Foncière MFC, Lebon* p. 417.

1826 It should be remembered that the investigation is not closed when the judge declares that there is no need to adjudicate or gives notice of a withdrawal.

1827 CE, ord. 12 November 2001, *Commune de Montreuil-Bellay, Lebon* p. 551. See similarly, deciding on a referral to a new hearing in order to better assess the reality of the risk incurred by the applicant in case of return to her country of origin: CE, ord. 14 January 2005, *Bondo, Lebon T.* p. 915.

1828 CE, ord. 12 December 2005, *Ngamissimi*, no. 287718. It will be seen that the person concerned was in fact re-routed to his country of origin on the same day as the application was lodged, with the result that the examination of the submissions against the order of the first judge is irrelevant.

1829 This is usually done by attaching to the statement of case filed with the court the fax slip sent to the opposing party with the note: "receipt ok".

additional documents or, with regard to respect for the adversarial process, to allow the opposing party to respond to a plea or a complex document produced during the public hearing. They will, where appropriate, be taken into account without the need for a new hearing. Two cases illustrate the implementation and practical interest of this procedure.

In the *Kilicikesen* case, the judge decided to postpone the closure of the investigation until after the hearing on 3 April 2004, in order to allow the parties, and in particular the administration, to clarify the conditions under which the applicants' daughter, who wore a headscarf, could be allowed to attend her school. On 5 April the Director of Legal Affairs of the Ministry of Education sent the applicants' lawyer a written document confirming and clarifying the oral indications as to the characteristics of the clothing that could be regarded by the authorities, in the circumstances of the case, as justified by the freedom to express religious beliefs. On 7 April he sent the applicants' lawyer a supplementary memorandum clarifying and interpreting the previous one, in the same way as on 5 April. The judge handed down his decision on the same day in the light of the evidence submitted¹⁸³⁰.

In the *Benbehar* case, this possibility was used to allow the parties to justify, with supporting documents, the truth of the claims made at the public hearing of 8 April 2005. At that first hearing, the applicant asserted that the enforcement of the deportation order infringed his right to lead a normal family life. He argued that he was about to marry a French national and that he had already concluded a civil solidarity pact with her. After this public hearing and the hearing of the applicant's lawyer and representatives of the Minister of the Interior, it was decided to extend the hearing until 14 April 2005 at noon. The parties were given the opportunity to produce documents and briefs in order to supplement and substantiate their claims. On 11 April 2005, the Minister produced documents from which it emerged that the applicant had stated on 20 November 2002 that he was married and had three children. On 13 April 2005, the applicant produced several documents, including a certificate of non-marriage dated 25 December 2004 in the presence of two witnesses. The judge expressly based his decision on the documents produced. He stated that "it results from the additional investigation ordered at the end of the summary hearing that when Mr. Benbehar submitted his application for territorial asylum on 20 November 2002, he certified that he was married. Benbehar certified that he was married to an Algerian national and that he was the father of three children; that he indicated on his application that his wife and children had remained in Algeria; that in response to the communication of this document, the person concerned merely produced a "certificate of non-marriage" drawn up by a local Algerian authority "on the attestation and responsibility" of two witnesses, the probative value of which is very uncertain; that, in these circumstances (...), the conclusions of his application cannot be accepted.), the conclusions of his application cannot be accepted"¹⁸³¹. The judge assesses the value and relevance of the documents produced by the parties after the hearing, and then rejects the application.

438. Thirdly, if the judge considers that he or she is sufficiently informed at the end of the hearing, or after the additional investigation decided on the basis of Article R. 522-8, the judge closes the investigation. This is the normal situation after the hearing. However, the judge will be obliged to reopen the investigation if a memorandum produced after the hearing provides new information likely to change his assessment¹⁸³². In the *Ouakid* case, the applicant produced a memorandum the day after the public hearing on 30 April 2002, presenting elements likely to modify the judge's assessment of the proportionality of the expulsion order against him. Mr Ouakid indicated that he had shown a real desire to reintegrate and that the expulsion order had been issued on the basis of materially incorrect facts. In view of these elements, which were likely to change his assessment, the judge called the parties to a new public hearing, which was held on 2 April. It is clear from the wording of his decision that the judge based himself on these new elements to admit the existence of a serious and manifestly illegal infringement of a fundamental freedom. Since the decision did not mention the provisions of Article R. 522-8, it can be deduced that the judge had not decided to defer the closure of the investigation until after the hearing on 30 April 2002. It was the content of the brief produced by the applicant the day after the hearing that justified reopening the investigation and holding a new hearing¹⁸³³.

The principle of adversarial proceedings is disregarded if the judge relies on an element produced after the hearing without having communicated it to the other party. In an order of 2 May 2006, the interim relief judge of the Conseil d'Etat stated "that when a new document emanating from one of the parties to the proceedings is referred to him after the hearing or, if he has postponed the closure of the investigation, on the date he has set, whether or not it is entitled 'note en délibéré', it is up to the interim relief judge to take cognisance of it before making his order; that although he always has the option, in the interest of the proper administration of justice, of reopening the investigation and submitting to the adversarial debate the elements contained in the document produced, he is not obliged to do so, on pain of irregularity of his order, only if this document contains either a

1830 CE, ord. 7 April 2004, *Kilicikesen*, *Lebon* p. 164.

1831 CE, ord. 14 April 2005, *Benbehar*, n° 279340.

1832 In the context of the interim injunction, the Conseil d'Etat censured an order which had refused to reopen the investigation after the production of a document likely to modify the judge's assessment (CE, 10 December 2001, *Association Gabas Nature Patrimoine*, *Lebon* T. p. 1126). In the event of referral to another hearing, which will be held by a single judge or a panel of judges, Article R. 522-8 paragraph 2 provides that the investigation is reopened.

1833 CE, ord. 7 May 2002, *Ministre de l'Intérieur c/ Ouakid*, *Lebon* T. p. 870.

statement of a factual circumstance which the party invoking it was unable to mention before the close of the investigation and which the judge could not ignore without basing his decision on materially inaccurate facts, or a new legal circumstance or one which the judge should note of his own motion; in order to enable the parties to ensure that the proceedings are in order in the light of these requirements, the production(s) made after the hearing must be included in the record of the proceedings"¹⁸³⁴. In this case, the first judge relied on documents and exhibits that the administration had not been able to place in the file of the adversarial procedure earlier. These documents had not been communicated to the plaintiff, although the statements they contained had been taken into account by the interim relief judge. In these circumstances, the contested order was made following an irregular procedure.

439. Once the investigation has been completed, the adversarial debate between the parties is over and the judge is in a position to rule on the application. He then sets an indicative date or time when he will give his decision.

III. The judgment

440. Decisions of the interim relief judge, which are made in an emergency - but by no means in a hurry - must nevertheless be reasoned and contain certain mandatory information. When the conditions for granting the order are met, the judge may accelerate the taking effect of his decision so that the serious and manifestly illegal infringement of a fundamental freedom ceases as soon as possible.

A. The content of the decision

441. In accordance with classic case law, the judge takes into account the date on which he or she rules to assess the merits of the application for interim relief¹⁸³⁵. This means that the judge takes into account the day of the hearing, and not the day of the referral - nor the day of the expiry of the 48-hour time limit for ruling¹⁸³⁶ - in order to assess whether the conditions for granting a measure requested under Article L. 521-2 are met. This applies to the urgency condition¹⁸³⁷ as well as to the other conditions¹⁸³⁸. Whether or not the application meets the conditions for granting a measure, it must always be justified and include certain mandatory information¹⁸³⁹.

442. When the judge has ruled according to the procedure of Article L. 522-1, he must mention the summoning of the parties to the hearing. Indeed, by providing that "the parties *are summoned* to the hearing without delay and by all means", Article R. 522-6 implies that the interim relief judge must mention the regular summons of the parties, on pain of irregularity of his decision¹⁸⁴⁰. For the rest, the elements that the judge is obliged to mention in his decision or in the minutes of the hearing are determined by Article R. 522-11.

This provision requires, firstly, that the order includes the information defined in Chapter II of Title IV of Book VII of the Code of Administrative Justice, entitled "Provisions specific to orders"¹⁸⁴¹. Firstly, Article R.

1834 CE, ord. 2 May 2006, *Amiraleva, alias Kirilova, épouse Koulayeva*, n° 292910, mentioned in the Recueil *Lebon*.

1835 See for example, for the administrative courts, CE, 9 February 1972, *Entreprise Quille*, RDP 1972, p. 1278; and for the civil summary proceedings (article 809 al. 1^{er} of the new code of civil procedure): Com., 23 October 1990, *Bull. civ. IV*, n° 252

1836 CE, ord. 19 June 2002, *Hoffer*, n° 247884.

1837 The judge of the référé-liberté has affirmed that "it is up to the judge of appeal of the référé administratif to appreciate the urgency at the date on which he pronounces" (CE, order 30 March 2001, *Schoettl*, n° 231963). See also CE, ord. 13 November 2002, *Harlant, Lebon T.* p. 875: "on the date of the present order, the condition of urgency required by Article L. 521-2 of the Code of Administrative Justice (...) cannot be regarded as satisfied".

1838 See in particular CE, ord. 8 June 2005, *Commune de Houilles, Lebon T.* p. 1036: "it is up to the interim relief judge to assess the existence of a serious and manifestly illegal infringement of a fundamental freedom on the date on which he makes his decision". Nevertheless, when an appeal is lodged against a decision, the judge assesses the legality of the latter in consideration of the factual and legal elements prevailing on the day it was issued. Thus, it is conceivable that the contested decision was not manifestly illegal on the date on which it was taken and that, at the same time, the situation arising from this decision is manifestly illegal on the date on which the court rules. See on this point the very explicit conclusions of G. Bachelier on CE, 2 July 2003, *Société Outremer Finance Limited, Lebon* p. 306, *AJDA* 2003, pp. 1780-1785. The government commissioner concludes that there is no manifest illegality in the decision of the public establishment Aéroport de Paris to detain the plane (pp. 1782-1783), and that the situation resulting from this decision is manifestly illegal (pp. 1783-1784).

1839 The requirements concerning the judgment are common to decisions made under the procedure of Article L. 522-1 and those set aside under the sorting procedure of Article L. 522-3. The differences relate to certain compulsory particulars from which the sorting orders are by nature exempted (summons to the hearing; proof that the adversarial process has been completed; executory formula) and the lesser rigour of the requirement to state reasons insofar as these decisions are made on the basis of the application. Orders issued on the basis of L. 522-3 have not been communicated to the administration since, by hypothesis, there is no defendant. They are notified only to the applicant.

1840 See, as regards summary suspension: CE, 5 December 2001, *Thomas, Lebon T.* p. 1134

1841 When the decision is handed down by a panel, the general provisions of Chapter I^{er} of Title IV of Book VII are applicable again. The main differences concern the obligation to mention that the rapporteur and the government commissioner have been heard (Article R.

742-1 makes it compulsory to mention that the hearing was public. Secondly, and by virtue of Article R. 742-2, the order must mention the names of the parties, the analysis of the conclusions¹⁸⁴² as well as the legislative provisions it applies; it must show the date on which it was signed. In accordance with Article R. 742-3, the order begins with the words "In the name of the French people"¹⁸⁴³ and indicates, after them, the capacity of its signatory¹⁸⁴⁴. Finally, Article R. 742-4 provides that the enacting terms of the order are divided into articles and preceded by the word 'ordains'¹⁸⁴⁵.

Secondly, Article R. 522-11 requires the order to indicate, where applicable, that the provisions of Article R. 522-8 (deferred closure of the investigation or reopened investigation) and R. 522-9 (public policy means communicated at the hearing) have been applied. This obligation is waived when an official report of the hearing has been drawn up under the responsibility of the interim relief judge and signed by him or her and by the officer in charge of the court registry. In principle, the drawing up of minutes is only an option for the judge¹⁸⁴⁶. It becomes compulsory and the minutes must be added to the file if the case is referred to a panel.

443. Where appropriate, the decision will state that certain matters ancillary to the subject-matter of the dispute have been settled. The decision will mention, where appropriate, that the applicant has been fined for improper use¹⁸⁴⁷ or that the judge has ruled on costs or on an application for legal aid¹⁸⁴⁸.

444. The Council of State had to determine the extent of the requirement for the interim relief judge to give reasons when analysing the conditions for granting the order. The degree of precision expected is the result of an arbitration between two opposing requirements: on the one hand, the need to provide sufficient information to the parties and to the superior judge¹⁸⁴⁹; on the other hand, the concern not to overburden the work of

741-2, paragraph 3) and to indicate the date of the hearing and the date on which the decision was handed down (Article R. 741-2, paragraph 4).

¹⁸⁴² The interim relief judge is obliged to refer to *all of the parties'* submissions (see CE, 12 June 2002, *Commune de Fauillet et al, Lebon* p. 215). He also has the obligation to rule on the admissibility of the conclusions for the purposes of intervention which may be presented (CE, ord. 16 December 2005, *Kabengeru et association Forum réfugiés*, n° 287905). As regards the pleas in law, case law requires that they all be analysed, on pain of irregularity of the decision (CE, 15 May 2002, *Baudoin*, n° 239487). It must first of all mention the pleas in law set out in the written pleadings - and reply to them. It must also mention and analyse the pleas put forward during the public hearing when these 'were not raised during the written procedure' (CE, 26 October 2001, *Aiguebonne, Lebon T.* p. 1119). However, neither Article R. 742-2 of the Code of Administrative Justice, applicable in summary proceedings by virtue of Article R. 222-11 of the same code, nor any other provision of this code requires the summary proceedings judge to mention in his or her citations the arguments put forward by the parties during the public hearing (CE, ord. 2 December 2005, *EURL Maryloup Marée*, no. 287533). The means developed orally should therefore only appear in the order if they constitute *new means* (see in common law procedures, and concerning written pleadings: CE, 21 July 1972, *Elections municipales de Xanton-Chassenon, Lebon* p. 582). Finally, the judge does not have to cite in the citations or reasons of his order the arguments or the description of the facts which accompany the pleas (CE, 12 July 2002, *Oulai Doué*, n° 245141).

¹⁸⁴³ This requirement is a particular application of the principle set out in Article L. 2 of the Code of Administrative Justice, according to which "Judgments are rendered in the name of the French people".

¹⁸⁴⁴ Article L. 10 of the Code of Administrative Justice provides that judgments "shall mention the names of the judges who handed them down". A decision rendered in disregard of these provisions is in principle vitiated by irregularity. Nevertheless, the requirement is applied with some flexibility in the context of summary proceedings: it is considered to be satisfied if the name of the judge appears in the minutes of the order even though the copy given to the applicant and then the enforceable copy that was subsequently notified to him or her do not show the name of this judge (CE, ord. 11 October 2001, *Tabibou, Lebon T.* p. 1133). Article R. 742-5 specifies that "the minute of the order is signed *only by the magistrate who issued it*". The plea based on the lack of signature of the contested order by the clerk must therefore be rejected (CE, 8 August 2001, *Soares dos Santos*, n° 234589). Finally, there is no provision requiring the signature of the magistrate who made the order for the ampliation of this order notified to the parties (CE, 27 July 2001, *Haddad*, n° 231889).

¹⁸⁴⁵ The grounds of the order generally consist of three parts: firstly, a statement of the various submissions of the applicant; secondly, an account of the arguments of the applicant and the respondent; and thirdly, a reference to the texts on which the interim relief judge relies. In the grounds for the decision, the judge sets out the facts and circumstances that gave rise to the referral and then assesses, in the light of the applicable law, whether the conditions for granting a measure requested on the basis of Article L. 521-2 are met.

¹⁸⁴⁶ Where minutes of the hearing are drawn up, they constitute a means of proof of the arguments raised during the hearing and of compliance with the adversarial principle.

¹⁸⁴⁷ The interim relief judge has the possibility of accompanying the rejection of the application with an order to pay a fine for abusive recourse under Article R. 741-12 of the Code of Administrative Justice. The interim relief judge had been allowed to use this procedure under the previous law (CE, 10 May 1989, *SA des établissements Laurent, Lebon* p. 848). In order to prevent and avoid excessive and fanciful requests to the interim relief judge, the Senate Law Commission wanted the interim relief judge to "*more systematically pronounce the fine for abusive recourse, in all cases where the applicant presents abusive requests by their number, their repetitive or systematic nature*" (R. GARREC, Senate Report No. 380, p. 68. Underlined). The judge of the référé-liberté thus condemns the applicant who applies to him in a manifestly irrelevant manner, for example by invoking the urgency of suspending provisions that have been implemented for more than seventeen years (CE, ord. 21 January 2002, *Auto-école Bergson*, n° 242051), by asking to establish the non-existence of the investigating judge (CE, ord. 28 October 2002, *Lecomte*, no. 251086) or of the magistrates of the judiciary (CE, order of 8 November 2002, *Chaumont*, no. 251377), or by requesting the suspension of the decree of 14 June 1997 appointing Mr Jean-Eric Schoettl as secretary general of the Constitutional Council (CE, order of 23 May 2005, *Hoffer*, no. 280703). The judge also imposes such a fine on applicants who, after their application has been rejected as manifestly ill-founded, return to submit the same conclusions, developing strictly identical arguments (CE, ord. 15 July 2003, *Bidalou*, no. 1258371; CE, ord. 31 July 2003, *Bidalou*, n° 259032; CE, ord. 8 August 2003, *Syndicat de la magistrature*, n° 259217; CE, ord. 2 July 2004, *Hoffer*, n° 269149; CE, ord. 1st December 2004, *Winter*, n° 274705; CE, ord. 19 August 2005, *Gajffe*, n° 284216; CE, ord. 25 January 2006, *Tueche*, n° 289305). The fact that the application is submitted through an *avocat aux Conseils* does not prevent the imposition of a fine for abusive recourse (CE, ord. 21 January 2003, *Commune des Angles*, n° 253421). It can be observed that the sentences pronounced in this respect have no effect on the behaviour of certain applicants who, despite the successive sentences pronounced against them, continue to wrongly apply to the judge for interim relief. On this procedure, see in particular J.-E. CALLON, "L'abus du droit au juge peut-il être sanctionné", *LPA* 28 March 2000, n° 62, pp. 4-10; and P. FRAISSEIX, "Droit au juge et amende pour recours abusif", *AJDA* 2000, pp. 20-30.

¹⁸⁴⁸ See e.g. CE, ord. 6 January 2005, *Landu-Diambu*, n° 276105 (admission to the benefit of legal aid, rejection of the main conclusions).

¹⁸⁴⁹ The precision of the decision enables the parties to understand and, where appropriate, correctly execute the measure prescribed.

a judge required to rule in 48 hours.

The judge must demonstrate the reason or reasons why a condition is or is not met. He cannot proceed by way of assertion, without adequate reasoning or explanation. In the context of Article L. 521-1 of the Code of Administrative Justice, the Council of State has stated that the interim relief judge must "show the reasons in law and in fact for which he considers that the urgency justifies the suspension of the contested act, or that he considers that it does not; that compliance with this requirement is assessed, however, in the light of the justifications presented in the defence"¹⁸⁵⁰. The government commissioner Francis Lamy stated that for the *référé-liberté* "the same requirements in terms of motivation as for the suspension should apply"¹⁸⁵¹. The solution found for interim relief is in principle applicable to the provisions of Article L. 521-2. It is up to the interim relief judge to specify in what way the condition of urgency is or is not met, and to justify to what extent he or she considers that the serious and manifestly illegal infringement of a fundamental freedom is or is not characterised. On this point, Mr Chauvaux had wanted the judge to be obliged to "give solid reasons for his decision with regard to each of the legal conditions: urgency, serious infringement of a fundamental freedom, manifestly illegal measure. His decision must in particular establish the illegality of the Administration's behaviour"¹⁸⁵². When the judge considers that at least one of the conditions is lacking, it is up to him to state why the decision or the challenged behaviour is not manifestly illegal, does not seriously infringe a fundamental freedom or does not characterise a situation of urgency requiring the pronouncement of a safeguard measure within 48 hours.

It can be observed that the orders of the judge of *référé-liberté* are often reasoned in greater detail and precision than the decisions rendered by a panel¹⁸⁵³. Many decisions are reasoned at length, as if to compensate by explanation for an authority or legitimacy diminished by the absence of collegiality. The form and quality of the reasoning also depend on the person of the judge hearing the case.

B. When the decision takes effect

445. The formalities following the judgment are governed by Articles R. 522-12 to R. 522-14 of the Code of Administrative Justice¹⁸⁵⁴. In order to speed up the effectiveness of the orders, Article R. 742-6 dispenses the judge from pronouncing them in public hearing¹⁸⁵⁵. The enforceability of the order may occur at different dates. In principle, in accordance with the usual rules, it takes effect from the day on which the party who must comply with it is notified¹⁸⁵⁶. According to Article R. 522-12, this must be done "without delay and by any means". It has been ruled that notification by fax is lawful: if it is not contested, the fax transmission report relating to the notification of an interim order sets in motion the time limit for appeal against this order¹⁸⁵⁷.

With the aim of accelerating the taking effect of the decision, Article R. 522-13 para. 2 provides that the interim relief judge may, like his judicial counterpart, decide that the order "shall be enforceable as soon as it has been issued", and therefore even before it is notified¹⁸⁵⁸. The judge then mentions this immediate enforceability in the operative part of the order¹⁸⁵⁹. Paragraph 3^{ème} of this article provides that "if the urgency so requires, the operative part of the order, together with the enforcement formula provided for in Article R. 751-1, shall be

It gives the judge of appeal or cassation the elements necessary for the exercise of his or her control.

1850 CE, Sect. 25 April 2001, *Association des habitants du littoral du Morbihan c/ Commune de Baden*, *Lebon* p. 220; CE, 16 February 2001, *Breucq*, *Lebon T.* p. 1092.

1851 F. LAMY, concl. on CE, Sect. 25 April 2001, *Association des habitants du littoral du Morbihan c/ Commune de Baden*, RFDA 2001, p. 850.

1852 D. CHAUVAUX, concl. on CE, 16 February 2001, *Breucq*, RFDA 2001, p. 672.

1853 See, however, for an expeditious reasoning: CE, 14 February 2003, *Société Le café français Notre-Dame*, n° 254137. When seized of an appeal against a decision ordering the closure of a drinking establishment for a period of eight days, the interim relief judge affirmed, without explaining the facts of the case, "that it does not emerge from the documents in the file submitted to the interim relief judge, either at first instance or on appeal, that the contested prefectural decision, taken on the basis of Article L. 62 of the Code on public houses and measures against alcoholism, is vitiated by an illegality of the obvious nature required by the legislator in the context of the special procedure instituted by Article L. 521-2".

1854 Article R. 522-14 provides, in a certain number of cases, for the transmission without delay of a copy of the decision to the Public Prosecutor or the Paymaster General. In case of rejection of an application under the sorting procedure, the interim relief judge may send a copy of his decision to the authorities concerned "for information" (see for example: CE, ord. 1^{er} June 2001, *Ploquin*, *Lebon T.* p. 1126; CE, ord. 20 November 2002, *Deboise*, n° 251803).

1855 See CE, 15 June 2001, *Syndicat intercommunal d'adduction d'eau potable de Saint-Martin-de-Ré*, n° 228856.

1856 Article R. 522-13 al. 1. The principle is identical in private judicial law. Under Article 489(1) of the new Code of Civil Procedure, the order is enforceable as soon as it has been brought to the attention of the interested parties by the notification made to them. It is the fulfilment of this formality that enables the party to avail itself of it.

1857 CE, 18 December 2002, *Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c/ SARL Le Méditerranée*, n° 249887. This solution had been accepted in the case of deportation (see CE, 22 March 2000, *Préfet de l'Isère c/ bouchalta*, *Lebon T.* p. 1149).

1858 Article 489(2) of the new Code of Civil Procedure provides that "in case of necessity, the judge may order that the execution will take place only on the basis of the minutes".

1859 See for example: CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL)*, *Lebon* p. 311; CE, 9 April 2004, *Vast*, *Lebon* p. 173; CE, ord. 11 April 2006, *Tefaarere*, *Lebon* p. 197.

communicated on the spot to the parties, who shall acknowledge receipt thereof"¹⁸⁶⁰. When the conditions for granting the order are met, these procedures make it possible to accelerate the time at which the administration will execute the measures taken by the interim relief judge and put an end to the unlawful situation. Once the order has been notified or communicated to the parties, the administrative authority must take the measures involved in its execution without delay.

Conclusion of Title I

446. The *référé-liberté* allows the immediate intervention of the administrative judge on a litigious situation. Access to the judge is facilitated. The formalities are simplified and the procedure made more flexible in order to allow a decision to be taken very quickly. But, if the conditions for granting a measure are met, the judge's intervention is not only rapid; it is also effective, capable of immediately and definitively putting an end to the infringement of the applicant's fundamental freedoms. When the conditions set out in Article L. 521-2 are cumulatively met, the judge can deploy the full extent of his or her prerogatives to put an end to the liberticidal situation.

¹⁸⁶⁰ This procedure was first introduced in the litigation of deportation. Under the terms of Article R. 776-17 of the Code of Administrative Justice, "The operative part of the judgment, together with the executory clause, shall be communicated on the spot to the parties present at the hearing, who shall immediately acknowledge receipt thereof". In the context of this procedure, this formality is substantial. The Conseil d'Etat censured as irregular the judgement pronounced on 5 November 2001 although the public hearing had taken place on 29 October (CE, 30 December 2002, *Préfet des Hauts-de-Seine c/ Makblouq, Lebon* p. 506).

Title II

An effective response power

447. What is the substantial effectiveness of the intervention of the judge of the *référé-liberté*?¹⁸⁶¹ What is its concrete ability to put an end to a situation of serious and manifestly illegal infringement of a fundamental freedom? Two elements make the intervention of the judge of *référé-liberté* remarkably effective. On the one hand, he has an extremely wide range of powers, which allows him to choose and impose the solution strictly adapted to the circumstances of the case in order to stop the infringement. On the other hand, its intervention puts a definitive end to the infringement of fundamental freedoms. The applicant thus obtains immediate and irreversible satisfaction, without the need to wait for confirmation - or the risk of reversal - of the decision by a judge on the merits. The effectiveness of the *référé-liberté* raises the question of the maintenance of administrative action in positive law.

Chapter 1

Efficiency due to the possibility of choosing the right measure

448. On the basis of Article L. 521-2 of the Code of Administrative Justice, the interim relief judge has an extensive jurisdictional arsenal that enables him to provide each problem with the particular solution that suits it. In order to respond to an exceptional situation, the judge has been given powers that are themselves exceptional. In this way, the atypical and derogatory nature of the summary procedure is also expressed in the powers vested in the judge. Indeed, by their nature and scope, they are unusual compared to the prerogatives usually vested in the administrative judge. To describe them, the orders issued on this basis refer to "the special powers provided for in Article L. 521-2 of the Code of Administrative Justice"¹⁸⁶². Even more remarkably, the Council of State's working group had stated that the interim relief judge would have "powers that are exorbitant to ordinary law" in the context of this procedure¹⁸⁶³. The very broad definition of his powers favours the settlement of each dispute by means of a solution strictly adapted to the facts of the case. When he cannot put an end to an infringement by dissuasion or persuasion, the judge of *référé-liberté* orders the appropriate safeguard measure.

Section 1: A very broad definition of the powers of the interim relief judge

449. One of the original features of the summary procedure lies 'in the broadness of what it allows'¹⁸⁶⁴. Indeed, Article L. 521-2 does not place the slightest limit on the power of the interim relief judge to stop the infringement of a fundamental freedom. However, the Conseil d'Etat considers that the latter can only take provisional measures.

1861 On this notion, see C. BLERY, *L'efficacité substantielle des jugements civils*, LGDJ, BDPrivé, t. 328, 2000, 397 p.

1862 CE, ord. 27 June 2002, *Centre hospitalier général de Troyes, Lebon* p. 228. See also CE, ord. 16 October 2003, *Syndicat des propriétaires de la pointe croissette*; CE, ord. 4 February 2004, *Commune d'Yvrac, Lebon T.* p. 828.

1863 "Report of the working group of the Council of State on emergency procedures", *RFDA* 2000, p. 947. The use of this expression in the field of contentious administrative procedure is atypical. Indeed, the notion of exorbitant prerogatives or exorbitant powers of the common law usually designates the special powers granted to the administration for the exercise of its mission of general interest and which are not known in private law. The expression is then understood as synonymous with prerogatives of public power. Private persons have powers under ordinary law, public persons have prerogatives that are not covered by ordinary law. In this sense, the concept is opposed to the rules of private law. On the other hand, the expression is used here not with reference to the rules of private - judicial - law, but with reference to those of administrative litigation itself. It means that unlike ordinary law procedures, in which the administrative judge exercises *ordinary* powers, the judge of the *référé-liberté* exercises powers that he or she does not usually have, *extra-ordinary* powers.

1864 B. PACTEAU, *Contentieux administratif*, 7^{ème} éd, PUF, coll. Droit fondamental, 2005, n° 278.

I. A power characterised by its lack of apparent limits

450. On the basis of Article L. 521-2, the administrative judge has extensive means of action vis-à-vis the administration. His power, simply finalised, is similar to a power of decision.

A. A simply finalised power

451. The powers of the interim relief judge are conceived in the broadest possible way since he or she may, under Article L. 521-2 of the Code of Administrative Justice, "order all measures necessary to safeguard a fundamental freedom"¹⁸⁶⁵. The prerogatives available to him are set out in the words 'measures', which designate the means used to safeguard the fundamental freedom, 'all', which expresses the absence of limits¹⁸⁶⁶, and 'order', which must be understood in a broad sense, as a synonym for 'decide'¹⁸⁶⁷. The powers of the interim relief judge are not defined in any other way, the legislator having avoided any enumeration that would have limited the scope of his or her possibilities *a priori*. Refusing to restrict his power of decision, the law does not indicate what safeguard measures may be ordered. It does not specify - and therefore does not limit - the nature or content of the measures that it can prescribe. Again, this "silence speaks volumes: it means no restrictions"¹⁸⁶⁸. During the preparatory work, M. Garrec emphasised that the powers conferred on the interim relief judge "are considerable and stated in a very general manner, leaving the judge considerable room for manoeuvre"¹⁸⁶⁹. When he intervenes on the basis of Article L. 521-2, President Chabanol points out, "the powers of the interim relief judge are not limited in any way"¹⁸⁷⁰. In other words, says Mr Fromont, 'his power is practically unlimited'¹⁸⁷¹. In the absence of legislative predetermination, it is therefore up to the interim relief judge, on a case-by-case basis, to determine the measure necessary to safeguard a fundamental freedom.

The value of the wording chosen is immediately apparent. By giving the judge considerable latitude in the choice of measure, it allows him or her to "adapt the content of the decision to the circumstances of the case"¹⁸⁷². It allows the judge to be flexible and even creative in determining the measures appropriate to the particular circumstances of each case. In other words, because of its generality and plasticity, the formula in Article L. 521-2 makes it possible to provide a specific response to the diversity of situations that may arise¹⁸⁷³. The judge will be able to imagine and develop solutions that the legislator could not have thought of when drafting the text. He is able to provide a solution adapted to each case submitted to him.

452. However, if the power of the judge of the *référé-liberté* is extended, it remains finalised by the text of Article L. 521-2. The measure prescribed must have a specific purpose and meet a precise objective: the necessary safeguarding of a fundamental freedom.

First of all, the measure prescribed must be aimed at "safeguarding" a fundamental freedom, i.e. protecting, defending or guaranteeing it. The summary judgment is designed to provide an appropriate solution to a particular situation. The measure adopted must constitute a response to the situation that justified the referral to the judge.

1865 For its part, the judge of *déféré-liberté* can only suspend the execution of an administrative act. On the basis of *de facto* action, the judicial judge may, in summary proceedings, take all necessary measures (Article 809 paragraph 1 of the new Code of Civil Procedure).

1866 It is synonymous with "any", "all" or "any kind of".

1867 *Strictly speaking*, the term order evokes the idea of giving an order, of condemning the administration concerned to all obligations to do or not to do. Here, however, the expression is understood in a broad sense, and is not limited to the pronouncement of injunctions. Indeed, measures such as suspension are not similar to orders. The pronouncement of a suspension measure is not the same as the exercise of the power of injunction: the judge does not issue an injunction to suspend. He does not rely on the administration to suspend the decision; he suspends it himself. The measure prescribed is in all respects comparable to a suspension of execution taken on the basis of Article L. 521-1 of the Code of Administrative Justice. It should also be noted that the word "order" is also used in Article L. 521-1 to describe the power of suspension conferred on the interim relief judge on this basis.

1868 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1593.

1869 R. GARREC, Senate Report No. 380, p. 55.

1870 D. CHABANOL, *La pratique du contentieux administratif*, 4^{ème} ed., Litec Jurisclasseur, 2002, n° 248.

1871 M. FROMONT, "Les pouvoirs d'injonction du juge administratif en Allemagne, Italie et France. Convergences", *RFDA* 2002, p. 556.

1872 *GAJA* No. 118, § 12.

1873 This flexibility is found in all summary proceedings that use similar wording, such as the possibility of ordering "any useful measure" in Article L. 521-3 of the Code of Administrative Justice or, in private judicial law, the possibility of ordering "all measures that do not come up against any serious dispute or that are justified by the existence of a dispute" (Article 808 of the New Code of Civil Procedure) or "the measures (...) that are necessary" (Article 809(1) and 873(1) of the New Code of Civil Procedure). In Belgium, Article 18 of the Consolidated Acts organises a provisional suspension procedure which allows the Council of State to take, pending a ruling on the application for suspension, all "measures necessary to safeguard the interests of the parties or of persons who have an interest in the resolution of the case". This formula gives the Council of State a very broad power to choose the measure to be prescribed (see P. LEWALLE, "Le contrôle de l'administration: l'effectivité du contrôle de la légalité", *RA* 2000, special issue 3, pp. 132-176, special p. 157).

It cannot pursue an objective other than the safeguarding of a fundamental freedom that has been specifically infringed or threatened by the administration. The objective must be the restoration of a normal situation, by putting an end to the irregular and liberticidal actions of the administration. In order to put an end to the serious and manifestly unlawful infringement of a fundamental freedom, the measure chosen must therefore be related to the manner in which the infringement occurred.

Secondly, Article L. 521-2 specifies that the measure prescribed must be "necessary" to safeguard a fundamental freedom, i.e. indispensable for its preservation. Necessary, according to the *Littré*, is what "must be in order for something to be done or to be done". The concept of necessity therefore introduces an idea of proportionality in the choice of measure. In order to meet this requirement, the measure must be related to the offending conduct of the public authority and adapted to the seriousness of that conduct. The *necessity* of a measure is thus distinguished from its *utility*, to use the expression mentioned for example in Article L. 521-3 of the Code of Administrative Justice. The judge of the summary judgment must retain the measure not simply useful to the safeguard of a fundamental freedom but truly indispensable to it. In other words, there must be a relationship of necessity between the measure prescribed and the seriousness of the situation. If a measure is useful but not necessary, the interim relief judge must opt for another measure more in keeping with the conduct in question. This requirement, however, does not seem likely to substantially attenuate the powers granted to him. It is more akin to a finalisation or orientation than to a real restriction. The powers conferred on the judge of *référé-liberté* remain particularly broad and make him a real *decision-maker*.

B. Decision-making power

453. Its power does not take the form of a binary alternative: pronouncement of a *predetermined* measure or rejection of the application. The choice of measure and, more precisely, the modalities of its intervention are not predefined. In an active and dynamic way, the judge of the summary judgment chooses, according to the particular data of each case, the means likely to restore the victim of the infringement in the enjoyment of his fundamental freedoms. He determines how to put an end to the infringement by exploiting all the possibilities available to him under Article L. 521-2. It selects, from among the various possible measures, the one that will produce the most effective result. This power of decision corresponds to the vocation of the summary procedure, which is to protect individual situations and the interests of the litigant. Indeed, when he intervenes on the basis of Article L. 521-2, the judge's mission is not to ensure an objective control of the regularity of the administrative action but to concretely defend the fundamental freedoms of the individuals. It is no longer a matter of the judge stating the law in the abstract but of acting in a useful way on a legal situation. To do this, they are given the powers to make concrete changes to the situations referred to them. In contrast to the classic model of cassation, where the judge had only limited powers¹⁸⁷⁴, the judge of summary jurisdiction is not a judge who breaks the law but a judge who decides and acts. He will decide, in each case, on the most effective way to protect the applicant's rights. The emphasis is therefore not on the protection of objective legality but on the effective defence of individuals against the administration¹⁸⁷⁵. The *référé-liberté* is the

1874 In the traditional French model, the exclusive function of the administrative court was to ensure compliance with the law by the administrative authorities. The sole function of the *recours pour excès de pouvoir*, conceived as a trial of an act, was to trigger verification of compliance with objective rules of law by the administrative authorities (see the famous presentation of this function by Maurice HAURIOU in note sous CE, 8 décembre 1899, *Ville d'Avignon*, D. 1900, 3, p. 73). As M. Fromont explains, "French doctrine has spoken (...) of the educational function of the administrative judge: the latter had to limit himself to saying whether the administration had behaved regularly or not. It did not matter what happened to the applicant in practice (...)" (M. FROMONT, *op. cit.*, p. 551). This conception of his office was based on the "cassation" model: the administrative judge "intervened in relation to the administrative decision in more or less the same way as a cassation judge reviews a judgment that is the subject of an appeal (...)" (J.-M. WOEHRLING, "Le contrôle juridictionnel de l'administration en Europe de l'Ouest. Particularisms and convergences", *REDP* Winter 1994, vol. 6, no. 2, p. 374). The focus of the debate was not the individual situation of the applicant but the conformity of the administration's conduct with the law. Consequently, in its capacity as guardian of objective legality, the administrative judge found himself locked into a binary alternative of annulment/rejection in the litigation of excess of power.

1875 In this respect, his office is in line with the new function that is being asserted for the administrative court in France as in other European countries. Administrative justice "is no longer considered as the guarantor of good administration, but as the main protector of the citizen against an increasingly omnipresent administration" (M. FROMONT, "La justice administrative en Europe: Convergences", in *Mélanges René Chapus*, Montchrestien, 1992, pp. 207-208). It is above all an institution intended to promote and guarantee the subjective rights of individuals (see in particular E. GARCIA DE ENTERRIA, "Contentieux administratif objectif et contentieux administratif subjectif à la fin du XX^e siècle: analyse historique et comparative", *RA* 2000, special issue 3, pp. 125-131; G. MARCOU, "Caractères généraux et évolution de la juridiction administrative en Europe occidentale", *RFDA* 2006, pp. 84-95). This change of perspective has led to a considerable development of the judge's decision-making powers in administrative proceedings. In France, in particular, the law of 8 February 1995, by giving the administrative judge a power to issue an enforcement order, has profoundly changed the way he conceives of his role and the way he intends to exercise his powers. As noted by Mr Guyomar and Mr Collin, "This derogation from the traditional principle of the prohibition of injunctions against the administration has led to a profound change in mentality" (M. GUYOMAR and P. COLLIN, *chron.*, *AJDA* 2001, p. 1049). Henceforth, "The administrative judge is (...) less reluctant to admit that his office is also to be an administrative judge" (F. DONNAT and D. CASAS, "L'office du juge administratif dans la jurisprudence récente du Conseil d'Etat", *Dr. adm.* 2004, studies no. 9, p. 12; see also D. BAILLEUL, "Les nouvelles méthodes du juge administratif", *AJDA* 2004, pp. 1626-1630). This evolution is fully embodied in the powers granted to the administrative judge of summary proceedings by the law of 30 June 2000. As M. Pacteau states, "If the 20th century^e was the century of the judge's supervision of the administrative function and that of its sanctions, the 21st century^e is already shaping up to be the

symbol of a new understanding of its office by the administrative judge.

454. However, the power of the judge of *référé-liberté*, even if defined in a particularly broad way, does not represent a power of substitution. The judge can decide on the measure to be *ordered* but he cannot decide in *place* of the administration. Consequently, it cannot be said that the law gives the judge of *référé-liberté* full contentious powers¹⁸⁷⁶. The judge of summary jurisdiction does not have a power of substitution but only - so to speak - a power to oppose (by suspension) and to order (by injunction). He orders or suspends, but he never replaces the administration. It should be noted that the qualification of full litigation is also excluded with regard to the second major criterion of distinction between excess of power and full litigation, namely the possibility or impossibility of challenging regulatory acts by way of action¹⁸⁷⁷. Since the judge of the *référé-liberté* can deal with such acts by way of action (but also, naturally, by way of exception), the qualification of full litigation is, here again, excluded. It should also be added, in the sense of the qualification of excess of power, that the summary application for interim relief is exempt from the need to be represented by a lawyer and that the applicant must justify an interest that has been infringed and not a subjective right that has been damaged (the requirement of a fundamental freedom does not come into play at the stage of admissibility, but rather at the stage of the substantive conditions), and that the scope of its decisions is not necessarily limited to the parties to the proceedings, for example, in the case of an appeal lodged against a regulatory act. Finally, in order to assess the legality of an administrative *decision*, the judge takes place on the day when the administration made its decision and not on the day when he/she makes the decision. Unlike the judge of full jurisdiction¹⁸⁷⁸, he or she does not take into account any changes that may have occurred in the legal or factual circumstances between the issuing of the contested decision and the delivery of the judgment¹⁸⁷⁹.

Of course, a final criterion could be taken into account in determining the nature of this procedure, namely the objective or subjective nature of the dispute in question. However, this criterion is inadequate in the case of summary proceedings¹⁸⁸⁰, because of the mixed nature of this procedure. On the one hand, as Mr Etchegaray states, the judge seized on the basis of Article L. 521-2 is "a judge of excess of power, since it is a question here of seeking an illegality"¹⁸⁸¹. On the other hand, it rules on the existence of subjective rights, formalised by the requirement of an infringement of fundamental freedoms. It rules on a question of objective legality but in relation to a subjective right.

455. According to the usual rules of administrative litigation, the power of decision of the judge of the *référé-liberté* must be exercised within the limits of the conclusions of the petitioner. In practice, however, it appears that the judge has a wide margin of freedom with regard to the terms of the application.

It has been ruled, under Article L. 521-1 of the Code of Administrative Justice, 'that, even when ruling on a matter that falls within the scope of full litigation, the interim relief judge can only rule within the limits of the conclusions submitted to him'¹⁸⁸². In this case, the judge of the first instance had first rejected the request for suspension made by the applicants; he had then issued an injunction to the administration and ordered various expert assessments on the basis of Articles R. 521-3 and R. 532-1 of the Code of Administrative Justice. After an appeal, the Supreme Court annulled the order of the first judge, accusing him of having ruled beyond the terms of the request. However, it should be noted that in this case, the annulment of the decision was justified above all by

century of his participation in public action and the new system of administrative summary proceedings - through the powers as much as the procedures it offers - will contribute to this presence of the judge on the very ground of administrative life" (B. Pacteau, *Contentieux administratif*, 6^{ème} éd., PUF, coll. Droit fondamental, 2002, n° 260).

1876 M. Guérin-Laporte affirms that the provisions of article L. 521-2 "give the judge of freedoms powers equivalent to those of the judge of full jurisdiction"; the author also evokes "the character of full jurisdiction of the judge of the *référé-liberté*" (E. GUERIN-LAPORTE, *Le commandement dans l'office du juge administratif*, thèse Montpellier I, 2002, p. 429).

1877 As M. Négrin states, "we must not forget that the major difference between the two recourses is that the recourse of full jurisdiction concerns only individual acts" (J.-P. NEGRIN, Preface to the thesis of B. BALDOUS, *Les pouvoirs du juge de pleine juridiction*, PUAM, 2000, p. 11). Only the judge de l'excès de pouvoir deals with regulatory acts by way of action.

1878 See CE, Sect. 8 January 1982, *Aldana Barrena*, *Lebon* p. 9, concl. B. GENEVOIS.

1879 Thus, the plaintiffs can produce, in support of their appeal and during the summary proceedings, any element relating to facts existing at the time when the administration took its decision: "as soon as they relate to *facts prior to the administrative decisions criticised*, elements can usefully be produced before the judge to be debated in the presence of the parties, even though the administration had no knowledge of them before taking these decisions" (CE, ord. 25 March 2003, *Minister of the Interior, Internal Security and Local Freedoms v. Sulaimanov*, *Lebon* p. 146). Conversely, the judge cannot take into account elements that occurred after the decision was taken. See for example CE, ord. 2 May 2006, *Amiraleva, alias Kirilova, épouse Koulayeva*, n° 292910, mentioned in the Recueil *Lebon*: the judge states, with regard to the decision to readmit an asylum seeker to another European State, "that although the deportation measure affecting young Patimat will have the effect of interrupting her schooling in a nursery school, this had begun at a date subsequent to the decision of the Prefect of Loire-Atlantique of 12 January 2006 ordering the handover of the applicant and her daughter to the German authorities". As a result, in a logic of excess of power, this element cannot be taken into account by the interim relief judge to assess the legality of the contested decision.

1880 And, it seems, beyond that: see F. MELLERAY, *Essai sur la structure du contentieux administratif français*, LGDJ, coll. BDP, t. 212, 2001, p. 165 and s.

1881 J.-R. ETCHEGARAY, "La réforme des procédures d'urgence : le nouveau juge des référés administratifs est-il arrivé ?", *Constr. urb.* 2001, chron. n° 1, p. 8.

1882 CE, 29 July 2002, *Ministre de l'équipement, du transport et du logement c/ Clerissi et autres*, *Lebon* T. p. 867.

the fact that the judge had ordered measures that did not fall within his office. Indeed, under Article L. 521-1 of the Code, the judge can only "order the suspension of the execution" of a decision; his power is strictly limited by this provision. Even if a request to this effect is made, the judge cannot, in any event, issue an injunction as a principal measure or order an expert opinion. Despite the general wording of the recital, it is therefore not certain that the solution adopted is exactly transposable to the *référé-liberté*, and can be applied with all its rigour in the context of Article L. 521-2, which recognises the judge not as having a predetermined power but as having the power to "order all necessary measures".

In practice, the interim relief judge has never ruled on the issue. The interim relief judge of the Council of State has never reproached a judge of the first instance ruling on the basis of Article L. 521-2 for having disregarded this requirement. The authors consider that the judge is¹⁸⁸³ or should be¹⁸⁸⁴ entirely free to define the necessary measures. In the light of the case law on this basis, it must be considered that the interim relief judge cannot pronounce a measure that is manifestly unrelated to the applicant's conclusions. On the other hand, he is free to select, within the framework drawn by the latter, the measure that seems best suited to the objective pursued. In particular, it may go beyond or fall short of the conclusions presented by the applicant.

When the conclusions are formulated in very general terms¹⁸⁸⁵, the applicant leaves it to the judge to determine the necessary safeguards in full. In the *Vast* judgment, the applicant asked the interim relief judge to order all measures to put an end to the contentious conduct as a matter of urgency. The conclusions were broad. The Conseil d'Etat suspended the execution of the note at the origin of the infringement and enjoined the administrative authority to give the competent services all instructions to put an immediate end to its application¹⁸⁸⁶.

Even when the conclusions are precise, the judge recognises that he has the power to depart from them in order to replace the measure requested by the applicant with a measure that may be either less stringent or more stringent. Thus, when the applicant requests an injunction that exceeds the jurisdiction of the interim relief judge, the judge may, *ex officio*, replace the requested measure with one of those that he may legally order. In an order of 17 March 2006, the judge stated that the Minister of the Interior should be enjoined "not to issue the residence permit requested by the applicant, which would exceed the jurisdiction of the interim relief judge, but to re-examine Mr Saidov's application for residence in the light of the grounds for this order within eight days of its notification"¹⁸⁸⁷. In this case, the judge has *ex officio* retained a different measure than the one requested by the applicant¹⁸⁸⁸. This approach allows him to save from inadmissibility conclusions that exceed the jurisdiction of the interim relief judge. It is also possible for the judge to go beyond the terms of the application by pronouncing a measure which, although not expressly requested by the applicant, nevertheless falls within the framework drawn up by the application. Thus, in the *FN IFOREL* case of 19 August 2002¹⁸⁸⁹, the interim relief judge was seized of two sets of conclusions. Firstly, the applicants requested the suspension of the effects of the letters by which the administrative authority refused to allow Impérial Palace, the manager of the town's conference centre, to hold the Front National's summer university in this hall. They then presented conclusions requesting that the administration be enjoined to "withdraw" the prohibition imposed on Imperial Palace to accept the holding of the summer university in its premises. As the conditions for granting the order were met, the interim relief judge suspended the effects of the contested letters and added to this measure an injunction not to obstruct the execution of the reservation contract concluded between IFOREL and Impérial palace. This injunction, which was not requested by the applicants but was an extension of their conclusions, reflects the margin of discretion available to the judge in interpreting them. Similarly, in the *Hadda* case, the applicant asked the interim relief judge, on the one hand, to order the suspension of the decision to refuse to register his application for territorial asylum, and on the other hand, to enjoin the prefect to examine the application for asylum and to issue the receipt for the application provided for by the decree of 23 June 1998. The Council of State, while respecting the general spirit of these conclusions, will order a more precise measure than those specifically requested by the applicant. It did not suspend the contested decision but enjoined the prefect to register Mr Hadda's application for territorial asylum as soon as he presented himself to the prefecture's services¹⁸⁹⁰.

1883 See *Pratique du contentieux administratif* Dalloz (October 2002), No. 290-435: the interim relief judge "determines the appropriate measures to ensure the safeguarding of the fundamental freedom in question".

1884 Commenting on the provisions of the Act of 30 June 2000, Ms Rouault stated: "It would be good if the administrative judge had (...) sovereign power to choose the appropriate measures" (M.-C. ROUAULT, "La loi du 30 juin 2000 : un petit pas vers un traitement efficace de l'urgence par le juge administratif", *D.* 2001, p. 401). For his part, M. Faure considers that it is doubtful whether the case law applicable to Article L. 521-1 prohibiting *ultra petita* rulings applies to Article L. 521-2 "because, set up as the guardian of fundamental freedoms, the judge of the *référé-liberté* should be left free to adopt any decision indispensable to their protection" (B. FAURE, "Juge administratif statuant en urgence. *Référé-liberté*", *Jel. Justice administrative*, fasc. 51 (11, 2002), n° 57).

1885 The judge of the *référé-liberté* admits the admissibility of conclusions formulated in a relatively general way provided that the latter present a sufficient degree of comprehension. The same is true on the basis of the law of 8 February 1995: the injunction conclusions must be precise (CE, 7 April 1995, *Grèkos*, *Lebon* p. 159) but they do not necessarily have to indicate the nature of the measures to be taken to satisfy them (CE, Sect., 26 March 1999, *Société Hertz France*, *RFDA* 1999, p. 977, note D. POUYAUD).

1886 CE, 9 April 2004, *Vast*, *Lebon* p. 173.

1887 CE, ord. 17 March 2006, *Saidov*, No. 291214.

1888 Where the applicant reformulates his or her submissions at the hearing, the judge will mention this in the grounds or citations of the decision. See *supra*, § 432.

1889 CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL)*, *Lebon* p. 311.

1890 CE, 15 February 2002, *Hadda*, *Lebon* p. 45.

Thus, the power of the judge of the *référé-liberté* is very extensive; it even appears to have no limit when reading Article L. 521-2. However, the Conseil d'Etat refuses to consider the power granted to him on this basis as unlimited. Applying the provisions of Article L. 511-1 of the Code of Administrative Justice to this procedure, it prohibits the interim relief judge from taking measures other than provisional ones.

II. The requirement of the provisional nature of the measures ordered

456. The case law relating to the temporal force of measures that may be ordered has long remained ambiguous in the area of interim relief. On the one hand, the interim relief judge of the Conseil d'Etat authorised himself, from the very first applications of this procedure, to order measures that were not of a provisional nature. On the other hand, the same judge has consistently affirmed the inadmissibility of submissions seeking measures other than provisional ones. Putting an end to this unsatisfactory situation, the interim relief judge of the Council of State, in an important order of 30 March 2007, clarified the applicable principles¹⁸⁹¹. The solution adopted leads to a distinction being made between two situations in order to determine the scope of the powers of the interim relief judge and, more specifically, the temporal force of the measures that may be ordered. When the pronouncement of a provisional measure is sufficient to remove the effects of an infringement, the judge may only pronounce a measure of this nature. In the opposite case, i.e. when the pronouncement of a provisional measure is not sufficient to put an end to the effects of an infringement, the interim relief judge "may order the person who is the author of the infringement to take any measure likely to safeguard the effective exercise of the fundamental freedom in question". Established as a principle, the requirement of the provisional nature of the measures prescribed has the particularity, in the case of interim relief, of being qualified when the circumstances justify it.

A. A requirement established as a principle

457. When the pronouncement of a provisional measure appears likely to put an end to the serious and manifestly illegal infringement of a fundamental freedom, the judge's power is limited. In such a case, the judge is obliged to pronounce only an interim measure and therefore cannot pronounce a final measure. In this situation, the conclusions aimed at pronouncing a non-provisional measure must be rejected by the interim relief judge as inadmissible. The Council of State derives this requirement from Article L. 511-1 of the Code of Administrative Justice. Opening Book V of the Code of Administrative Justice in its legislative part, Article L. 511-1 states that "The interim relief judge shall rule on measures of a provisional nature. He shall not be seized of the main issue (...)". This provision, directly inspired by Article 484 of the New Code of Civil Procedure¹⁸⁹², expresses the idea that "the summary procedure is a provisional, protective procedure"¹⁸⁹³.

That being the case, as Roger Perrot has pointed out, it is 'striking that nowhere in the law is there a definition of the provisional decision or measure, as if the provisional were an accident of legal life that we give up defining for want of being able to control it'¹⁸⁹⁴. In a first approach, "one is tempted to ask for time and to see in the provisional decision that which is limited in duration, as opposed to the final judgement which is eternal"¹⁸⁹⁵. However, as Jacques Normand has pointed out, this approach must be rejected insofar as the "temporary" does not necessarily correspond to the "provisional"¹⁸⁹⁶. In reality, in private judicial law as in administrative litigation, the provisional measure is that which is *reversible*¹⁸⁹⁷, that which can be called into question outside the appeal procedures, both by the judge on the merits who may be called upon to rule - and who is not bound by the legal solution given in summary proceedings - and by the summary proceedings judge himself, who, upon referral by any interested party, can reverse his own decision in the event of 'new elements' (Article L. 521-4 of the Code of Administrative Justice) or "new circumstances" (Article 488 of the New Code of Civil Procedure). In this sense, "a provisional decision is one which, on the fringes of appeal, can always be revised, modified or retracted by the

1891 CE, ord. 30 March 2007, *Ville de Lyon*, n° 304053, published in Recueil *Lebon*, *Dr. adm.* 2007, comm. n° 90, note F. MELLERAY; *LPA* 6 August 2007, n° 156, pp. 22-30, note O. LE BOT.

1892 "The interim order is a provisional decision (...) in cases where the law confers on a judge who is not seized of the main proceedings the power to order immediately the necessary measures.

1893 D. LABETOUILLE, "L'activité contentieuse du Conseil d'Etat en 2003", *Dr. adm.* 2004, Interview No. 1, p. 7.

1894 R. PERROT, "Du 'provisoire' au 'définitif'", in *Le juge entre deux millénaires. Mélanges offerts à Pierre Drai*, Dalloz, 2000, p. 447.

1895 R. PERROT, *op. cit.* p. 447.

1896 J. NORMAND, *RTD civ* 1997, p. 499. In the same sense, M. Plessix notes that "The provisional must not be confused with the temporary. What is provisional is what is not definitive, irrevocable. The provisional is not the antithesis of the permanent; it is closer to the interim than to the temporary, to the transitory than to the ephemeral" (B. PLESSIX, 'Le caractère provisoire des mesures prononcées en référé', *RFDA* 2007, p. 77).

1897 According to the Conseil d'Etat, the provisional nature of a measure "is assessed with regard to the purpose and effects of the measures in question, in particular their reversible nature" (CE, 31 May 2007, *Syndicat CFDT Intercro* 28, No. 298293, mentioned in the Recueil *Lebon*).

effect of another decision; one which, in a word, is exposed to all contrary winds"1898 . However, in order for the measure to be reversible, the possibility of challenging the decision must be not only virtual but really effective. This implies, therefore, that the dispute is not extinguished by the mere pronouncement of the decision.

According to this definition, the suspension of the execution of an administrative decision against which an appeal on the merits has been lodged1899 constitutes a provisional measure, which can be ordered by the interim relief judge. Indeed, such a measure may be challenged by both the judge on the merits and the interim relief judge if an interested party submits a new element to the latter. Similarly, an injunction addressed to an administrative authority to restore the applicant trade union's previous rights by restoring the premises that its trade union section had had until then, all the goods and documents found there, as well as the leave of absence granted to its representatives, is of a temporary nature. The Supreme Court therefore censured the interim relief judge for error of law, as he had denied the provisional nature of the measures requested without taking into account their reversible nature1900 .

458. However, the judge may not annul, repair or pronounce any other measure of a final nature.

Firstly, it does not have the power to annul an administrative decision. Thus, it cannot annul the decision by which a university president refuses to register the applicant for a postgraduate degree1901 , the prefectural order extending and transforming a community of communes into a community of agglomerations1902 , the ministerial order declaring the applicant's compulsory retirement1903 or the decision refusing to re-enrol a student in a high school1904 .

Secondly, the judge cannot repair the damage suffered by the victim as a result of an infringement of his or her fundamental freedoms1905 . The Court of Cassation also prohibits the civil judge of summary proceedings from repairing the harmful consequences of an assault1906 .

Thirdly, the interim relief judge may not issue an injunction that would have effects identical in all respects to those that would result from the administration's execution of a contentious annulment1907 . In practice, this hypothesis only concerns decisions refusing a request from the citizen1908 and, by extension, abstentions (which would also result in a refusal if the administration were to take a position)1909 and the withdrawal of an advantage granted to the applicant following a prior action by the latter1910 . Under these conditions, the real justification

1898 R. PERROT, *op. cit.* pp. 447-448.

1899 See thus CE, 2 February 2004, *Abdallah, Lebon* p. 16.

1900 CE, 31 May 2007, *Syndicat CFDT Intercos 28*, n° 298293, mentioned in the *Recueil Lebon*.

1901 CE, ord. 24 January 2001, *Université Paris VIII Vincennes Saint-Denis, Lebon* p. 37. See also CE, ord. 29 October 2001, *SARL Objectif*, n° 239443.

1902 CE, 12 June 2002, *Commune de Fauillet et autres, Lebon* p. 215.

1903 CE, ord. 11 July 2007, *Sanguin*, n° 307334.

1904 CE, ord. 11 August 2005, *Millan*, No. 283995. Similarly, the civil judge of summary proceedings cannot pronounce an annulment (see for example, concerning the disciplinary sanction imposed on an employee: Soc. 5 March 1987, *Bull. civ. V*, n° 110; Soc., 4 November 1988, *Bull. civ. V*, n° 568; Soc., 23 March 1989, *Bull. civ. V*, n° 253).

1905 CE, ord. 29 October 2001, *SARL Objectif*, n° 239443; CE, ord. 2 April 2003, *Gaiffé*, n° 255597; CE, ord. 15 October 2004, *Sabi*, n° 273110.

1906 The judge of the merits alone is competent to hear the appeal for compensation in case of assault, to the exclusion of the judge of summary proceedings (see S. PETIT, *La voie de fait administrative*, PUF, coll. QSJ, 1995, pp. 113-114). Generally speaking, the civil judge of summary proceedings is not empowered to repair damage by awarding damages (Civ., 15 March 1939, *GP* 1939, 1, p. 757).

1907 CE, ord. 10 April 2001, *Merzouk, Lebon T.* p. 1135; CE, ord. 9 July 2001, *Boc*, n° 235696; CE, ord. 17 July 2003, *Syndicat de la magistrature*, n° 258494; CE, ord. 2 August 2002, *Chamouma*, n° 249189.

1908 When the Minister of the Interior has refused to communicate to a person the file concerning him or her held by the intelligence service, the injunction to proceed with this communication would be equivalent to an annulment of this refusal (CE, ord. 1^{er} March 2001, *Paturel, Lebon T.* p. 1134). Similarly, if the administration has refused a school enrolment because the parents have not produced proof of residence, the judge of the référé-liberté cannot order the administrative authority to proceed with this enrolment (CE, order 9 July 2001, *Boc*, n° 235696). Nor can he order the assignment of a hospital practitioner to a post that the director of the establishment has refused him (CE, order of 2 August 2002, *Chamouma*, No. 249189). The judge cannot enjoin the administration to re-register the applicant on the list of automobile experts when the competent authority has refused him such re-registration (CE, ord. 15 December 2005, *Marcon, Lebon* p. 565). It cannot order the administration to issue the applicant with a residence permit that has been refused (CE, ord. 10 April 2001, *Merzouk, Lebon T.* p. 1135; CE, 8 August 2001, *Soares dos Santos*, n° 234589; CE, ord. 12 November 2001, *Ministre de l'Intérieur cf Béchar, Lebon T.* p. 1132; CE, ord. 25 October 2004, *Ben Habbab et Dupré Habbab*, n° 273436; CE, ord. 23 November 2004, *Syndou*, n° 274368). Indeed, when the prefectural authority has refused to grant a foreign national's application for a residence permit, the injunction to issue him with such a permit would have a result similar to the annulment of this refusal. In a comparable manner, the judge cannot order the "withdrawal" of the refusal to deliver a temporary occupation permit of the public domain because such an injunction would be equivalent to an annulment of the said withdrawal (CE, ord. 2 July 2003, *Commune de Collioure, Lebon T.* p. 930).

1909 Thus, the judge cannot order the administration to renew the applicant's national identity card and passport when no action has been taken on his request for several months (CE, ord. 26 April 2005, *Minister of the Interior, Internal Security and Local Freedoms v M'LAMALL, Lebon T.* p. 1034). Similarly, the conclusions presented by the Syndicat de la magistrature, seeking an order to the Minister of Justice to appoint Mrs Ben Hamida as representative of this union to the board of directors of the Ecole nationale de la magistrature, exceed the competence of the judge of summary proceedings insofar as they tend to have him pronounce "an injunction whose effects would be identical in all respects to those which would result from the execution by the administrative authority of the decision by which the judge of excess of power would, if necessary, annul the decision refusing to designate Mrs Ben Hamida" (CE, ord. 17 July 2003, *Syndicat de la magistrature*, no. 258494).

1910 For example, when the prefect has recognised the applicant's right to obtain the requested residence permit, subject to the usual checks, the injunction to issue her with this permit would have the same effects as the enforcement measure that the prefect would be obliged to take in the event that the illegal withdrawal of this decision was annulled on the grounds of excess of power. It is therefore not up to the interim relief judge, "even if seized on the basis of Article L. 521-2 of the Code", to issue such an injunction (CE, order of 14 February 2003, *Fouzi*, n° 254185).

for the refusal to grant the applicant's request is not the provisions of Article L. 511-1 but rather the administration's discretionary power to grant or refuse the applicant's request in such a case. In other words, the judge refuses to order the administration to act in a certain way simply because it is not obliged to act in a certain way. Since the administrative authority has a discretionary power as to the content of the decision to be taken, the judge can only, in such a case, order it to examine or re-examine the applicant's request within a specific time limit. In other words, to use the distinction made in the Act of 8 February 1995, the judge refuses to issue an injunction falling within the scope of Article L. 911-1 on the grounds that the administration is in the situation corresponding to Article L. 911-2. Two elements corroborate this analysis. On the one hand, the judge does not reject a case when the administration has no discretionary power and is obliged to act in a certain way. This is the case, for example, when he orders the administration to provide assistance from the public force when it had refused to provide this assistance. The ordered measure is undeniably final; it has effects for the administration identical in all respects to a cancellation of its refusal; nevertheless, the judge does not oppose any inadmissibility. On the other hand, it appears from the wording of certain decisions that the interim relief judge expressly links the inadmissibility of the conclusions to the margin of freedom available to the administration to refuse to act, i.e. to the fact that it is not obliged to act in a determined direction. For example, in *Allouache et al.*, the judge specified that it was not within his powers to order the suspension of the state of emergency because such a measure would have "the same scope as the obligation that would weigh on the administrative authority following a decision by the Council of State ruling on the dispute annulling the refusal of the President of the Republic to put an end to the state of emergency on the grounds that he could legally refrain from issuing a decree to that effect"¹⁹¹¹. Although the solution is linked by the judge to the provisions of Article L. 511-1 of the Code of Administrative Justice, its sole justification is the discretionary power enjoyed by the administration in the cases concerned. Even in ordinary law procedures, where the decisions rendered are legally final, the judge can never oblige the administration to take a specific decision when it has a discretionary power. In such a case, the judge can only enjoin the competent authority to re-examine the request presented by the citizen within a given time limit. This logic applies in all procedures and, in particular, in matters of interim relief, without the need to call upon the provisions of Article L. 511-1 of the Code of Administrative Justice. Like the judge of the merits, the judge of the summary judgment orders the administration to act in a determined direction when the latter is in a situation of bound competence in front of the decision. Like the judge on the merits, he or she orders the administration to examine or re-examine the application when it has discretionary power¹⁹¹².

459. In any event, the interim relief judge can only "in principle" - according to the *Ville de Lyon* order - pronounce provisional measures. However, it follows from this same order that the power of the interim relief judge is limited only insofar as a provisional measure is sufficient to remove the effects of the infringement. The judge is freed from this limit when no such measure will put an end to the infringing situation.

B. A requirement set aside in case of necessity

460. When only a non-provisional measure is likely to put an end to a serious and manifestly unlawful infringement of a fundamental freedom, then and only then is the judge of the interim relief order allowed to enjoin the infringer "to take any measure likely to safeguard the effective exercise of the fundamental freedom in question"¹⁹¹³. Recourse to such an injunction is only permitted when no provisional measure is likely to remove the effects of the infringement. In such a situation, the judge's powers are strengthened: he may order the administration to do or carry out anything that is legally and materially necessary to safeguard a fundamental freedom.

However, the power of the interim relief judge is not absolute in such a case. In the *Ville de Lyon* order, the interim relief judge of the Conseil d'Etat deliberately avoids using the term "final" (as opposed to "provisional"). While the interim relief judge may order *non-provisional* measures ("non-provisional" in the sense that these measures will clear up the dispute within a very short period of time and consequently make it unlikely, if not impossible, that the case will be challenged), he or she may not prescribe *definitive* measures (i.e. measures of annulment or reparation), as these *legally* - and no longer merely in practice - prevent any possibility of challenging the court's decision. This distinction between 'non-provisional' and 'final' is justified by the existence of the review procedure under Article L. 521-4 of the Code of Administrative Justice¹⁹¹⁴. In fact, the possibility for the interim relief judge, to which any interested party may refer, to modify or revoke his decision in the event of new information, makes it necessary to consider the measures ordered as provisional - at least in terms of legal fiction. Appearing in Title II of Book V of the Code of Administrative Justice, this provision applies, at least virtually, to the référé-

1911 CE, ord. 9 December 2005, *Allouache and others*, *Lebon* p. 562.

1912 When the applicant requests that the administration be ordered to act in a certain way, although the administration has a discretionary power, it is sufficient to order the administrative authority to decide on the applicant's request within a certain period of time in order to lift the inadmissibility. See *supra*, § 455, the *Saidov* order.

1913 Formula of the aforementioned *Ville de Lyon* ordinance.

1914 On this mechanism, see *infra* §§ 520 et seq.

liberté¹⁹¹⁵. In these circumstances, recognising the legally final nature of measures taken on the basis of Article L. 521-2 would be incompatible with the review mechanism provided for in Article L. 521-4. In any event, a non-interim measure ordered by the interim relief judge - for example, an injunction to rent a municipal hall - remains provisional in law¹⁹¹⁶.

461. In the *Ville de Lyon* order, the interim relief judge specifies that the lack of useful effect of a provisional measure may result from two factors in *particular*. Firstly, it may be due to the time limits within which the judge is seized. This is the case if the occurrence of the infringement is imminent: in such a case, the decision will immediately and definitively modify the legal situation, making the subject matter of the dispute disappear in the days if not the hours following its pronouncement. The lack of useful effect of a provisional measure may also arise from the nature of the infringement of the fundamental freedom, in particular when this infringement results from a prohibition whose effects are themselves provisional or limited in time (e.g. a prefectural order prohibiting the holding of a demonstration on the public highway).

462. In such a case, the judge is freed from the limit set out in Article L. 511-1 and can pronounce measures that are not provisional in nature. The example of the *Ville de Lyon* order is significant on this point. The facts underlying this decision are reminiscent of cases previously decided by the interim relief judge concerning the refusal to rent rooms to Jehovah's Witnesses¹⁹¹⁷. By an implicit decision dated 9 January 2007, the local association for the worship of Jehovah's Witnesses in Lyon Lafayette was refused the use of the municipal hall it had requested to rent for 2 April 2007, from 6:30 pm to 10:30 pm. In an order dated 15 March 2007, the interim relief judge of the Lyon administrative court upheld the association's claims based on Article L. 521-2 of the administrative justice code. In line with the *FN-IFOREL* case law¹⁹¹⁸, applied to the Jehovah's Witnesses religious associations in the aforementioned orders, the judge of the first instance considered the refusal to rent the municipal hall as constituting a serious and manifestly illegal infringement of the freedom of assembly. The city of Lyon did not mention any threat to public order, but only general considerations relating to the sectarian nature of the association, nor any reason based on the needs of the administration of municipal property or the functioning of services. As the condition of urgency was also met, the interim relief judge ordered the necessary safeguards, firstly by suspending the execution of the decision by which the mayor of Lyon refused to rent the Victor Hugo municipal hall to the applicant association, and secondly by ordering the mayor to rent the hall or an equivalent hall for the evening of 2 April 2007.

The city of Lyon appealed against this order. It argued that the judge of the first instance had ruled on inadmissible conclusions since the injunction sought was not provisional in nature. The judge of appeal found that the conditions for granting a non-provisional measure had been met in this case. He noted that by ordering the mayor of Lyon to make the requested municipal hall available to the local association for the worship of Jehovah's Witnesses, the first judge "enjoined the city to take a measure that was not provisional in nature. However, this injunction did not exceed the judge's powers since, as the order stated, "the nature of the ban imposed on the association and its effects allowed the interim relief judge, in order to safeguard the freedom of assembly, which he decided was being seriously infringed in a manifestly illegal manner, to order the mayor to authorise the association to rent a municipal hall on the day and at the time it had requested. Consequently, the interim relief judge of the Lyon administrative court did not rule on inadmissible conclusions and did not disregard the scope of the provisions of Article L. 521-2 of the Administrative Justice Code.

The Conseil d'Etat's interim relief judge applied this case law a second time in an order dated 9 July 2007, *Commune du Port*¹⁹¹⁹. In disregard of Law No. 84-53 of 26 January 1984 on statutory provisions relating to the territorial civil service and Decree No. 85-397 of 3 April 1985 on the exercise of trade union rights in the territorial civil service, the commune of Le Port refused to make a separate room available to the Syndicat autonome de la fonction publique territoriale. Referred to on the basis of Article L. 521-2 of the Code of Administrative Justice, the first instance summary proceedings judge ordered that a separate room be allocated to this union within one month. The commune appealed this decision. It asserted that the measure ordered by the interim relief judge was definitive, whereas, in its view, only a provisional measure could be ordered on this basis. The interim relief judge of the Council of State rejected this argument. Admittedly, the measure prescribed was not provisional in nature. However, it did not exceed the powers of the interim relief judge since no such measure could effectively put an

1915 Even though, to date, it has only been applied once. See *infra* § 524.

1916 It follows that in the event that an appeal for misuse of power has been lodged against a refusal to rent a room, the judge of the main proceedings is still obliged to rule on this request notwithstanding the pronouncement of the injunction. Since the refusal to make the room available was neither withdrawn nor repealed following the intervention of the judge of the référé-liberté, the judge of the excess of power cannot rely on this injunction to oppose the applicant a non-lieu à statuer. See CAA Bordeaux, 27 December 2006, *Association Comité action Palestine*, *AJDA* 2007, pp. 1142-1145, note O. BUI-XUAN.

1917 See TA Rennes, ord. 11 February 2002, *Association locale pour le culte des témoins de Jéhorah de Lorient*, *GP* 29 April 2003, p. 12. See also, for the refusal to rent the Charléty stadium: TA Paris, ord. 13 May 2004, *Association culturelle des témoins de Jéhorah de France et autres*, *AJDA* 2004, pp. 1597-1599, note G. GONZALEZ.

1918 CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux: (IFOREL)*, *Lebon* p. 311.

1919 CE, ord. 9 July 2007, *Commune du Port*, n° 307046.

end to the serious and manifestly illegal infringement of a fundamental freedom. The appeal judge emphasised that in view of the circumstances of the case, "the injunction made to the municipality to make premises available to the trade union within one month constituted the only measure suitable for safeguarding the trade union freedom that was thus infringed". Consequently, "the interim relief judge did not rule on inadmissible conclusions and did not misunderstand the scope of the provisions of Articles L. 511-1 and L. 521-2, from which it follows that while the measures ordered by the interim relief judge must in principle be provisional in nature, this is not the case for measures which alone are likely to remove a serious and manifestly illegal infringement of a fundamental freedom, such as trade union freedom".

463. Beyond practical considerations, what are the reasons for legally justifying, if not setting aside, at least adapting the provisions of Article L. 511-1 of the Code of Administrative Justice with regard to interim relief?

The first possible justification is based on the very text of Article L. 521-2, which allows the judge to order *all* necessary measures. Even before the Conseil d'Etat agreed, in the *Ville de Lyon* order, to open a breach in the principle of the provisional nature of the measures prescribed, Messrs Bourrel and Gourdou stated that "Despite the general wording of Article L. 511-1 of the CJA, it may be found rather paradoxical to apply the condition of the provisional nature of the measures ordered to the judge of the *référé-liberté*, who is empowered, by the very wording of Article L. 521-2 of the CJA, which institutes it, to "*order all necessary measures*"¹⁹²⁰. The authors deduced that "Following the example of the precontractual summary procedure (...), the formal condition of '*provisional measures*' should no doubt be waived here"¹⁹²¹. However, in itself, the formula "all necessary measures" does not seem sufficient to justify the pure and simple exclusion of Article L. 511-1. Indeed, in the absence of a normative hierarchy between the two provisions, the judge cannot set aside one in favour of the other but must opt for a conciliatory interpretation. In this particular configuration, reconciling the two texts would lead to authorising the interim relief judge to order all necessary *provisional* measures.

The second justification stems from the observation that the general provisions of Article L. 511-1 are somewhat unsuited to the specific procedure of summary proceedings. The provisions of this article, its philosophy and its purpose are not entirely appropriate for summary proceedings. Considered as a whole, and in the light of the considerations that justified its enactment, Article L. 511-1 is not perfectly suited to summary proceedings and is not really designed to apply to such proceedings. In fact, Article L. 511-1 formulates two different rules by prohibiting the interim relief judge from pronouncing final measures on the one hand, and prohibiting the judge from ruling on the main issue on the other. Although these two proposals are distinct, they are nevertheless closely related¹⁹²². Each exists and has meaning only in relation to the other. Neither of these two propositions can be read independently of the other. Because he is not seized of the main issue, the interim relief judge cannot pronounce definitive measures¹⁹²³. Conversely, because he pronounces strictly provisional measures, he should not be seized of the main issue¹⁹²⁴. If one of the prohibitions is lifted, the other is no longer necessary. It follows that the prohibition on final measures set out in Article L. 511-1 must be reserved for proceedings in which the court is not called upon to decide on the merits of the case. As long as the interim relief judge leaves the question of the legality of the act untouched, it is natural that he cannot take final measures and is subject to the requirement that the measures taken be provisional. On the other hand, as soon as he exercises the function of a judge of the merits, as soon as he is called upon to rule on the main issue, one of the proposals of Article L. 511-1 disappears, and with it the requirement of the provisional nature of the measures ordered.

The procedure of Article L. 521-1 responds to the first of the proposals of Article L. 511-1: the interim relief judge does not rule on the main issue. Consequently, it is natural that the second proposal should be applied to

1920 A. BOURREL and J. GOURDOU, *Les référés d'urgence devant le juge administratif*, L'Harmattan, coll. La justice au quotidien, 2003, p. 86. Underlined.

1921 A. BOURREL and J. GOURDOU, *op. cit.* p. 87. Underlined.

1922 It had been noted, under the previous law, that the prohibition of prejudice to the principal and the provisional nature of the interim order constituted "two sides of the same legal situation" (J. PONELLE, *Le référé en cours d'instance*, Librairie du recueil Sirey, 1934, p. 261, quoted by Y. STRICKLER, *Le juge des référés, juge du provisoire*, thèse Strasbourg, 1993, p. 429). The link between these two concepts is so strong that they are frequently assimilated. For many authors, a decision is only provisional insofar as the judge does not rule on the substance of the law. Thus, M. Frances stated that a decision would not be provisional if the summary proceedings judge had to "provisionally decide the substantive issue" (M. FRANCES, *Essai sur les notions d'urgence et de provisoire dans la procédure de référé*, Librairie du recueil Sirey, 1935, p. 48). Establishing a direct correlation between the two elements, M. Lacabarats states: "The provisional nature of the decision is a fundamental feature of summary proceedings: the summary proceedings judge does not decide on the merits of the dispute" (A. LACABARATS, "Le référé", in *Le nouveau code de procédure civile: vingt ans après*, colloque des 11 et 12 décembre 1997, La documentation française, 1998, p. 222). The same link is found in the words of M. Strickler, who states that "When he rules, the summary proceedings judge makes a *provisional* decision, as a precaution. He does not decide on the substance of the law (...)" (Y. STRICKLER, *op. cit.*, p. XXII. Underlined).

1923 The provisional nature of the measure is a consequence of the prohibition on the court ruling on the main issue. In accordance with this principle, a court that does not decide on the merits of the case cannot pronounce final measures. Finality is a property that attaches to and must be reserved for decisions in which the court rules on the substance of the law.

1924 The prohibition on ruling on the main issue is the consequence of the provisional nature of the measures ordered. The interim relief judge, "because of the provisional nature of the interim order, is not entitled in principle to rule on the merits of the law" (P. ESTOUP, *La pratique des procédures rapides. Référés, ordonnances sur requête, procédures d'injonction, procédures à jour fixe et abrégées*, 2^{ème} éd., Litec, 1998, p. 22). "Judge of the provisional, the judge of summary proceedings does not have to say the law. As a judge of the provisional, the judge of summary proceedings does not create anything definitive and *should not*, as a consequence, apprehend the merits" (Y. STRICKLER, "Réflexions sur le référé judiciaire. Retour sur le provisoire", in *Le nouveau juge administratif des référés*, PUS, 2002, p. 74. Underlined).

him: the prohibition on ordering final measures. Indeed, the judge does not apprehend the substance of the law insofar as his intervention is conditioned by the existence of a serious doubt on the legality of the challenged decision. The law only requires an appearance or likelihood of illegality. The interim relief judge does not rule on the main issue. Consequently, the measures taken on this basis must logically be subject to the requirement of provisional character. More generally, provisional status is the rule for ancillary proceedings whose purpose is to adjust the situation of the parties pending a judgment on the merits. As Mr Debbasch explained, "The ancillary proceedings must not encroach on the main proceedings. The result is that the judge with jurisdiction because of the urgency will not have either of the two jurisdictional prerogatives that he or she possesses during the judgment of the main proceedings. He will only be able to order provisional measures, and his judgment will consequently be devoid of any authority of *res judicata*. It may not, moreover, prejudice in any way the outcome of the main proceedings"¹⁹²⁵. In law, the application of Article L. 511-1 to the interim relief procedure is therefore justified. But what about the interim relief procedure, an autonomous procedure in which the judge rules on a manifest illegality?

Under the previous law, the prohibition on prejudicing the main proceedings meant that the interim relief judge could not deal with the substance of the law. According to Government Commissioner Grévisse, any measure "which involves taking a position on a question affecting the substance of the law or which, by its object, concerns the substance of the law"¹⁹²⁶ is prejudicial to the principal. Similarly, in civil matters, "the prohibition on prejudging the principal was understood to mean a prohibition on judging the substance of the law"¹⁹²⁷. The scope of the new formula, which abandons the reference to "prejudice" to the principal¹⁹²⁸, is more or less the same as the previous one. It means that the interim relief judge "is not empowered in principle to rule on the substance of the law"¹⁹²⁹. As a result, a court rules on the main issue when it has to decide on the substance of the law. As soon as he decides on the merits of the claim submitted to him, or establishes the illegality of the act or conduct challenged, the court rules on the main issue. Article L. 521-2 sets out the requirement of a "manifestly" illegal infringement of a fundamental freedom. In so doing, the law leads the judge of the summary judgment to seek and, if necessary, to find the existence of a manifest illegality. The control of this condition, if it proves to be satisfied, necessarily leads the judge to rule on the main issue. By establishing the proven and certain violation of a legal norm by an administrative act or behaviour, the judge apprehends the substance of the law; he assesses, in substance, the legality of the litigious situation. As Mr Chahid-Nourai and Mr Lahami-Depinay state, "as far as the summary procedure for fundamental freedoms is concerned (...) the decision to be handed down prejudices the main issue, since the judge is asked to find that the contested decision is manifestly illegal"¹⁹³⁰. Similarly, Mr Ricci observes that the interim relief judge "decides the main issue"¹⁹³¹. Insofar as the first proposition of Article L. 511-1 is not satisfied, it seems questionable to apply this provision - and the limitation it contains as to the provisional nature of the measures prescribed - fully to the procedure of Article L. 521-2.

464. Over and above the foundations of this case law, it should be noted that, in the end, the solution adopted preserves, in terms of principles, the fiction of the provisional nature of summary measures. On the one hand, it hinders the pronouncement of definitive measures such as annulment and reparation. According to the case law, the provisions of Article L. 521-2 are only intended to allow the interim relief judge to "*paralyse* the effects of an administrative decision or an action by the administration"¹⁹³². On the other hand, this provisional - or at least non-final - nature makes it possible, at least potentially, to implement the mechanism of Article L. 521-4 of the Code of Administrative Justice.

As implemented in the context of this procedure, this principle does not substantially restrict the power of the judge of the *référé-liberté*, as it is broadly defined by the text of Article L. 521-2. In practice, the judge intervenes in two different ways to put an end to the conduct submitted to him on this basis.

1925 C. DEBBASCH, *Procédure administrative contentieuse et procédure civile*, LGDJ, coll. BDP, t. 38, 1962, p. 308.

1926 GREVISSE on CE, Sect. 14 March 1958, *Secretary of State for Reconstruction and Housing*, *AJDA* 1958, II, p. 186. Thus, "For the administrative judge, any decision that states the law is (...) prejudicial to the principal" (M.-R. TERCINET, *L'acte conservatoire en droit administratif*, LGDJ, coll. BDP, t. 132, 1979, p. 172). For the interim relief judge, not to prejudice the main issue is not to "decide in any way the merits of the dispute. (...) The case must remain unfinished" (C. DEBBASCH, *op. cit.*, p. 309). The prohibition of prejudicing the main issue implies "that the judge does not take sides on any question of law" (B. LASSERRE and J.-M. DELARUE, *chron. under CE, Sect., 9 December 1983, Ville de Paris*, *AJDA* 1984, p. 84).

1927 Y. STICKLER, thesis, p. 55. In application of this rule, the Court of Cassation regularly recalled "that it is not the role of the summary proceedings court to judge the merits of the law" (see for example Com. 5 June 1972, *SARL Mihpa c/ SA Laboratoires Glayo*, *Bull. civ. IV*, n° 175).

1928 On the reasons for the change of formula, see P. ESTOUP, *op. cit.* p. 21.

1929 P. ESTOUP, *op. cit.* p. 22. See for example Com. 6 March 1985, cited by Y. STRICKLER, *op. cit.* p. 518: according to the Commercial Chamber of the Court of Cassation, it is only "insofar as he is not led to take sides on the existence of the rights claimed that the judges called upon to hear the merits of the dispute would have to assess" that the summary proceedings judge can apply an agreement purely and simply.

1930 N. CHAHID-NOURAI and C. LAHAMI-DEPINAY, "L'urgence devant le juge administratif: premières applications des articles L. 521-1 et L. 521-2 nouveaux du Code de justice administrative", *LPA* 12 February 2001, n° 30, p. 14.

1931 J.-C. RICCI, "Quels référés pour quels pouvoirs? Le référé-liberté, la notion de libertés fondamentales, le référé-suspension", *RRJ* 2003/5 *L'actualité des procédures d'urgence*, p. 3096.

1932 CE, ord. 18 March 2005, *M. Ali A., Lebon* p. 122; CE, ord. 13 July 2005, *Bagachev*, n° 283207.

Section 2. Two modalities of intervention

465. In the past, legal scholars have denounced the discrepancy between the extent of the jurisdictional arsenal with which the Council of State has equipped itself and the timid use it often makes of it. In his *Huron* savant, Professor Rivero deplored 'that the arrows he knows so well how to cut to launch against arbitrariness rarely come out of their quiver, and that his tomahawks, sharpened with care, remain in his belt more often than they whistle in the air'¹⁹³³. Other authors had also noted and denounced the restraint shown by the administrative judge when it came to pronouncing binding measures against the administration. Achille Mestre noted that 'the Council of State deliberately does not use all the powers that are the prerogative of the jurisdictional function and does not ensure the full effectiveness of the means of control available to it'¹⁹³⁴. In order to prevent such a phenomenon from recurring under the Law of 30 June 2000, the interim relief judge was strongly urged to use his new powers without restraint. Before the reform came into force, the Minister of Justice stated that the summary proceedings procedures "will only improve the efficiency of the administrative judge if he is not timid and does not have a restrictive conception of his powers"¹⁹³⁵. After the implementation of the Act of 30 June 2000, the Council of State echoed these concerns when it stated, in its 2003 public report, that the interim relief judge should not hesitate "to use his powers without temerity"¹⁹³⁶. The judge of the *référé-liberté* was thus invited to make unbridled use of his or her powers and fully exploited the potential of this instrument.
466. In the context of Article L. 521-2, it seeks and selects the solution which, in view of its practical effects, will be able to put an end to the infringement of a fundamental freedom. He uses the prerogatives attributed to him in a flexible and realistic manner. In practice, the judge's intervention to put an end to an infringement takes two different forms. By persuasion or dissuasion, the judge can first of all bring the administration to satisfy the applicant. It is the administrative authority which, by virtue of the sole intervention or threat of intervention of the interim relief judge, will put an end to the litigious situation. Otherwise, when the judge cannot bring the administration to reconsider its position, he pronounces a binding measure against it. The cases in which the applicant obtains satisfaction are divided equally between these two methods: 5% of applications are settled in favour of the applicant without the pronouncement of a measure, 5% following the pronouncement of a measure¹⁹³⁷. These two methods of intervention express and reflect the role of the judge in summary proceedings as a decision-maker.

I. Persuasive or dissuasive intervention by the interim relief judge

467. The referral to the interim relief judge and, possibly, the exchanges that take place in chambers, sometimes have the effect that the administration acts without waiting for the interim relief order and thus deprives the conclusions presented of purpose. A rapprochement between the parties may also lead to the withdrawal of the claimant who, having won the case, gives up his appeal. Thus, provided that the conditions required by Article L. 521-2 are met in a probable manner - otherwise the administration will be reluctant to reverse its position on its own -, the applicant for interim relief may obtain satisfaction without the judge having to pronounce the slightest measure. The non-contentious settlement of the dispute then results in the extinction of the subject matter of the dispute resulting, depending on the case, from a withdrawal which the judge will acknowledge, or from a dismissal of the case which it is up to him to establish. The cases in which the petitioner obtains satisfaction without any measure being pronounced thus result from the effective intervention or the simple threat of intervention of the judge of the summary judgment.

A. Satisfaction before the hearing: the dissuasive role of the judge

468. The applicant can first of all obtain the cessation of the infringement by the mere threat of intervention by the judge of the summary proceedings. Indeed, when the administration is summoned to a public hearing

1933 J. RIVERO, "Nouveaux propos naïfs d'un Huron sur le contentieux administratif", *EDCE* 1979-1980, p. 28.

1934 A. MESTRE, *Le Conseil d'Etat protecteur des prérogatives de l'administration*, LGDJ, coll. BDP, t. 116, 1974, p. 81.

1935 E. GUIGOU, 'Closing of the colloquium' of the 2^{me} centenary of the Council of State, *RA* 2000, special issue 3, p. 214.

1936 CONSEIL D'ETAT, Public Report 2003, *EDCE* No. 54, p. 452.

1937 This brings the number of cases in which the applicant for interim relief is successful to 10%. This relatively low figure is mainly due to the strict conditions of granting. Also to be taken into account is the fact that the number of unrealistic applications seems to be higher than in other court proceedings.

under the summary proceedings, this means that the request has not been rejected at the preliminary screening stage. For the judge, the dispute has a serious character; the request has not been considered as manifestly ill-founded. Consequently, the public authority runs a certain risk in persevering with its behaviour. Alerted by this summons, it knows that there is still time for it to backtrack. Also, instead of a possible censure imposed by the judge of the *référé-liberté*, the administration sued on the basis of Article L. 521-2 will sometimes prefer to go back on its own to the decision or the behaviour that gave rise to the referral. It is undeniable, in fact, that a censure pronounced by the judge of the *référé-liberté* has a moral connotation. A conviction for infringement of fundamental freedoms exposes a local politician to the risk of political and media exploitation of the decision. More generally, such a sentence can tarnish the image of a public authority or its leaders. Therefore, it is sometimes preferable for a political or administrative official to reverse his or her position - at an early stage - rather than suffer the stigma attached to a conviction on this basis.

The dissuasive effect of the judicial sanction is thus particularly effective in this area¹⁹³⁸. For the plaintiff, the referral to the judge and the fear that the sanction provokes in the administrator are enough to obtain satisfaction. The administration performs itself without the judge having to prescribe any measure. If the administration takes measures that have exactly the same scope as those requested in summary proceedings, the applicant's conclusions become irrelevant and the judge declares that there is no need to adjudicate.

469. The dissuasive effect of the *référé-liberté* was apparent from the first applications of the procedure with the *Hyacinthe* order of 12 January 2001¹⁹³⁹. The applicant, a Haitian national, had been unable to claim refugee status due to the refusal of the prefecture to provide her with the form required to submit such an application. The judge of the first instance had rejected her conclusions by way of the sorting procedure, requesting that the prefectural authority be ordered to provide the necessary form, to examine her file and to issue her with a temporary residence permit. Ms Hyacinthe appealed against this decision to the interim relief judge of the Council of State¹⁹⁴⁰. On the same day the application was lodged, the Ministry of the Interior ordered the Prefect of Seine-Saint-Denis to register the asylum application submitted by Ms. Hyacinthe, the completion of this formality automatically entailing her provisional admission to residence. Thus, in this case, the summons to the public hearing was sufficient to lead the administrative authority to reform its behaviour. The judge found that the measures taken by the administration "rendered the injunctions requested by the applicant pointless" and found that there was therefore no need to rule on the application. Similarly, in the *Aubert* case, the applicants had unsuccessfully applied to the administrative authority for a family reunification authorisation to allow the arrival in France of Mrs Aubert's children from a previous union. By order of 2 August 2006, the interim relief judge of the Marseille administrative court rejected the request made by the applicants on the basis of Article L. 521-2 to order the administration to issue the authorisation. The day after the appeal was lodged, the Bouches-du-Rhône prefect ruled in favour of the family reunification application¹⁹⁴¹.

The measures can also be taken before the hearing and brought to the applicant's attention at the hearing, as in the *Moussa* order of 25 April 2005. In this case, the administration had refused the right to temporary residence to a foreign national wishing to apply for recognition as a refugee. The judge of the first instance having rejected his request that the prefect be ordered to issue him a temporary residence permit, the interested party appealed against this decision on 21 April 2005. In a memorandum dated 22 April 2005, the administration initially concluded that the application should be rejected. However, during the hearing, the representatives of the Minister of the Interior stated that instructions had been given by the central administration to the services of the Gard prefecture to allow the applicant to register his asylum application and be issued with a temporary residence permit. The interim relief judge of the Conseil d'Etat stated that "in these conditions, as agreed by the applicant's counsel, there

¹⁹³⁸ The dissuasive effect can also be effective in other disputes. For example, when the outcome of an appeal appears uncertain for the tax administration, it will sometimes prefer to give satisfaction to the applicant-taxpayer, rather than run the risk of bad jurisprudence likely to give rise to major and costly litigation. The threat of judicial intervention can play an equally effective role in the litigation of administrative control of local authority acts. Five years after the decentralisation laws, withdrawals and dismissals accounted for approximately 40% of this litigation, i.e. a significant proportion. As President Chabanol explained, 'Since the majority of withdrawals are ordered by the withdrawal of the act referred to, it can be concluded from this abnormally high percentage that the local authority has, in two cases out of five, renounced its initial position before the judge actually intervened, which therefore played, as in the pre-litigation phase, a role of threat in the hands of the representative of the State, a threat that was effective but not effective' (D. CHABANOL, 'Les contrôles. La jurisprudence administrative', *AJDA* 1987, p. 185). On this theme, see J. RIVERO, "Sanction juridictionnelle et règle de droit", *Etudes offertes à Léon Julliot de la Morandière*, Dalloz, 1964, pp. 457-469; *ID.*, "Sur l'effet dissuasif de la sanction juridique", in *Mélanges offerts à Pierre Raynaud*, Dalloz-Sirey, 1985, pp. 675-685.

¹⁹³⁹ CE, ord. 12 January 2001, *Hyacinthe*, *Lebon* p. 12. See, relating the events encountered by the applicant: S. ZAPPI, "Le ministère de l'Intérieur condamné pour entrave au droit d'asile", *Le Monde* 16 January 2001, p. 11. This article illustrates the bad press that a conviction by the *référé-liberté* judge is likely to cause for the administration.

¹⁹⁴⁰ The latter will agree to rule on the request. In principle, he should have, in application of Article L. 523 al. 1 of the Code of Administrative Justice, requalified the request for appeal as an appeal in cassation and transmitted it to a collegial formation (see, in such a case: CE, Sect., 28 February 2001, *Casamovas*, *Lebon* p. 108). In order to justify his intervention, the interim relief judge affirms "that the decision to dismiss the case (...) dispenses with the need to assess the admissibility of the application (...)".

¹⁹⁴¹ CE, ord. 21 August 2006, *Aubert*, n° 296570. For a similar application, concerning the issuance to the applicant of a receipt for the submission of his application for a residence permit, see CE, ord. 27 October 2006, *Nkouka*, n° 298319.

is no need (...) to rule on the conclusions of the application"¹⁹⁴². In some cases, a simple commitment by the administration, not yet followed by effects, may be sufficient to pronounce that there is no need to adjudicate¹⁹⁴³.

470. It should be noted that this dissuasive effect also applies when the interim relief judge of the Council of State rules in the first and last instance. In particular, there are numerous applications in the case of visa refusals. After the application has been lodged, and after the judge has summoned the parties to a public hearing, the requested visa is issued by the consulate to the applicant on the orders of the Minister for Foreign Affairs¹⁹⁴⁴. This effect has also come into play in cases where residence permits have been refused¹⁹⁴⁵ or withdrawn¹⁹⁴⁶.

471. The fear of punishment thus appears to be effective in this field: the initiation of the appeal and the summoning of the administration to the hearing lead the latter to grant the applicant the measure requested in summary proceedings. The cases in which the applicant obtains satisfaction without a measure being pronounced also cover a second hypothesis, linked to the effective intervention of the judge during the public hearing.

B. Satisfaction during the hearing: the persuasive and conciliatory role of the judge

472. In this case, it is no longer the judge's fear that leads the administration to modify its behaviour but its qualities of listening, dialogue and appeasement. Like a judge of the peace, the interim relief judge will bring the parties to discuss, to take up or resume dialogue, to come closer together in order to reach a common ground¹⁹⁴⁷.

It thus proceeds to a *conciliation*, the expression being understood here in the common sense. *Strictly speaking*, as it comes to us from private law, conciliation is a transaction within the meaning of Article 2044 of the Civil Code - an agreement by which the parties agree to mutual concessions to put an end to the dispute between them. Considered here in the broadest sense, the notion of conciliation expresses the idea that a third party will attempt, during a hearing of the parties, to bring the interests of the parties together in order to reach a non-contentious settlement of the dispute between them. The implementation and outcome of conciliation is not formal. On the one hand, it does not necessarily take the form of a dismissal or withdrawal of the case. On the other hand, it can occur - and indeed most often does - in cases where the applicant does not meet the conditions for granting Article L. 521-2. In this case, the hearing has made it possible to settle a dispute, even if it did not correspond to the

¹⁹⁴² CE, ord. 25 April 2005, *Moussa*, n° 279827. The reference to the position of the applicant's counsel is important here. In a case with similar circumstances, the Minister of the Interior had, prior to the hearing, enjoined the prefectural administration to register the applicant's application for territorial asylum as soon as the latter presented himself again at the prefecture. The Council of State considered that if the administration had not informed the person concerned of this step, and therefore had not put him in a position to obtain this registration, his request had not become moot (CE, 15 February 2002, *Hadda, Lebon* p. 45). The judge therefore assesses whether the dispute still has a purpose in the light of all the facts of the case and, where applicable, the applicant's position.

¹⁹⁴³ See e.g. CE, ord. 2 May 2006, *Merzouki*, n° 292803. At first instance, the applicant asked the interim relief judge of the Paris administrative court to order the prefect to return his passport and driving licence without delay. The judge of the first instance having rejected his request, the applicant brought the case before the judge of appeal for interim relief. The latter noted that, after the application was made to the interim relief judge of the Paris Administrative Court, the applicant's counsel was told that the administration was prepared to return the documents to him. Indications to the same effect were confirmed both during the written procedure and during the hearing before the Council of State. In these circumstances, the dispute became moot as regards the return of the applicant's passport and driving licence. See, in the same sense, CE, 12 July 2006, *Grarud*, n° 295022 (for a passport issue).

¹⁹⁴⁴ See in particular: CE, ord. 17 December 2002, *Safi and Gestlain*, No. 252520; CE, ord. 5 October 2004, *El Boukbari*, No. 272833; CE, ord. 29 October 2004, *Ben Habbab*, No. 273612; CE, ord. 25 February 2005, *Akue*, No. 277848; CE, ord. 25 March 2005, *Soumbou*, No. 278823; CE, ord. 28 June 2005, *Kondombo*, No. 281827 17 October 2005, *Laiguillon-Zairi*, No. 286075; CE, ord. 17 February 2006, *Idrissa Boubou*, No. 290172; CE, ord. 4 August 2006, *Laksiba*, No. 296042.

¹⁹⁴⁵ See for example CE, 29 July 2002, *Stojanovic*, n° 246835.

¹⁹⁴⁶ See CE, ord. 21 October 2003, *Monkolot*, n° 261061. Miss Monkolot, a national of the Democratic Republic of Congo, was issued a refugee card and travel document by the French authorities on 2 January 2003, valid from 18 June 2003 to 17 June 2005. While travelling to the Congo, the applicant was subject to an authentication check of the documents she presented at the airport in Brazzaville. The French embassy retained her refugee certificate, her travel document and her residence permit application receipt for the purposes of this check. Believing that she was unable to assert the right to return to France conferred on her by her refugee status, Ms Monkolot referred the matter to the Council of State's interim relief judge on the basis of Article L. 521-2 of the Administrative Justice Code. During the investigation of the application for interim relief, the French embassy in Brazzaville, after having received the information requested for authentication from the Val-d'Oise prefecture, returned to the applicant her refugee certificate, her travel document and her residence permit application receipt.

¹⁹⁴⁷ See, defending with conviction this approach of the judge's job, B. STIRN, "Juridiction et jurisprudence administratives: le temps du mouvement", in *L'architecture du droit. Mélanges en l'honneur du Professeur Michel Troper, Economica*, 2006, pp. 939-950; ID, "Juge des référés, un nouveau métier pour le juge administratif", in *Juger l'administration, administrer la justice. Mélanges en l'honneur de Daniel Labetoulle*, Dalloz, 2007, pp. 795-801.

exceptional situation for which the summary procedure is designed.

One might have thought, *a priori*, that the field of serious infringements of fundamental freedoms was a perfectly unsuitable area for the organisation of a conciliation between the parties. In reality, however, there is no question of making arrangements with the law or compromising on respect for fundamental freedoms. The purpose of conciliation is not to make the applicant accept a - mitigated - infringement of his fundamental freedoms. The purpose of reconciliation is to enable the parties to reach common ground. Even if the conditions for granting are not met, the hearing will be an opportunity for dialogue and a non-contentious resolution of the dispute between the two parties. Conciliation is thus presented, as in the civil summary procedure, as a "final attempt to resolve a conflictual situation in a calm manner"¹⁹⁴⁸.

473. Because of its characteristics, the summary proceedings hearing is the ideal setting for conciliation¹⁹⁴⁹. It offers a flexible and open space for dialogue, which encourages direct discussion between the parties but also between the parties and the judge.

Firstly, the hearing makes it possible to have a direct dialogue between the protagonists, thanks to the physical presence of the parties and the oral hearing. This presupposes, on the one hand, that both parties are present. Indeed, if one of the parties is not present at the hearing, simply referring to its conclusions, no dialogue can take place. In summary proceedings, conciliation is never achieved by the mere exchange of written submissions. The presence of the parties at the hearing is a *sine qua non* condition for conciliation. President de Belleyme, the historical father of summary proceedings, himself pointed this out when he stated that without the appearance of the parties in person, "the president would lose a happy opportunity to extinguish the proceedings by conciliation"¹⁹⁵⁰. On the other hand, orality favours a real-time dialogue between the parties. The hearing in chambers can take place around a table, with the parties exchanging arguments verbally and discussing any exhibits that may have been submitted without formality. For the parties, the hearing becomes a space for listening and dialogue. As Mr Gentili states, "orality allows for a dialogue (in the literal sense) from which conciliation, even partial, may emerge"¹⁹⁵¹. As the proceedings progress, the parties may realise that a rapprochement is possible. Sometimes the claimant has not made himself understood in his dealings with the administrative authority, or relations between the two parties have become strained, or the administration has been unable to deal with a case with the importance it deserves. The hearing gives the protagonists the opportunity to discuss, explain and, if necessary, understand all the facts of the dispute with additional documents. The hearing is an opportunity for a dialogue that has not always been possible beforehand.

Secondly, thanks to the intervention of the judge ruling alone, it allows for direct dialogue between the judge and the parties. As M. Perrot observed, "the search for direct dialogue is hardly conceivable in a collegial, abstract and impersonal framework which, by its inevitable solemnity, hinders a genuine confrontation"¹⁹⁵². Conciliation requires a "human contact that would be difficult to achieve with collegiality"¹⁹⁵³. However, the single judge is, by nature, closer to the litigants than a panel can be. He is a "judge of the field, of proximity and immediacy"¹⁹⁵⁴. Ruling alone and without any particular solemnity, he is more inclined to facilitate, or even seek, a certain proximity with the parties to the proceedings. The explanatory memorandum to the draft law on summary proceedings also stated that it wanted to "promote dialogue with litigants" through the oral procedure. And indeed, orality modifies the relationship between the judge and the parties, as well as between the parties themselves: 'We are seeing a transformation in the relationship between claimants and their judge, thanks to the lack of formalism in the hearings in chambers. It even happens that the relationship between the antagonistic parties is modified, in the sense of a better understanding of the other's point of view, on the occasion of their verbal exchanges before the summary jurisdiction judge'¹⁹⁵⁵.

474. These elements represent the basis for a rapprochement between the parties at the summary hearing¹⁹⁵⁶.

¹⁹⁴⁸ J. NORMAND, obs. in *RTDciv* 1981, p. 441.

¹⁹⁴⁹ As some authors had already foreseen when the reform of 30 June 2000 was first applied. See for example B. SEILLER, note under TA Orléans, order of 8 February 2001, *Société Robert Nioche et ses fils*, *AJDA* 2001, pp. 500-504. The author states in particular: "How can we not hope that this debate will be the occasion for a conciliation under the aegis of the interim relief judge? Having finally the possibility, like his judicial counterpart, to hear the parties, to question them, to become more aware of their respective interests, he will, spontaneously or not, be encouraged to try to reconcile their points of view" (*op. cit.*, p. 503).

¹⁹⁵⁰ L.-M. DE BELLEyme, Ordonnances sur requête et sur référé selon la Jurisprudence du Tribunal de première instance du département de la Seine, t. 2, 2^{ème} ed., Joubert, 1844, p. 35, quoted by Y. STRICKLER, *op. cit.*

¹⁹⁵¹ C. GENTILI, "L'utilisation des écrits dans la procédure civile orale", *LPA* 7 September 2001, n° 179, p. 5.

¹⁹⁵² R. PERROT, "Le juge unique en droit français", *RIDC* 1977, p. 668.

¹⁹⁵³ J. NORMAND, "Le juge unique en droit privé", Travaux du IX^e colloque des Instituts d'études judiciaires, Nice, 20-21 May 1974, *Les juges uniques*, Centre d'études judiciaires, Faculté de droit et des sciences économiques de l'Université de Nice, 1975, p. 12.

¹⁹⁵⁴ B. PACTEAU, "Le juge unique dans les juridictions administratives. Le point de vue de la doctrine", *GP* 1998, 1, p. 180.

¹⁹⁵⁵ R. DENOIX DE SAINT MARC, "Les procédures d'urgence : premier bilan", *AJDA* 2002, p. 1.

¹⁹⁵⁶ Civil summary proceedings, which have long been organised in accordance with these principles, have seen a considerable increase in the use of this procedure. Courivaud remarked, more than a century ago, that summary proceedings offer the applicant "the possibility of transactions which are often more advantageous than trials" (F. COURIVAUD, *Des référés. Principes de compétence et de procédure*, Imprimerie Blais et Roy, 1900, p. 11). Conciliation is nowadays a common practice before the civil judge of summary proceedings. The latter "participates in a consultation process that tends as often as possible to find common ground" (J.-F. BURGELIN, J.-M. COULON and M.-A. FRISON-

However, the judge must have the necessary qualities and the parties must be willing to find common ground.

Above all, it is essential that the single judge has the qualities to establish the basis for dialogue and reconciliation between two antagonistic parties. This task can be difficult in a dispute where the stakes can be high and tensions very high. Therefore, the interim relief judge must have real listening and appeasement skills, which alone will enable him or her to engage the litigants in a conciliatory process. In order to reconcile points of view, the judge must play an active role during the summary proceedings hearing: "on this occasion, the judge becomes a participant and, in consultation, devises a solution acceptable to all, becoming a sort of catalyst for concord"¹⁹⁵⁷. The judge who wishes to promote a rapprochement must not confine himself to the role of a distant observer. They must commit themselves, get involved, not be neutral, in order to bring the parties to dialogue. The judge will try to find the concordant will of the parties and will avoid sitting and passively listening to the successive claims of the parties. The amicable resolution of the conflict between the litigants may only become apparent to them in the course of the proceedings; this is why the judge's listening and interventions must be permanent and constantly geared towards seeking a possible agreement between the parties. Of course, the attempt at conciliation is always an option for the judge. But very often, as the importance of its success shows, the judge of the *référé-liberté* will engage in this way as soon as he sees the possibility of a non-contentious settlement of the dispute. He then brings the points of view closer together and persuades the administration to reverse its decision.

However, the judge is not the only actor in conciliation. For a reconciliation to be possible and feasible, the parties must also be open to dialogue, the claimant must not be rigid in his or her claims and the administration must not be rigid in its position. In practice, it can be observed that the obstacles to dialogue most often result from the attitude of the claimant and not from the defendant administration. During the summary proceedings hearing, the latter does not hesitate to admit that it is wrong. Wishing to act legally, it asks the judge for guidance on how to proceed in this case and in the future. Sometimes, the interim relief judge's efforts at rapprochement come up against the attitude of an applicant who refuses to engage in dialogue. In the *Kilicikesen* case, for example, the reasons for the decision show that the judge sought to reach an agreement between the parties, but failed to do so because the applicant did not agree to this approach. The two parties first sought mutual understanding: "during the hearing held on Saturday 3 April 2004 by the interim relief judge of the Council of State, the two parties agreed that the current situation should not be prolonged and that, unless it considered that the child's dress exceeded the limits of freedom of expression of religious beliefs, the national education administration should take all necessary steps to ensure that young Hilal was admitted to the classrooms. However, the applicants did not wish to pursue the dialogue. During the hearing on 3 April, the Director of Legal Affairs of the Ministry of Education specified in detail the characteristics of the clothing that could be considered, in the circumstances of the case, to be justified by the freedom of expression of religious beliefs, an act that demonstrated the administrative authority's willingness to engage in dialogue and openness. The administration indicated that, provided that these arrangements were observed, young Hillal could attend school normally. Nevertheless, the applicants made it known that they persisted in their initial conclusions. The judge concluded that the proceedings initiated could not be regarded as having become moot. The applicants knowingly broke off the dialogue and refused to react to the indications given by the administration. In the end, this attitude does them a disservice since the document and the undertakings given by the administration are assessed by the judge without having been discussed by the applicants. The judge based himself on the assurances given by the administration, and not discussed by the applicants, to exclude the illegal infringement of a fundamental freedom. The judge emphasised that "it does not appear that, at the date of the present decision, an unlawful infringement of such a freedom can be found against the State in this case, *given the assurances and indications* given by the Director of Legal Affairs of the Ministry of National Education"¹⁹⁵⁸. Similarly, in a case where the applicants criticised the administration's slowness in examining visa applications, the judge took into account the undertakings given by the administration during the hearing in order to exclude the serious and manifestly illegal infringement of a fundamental freedom. The interim relief judge stated that the conditions for granting visas could not be considered to have been met "given the above-mentioned conditions in which the visa application was and still is being investigated and in view of the undertakings given by the administration during the public hearing to complete the investigation as soon as possible"¹⁹⁵⁹.

A claimant who obtains satisfaction in this way has no interest in continuing the proceedings, as illustrated by the *Le Garff* case. Mrs Le Garff and her daughter Mrs Lopez applied to the interim relief judge of the administrative court for an injunction against the mayor of the municipality to grant their request for the transfer of the building permit issued to Mrs Lopez to Mrs Le Garff. At the public hearing held on 27 March, the interim relief judge, in view of the oral indications of the municipality's representative, transcribed in the minutes of the hearing and according to which satisfaction would be given to Ms. Le Garff and Ms. Lopez, postponed the closure of the investigation until 28 March at 2 p.m. By fax sent after the hearing on 27 March, the mayor confirmed to the interim relief judge his agreement to the transfer. He also sent an order dated the same day, signed by one of his deputies, ordering the transfer. In view of these elements, the interim relief judge decided, by order of 31 March,

ROCHE, "Le juge des référés au regard des principes procéduraires", *D.* 1995, p. 67). See on this point: Y. STRICKLER, thesis cited above, p. 343 et seq.

1957 H. LE FOYER DE COSTIL, "Le vol d'aigle du juge des référés", in *Etudes offertes à Pierre Bellet*, Litec, 1991, p. 343.

1958 CE, ord. 7 April 2004, *Kilicikesen, Lebon* p. 164, *JCP A* 2004, 1554, note E. TAWIL.

1959 CE, ord. 13 January 2006, *Rasamoelina*, No. 288434.

that there was no need to rule on the conclusions for an injunction and suspension presented by the applicants. The applicants, who had obtained full satisfaction before the first judge, nonetheless appealed against this decision, out of procedural stubbornness. Since they did not provide any evidence to call into question the validity of the contested order and presented submissions to the effect that the municipality should be ordered to pay Mrs Le Garff a "provision of 1,000 euros to be used as a basis for damages for the mental torture inflicted", the applicants were fined for abusive recourse¹⁹⁶⁰.

475. It is important to note that this desire to bring the judge of the *référé-liberté* closer and to calm things down is not limited to cases in which the conditions for granting it are met. In practice, it can even be observed that this method of dispute resolution most often covers cases in which the applicant does not justify being in an exceptional situation within the meaning of Article L. 521-2 but is nevertheless placed in an abnormal or prejudicial situation. Thanks to the judge's intervention, the administration shows goodwill in order to facilitate a rapid resolution of the difficulty to which the applicant is exposed. Several cases illustrate the interim relief judge's role as a judge of peace.

In the case of *Abamada and Said Abdallah*¹⁹⁶¹, the applicants, of Comorian nationality, had asked the prefect to renew their student residence permit in order to undertake an apprenticeship. The prefect refused them, which they challenged on the basis of Article L. 521-2 of the Administrative Justice Code. Both the first instance judge and the appeal judge refused to grant their request, observing that the apprenticeship contract is, by virtue of Article L. 117-1 of the Labour Code, an employment contract and that apprenticeship therefore requires a residence permit for employees. Before the interim relief judge of the Council of State, the Minister of the Interior himself indicated that it is actually up to the applicants to apply for the work permit and employee residence permit that corresponds to their apprenticeship training project. The interim relief judge took advantage of the goodwill shown by the administration by indicating that "*it will be up to the prefectural authority, to examine the applications with all the attention they deserve, given the presence in France since 1999 of the two young applicants, their good integration and the nature of their projects*". The judge recalled that it had been "specified during the public hearing that the applicants must apply for a provisional residence permit, which the administration, *which will refrain from any measure of deportation during the examination of their applications for a residence permit, is prepared to issue*". Consequently, the order states, the applicants should be "invited to submit as soon as possible applications for a provisional residence permit and a residence permit as an employee, which the administration will examine under the conditions indicated above".

In the *Moussaoui* case¹⁹⁶², the applicant had not been able to return to France on 5 June 2004 after a stay in Tunisia, even though he held a provisional residence permit valid until 8 June 2004. The judge of the *référé-liberté* rejected the request made against the behaviour of the police prefect on the grounds that the circumstances that had prevented the applicant's return were attributable, on the one hand, to the airline that had refused to embark him, as he had not been able to present a "return visa" - a document for which there is no provision in the law - and, on the other, to the consular authorities. Nevertheless, and in view of the difficulties encountered by the applicant, the administration declared itself ready, during the public hearing, to grant him, exceptionally, a new temporary residence permit. During the hearing, the administrative authority emphasised that this gesture was justified by the fact that the applicant had the right to return to French territory until 8 June 2004 and by the fact that he could then have obtained, given his situation, the renewal of his temporary residence permit. It declared itself ready to expressly mention on this authorisation that it authorises the person concerned, during the entire period of validity of his permit, to leave and return to French territory. The judge considered that "there are grounds for inviting the applicant to submit such an application as soon as possible, which the administration will examine with all the attention it deserves".

In a case where a minor child was separated from her mother and placed in a waiting zone because she did not have a visa or document allowing her to enter the country, the judge indicated that his order, rejecting the application because of the absence of manifest illegality, "does not, however, prevent the administrative authority from making use, in view of the particular circumstances of the case as revealed during the summary hearing, of its power to regularise the situation, "However, this does not prevent the administrative authority from making use, in view of the particular circumstances of the case as highlighted during the summary hearing, of its power to regularise the residence of foreign nationals under the conditions recalled by the Council of State's opinion of 22 August 1996"¹⁹⁶³.

In an order of 29 September 2004, the judge stated that in the absence of new legal or factual circumstances since the intervention of a deportation order, the person concerned could not usefully challenge its enforcement by way of summary proceedings. The interim relief judge therefore rejects the application lodged on the basis of Article L. 521-2. He nevertheless invited the parties to find a solution that would protect the general interest and the interest of the applicant. In this case, the judge reminded the administration that it always has the possibility to

1960 CE, ord. 15 April 2003, *Le Garff*, n° 256023.

1961 CE, ord. 25 June 2003, *Abamada and Said Abdallah*, n° 257835.

1962 CE, ord. 30 July 2004, *Moussaoui*, n° 270462.

1963 CE, ord. 29 September 2004, *Minister of the Interior, Internal Security and Local Freedoms v. Aubame*, n° 272584.

regularise the situation of an illegal alien. He noted that "it was indicated, during the oral debates in the public session, that the prefectural authority would examine the application for regularisation submitted by [the applicant] as soon as possible and would take into account, in particular, the fact that the interested party is married to a compatriot who holds a residence permit and is professionally active, that a child was born in France from their union on 13 February 2004 and that [the applicant] has never, by his behaviour, disturbed public order. Its indications take on a much more directive tone when the judge - even though he rejected the applicant's request - indicated in the operative part of his decision that the administrative authority would "examine" the applicant's request to regularise his situation "under the conditions recalled in the grounds of this order"¹⁹⁶⁴. The indicative tense here is imperative.

In *Société SIMBB*, the applicants challenged the authorisation given by the prefect to allow administrative agents to enter private property in order to prepare a draft route for the establishment of the right of way provided for in Article L. 160-6 of the Urban Planning Code¹⁹⁶⁵. The judge concluded that there was no manifest illegality and no serious infringement of property rights. Nevertheless, he noted that "as was emphasised during the debates held at the public hearing, no one disputes that there is reason to establish, for the disputed plots, the easement provided for by Article L. 160-6 of the town planning code; that if the characteristics of these plots, walled in before 1^{er} January 1976 and which include, in addition to a dwelling house, an outbuilding located on the immediate edge of the sea, imply a particular layout, it is up to the owners to propose and, in any case, to the administration to determine, in compliance with the procedures defined in the town planning code, the methods of establishing the easement likely to best reconcile the various interests involved; that the preliminary measures which the order of the Prefect of Finistère allows to be carried out are of a nature to clarify the different eventualities which can be envisaged"¹⁹⁶⁶. Here the judge lays the foundations for future dialogue between the various protagonists. Taking into account all the interests involved, he indicates to them the steps to follow to organise the establishment of the easement.

476. It is noteworthy that, in half of the cases in which the applicant obtained satisfaction, the interim relief judge did not have to pronounce the slightest measure to put an end to the litigious situation. A significant number of applications are thus settled in a non-contentious manner, sometimes before the public hearing, sometimes during it. The judge does not have to order the administration to do anything. The dispute is certainly settled thanks to him, thanks to his intervention - virtual or effective - but without pronouncing a binding measure. If the administration does not agree to satisfy the plaintiff, the judge will implement binding measures to stop the infringement of a fundamental freedom.

II. The pronouncement of a binding measure

477. The law gives the judge very broad powers to stop the infringement of a fundamental freedom, ranging from a simple suspension to a principal injunction. The definition of the necessary safeguards is adapted to the particularity of each situation. The judge ensures compliance by explanation and authority.

A. Selecting the appropriate safeguard measure

478. The judge has a wide range of measures at his or her disposal to stop the infringement of a fundamental freedom. The choice of the appropriate safeguard measure is based on two concerns. Firstly, it must be appropriate to the particular situation before the court; secondly, it must be proportionate to the seriousness of the infringement. The measures decided by the court to put an end to an infringement may take the form of a stay of execution, a rejection subject to an injunction, or an injunction on a principal basis.

1. Suspension of enforcement

479. The interim relief judge may first of all put an end to an infringement by pronouncing a suspension measure. By recognising the power to take all necessary measures, the law necessarily intended to allow the interim relief

¹⁹⁶⁴ CE, ord. 29 September 2004, *Préfet de la Marne, Lebon T.* p. 829.

¹⁹⁶⁵ This provision provides for the establishment of an easement for pedestrian passage along the coastline. Under the terms of this article, "Private properties bordering the public maritime domain are encumbered over a three-metre wide strip with an easement intended to ensure the exclusive passage of pedestrians".

¹⁹⁶⁶ CE, ord. 10 January 2005, *Société SIMBB et autres*, No. 276137.

judge to suspend the execution of an administrative decision. The fact that Article L. 521-1 organises a specific suspension procedure was not considered to be an obstacle to the recognition of this power in favour of the judge of summary jurisdiction. In the early days of the reform, some judges of the first instance refused to recognise this power to the judge of summary jurisdiction, considering that the pronouncement of such a measure fell within the exclusive competence of the judge of summary suspension¹⁹⁶⁷. Nevertheless, the Conseil d'Etat has ruled out the application of a parallel summary judgment exception in this matter¹⁹⁶⁸. The power to suspend the execution of a decision does not constitute a monopoly of the interim relief judge. Seized on the basis of Article L. 521-2, "the interim relief judge may order the suspension of the act referred to him when he considers that the conditions laid down by these provisions are met and that the suspension is necessary to safeguard a fundamental freedom"¹⁹⁶⁹. Obviously, the pronouncement of a suspension measure is only conceivable against an administrative decision. It would make no sense to consider implementing it against the behaviour and actions of the public authorities, as it is logically impossible to suspend the execution of an action or abstention¹⁹⁷⁰.

480. When the infringement of fundamental freedoms stems from an administrative decision, the pronouncement of a suspension measure, accompanied, if necessary, by an enforcement order, is most often a fully satisfactory response to remedy the contentious situation. A distinction must be made, however, according to whether the infringement is the result of a positive or negative decision.

If the infringement originates in a positive decision, the suspension of its effects is *ipso facto* sufficient to put an end to the infringement. By neutralising the effects of the decision which is at the origin of the infringement, the judge automatically puts an end to the situation of infringement caused by the decision. In the *FN IFOREL* case, the administrative authority had, by letters addressed to the company managing the congress centre, obstructed the execution of the rental contract concluded between the latter and IFOREL. By suspending the effects of these letters, the judge put an end to the impossibility of executing this contract and, consequently, to the infringement of the freedom of assembly¹⁹⁷¹. When the mayor of a municipality decides by municipal decree to close a local shop to the public, the suspension of this decree is a sufficient measure to put an end to the infringement of the freedom of enterprise¹⁹⁷². By suspending the mayor's decision to organise certain public events in the local church, the interim relief judge is opposing an infringement of religious freedom¹⁹⁷³. The infringement of the right to property is prevented by the suspension of the execution of the orders of the prefect of Mayotte concerning the partial repossession of the property of the applicants¹⁹⁷⁴ or of the municipal order authorising access and parking by third parties on a private road¹⁹⁷⁵. Similarly, the suspension of orders requisitioning striking staff is sufficient to put an end to the infringement of the right to strike¹⁹⁷⁶. When the infringement of the secrecy of correspondence originates in a note addressed by the mayor to the mail service, the neutralisation of the effects of this note acts directly on the origin of the infringement¹⁹⁷⁷. The suspension of the decision to deport the applicant to her country of origin or to enforce a deportation order prevents, in the circumstances of the case, the occurrence of an infringement of personal freedom in the first case¹⁹⁷⁸, and of the right to lead a normal family life in the second¹⁹⁷⁹. Thus, the suspension of enforcement is in principle sufficient to put an end to the interference resulting from a positive decision. In some cases, however, it may be necessary to accompany this measure with an injunction to do or not to do. On the one hand, the judge may order the administration to draw the consequences of its decision by taking the measures required for its execution¹⁹⁸⁰. In the above-mentioned *Vast* judgment, the Council of State ordered the mayor to instruct his departments to put an immediate end to the disputed note infringing the secrecy of correspondence and the free exercise of their mandate by local elected representatives. On the other hand, to prevent the administration from taking an identical measure, the interim relief judge may also issue an injunction - primarily - not to do so. In the above-mentioned *FN IFOREL* order, the judge enjoins the administrative authority not to obstruct the execution of the reservation contract concluded between IFOREL and the company Impérial Palace¹⁹⁸¹. If the infringement is caused by a negative decision, the suspension of its

1967 See the typical example cited by E. PRADA-BORDENAVE *in* concl. on CE, Sect. 23 November 2001, *Aberbri*, *RFDA* 2002, p. 335.

1968 See *supra*, § 373.

1969 CE, 4 February 2005, Minister of the Interior, Internal Security and Local Freedoms v. Rezai, No. 270407.

1970 These can only be countered by means of injunctions.

1971 CE, ord. 19 August 2002, Front national et Institut de formation des élus locaux (IFOREL), *Lebon* p. 311.

1972 CE, ord. 14 March 2003, *Commune d'Ervy*, *Lebon* T. p. 931.

1973 CE, ord. 25 August 2005, *Commune de Massat*, *Lebon* p. 386.

1974 CE, 2 February 2004, *Abdallah*, *Lebon* p. 16.

1975 CE, ord. 10 September 2003, *Commune d'Hyères-les-Palmiers*, n° 260015.

1976 CE, 9 December 2003, *Aguillon and others*, *Lebon* p. 497. It is noteworthy that the judge here does not suspend the order challenged by the applicants, but an order issued after it (see *supra*, § 383).

1977 CE, 9 April 2004, *Vast*, *Lebon* p. 173.

1978 CE, ord. 14 January 2005, *Bondo*, *Lebon* T. p. 915.

1979 CE, ord. 21 February 2005, *Najemi*, n° 277520.

1980 It is difficult to distinguish in this case whether the judge is issuing an enforcement order or a principal injunction, the effects of which are similar to an enforcement order.

1981 CE, ord. 19 August 2002, Front national et Institut de formation des élus locaux (IFOREL), *Lebon* p. 311. See in the same sense,

execution is not sufficient, by itself, to remedy the infringement. In order to be effective, it must be accompanied by an enforcement order, which may be issued *ex officio* by the court, i.e. without even having been requested by the applicant¹⁹⁸².

The judge of the summary judgment may opt for a total or partial suspension of the effects of the contested decision. The partial suspension is limited to the provisions of the decision for which the conditions for granting the order set out in Article L. 521-2 are met. Thus, in the *Commune de Wingles* case, the applicant company challenged a municipal order restricting the circulation of vehicles transporting dangerous materials on certain roads in the commune. The judge stated that, taken as a whole, this decision did not seriously and manifestly infringe a fundamental freedom. On the other hand, the application of this decision to rue de Meurchin, in its part located outside the built-up area, does infringe a fundamental freedom. As the conditions for granting the permit were only met with regard to this portion of the municipal roadway, the judge decided that the municipal order "is suspended only insofar as it concerns the part of rue de Meurchin located outside the built-up area of Wingles"¹⁹⁸³.

2. The conditional rejection

481. A particularly innovative and original solution was implemented in the *Tibéri* order of 24 February 2001¹⁹⁸⁴. In this decision, the interim relief judge of the Council of State used "an unusual, if not unprecedented formula"¹⁹⁸⁵, consisting of rejecting the appeal "subject to" the adoption of a certain behaviour by the administration concerned. The administrative judge's capacity to make decisions is fully expressed in this decision, which at the same time demonstrates his ability to imagine and devise a practical and appropriate solution for each problem. The applicant, who had not been invited to a debate organised by the television channel Canal +, criticised what he considered to be the failure of the Conseil supérieur de l'audiovisuel (CSA) to ensure respect for pluralism in this medium. He therefore asked the interim relief judge 'to enjoin the CSA to enjoin Canal + (...) either to extend the planned televised debate to all the leading candidates of the lists represented in all the districts of Paris, or to abandon any debate (...)'

482. The judge began by recalling, at some length, the applicable law and the circumstances that gave rise to the referral. He explained that the Law of 30 September 1986 entrusted the CSA with the task of ensuring compliance with the principles set out in its Articles 1^{er} and 3, which include equal treatment and the expression of pluralism of thought and opinion. No provision of this law gives the CSA the power to substitute itself for audiovisual communication services in the definition and implementation of their editorial policy. The interim relief judge stated "that Canal +'s choice to organise debates between two candidates during the election period rather than other forms of programming is in principle part of its editorial policy; however, it is incumbent on this channel to ensure that this choice does not lead to a breach of the principle of equal treatment between candidates". He then explained the circumstances of the case. Canal + chose to organise a one-hour debate on 28 February 2001 between Mr Delanoë and Mr Séguin, both of whom were candidates for the mayoralty of Paris nominated by the parties representing the two main national political forces. Canal + also made it known, both in various letters prior to and during the interim hearing, that Mr Tibéri and Mr Contassot could speak the following day, at the same time, either in a debate organised according to the same rules as the previous day's debate or, for each of them, in the form of a 15-minute interview with a Canal + journalist.

The interim relief judge applied these legal principles to the circumstances of the case. He noted that, although it did not in itself contravene any rule or principle, the choice made by Canal + to organise - before the first round - a duel between Mr Delanoë and Mr Séguin led in practice to "difficulties" in ensuring compliance with the principle of equal treatment of candidates. It specifies that in this case these difficulties are increased by the fact that Mr Tibéri, although he has not received a nomination similar to those of Mr Delanoë and Mr Séguin, is the outgoing mayor of Paris, a candidate to succeed him. Consequently, he said, "it is essential that the proposed 'duel' between Mr Delanoë and Mr Séguin be accompanied by the most appropriate proposals from Canal + to ensure fair treatment between candidates". The interim relief judge stated that "it is incumbent on the Conseil supérieur

TA Paris, ord. 13 May 2004, Association culturelle des Témoins de Jéhovah de France et autres, AJDA 2004, pp. 1597-1599, note G. GONZALEZ: the interim relief judge suspends the decisions of the mayor of Paris refusing to make the Charléty Stadium available to the Jehovah's Witnesses religious association, and enjoins him not to obstruct the execution of the rental contract concluded between the stadium's operating company and this association.

1982 This is in accordance with the solution reached on the basis of Article L. 521-1. Indeed, the Conseil d'Etat considered that the judge of the summary suspension may, 'on his own initiative', accompany the suspension measure 'with an indication of the provisional obligations that will result for the administration' (CE, 27 July 2001, *Minister of Employment and Solidarity v. Vedel, Lebon* p. 416).

1983 CE, ord. 26 November 2004, *Commune de Wingles*, n° 274226.

1984 CE, ord. 24 February 2001, *Tibéri, Lebon* p. 85, JCP G 2001, I, 318, chron. C. BOTTEAU; D. 2001, pp. 1748-1751, note R. GHEVONTIAN; RFD A 2001, pp. 629-649, note B. MALIGNER; *Com. com. électr.* 2001, comm. n° 51, obs. G. DECOCQ and A. LEPAGE.

1985 J.-L. D'HERVE, "L'urgence devant le juge administratif: premiers jalons", *Les cahiers juridiques* April 2001, p. 24.

de l'audiovisuel to contribute, in accordance with its powers, to ensuring that this is the case; that it will be up to it in particular to determine whether Canal +'s proposal to offer Mr Tibéri the opportunity to speak for 15 minutes with a journalist ensures fair treatment or whether such an interview should not be scheduled for a longer period".

In the end, the judge rejected the appeal with a very important reservation. He stated that while the principle of pluralistic expression of currents of thought and opinion is a fundamental freedom, "the situation submitted in this case to the interim relief judge cannot be regarded as revealing a 'manifestly illegal infringement' of this freedom". Consequently, "*and subject to what has just been said about the role to be played by the Conseil supérieur de l'audiovisuel, Mr Tibéri's application should be dismissed*"¹⁹⁸⁶. Since one of the conditions is lacking, the outgoing mayor's request for an injunction to the CSA is rejected. However, the reservation made in the operative part requires that "the search for appropriate solutions to the requirement of fair treatment of candidates be continued in conjunction with Canal +". According to the authors of the *Great Judgments*, "This amounts to an order to seek such solutions"¹⁹⁸⁷. The injunction is latent; it will only produce its effects if the conditions for triggering it are met, in other words if the CSA does not comply with the reservations expressed in the decision. The reasoning is thus in two stages. In the grounds of the order, the judge indicates to the CSA precisely the behaviour which it must adopt in order to act in accordance with the law and fundamental freedoms¹⁹⁸⁸. In the operative part of the order, the judge makes it clear to the CSA that if it does not comply with these guidelines, the manifestly unlawful infringement may be found and consequently - in the event of a referral - an injunction issued. In so doing, the interim relief judge invites the applicant to appeal again in the event that the CSA does not comply with the conditions to which the rejection of the application was subject. According to Mr d'Hervé, this formula can be seen as "an indication that the judge's door remains open"¹⁹⁸⁹. In the same vein, Mr Ghévontian indicates that "faced with a new application, the administrative judge would no doubt have been more directive..."¹⁹⁹⁰. He did not have to do so, as Canal + finally agreed to double the airtime initially offered to Mr Tibéri.

483. Nevertheless, one must question the reasons for this approach in the circumstances of this case. Why not issue an injunction directly to the CSA instead of adopting a solution which leads to a strictly identical result but by the back door? Why did you simply threaten to issue an injunction if it did not take the necessary measures itself? Why threaten to issue an injunction, and opt for a conditional rejection, claiming that it is possible to issue an injunction?

First of all, this approach could be seen as a desire to preserve the CSA's margin of freedom; the interim relief judge would leave it up to the CSA to resolve the problem itself, but under its supervision and according to its very precise guidelines. This would be tantamount to recognizing a certain margin of initiative to ensure more actively that pluralism is respected. The solution would thus appear to be more respectful of the prerogatives of the institution than if the judge had ordered the CSA to exercise its powers in a specific way. It respects the discretionary power of the independent administrative authority to ensure the respect of pluralism. The interim relief judge gives the CSA the opportunity to fulfil its obligations more effectively. Otherwise, the manifestly unlawful infringement will be qualified, it will no longer be neutralised, and the injunction will be pronounced.

However, this interpretation appears unlikely for three reasons. Firstly, the CSA's behaviour did not appear to be manifestly unlawful insofar as its powers are in fact very limited. It can issue recommendations and sanctions to audiovisual communication services in the event of a breach of their obligations, but it does not have the power to issue *a priori* injunctions to these services. Consequently, it could not be reproached for not using powers that it does not have. Secondly, in principle, it is doubtful whether it is possible for the judge, in the presence of a manifestly unlawful infringement, to "save" the administration's behaviour and refrain from issuing an appropriate safeguard measure. While such a solution is commonly used in the litigation of legality and constitutionality¹⁹⁹¹,

¹⁹⁸⁶ The reservation is included in the operative part of the order, in Article 1^{er}: "Subject to the Conseil supérieur de l'audiovisuel continuing to seek appropriate solutions, in conjunction with Canal +, to the requirement of fair treatment of candidates, Mr Tibéri's application is rejected".

¹⁹⁸⁷ *GAJA* No. 118, § 12. In the same vein, M. Maligner states that "Although it is not, strictly speaking, an injunction, this formula is very similar to one" (B. MALIGNER, *op. cit.*, p. 644).

¹⁹⁸⁸ It is the responsibility of the Commission to ensure that the editorial choice of Canal plus "does not lead to a breach of the principle of equal treatment between candidates" (4^{ème} recital). It is incumbent on it "to contribute, in accordance with its powers, to ensuring that" Canal + accompanies the proposed duel between Mr Delanoë and Mr Seguin "with the most appropriate proposals to ensure fair treatment between the candidates". In particular, it is a matter of "examining whether Canal +'s proposal to offer Mr Tibéri the opportunity to speak for 15 minutes with a journalist ensures fair treatment or whether such an interview should not be perceived as lasting longer" (6^{ème} recital).

¹⁹⁸⁹ J.-L. D'HERVE, *op. cit.* p. 24.

¹⁹⁹⁰ R. GHEVONTIAN, *op. cit.* p. 1751.

¹⁹⁹¹ The judge adds to the act under review what is necessary or subtracts from it what it lacks in order to comply with the higher standard and thus avoid judicial censure. The technique used by the Council of State is usually referred to as 'venom removal' (for an illustration, see CE, Ass., 4 January 1957, *Syndicat autonome du personnel enseignant des Facultés de Droit, Lebon* p. 9). As regards the constitutional technique of compliance subject to reservation, see T. DI MANNO, *Le juge constitutionnel et la technique des décisions "interprétatives" en France et en Italie*, *Economica* PUAM, 1997, 617 p.; A. VIALA, *Les réserves d'interprétation dans la jurisprudence du Conseil constitutionnel*, LGDJ, BCSP t. 92, 1999, 318 p. However, the solution of the *Tibéri* ordinance differs significantly from these techniques in that its implementation requires the administration to adopt a certain behaviour. In the case of conditional compliance or withdrawal of the venom, the act is 'reformed' by the judge without the legislator and the administration having to intervene in any way. The technique is effective with or without the assistance of the authority concerned. In the *Tibéri* hypothesis, on the other hand, the technique only becomes effective if the administration agrees to modify its behaviour.

In reality, it is closer to the solution implemented in the litigation of excess of power with the *Titran* judgment of 27 July 2001

its transposition to the field of serious infringements of freedoms seems relatively unlikely. If the judge can neutralise an illegality or unconstitutionality, it is difficult to imagine that he will do the same in the case of a serious infringement of freedoms resulting from administrative behaviour. Lastly, the interim relief judge could not in any event order the measure requested by the applicant. Indeed, since the administrative court cannot order an administrative authority to behave illegally¹⁹⁹², it was not possible for it to order the CSA in this case to take a measure that this authority does not have the legal power to take.

In reality, the solution given must be seen as a practical response of the judge to a concrete problem in view of the powers at his disposal. The judge of the *référé-liberté* uses his prerogatives in a realistic way. The conditions for granting Article L. 521-2 were not met; the CSA's abstention was not manifestly illegal; the judge could not pronounce a safeguard measure. If he pronounced an indirect injunction, it was only because he could not do more, as Ms Decocq and Ms Lepage pointed out. "The CSA's role here is not to impose but to encourage"¹⁹⁹³. When the conditions for issuing an injunction are met, the judge issues the injunction without seeking to "save" the impugned behaviour.

3. The principal injunction

484. The measure necessary to safeguard a fundamental freedom may take the form of a principal injunction. This "profoundly new power"¹⁹⁹⁴ is exercised in various ways.

a. A profoundly new power

485. The injunction is "an order to adopt a certain behaviour"¹⁹⁹⁵. It is a power to order, and in this respect it differs from substitution, which is a power to reform. While these two powers may in practice lead to a broadly equivalent result for the applicant¹⁹⁹⁶, they are nevertheless very different in nature. As M. Négrin stated with regard to the law of 8 February 1995, the power of injunction "confers on the judge a lesser imperium than the power of substitution": the former "is only a power to prevent accompanied by the order given to the administrative authority to rule in a certain way, whereas the power of substitution grants the judge the competence to rule in place of the latter"¹⁹⁹⁷. In the scale of the judge's prerogatives, the power of injunction is one notch below the power of substitution. As M. Moderne points out, "ordering the holder of an administrative power to act is not the same as acting in its place: in the first case, the power of decision is kept in the hands of the administration, in the second it is attributed to the judge"¹⁹⁹⁸. Substitution will always lead to the desired result¹⁹⁹⁹. With an injunction, on the other hand, the judge leaves it entirely to the public authority²⁰⁰⁰.

(*AJDA* 2001, pp. 1046-1053, chron. M. GUYOMAR and P. COLLIN). The Conseil d'Etat ruled on an appeal for excess of power against the refusal of the Minister of Justice to repeal the decrees setting up an automated management system for certain procedures in the high courts. Having accepted the illegality of the refusal, the Council annulled it on condition that the Minister had not given a legal basis to the management system in question within the two-month period allowed, the judgment specifying the measures likely to remedy the irregularity found. The administrative authority is thus given time to carry out the necessary regularisation. If it fails to adopt the measures indicated by the judge, he will have to proceed without delay to the abrogation of the orders. An identical solution to the *Titan* judgment was mentioned by the Government Commissioner Francis Lamy in his conclusions on the *Vassilikiotis* judgment of 29 June 2001 (see above, p. 1047). The contested regulatory text was illegal by omission, not containing certain provisions required by Community law. The Government Commissioner had envisaged the possibility of a conditional annulment. This would have consisted in declaring the contested order illegal, while specifying in the operative part that such an annulment would only take effect if the administration did not make the necessary additions to the contested act, within a time limit set by the judge and in accordance with the procedures laid down in the grounds for the decision, to bring it into line with the requirements of Community law. While stressing the merits of such a solution, Mr Lamy nevertheless rejected it, considering it ill-suited to the dispute before the Council of State. On this decision, see the observations of S. DAMAREY, "De l'annulation partielle à l'annulation conditionnelle : nouvelles perspectives contentieuses", *LPA* 24 October 2001, No. 212, pp. 12-17.

1992 The Council of State has affirmed, on the basis of Article L. 521-1, that the judge of summary proceedings cannot order a mayor to demolish a building when the legal conditions for such destruction are not fulfilled (CE, 26 September 2001, *Westerloppe*, n° 231681). The judge of summary proceedings, whether he intervenes on the basis of article L. 521-1 or article L. 521-2, cannot order the administration to adopt an illegal behaviour.

1993 G. DECOCQ and A. LEPAGE, *op. cit.* p. 32.

1994 D. LABETOUILLE, "Le projet de réforme des procédures d'urgence devant le juge administratif", *AJDA* 1999, special issue *Puissance publique ou impuissance publique?*

1995 C. GUETTIER, "Injonction et astreinte", *Jcl. administratif*, fasc. 1114 (2, 1998), n° 8.

1996 See F. MELLERAY, *Essai sur la structure du contentieux administratif français*, LGDJ, coll. BDP, t. 212, 2001, p. 84 et seq.

1997 J.-P. NEGRIN, Preface to the thesis by B. BALDOUS, *Les pouvoirs du juge de pleine juridiction*, PUAM, 2001, p. 10.

1998 F. MODERNE, "Etrangère au pouvoir du juge, l'injonction, pourquoi le serait-elle?", *RFD* 1990, p. 800.

1999 The administration is deprived of any option between enforcement and non-enforcement and is confined to a purely passive attitude. It is not required to do anything, except possibly not to oppose alternative measures.

2000 It alone can act to the exclusion of any other authority and in particular the judge himself. As Ms Brahic-Lambrey points out, by issuing an injunction the court must accept the risk of non-enforcement of its decision. "The injunction necessarily presupposes that the holder of the injunction accepts its possible non-enforcement. By issuing an injunction, the holder is aware that he is relying on the addressee, and therefore that he may come up against his resistance" (C. BRAHIC-LAMBREY, *L'injonction, étude de la dynamique d'un processus*, PUAM, 2003, p.

486. For a long time, the administrative judge was prohibited from issuing any form of injunction against the administration²⁰⁰¹. This prohibition, which goes back a long way²⁰⁰², concerned both principal injunctions and enforcement injunctions²⁰⁰³. It applied to all proceedings, both on the merits and in summary proceedings²⁰⁰⁴. However, this position did not result from any legal norm²⁰⁰⁵. In the absence of a standard that could support the principle, the judge was in fact reducing his powers on his own. The rule prohibiting injunctions was justified solely by the fear of offending the administration and ultimately encountering resistance from it. For the judge, it had become 'a kind of "taboo"', 'apparently deriving its legitimacy from its ritual repetition'²⁰⁰⁶. Despite the - almost unanimous - criticism of this case law²⁰⁰⁷ even within the ranks of the administrative jurisdiction²⁰⁰⁸, it was not changed. It was not until the legislator intervened twice in the 1990s that this *principle* was tempered.

487. The administrative judge was first granted a power of injunction on a principal basis, with a limited scope of application, by the Act of 4 January 1992 establishing the référé-précontractuel. When a public authority fails to comply with its obligations to advertise and invite competition prior to the conclusion of a contract, the judge may "order the person responsible for the failure to comply with its obligations"²⁰⁰⁹. The recognition of this power was an important innovation compared to the traditional principle of prohibition of injunctions. As Mr Marcou states, "This first step undoubtedly facilitated the next one, taken by the law of 8 February 1995, which allows the judge to order the administration to enforce its decisions"²⁰¹⁰. On the basis of the

379).

2001 On the other hand, it recognised that it was competent to issue *procedural injunctions* against public persons, within the framework of its powers to direct the investigation (CE, Sect., 1^{er} May 1936, *Coeuspel du Mesnil*, *Lebon* p. 485).

2002 According to M. Chevallier (J. CHEVALLIER, "L'interdiction pour le juge administratif de faire acte d'administrateur", *AJDA* 1972, I, p. 70), it goes back to the Conseil d'Etat decision of 16 January 1874, *Frères des écoles chrétiennes* (*Lebon* p. 43). The appearance of this principle is a consequence of the law of 24 May 1872 making the transition from retained justice to delegated justice. Before this law, the administrative judge did not hesitate, in his opinions, to formulate injunctions to the administration. Considering itself to be part of the administrative hierarchy, covered by the authority of the Head of State, the Council of State could force the administrative authorities to obey. After the transition to delegated justice, the Council no longer considers itself entitled to issue injunctions to the administration, as it considers them contrary to its jurisdictional status. This principle has been firmly established by case law. The Council of State states: "it does not enter into the powers of the administrative judge to address injunctions to an administrative authority" (CE, 4 February 1976, *Elisonde*, *Lebon* T. p. 1069), "it is not up to the administrative judge to address injunctions to the administration" (CE, 15 February 1978, *Plantureux*, *Lebon* p. 73), "the administrative judge does not have the capacity to address injunctions to the administration" (CE, Sect., 25 November 1953, *Lebon* p. 515).

2003 A principal injunction (also called a substantive injunction or an initial injunction) is the one whose pronouncement is the very object of the referral to the judge. The enforcement order is the accessory of a main sentence; it consists in prescribing to the administration the measures that the enforcement of the judicial decision implies. Both forms of injunction were prohibited. The Conseil d'Etat declared inadmissible the conclusions attempting to obtain an injunction on a principal basis: ordering the admission of the applicant to an educational establishment (CE, 25 November 1953, *Collado*, p. 515) or his reinstatement in official housing (CE, 22 November 1968, *Ville de Toulouse*, *Lebon* p. 587), ordering a minister to re-examine a decision (CE, Sect, 22 April 1955, *Commune de Saint-Martin-en-Vercors*, *Lebon* p. 203) or to modify a regulation (CE, 23 April 1980, *Camlong*, *Lebon* p. 194), or to prescribe that the administration submit the applicant to a medical examination (CE, 9 July 1958, *Dhamelincourt*, *Lebon* p. 424). The administrative judge also declared inadmissible the conclusions tending to pronounce an injunction of execution (see for example CE, Sect., 25 November 1953, *Collado*, *Lebon* p. 515).

2004 The Conseil d'Etat declared "that it is not up to the administrative court, nor, consequently, to the judge of the administrative summary procedure, to issue such injunctions" (CE, 27 February 1974, *Verguin*, *Lebon* p. 154; CE, 10 October 1979, *Kalowski*, n° 12952).

2005 The arguments put forward in support of this case law appeared to be very fragile. Marcel Waline stated that "there is no principle that can be validly opposed to the recognition of this power of the judge" (M. WALINE, note under CE, Sect. 23 January 1970, *Minister of State for Social Affairs v Amoros*, RDP 1970, p. 1040). The prohibition could not first of all be based on the principle of separation between the active administration and the administrative jurisdiction. Indeed, the act of injunction is not an act of administration. The judge does not take the place of the administration and does not address the citizens directly. Since the judge does not act as an administrator, he does not disregard the principle of separation. The practical arguments, based on the respect of the prerogatives of the administration, were for their part struck by a certain anachronism. Faced with the growing affirmation of the requirements of the rule of law, it was becoming increasingly difficult "to justify doctrinally the refusal of an injunction" (M. Roux, concl. on CE, Sect., 17 October 1986, *Vinçot*, *Lebon* p. 237). For a critical account of the theoretical and practical arguments put forward in support of this case law, see F. MODERNE, *op. cit.* special pp. 803-804.

2006 F. MODERNE, *op. cit.* p. 809.

2007 See in particular J. RIVERO, "Le Huron au Palais-Royal, ou réflexions naïves sur le recours pour excès de pouvoir", *D.* 1962, chron. pp. 37-40, esp. pp.38-39; *ID.*, "Le système français de protection des citoyens contre l'arbitraire administratif à l'épreuve des faits", in *Mélanges en l'honneur de Jean Dabin*, Sirey, 1963, t. II, pp. 813-836, esp. pp. 827 et seq. MESTRE, *Le Conseil d'Etat protecteur des prérogatives de l'administration*, LGDJ, coll. BDP, t. 116, 1974, pp. 62-71; H. OBERDORFF, *L'exécution par l'administration des décisions du juge administratif*, thèse Paris II, 1981, pp. 188-216; Y. GAUDEMET, "Réflexions sur l'injonction dans le contentieux administratif", *Le pouvoir. Mélanges offerts Georges Burdeau*, LGDJ, 1977, pp. 805-824; J. CHEVALLIER, "L'interdiction pour le juge administratif de faire acte d'administrateur", *AJDA* 1972, I, pp. 67-89; J.-M. PONTIER, "Contrôle juridictionnel et nouvelles protections en France", *AEAP* 1983/VI, pp. 43-60, esp. p. 51; G. DUPAIGNE, "La balance sans le glaive", *GP* 1987, 1, pp. 468-469; F. MODERNE, article prec.

2008 See in particular S. HUBAC and Y. ROBINEAU, "Droit administratif : vue de l'intérieur", *Pouvoirs* n° 46, 1988, pp. 113-126, spe. p. 124 et seq.; J.-M. WOEHRLING, "Réflexions sur une crise : la juridiction administrative à la croisée des chemins", in *Service public et libertés. Mélanges offerts au professeur Robert-Edouard Charlier*, éditions de l'Université et de l'Enseignement Moderne, 1981, pp. 341-368, spe. pp. 345-346.

2009 For example, restarting the entire award procedure (CE, Ass., 10 June 1994, *Commune de Cabourg*, *Lebon* p. 301, concl. S. LASVIGNES), proceeding with a new call for tenders (CE, 6 November 1998, *Assistance publique Hôpitaux de Marseille*, *Lebon* T. p. 1098) or withdrawing from the rules of the consultation an illegal criterion (CE, 25 July 2001, *Commune de Gravelines*, *Lebon* p. 391)

2010 G. MARCOU, "Le droit administratif français entre l'ordre juridique national et l'ordre juridique communautaire", in *Les mutations du droit de l'administration en Europe. Pluralisme et convergences* (G. MARCOU dir.), L'Harmattan, coll. Logiques juridiques, 1995, p. 84. Among the many commentaries on this law, see R. DEBBASCH, "Le juge administratif et l'injonction : la fin d'un tabou", *JCP G* 1996, I, 3924; B. PACTEAU, "Le contentieux administratif: une révolution de velours", *Gazette des communes* 10 April 1995, pp. 74-79; D. CHABANOL, "Un printemps procédural pour la juridiction administrative?", *AJDA* 1995, pp. 388 et seq.; P. VALADOU, "Le pouvoir de commandement du juge à l'administration", *LP* 29 May 1995, No. 64, pp. 4-10; F. MODERNE, "Sur le nouveau pouvoir d'injonction du juge administratif" (On the administrative judge's new power to issue injunctions), *RFDA* 1996, pp. 43-57; PICARD, "La loi du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénal et administrative : aspects administratifs", *JCP G* 1995, I, 3840; O. SACHS, "La réforme du

provisions of this law, and on condition that conclusions to this effect are submitted to him, the administrative judge may now prescribe the enforcement measures that his decision implies. The judge of the injunction is then the judge of the execution: he prescribes to the administration the consequences that its decision necessarily implies and which can consist either in taking a decision in a determined direction, or in taking a new decision after instruction. These two legislative innovations are very important. Nevertheless, the principle of the prohibition of injunctions remains. The laws of 4 January 1992 and 8 February 1995 have undermined the principle of the prohibition of injunctions to adjudicate, but they have not caused it to waver. They made exceptions to it but the principle was not overturned. In particular, the judge cannot issue injunctions as a principal outside contractual disputes²⁰¹¹, and the provisions of the Act of 8 February 1995 do not allow him to issue injunctions as a principal²⁰¹². In this context, the recognition of the power to issue injunctions on a principal basis in favour of the judge of *référé-liberté* was a remarkable innovation.

488. The granting of this power was justified by the need to be able to react effectively to an infringement arising from administrative behaviour and not from an administrative decision. In such a case, the power of suspension is inadequate and the injunction is the only measure that can effectively combat the infringement of fundamental freedoms. It is the only way to remedy an infringement resulting from administrative behaviour. Even a power of substitution is not always suitable for this type of situation insofar as it can only be usefully implemented in the presence of a decision; it is ineffective when a request is made not to modify an act but to remedy a situation or to carry out a material operation. The power of injunction is more flexible and can be adapted to all situations. It is from the exercise of this power that the civil judge of summary proceedings drew his remarkable effectiveness in the presence of behaviour constituting an assault²⁰¹³. Moreover, the recognition of such a power is easy to understand in view of the situation of *necessity* to which the interim relief judge must respond²⁰¹⁴.

Compared to the previous state of the law, this power constitutes "an absolute innovation"²⁰¹⁵. It was presented, during the preparatory work, as "an unprecedented power of injunction"²⁰¹⁶. Ms Burgorgue-Larsen notes that "for the first time in the history of administrative litigation, the judge is vested with a power of injunction with regard to the administration before the dispute has been decided on the merits and without an appeal having been lodged against an administrative act"²⁰¹⁷. Insofar as it is exercised initially, its power goes beyond the narrow framework of the Act of 8 February 1995, which limits the exercise of the power of injunction to the sole purpose of guaranteeing the execution of a judicial decision. It goes beyond the clarification of obligations resulting from *res judicata*. In that it is exercised primarily, its power of injunction is closer to that enjoyed by the interim relief judge in the context of the pre-contractual interim relief procedure. On this point, M. Garrec observed that the powers attributed to the judge of the *référé-liberté* "can be compared to those of the judge of the *référé pré-contractuel*, in the particular field of public contracts. The aim is to put an end to an illegal situation by ordering the administration to act in a certain way"²⁰¹⁸. Although the referent is not the same in the two procedures - serious and manifestly illegal infringement of a fundamental freedom in one case, failure to comply with the obligations to advertise and invite competition in the other - the power of injunction attributed to the judge is considerable and is exercised primarily in each of the two procedures. The power of the judge in the summary proceedings is nevertheless defined in a broader way since he can order all necessary measures. Thus, in comparison with the solutions that prevailed until then, the injunction prerogatives of the administrative judge are exponentially expanded. When the interim relief judge issues an injunction under Article L. 521-2, he is, according to Mr

contentieux administratif issu de la loi du 8 février 1995", *CJEG* 1995, pp. 175 et seq.; P. FRAISSEX, "La réforme de la juridiction administrative par la loi n° 92-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative", *RDP* 1995, p. 1053 et seq.

2011 Subject to certain very specific possibilities, and of limited scope, such as the obligation to communicate an administrative document in the context of the summary procedure, which does not allow the execution of an administrative decision to be obstructed.

2012 See for example CE, 7 April 1995, *Surry, Lebon* p. 158; CE, 28 February 1996, *Fauqueux, Lebon* p. 52; CE, 16 November 1998, *Ferty, Lebon* p. 417.

2013 See J.-M. LE BERRE, "Les pouvoirs d'injonction et d'astreinte du juge judiciaire à l'égard de l'administration", *AJDA* 1979, pp. 14-18. According to established case law, the civil judge may order public persons to do or not to do anything in order to prevent the commission of an assault or to put an end to it. First of all, it can issue positive injunctions: evacuation of the premises (TC, 2 February 1950, *Gaufréteau c/ Manufacture d'armes de Chatellerault, Lebon* p. 651), connection to a sewage network blocked at the request of the mayor (Civ. 1^{ère}, 5 May 1988, *Droit et patrimoine hebdo*, n° 251, 16 June 1998, p. 2 et seq.), restitution of a passport (TC, 19 November 2001, *Miss Mobamed v. Minister of the Interior, Lebon* p. 755). The court may also issue negative injunctions, for example to interrupt the work undertaken (TC, 10 February 1949, *Roubaud c/ Syndicat du lotissement Sainte-Anne, Lebon* p. 591) or to stop the interference with radio broadcasts (Civ. 1^{ère}, 3 May 1983, *Syndicat interprofessionnel des radios et télévisions indépendantes et autres c/ Télédiffusion de France, Bull. civ. I*, n° 138).

2014 As Ms Brahic-Lambrey has pointed out, the situation that conditions the implementation of the injunction process is "a situation of necessity" (C. BRAHIC-LAMBREY, *op. cit.*, p. 136). The main elements identified as characterising a situation of necessity - urgency, harm to a protected interest and seriousness (see the numerous examples, cited by the author on pp. 137-147, of injunction powers whose implementation is conditional on the presence of one or more of these criteria) - are all to be found, cumulatively, in Article L. 521-2 of the Code of Administrative Justice. The conditions for granting a summary judgment are unquestionably characterised by a situation of necessity.

2015 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1591.

2016 R. GARREC, Senate Report No. 380, p. 41.

2017 L. BURGORGUE-LARSEN, *Libertés fondamentales*, Montchrestien, coll. Pages d'amphi, 2003, p. 20. However, a reservation may be expressed as to the fact that the summary judgment judge does not rule on the merits of the law (see *supra*, §§ 278-279).

2018 R. GARREC, Senate Report No. 380, p. 55.

Chauvaux, "going to the extreme limit of the powers of the administrative judge"²⁰¹⁹.

The recognition of such an extensive power of injunction has raised questions, and even concerns, about respect for the principle of separation between the administrative court and the active administration. For Mr Garrec, this power "changes the nature of the relationship between the administrative judge and the public authority"²⁰²⁰. In the same vein, Mr Fromont observed that the granting of such a power of injunction "brings about a great upheaval in the relationship between the administrative judge and the administration"²⁰²¹. So much so that one may "wonder whether the principle of the separation of powers (according to French law) is not more or less offended", said Professor Chapus, while recognising nevertheless "that both the urgency of intervening to safeguard a fundamental freedom and the provisional nature of the measures ordered may justify the setting aside of the best principles"²⁰²².

b. The exercise of the power of injunction

489. The judge of the *référé-liberté* is likely to pronounce different types of injunctions against the administration on a principal basis. This diversity of injunctions allows the judge to adapt the content of the measure to the variety of situations submitted to him. He is thus able to oppose, by means of targeted injunctions, the occurrence or continuation of a serious and manifestly illegal infringement of a fundamental freedom.

490. The judge may first of all order the administrative authority to refrain from doing something. He can thus order the prefectural authority to temporarily postpone the execution of a removal measure²⁰²³, a mayor not to obstruct the execution of a contract for the rental of a municipal hall²⁰²⁴ or a stadium²⁰²⁵, a public establishment for inter-communal cooperation to cease intervening in the competences of its member municipalities²⁰²⁶. It enjoined "the various administrative authorities dealing with the disciplinary proceedings against Mr Gollnisch to refrain from taking public positions on both the disciplinary proceedings and the criminal proceedings following the remarks made by Mr Gollnisch on 11 October 2004, under conditions that would be contrary to the principle of the presumption of innocence"²⁰²⁷. The interim relief judge of the Council of State enjoined the Minister of Justice not to implement a decree granting the applicant's extradition to the Albanian authorities and, in particular, not to notify the decree to these authorities²⁰²⁸. Similarly, it prohibited a community of agglomerations from cutting down trees or having them cut down until the authorisation required by Article L. 130-1 of the Urban Planning Code to carry out such operations had been issued²⁰²⁹.

491. Most often, the injunction takes the form of an obligation to do. It may involve, in the first instance, taking a specific decision under conditions similar to Article L. 911-1 of the Code of Administrative Justice, i.e. when the administration is in a situation of bound jurisdiction, with no freedom of choice as to the content of the decision. For example, a summary proceedings judge ordered the regional council of the veterinary order to 'send by registered mail with acknowledgement of receipt a denial to all the addressees mentioned in its letter of 27 November 2002 written in the name of the [applicant] stating that the notice of suspension contained in this letter, which stems from an error, is null and void (...)'²⁰³⁰.

The injunction to do may consist, secondly, in taking a decision after a new investigation, under conditions similar to Article L. 911-2, namely by examining or re-examining a request submitted by a citizen. This injunction corresponds to cases in which the administration is obliged to take a decision after investigation or new

2019 D. CHAUVAUX, concl. on CE, 16 February 2001, *Breucq*, *RFDA* 2001, p. 672. This statement must nevertheless be qualified insofar as the ultimate level of the administrative judge's powers is embodied in the substitution and not in the injunction (see *supra*, § 485).

2020 R. GARREC, Senate Report No. 380, p. 55.

2021 M. FROMONT, "Les pouvoirs d'injonction du juge administratif en Allemagne, Italie et France. Convergences", *RFDA* 2002, p. 556.

2022 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1591.

2023 CE, ord. 10 April 2001, *Merzouk*, *Lebon T.* p. 1135. The judge does not issue this injunction, but presents it as a measure that the applicant could formulate "if necessary".

2024 CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL)*, *Lebon* p. 311; TA Rennes, ord. 11 February 2002, *Association locale pour le culte des témoins de Jéhovah de Lorient*, GP 29 April 2003, p. 12.

2025 TA Paris, ord. 13 May 2004, *Association culturelle des Témoins de Jéhovah de France et autres*, *AJDA* 2004, pp. 1597-1599, note G. GONZALEZ.

2026 CE, 12 June 2002, *Commune de Fauillet et autres*, *Lebon* p. 215. More specifically, the community of communes is enjoined to cease taking any measure anticipating the implementation of the decree on extension-transformation into a community of agglomerations, and to cease applying the acts by which it began to exercise the competences resulting from the said decree.

2027 CE, ord. 14 March 2005, *Gollnisch*, *Lebon* p. 103.

2028 CE, ord. 29 July 2003, *Peqini*, *Lebon* p. 345.

2029 CE, ord. 8 November 2005, *Moissinac Massenat*, *Lebon* p. 491. See, in similar circumstances: CE, 14 June 2006, *Association syndicale du canal de la Gervonde*, n° 294060, mentioned in the *Recueil Lebon*. The judge enjoined the Association syndicale du canal de la Gervonde not to proceed with any cutting or felling of trees on the parcels owned by the department of Isère until the possible intervention of a deliberation of the syndicat de la Gervonde taken and made enforceable in accordance with the statutory rules applicable to it.

2030 TA Nancy, ord. 11 February 2002, *Freyheit*, n° 02157, quoted by P. CASSIA, *Les référés administratifs d'urgence*, LGDJ, coll. Systèmes Droit, 2003, p. 137.

investigation. Thus, the interim relief judge ordered the consular authorities 'to proceed *without delay*, as soon as [the applicant] submits a complete file, with the examination of his application in compliance with the provisions of Article 8 of the decree of 26 February 2001'²⁰³¹. It has issued numerous injunctions of this nature to the prefectural authority, for example to decide, within a maximum of 15 days from the notification of the order in light of the factual and legal situation existing on the date of its decision, on the applicant's right to a residence permit²⁰³²; to complete, within 15 days, the examination of the applicant's application for a residence permit and to issue her, as soon as she is notified of the order, with a receipt equivalent to a residence permit²⁰³³; examine, within 8 days of its submission by the applicant, an application for a provisional residence permit in order to allow him/her to submit an asylum application to the director of the French Office for the Protection of Refugees and Stateless Persons, in full knowledge of his/her rights and obligations²⁰³⁴; examine an application for a residence permit bearing the words "private and family life" which the applicant is invited to submit to it²⁰³⁵ or, within a period of 15 days, re-examine the file submitted by the applicant to renew his or her national identity card and passport²⁰³⁶. The interim relief judge of the Council of State ordered the Minister of the Interior to re-examine the applicant's application for admission to residence in light of the reasons for his order within eight days²⁰³⁷. It enjoined the mayor of a municipality, after suspending a regulation requiring prior authorisation for the entry and parking of ships in the port, "to re-examine the situation of SARL Côte Radieuse with regard to the right to embark and disembark passengers in the port of Collioure, within three days of the present order"²⁰³⁸. The interim relief judge ordered the director of a hospital, within eight days, to re-examine the situation of the applicant, who had been placed automatically in his establishment, in order to allow him to exercise his rights to communicate with the administrative and judicial authorities and to send and receive mail²⁰³⁹. It enjoined the President of French Polynesia to decide "without delay" on the action to be taken on the applicant's resignation, in view of the reasons set out in the order²⁰⁴⁰.

Thirdly and lastly, the injunction to do so may consist in carrying out a specific action. Thus, the interim relief judge ordered the prefectural authority to return to the members of a family of French nationality their illegally withdrawn identity documents²⁰⁴¹; to return, within 8 days, a valid residence permit²⁰⁴²; to issue within 8 days a receipt valid as a provisional residence permit to the applicant²⁰⁴³; to register the applicant's application for territorial asylum "as soon as the applicant, who must be informed by the prefect within 48 hours of notification of this decision, presents himself at the prefecture"²⁰⁴⁴; to "take all necessary measures" to ensure the execution of a court order prescribing the eviction of untitled occupants²⁰⁴⁵; to deliver to the applicant, within 8 days, the national identity card that he or she has requested²⁰⁴⁶; to admit the applicants as asylum seekers within 8 days²⁰⁴⁷. The interim relief judge ordered the mayor to put back in place the chain preventing access to the service road of a port²⁰⁴⁸; to give his services all instructions to "immediately" put an end to the application of a note issued by him²⁰⁴⁹; to remove the bollards installed in front of the premises of a private company and to proceed with the work necessary to connect its premises to the public road²⁰⁵⁰; to put at the disposal of an association the municipal hall for which it was requesting the rental²⁰⁵¹. He "enjoined a hospital to "carry out, in the department where [the applicant] is or in another appropriate hospital department, all investigations and care medically compatible with the general condition of the interested party, to specifically treat her recent neurological condition,

2031 CE, ord. 4 December 2002, *Du Couëdic de Kéranant*, *Lebon T.* p. 875.

2032 CE, 11 June 2002, *Aït Oubba*, *Lebon T.* p. 869.

2033 TA Montpellier, ord. 19 October 2001, Miss Béchar, confirmed on appeal by CE, ord. 12 November 2001, *Ministre de l'Intérieur c/ Béchar*, *Lebon T.* p. 1132. The same injunction was issued by the Conseil d'Etat in a strictly identical case: CE, 7 May 2003, *Boumaïza*, n° 250002.

2034 CE, ord. 21 December 2004, *Luzolo Kondé*, n° 275361.

2035 CE, ord. 21 February 2005, *Najemi*, n° 277520.

2036 CE, ord. 26 April 2005, Minister of the Interior, Internal Security and Local Freedoms v. M'LAMALI, *Lebon T.* p. 1034.

2037 CE, ord. 17 March 2006, *Saidov*, No. 291214.

2038 CE, ord. 2 July 2003, *Commune de Collioure*, *Lebon T.* p. 930. In so doing, the judge implicitly but necessarily obliges the mayor to modify or repeal the bylaw whose illegality has been found. This regulation was the legal basis for the refusal to grant the applicant. If the by-law is maintained as it stands and the mayor gives satisfaction to the applicant, the individual decision will be taken in violation of its provisions. If the mayor refuses the applicant again, based on the provisions of the by-law, the scope of the interim order will be disregarded. Therefore, the mayor is obliged to amend the bylaw by removing the illegality found by the judge or to repeal it altogether before reconsidering the applicant's situation.

2039 CE, 15 May 2002, *Bandoïn*, n° 239487.

2040 CE, ord. 11 April 2006, *Tefaarere*, *Lebon* p. 197.

2041 TA Marseille, order 9 March 2001, confirmed on appeal by CE, order 2 April 2001, *Ministre de l'Intérieur c/ Consorts Marcel*, *Lebon* p. 167.

2042 CE, ord. 8 November 2001, *Kaigisisz*, *Lebon* p. 545.

2043 TA Grenoble, 19 October 2001, *Farboud*, confirmed on appeal by CE, ord. 12 November 2001, *Ministre de l'Intérieur c/ Farboud*, *Lebon T.* p. 1126.

2044 CE, 15 February 2002, *Hadda*, *Lebon* p. 45.

2045 CE, 29 March 2002, *SCI Stéphaneur et autres*, *Lebon* p. 117 (15-day time limit to comply, concerning a building for residential use); CE, ord. 21 November 2002, *Gaz de France*, *Lebon* p. 408 (two-month time limit to comply); CE, ord. 27 November 2002, *SCI Résidence du théâtre*, *Lebon T.* p. 874 (three-month time limit to comply)

2046 CE, ord. 11 March 2003, *Samagassi*, *Lebon* p. 119.

2047 CE, 14 May 2004, *Gaitukaer*, n° 267360.

2048 TA Nice, ord. 14 August 2003, confirmed on appeal by CE, ord. 10 September 2003, *Commune d'Hyères-les-Palmiers*, n° 260015.

2049 CE, 9 April 2004, *Vast*, *Lebon* p. 173.

2050 TA Nice, ord. 18 May 2001, confirmed on appeal by CE, ord. 31 May 2001, *Commune d'Hyères-les-Palmiers*, *Lebon* p. 253.

2051 TA Rennes, order 21 February 2002, Association locale pour le culte des témoins de Jéhovah de Lorient, GP 29 April 2003, p. 12.

involving loss of sight and hearing, and to consider transferring her to a palliative care unit only if the irreversibility of this condition is considered to be established"²⁰⁵². The interim relief judge ordered the director of a detention centre to provide the applicant with a copy of the entries in the register showing the arrival and departure of mail concerning him²⁰⁵³, the director of a hospital to ensure that the minimum service was provided by priority to emergency doctors who were not on strike and to draw up a duty roster without delay listing all the practitioners at the hospital who were professionally qualified to work for the SAMU²⁰⁵⁴. It also enjoined the director of a school, within 15 days of notification of the order, to refer the dispute between the school administration and the applicant to the school's disciplinary board²⁰⁵⁵.

492. Several criteria are taken into account by the interim relief judge in determining the purpose, content and scope of an injunction.

First of all, the injunction must be *possible*, which presupposes that its enforcement is feasible. The holder of the power to issue an injunction, "guided by the imperative of utility, only issues injunctions that are possible in the circumstances of the case. The feasibility of the measure is indeed a condition of its usefulness"²⁰⁵⁶. The injunction may not go beyond technical impossibilities, nor may it encounter major material difficulties in its implementation. The interim relief judge of the Council of State respects this rule by ensuring that he only ever orders injunctions whose execution appears objectively feasible. On the other hand, some judges of the first instance sometimes venture to issue unrealistic injunctions to the public authorities, consisting for example of preventing the holding of a rave party bringing together several tens of thousands of participants²⁰⁵⁷ or of putting an end to the blocking of a university by "striking" students²⁰⁵⁸. These injunctions were impossible to execute and were not executed by the administration. The police authority was condemned to unrealistic obligations to do so, which undermines the credibility of the injunction procedure and weakens the authority of the interim relief judge²⁰⁵⁹.

The injunction must also be *adapted* to the situation which justified its issue, i.e. be adequate in nature and proportionate in scope. The injunction is like a mirror seeking to return precisely to the situation of serious and manifestly unlawful interference with a fundamental freedom. Generally speaking, "the injunction is a reflection of

2052 TA Marseille, order of 22 January 2004, *Ms X*, No. 04427/0.

2053 TA Nantes, order 7 March 2002, confirmed on appeal by CE, order 22 March 2002, *Minister of Justice v Caze, Lebon T*, p. 852.

2054 TA Orléans, ord. 11 December 2001, *Bennis*, *AJFP* 2002, p. 39.

2055 TA Cergy-Pontoise, order 21 October 2004, *M. Singh*, *Procédures* 2005, n° 79, p. 28, note X.

2056 C. BRAHIC-LAMBREY, *op. cit.* p. 368.

2057 TA Châlons-en-Champagne, ord. 29 April 2005, *Conservatoire du patrimoine naturel et autres*, *AJDA* 2005, pp. 1357-1360, note H. GROUD and S. PUGEAULT; *JCP A* 2005, 1216, note P. BILLET. The "Teknival" is a large-scale musical event organised once a year, bringing together several thousand people over a weekend. On the second day of the event, and with 40,000 people expected for the weekend, the interim relief judge ordered the prefect of the Marne "to take all necessary measures to immediately prohibit the continuation of the "Teknival" event". With this injunction, the judge asked the police authority to dislodge several thousand people from the Teknival site and at the same time to prevent several thousand other people from gaining access to it. The injunction was objectively unfeasible, given the conditions under which the police would have to intervene, the number of participants and, above all, the fact that the demonstration had already begun.

2058 In an order of 13 April 2006 (TA Toulouse, ord. 13 April 2006, *Wenger et al.*, *AJDA* 2006, p. 844, obs. E. ROYER, pp. 1281-1286, note X. BIOY), the judge of the référé-liberté affirmed that, faced with the occupation of the premises of the University of Toulouse-le Mirail, "the president of this university, even though he has implemented the means to continue teaching intended for particular categories of students and to develop for the others alternative ways of acquiring knowledge, has not used all the powers he has under article L. 712-2 of the Education Code; that it thus illegally disregarded the scope of its powers; that it is not established that the safeguarding of public order and the respect of the rights of others would have justified its refraining from exercising all of the said powers. Consequently, the judge enjoined the President of the University "to take all useful measures, particularly for the continuation of all teaching in conditions conducive to effective preparation for the examinations".

2059 These decisions also raise difficulties with regard to the assessment of the requirement of manifest illegality and the overall assessment of urgency. In both cases, the police authority's refusal to act did not appear to be disproportionate to the objective of safeguarding public order. It is difficult to regard these refusals as illegal, let alone manifestly illegal. The refusal or abstention of the police authority to send the forces of law and order is only unlawful if there is no disturbance of the public order. In these two cases, it is certain that the use of force would trigger major disturbances, which are not comparable to the disturbance resulting from the organisation of a rave party or the occupation of university premises. As President Bonichot pointed out, "Maintaining that the State is obliged to intervene in all cases to immediately re-establish public order means nothing and is a mere incantation. It will never be possible to establish as a legal principle the obligation for the State to evacuate a factory or the public highway or to crush a demonstration at any cost" (J.-C. BONICHOT, "Devoir d'agir ou droit de ne pas agir : l'Etat entre les exigences de l'ordre public et celles du droit européen", *AJDA* 1999, special issue Puissance publique ou impuissance publique, p. 86). Similarly, the urgency to enjoin does not seem to have been confronted, in these decisions, with the urgency not to enjoin. As M. Royer points out in the aforementioned order of the interim relief judge of the administrative court of Toulouse, "One may wonder whether the judge took full account of the difficulties encountered by university presidents in such circumstances in view of the weakness of their means" (*op. cit.*, p. 844). Other interim relief judges have shown greater discernment in assessing the risk of disturbance. Thus, in a case identical to the previous one, the interim relief judge of the administrative court of Melun declared that "even supposing that the applicant justified the existence of an emergency situation, since he was prevented from accessing the university library to prepare for his exams, and that the right to education constitutes a fundamental freedom, M. Pineda does not establish that by taking the decision to close certain university buildings due to public order disturbances likely to endanger the safety of individuals, the president, in exercising his power to maintain public order within the university premises, would have seriously and manifestly illegally infringed this freedom" (TA Melun, order of 23 March 2006, *Pineda*, n° 06-1796/5, *AJDA* 2006, obs. C. de MONTECLER). Similarly, the aforementioned order of the Châlons-en-Champagne interim relief judge does not seem to have taken into account the serious public order problems that would inevitably arise from the intervention of law enforcement officers. It was indeed certain that the participants would not leave the site of the rally of their own free will and that the intervention of the forces of law and order would lead to confrontations with them. Furthermore, denying access to the site to thousands of participants could lead to road blockages that would prevent the movement of emergency and rescue vehicles.

the situation of necessity that causes it. It is therefore the opposite of this situation, while being perfectly modelled on it, with the aim of reversing it (...)2060 . The judge must make the injunction the opposite response to the situation that justified his referral. He determines on a case-by-case basis how to respond to the situation of necessity that justifies the issuing of an injunction, i.e. how to correct and reverse it by counterbalancing its effects. In order to do this, it is not enough for the injunction to be of a nature that it responds to the particular situation submitted to the judge; it must also be proportionate in scope. What is important above all is to re-establish or establish a balance, a "normal" situation, and not to end up in a situation of reverse necessity by imposing an excessively heavy, restrictive or disproportionate burden on the administrative authority. It is a question of restoring a broken balance, not of creating a reverse imbalance. The administration has illegally withdrawn identity documents, the judge orders it to return them; it immobilises an aircraft by surrounding it with concrete blocks, the judge orders it to end the immobilisation by removing the concrete blocks surrounding the aircraft. Thus, the judge does not go beyond what is necessary to stop the infringement.

Secondly, the injunction must be *precise*. The judge must clearly indicate the obligations of the administration. The administration must know exactly what its attitude should be. There must be no ambiguity as to the scope and content of its obligations or the way in which they are to be fulfilled. In order to prevent any enforcement difficulties, the judge of the summary judgment is very prescriptive when necessary, explaining to the administration in a precise manner the obligations that are imposed on it.

The judge must also set a *deadline* for the execution of the injunction. In the case of a positive injunction, the judge of the référé-liberté sets a very short deadline which will urge the administration to comply. To determine the time limit, the judge takes into consideration the period of time that is expected to be necessary for the injunction to be carried out because of the constraints of all kinds that may weigh on it. This is usually in the order of a few days2061 . Sometimes the judge orders the administration to comply "without delay" or "immediately". In practice, the longest period allowed to the administration to comply is three months and concerns the obligation to provide the assistance of the public force to execute a decision to evict squatters, given the difficulties of the operation. The injunction then has a lifetime corresponding to the period set for its execution. In the case of a negative injunction, the judge sets a deadline or determines an event on the expiry or occurrence of which the administration will be released from the obligation not to act. It must refrain during this period, and wait to be released from it before being able to act.

Finally, the injunction must be accompanied by the *threat of a sanction*. It must be sufficiently clear that failure to comply with the injunction will lead to negative consequences. The threat may be directly apparent, for example when the court issues the injunction under penalty.

The appropriate decision to put an end to the infringement having been defined, it remains for the judge to ensure that it is respected. It is important that it produces a concrete result for the victim of an infringement, and effectively puts an end to the situation of serious and manifestly unlawful infringement of a fundamental freedom.

B. Accompanying the safeguard measure

493. The judge of the référé-liberté is involved in the execution of his sentences. To be sure that his decision will be perfectly understood by the administration and correctly executed by it, he adds a dose of constraint and pedagogy to his decisions. When necessary or useful, he indicates in detail to the administration the measures that must be adopted to stop the infringement. Having decided on a measure and explained what it entails, he also provides himself with the means to forcefully enforce compliance.

1. The explanation

494. Regardless of the type of measure pronounced, the judge of référé-liberté shows, when the circumstances require it, exemplary didactic qualities to ensure the correct execution of his decision. Whereas the decisions of the administrative judge are traditionally brief and laconic2062 , the orders of the judge of interim relief

2060 C. BRAHIC-LAMBREY, *op. cit.*, p. 373.

2061 See *supra*, § 491.

2062 Authors have long emphasised the concise wording of Council of State judgments (see in particular D. SERRIGNY, *Traité de l'organisation, de la compétence et de la procédure en matière contentieuse administrative*, 2^{ème} ed, Aug. Durand librairie éditeur, 1865, vol. I, p. VI; E. LAFERRIERE, *Traité de la juridiction administrative et des recours contentieux*, Berger-Levrault, 1887, t. I, p. IX; G. JEZE, "Collaboration du Conseil d'Etat et de la doctrine dans l'élaboration du droit administratif français", *Livre jubilaire du Conseil d'Etat*, Recueil Sirey, 1952, p. 348; B. DUCAMIN, "Le style des décisions du Conseil d'Etat. Les réactions d'un public cultivé", *EDCE* 1984-1985, pp. 129-145, special p. 129). Hauriou was one of the few authors to praise this brevity of judgments (see note under CE, 28 February 1919, *Dames Dol et Laurent*, *S.* 1918-1919, p. 343). A large part of the doctrine has nevertheless contested the objective dryness and excessive laconism of the administrative judge's decisions, perceived as an obstacle to the intelligibility and clarity of his decisions (see in particular R.-E. CHARLIER, "Is the technique of our

indicate very precisely to the administration the obligations that are incumbent upon it with a concern for precision that borders on pedagogy²⁰⁶³. In accordance with his role as a decision-maker, the judge is not content to note a situation of serious and manifestly illegal infringement of a fundamental freedom and then leave the administration to draw the consequences alone. On the contrary, he guides and directs the administrative authority in the execution of its decisions. Through a particularly careful and directive drafting of the reasons for his orders, the judge instils, within the framework of his office, an additional dose of constraint against the administration. Abandoning his former reserve, he shows himself to be resolutely directive and involved in the effectiveness of his sentence. He does not hesitate to "undertake administrative action"²⁰⁶⁴, even if this means overstepping his duties as administrator.

The purpose of the deliberately pedagogical drafting of his decisions is to ensure that they are correctly applied by the administration²⁰⁶⁵. If the judge of the *référé-liberté* wants the administrative authority to execute its decisions correctly, he must also put it in a position to understand all the implications. Indeed, when the administration's obligations are not clearly determined, it may, despite its good faith, hesitate as to what to do in the face of a complex legal situation, since it does not know exactly how to act, it may sometimes indulge in inertia or refrain from taking the necessary measures. By explaining to the administration how it should behave, in this

public law appropriate to its function?", *EDCE* 1951, p. 43; J. RIVERO, "Jurisprudence et doctrine dans l'élaboration du droit administratif", *EDCE* 1955, p. 30; J. MORAND-DEVILLER, "Le contrôle de l'administration: la spécificité des méthodes du juge administratif et du juge judiciaire", in *Le contrôle juridictionnel de l'administration. Bilan critique*, Economica, 1991, p. 199; M.-C. PONTTHOREAU, "Réflexions sur la motivation des décisions juridictionnelles en droit administratif français", *RDJ* 1997, p. 748; B. PACTEAU, "La jurisprudence, une chance du droit administratif?", *RA* 1999, special issue 6, p. 79).

2063 This educational effort is not exclusively addressed to the administration. It may also concern judges of the first instance and the applicants themselves.

As was emphasised by the authors when the administrative courts were set up in 1953, a full statement of reasons for the Council of State's decisions promotes the correct and uniform application of its case law by first instance judges (see J. RIVERO, "Le Conseil d'Etat, Cour régulatrice", *D.* 1954, chron. pp. 157-162; F. GAZIER, "De quelques perspectives ouvertes par la récente réforme du contentieux administratif" (On some prospects opened up by the recent reform of administrative litigation), *RDJ* 1954, pp. 669-683, esp. 680). With this objective in mind, the Administrative Jurisdiction Division has implemented a proactive jurisprudential policy consisting of providing precise and detailed reasons to assist judges at first instance in applying the reform of 30 June 2000. As the vice-president of the Council of State stated, "The first orders were voluntarily given lengthy reasons for the information of the parties and the judges of the administrative courts" (R. DENOIX DE SAINT MARC, "Les procédures d'urgence : premier bilan", *AJDA* 2002, p. 1). The supreme court of the administrative jurisdiction order intended to set out with the greatest clarity the procedural rules and the regime of the new summary proceedings, in order to guarantee their flawless application. The *Hyacinthe* order bears witness to this approach (CE, ord. 12 January 2001, *Hyacinthe*, *Lebon* p. 12). As the applicant had obtained satisfaction before the hearing, the judge had to note that the subject matter of the dispute had disappeared and declare that there was no need to adjudicate. He could have left it at that, as is the usual rule. However, before declaring the case dismissed, and even though he is not obliged to do so, he examines at length, and one by one, whether the conditions for granting it have been met. In law, this examination was not necessary. Its sole purpose is to give the lower courts guidance on how to assess the conditions of a measure applied for under Article L. 521-2. Similarly, the order of 12 November 2001, *Commune de Montrenil-Bellay*, contains very precise and general guidelines on assessing the conditions of serious and manifestly unlawful interference with a fundamental freedom (see *above*, §§ 223 and 256).

The interim relief judge will also show pedagogy towards the applicant when he has not used the appropriate interim relief procedure. He may invite the applicant to appeal to him on the appropriate basis, going so far as to indicate the steps that he must first take with the administration. This referral can be made from the judge of the *référé-liberté* to another judge, or from another judge to the judge of the *référé-liberté*.

The judge of the *référé-liberté* may direct the applicant to the judge on the merits to claim the annulment of a decision and compensation for the damage it is supposed to have caused him (see CE, ord. 29 October 2001, *S.A.R.L. Objectif*, n° 239443). It may also invite the applicant to refer the matter to the Commission de recours contre les refus de visa d'entrée en France (CE, ord. 18 February 2005, *Launay and Benjilil*, no. 277579; CE, ord. 15 March 2005, *Sosson*, n° 278502). The interim relief judge may also direct the applicant to an interim relief procedure adapted to his situation: the interim supply procedure (CE, ord. 4 February 2004, *Commune d'Yvrac*, *Lebon* T. p. 828) or, more often, the interim suspension procedure. In the *Commune de Venelles* decision, the Conseil d'Etat directs applicants to the summary suspension procedure, indicating precisely the steps to be taken to obtain the suspension of the mayor's refusal to convene the municipal council. The ruling states that 'this decision does not prevent the interested parties, if they believe themselves to be admissible and well-founded, from bringing an appeal before the administrative court on the grounds of excess of power against the mayor's refusal and from referring to the interim relief judge of that court conclusions aimed at ordering the suspension of the decision on the basis of the provisions of Article L. 521-1 of the Code of Administrative Justice, together with an indication of the obligations that the mayor will be required to fulfil' (CE, Sect. 18 January 2001, *Morbelli, maire de la Commune de Venelles*, *Lebon* p. 18). For other examples of referral from the judge of the *référé-liberté* to the judge of the *référé-suspension* see *supra*, § 40.

Conversely, it may happen that the applicant for interim relief is directed to the interim relief procedure. Thus, the judge of the *référé-conservatoire* was able to direct an applicant towards the two other urgent *référé* proceedings, by indicating to him in a precise manner the procedure to follow, including in the pre-litigation phase. In the decision of 11 June 2002, *S.A.R.L. Camping d'Or*, the Conseil d'Etat stated that in order to obtain the eviction of unauthorised occupants, "it was up to the applicant company, if it believed it had grounds for doing so, to request the assistance of the police from the prefect of Hérault, by presenting an enforceable court decision, or to ask the mayor (...), by invoking the existence of a court decision, to take the necessary measures to prevent the eviction of the occupants.", by invoking the existence of an imperious emergency, to proceed with the automatic execution of the contentious order, before seizing, in the event of refusal, the judge of the summary proceedings in application of articles L. 521-1 or L. 521-2 of the Code of Administrative Justice" (CE, 11 June 2002, *S.A.R.L. Camping d'Or*, *Lebon* T. p. 933). Similarly, the judge of the summary suspension can indicate to the applicant who does not have a prior decision that the way of article L. 521-2 is open in this case (CE, order 20 December 2005, *Meyet*, n° 288253). The referral of the applicant for interim relief to the procedure of Article L. 521-2 is very rare because the substantive conditions of Article L. 521-2 are more demanding than those of Article L. 521-1. It is not, however, unthinkable, because of the more flexible nature of its conditions of admissibility.

2064 According to the famous formula of Laferrière (E. LAFERRIERE, *Traité de la juridiction administrative et des recours contentieux*, 2^{ème} éd., Berger-Levrault, 1896, t. 2, p. 569).

2065 This effort at explanation also enables the summary judgment judge to compensate for "the relative 'brutality' of the effects of his decisions" (M. GUYOMAR and P. COLLIN, *op. cit.*, *AJDA* 2001, p. 1050). It favours, if not an adherence to the chosen solution, at least a better understanding of it. By making a decision more readable and understandable, the judge contributes to its better acceptance.

case and in the future, the judge removes any difficulty so that the administration executes its decisions correctly and acts in accordance with the law and fundamental freedoms. The judge ensures, by explanation, the respect of the law and of his decisions, and thus guarantees the effectiveness of his intervention. He tells the administration how to stop an infringement and how to avoid its recurrence in the future. This enables it to remedy the infringement and prevent further infringements. It thus ensures that its intervention is effective. The recitals of the decision, and sometimes even the operative part of the decision, set out in detail what the administration must do to comply with the court decision in the case in question and not be subject to further court censure in the future.

495. In the presence of a complex legal situation, the judge of the *référé-liberté* will not take the risk of an incorrect or incomplete execution of his decision by the administration. When the legal difficulties are serious, and the liberties are threatened, the administrative judge excludes that the administration alone decides on the consequences of its decision. He intends to avoid that an infringement can continue after his intervention because of a bad understanding of his order. In such a case, he refuses to leave it entirely to the administration and, in order to avoid any error or resistance in its implementation, defines himself the measures likely to restore the applicant in his rights and to put an end to the "particular situation" caused by an administrative action or abstention. It guides, directs, and in so doing frames the conduct of the administrative authority that has been guilty of infringing a fundamental freedom. It realistically indicates the obligations incumbent on the administration. It guides the public person to whom the decision is addressed by indicating the procedure to follow. By detailing in this way the obligations imposed on it to put an end to the serious and manifestly unlawful infringement of a fundamental freedom that it has caused, the interim relief judge removes any difficulty likely to hinder the correct and immediate execution of his decision²⁰⁶⁶. For a judge who has the particularity of acting in real time, this means optimising the effectiveness of his intervention at a time when there is still time to act on the administration's behaviour. This first form of pedagogy can be applied when the judge issues an injunction²⁰⁶⁷ or a dismissal with reservations²⁰⁶⁸.

It is notable that this approach is sometimes implemented even though the conditions for granting it are not met. Even if he cannot pronounce a safeguard measure, the judge nevertheless intends to give useful effect to his intervention. The *Kurtarici* decision of 3 April 2002 is particularly significant on this point. Before concluding that the contested expulsion measure is not manifestly illegal, the interim relief judge takes care to give the parties indications as to the follow-up that may be given to the dispute. These indications are addressed both to the applicant, to whom the judge indicates the path to follow to obtain satisfaction, and to the administration, which is invited to show humanity in its assessment. The judge pointed out to the applicant that he "has the possibility of applying, from his country of origin where he currently resides, to the Minister of the Interior for the repeal of the expulsion order issued against him, relying in particular on the relative seniority of the criminal acts he committed during a given period and his behaviour since then". The interim relief judge then addressed the administrative authority, stating that "it will be up to the Minister of the Interior, who is seized of such an application, to rule on it, taking into account both the facts in question and the personal situation of the person concerned who, having arrived in France at a very young age, was living with a French woman before his expulsion and is expected to father a French child soon". In the absence of a serious and manifestly illegal infringement of a fundamental freedom, the judge cannot pronounce safeguard measures. Nevertheless, his intervention may make it possible, thanks to the indications given, to rapidly remedy the situation that gave rise to the referral²⁰⁶⁹.

2066 Authors have long emphasised that the judge's pedagogy appears to be a decisive element for the correct execution of his decisions. Thus, Mr Chevallier stated that "the more precise the decision, the more imperative it is, and the more difficult it is to evade it" (J. CHEVALLIER, "L'interdiction pour le juge administratif de faire acte d'administrateur", *AJDA* 1972, p. 88). Mrs Joliot indicated that "the execution of court decisions would undoubtedly be facilitated more than once if the judge agreed to suggest, in the reasons for his decision, the measures likely to give it full effect" (M. JOLIOT, *Les insuffisances du contrôle des actes de l'administration par le juge administratif*, thesis Paris II, 1975, p. 201). In the same vein, Jean Rivéro declared that "a precise, positive, imperative court decision, clearly stating what must be done, would cut short many evasions (...)" (J. RIVERO, "Le système français de protection des citoyens contre l'arbitraire administratif à l'épreuve des faits", *op. cit.*, p. 830). The proper execution of court decisions by the administration depends in the final analysis on the administrative judge's ability to render a clear and unequivocal decision. If traditionally, the administrative judge was not reluctant to resort to directive recitals, stating as an indication the measures to be taken, the use of this procedure was very exceptional and was presented as a substitute for the absence of injunction power. It was not until the Act of 8 February 1995 that this form of reasoning developed as a necessary complement to the power of injunction. Outside the framework of the Act of 8 February 1995, this practice led to particularly didactic reasons through which the administrative judge explained to the administration the concrete consequences of an annulment for excess of power (see C. CHARLES, "Dix ans après : à quoi a servi la loi du 8 février 1995, *Dr. adm.* 2005, études n° 10, spé pp. 13-15). For an illustration of this procedure in excess of power, see the *Vassilokiottis* and *Titran* judgments cited *above*, § 483.

2067 See *supra*, §§ 490-91, for examples of injunctions that specifically indicate to the administrative authority the behaviour to be adopted.

2068 In the *Tibéri* case, for example, the court sets out very precisely the obligations of the Conseil supérieur de l'audiovisuel and the steps that the institution must take to ensure respect for pluralism (see *above*, §§ 481-483).

2069 CE, ord. 3 April 2002, *Ministre de l'Intérieur c/ Kurtarici*, *Lebon T.* p. 871. Similarly, in the *Commune de Théoule-sur-Mer* order, the Council of State's interim relief judge ruled out the existence of a serious and manifestly illegal infringement of a fundamental freedom. He nevertheless added that it was up to "the commune of Théoule-sur-Mer and the Cannes Aquaculture company to come together, after the State services have issued a new authorisation to operate the sea fish farm managed by this company, to define, if necessary with the help of these services, the terms of access of the company to its installations which reconcile the requirements of good management of the domain and the needs of normal operation of the company" (CE, ord. 22 May 2003, *Commune de Théoule-sur-Mer*, *Lebon* p. 232).

496. The judge of the *référé-liberté* also gives the administrations the keys to fulfil their mission of general interest in the respect of legality and fundamental freedoms. This second form of motivation can be expressed whatever the measure prescribed, and even in the absence of a measure being pronounced.

First of all, the judge may set out, in a formulation similar to the ruling, the main principles governing administrative action in a given situation²⁰⁷⁰. This approach coincides with a desire on the part of the administrative authority, and in particular of central administrations, to obtain advice on how to act. Thus, in the *Samagassi* order of 11 March 2003, the interim relief judge of the Council of State indicates to the administration what its behaviour should be in the presence of identity theft: he explains, develops and specifies its obligations in such a case²⁰⁷¹. Similarly, in the *Gollnisch* decision, the judge indicates in a very precise manner the conditions under which the rector of an academy can initiate disciplinary proceedings against a teacher-researcher and communicate publicly on the disciplinary procedure underway²⁰⁷².

On the other hand, the judge may indicate to the administration the behaviour it should follow in the future in order to act in compliance with the law and fundamental freedoms, so that its action is free from defects in the circumstances of the case or in similar circumstances²⁰⁷³. The interim relief judge, who has censured the conduct of the administrative authority, indicates to it the procedure to be followed and the conditions to be respected in the future in order to act without unlawfully infringing fundamental freedoms. If the administration intends, in the general interest, to take a measure with a similar purpose, it has all the elements necessary for the legality of its action. Thus, in the *Aguillon* judgment, the judge specifies the conditions under which a requisition measure for striking personnel can be legally taken. The prefect may requisition striking staff from a private employer, but he may only take measures "imposed by the emergency and proportionate to the needs of public order". In order not to paralyse administrative action or prevent the use of this power if circumstances so require, the decision states that the suspension pronounced "does not prevent the prefect, if the conflict is prolonged, from deciding to make use of the powers he has under Article L. 2215-1 of the General Local Authorities Code within the limits set out in the grounds for this decision"²⁰⁷⁴. In the *FN IFOREL* order, the interim relief judge enjoined the administration not to obstruct "except in the case of new legal or factual circumstances" the execution of the reservation contract concluded between IFOREL and the company Impérial Palace. By this wording, it implicitly indicates that if a threat to public order arises, an identical measure can be legally taken without incurring the censure of the judge of the summary judgment²⁰⁷⁵.

497. The exact scope of these grounds needs to be examined. To what extent are they binding on the administration? Do they represent simple guidelines which it can use if it wishes, but which it could just as easily ignore? Or are they real obligations with which it is legally bound to comply? The case law on the scope of grounds leads to a distinction being made between two situations in order to apply different solutions to them: on the one hand, grounds that constitute the necessary support for the provision benefit from the authority attached to it; on the other hand, grounds that do not constitute the necessary support for the provision do not benefit from its authority²⁰⁷⁶.

²⁰⁷⁰ The *Rodière* decision remains one of the most frequently cited examples in the litigation of excess of power (CE, 26 December 1925, *Lebon* p. 1065). It has been said that in this decision, the Council gave "advice to the active administration" (Y GAUDEMET, "Réflexions sur l'injonction dans le contentieux administratif", *op. cit.*, p. 819) in civil service litigation, in order to guide it in reconstituting its career. More recently, in the *Société à objet sportif "Toulouse Football Club"* judgment, the Conseil d'Etat, after annulling a decision by the National Football League which had refused to annul the results of a match between two League 1 clubs, gave, in the words of M. Lachaume, "a veritable course in positive law on the homologation of results in federal championships" (J.-F. LACHAUME, note under CE, Sect. 25 June 2001, *Société à objet sportif "Toulouse Football Club"*, *Revue juridique et économique du sport* March 2002, p. 43).

²⁰⁷¹ CE, ord. 11 March 2003, *Samagassi*, *Lebon* p. 119. The order indicates that for the application of the provisions of the decree of 22 October 1955 instituting the national identity card, it is up to the competent administrative authorities to ensure, under the control of the judge of excess of power, that the documents produced in support of an application for a national identity card are of such a nature as to establish the identity and nationality of the applicant. While it is up to them to carry out, on this occasion, the verifications that may be required by certain particularities of the documents produced in support of the application, the mere fact that fraud committed by a third party is revealed during the examination of the application cannot legally justify the issuing of the national identity card being deferred beyond the time required for these verifications. In particular, in such a case, the issue of the card cannot be made conditional on the outcome of criminal proceedings initiated by the administration concerning the behaviour of the third party. If the administrative authority discovers, on this occasion, that an identity document has already been issued to a third party for the benefit of an impersonation of the applicant, it must withdraw this document, under the control of the judge of the excess of power, without being able to take advantage of this impersonation to deprive the applicant, until the end of the criminal proceedings, of the national identity card to which he is entitled.

²⁰⁷² See *supra*, § 199.

²⁰⁷³ For examples in the litigation of excess of power, see CE, 18 June 1926, *Sieurs Belkacem Bentami et autres*, *Lebon* p. 614; CE, Sect. 8 December 1933, *Sieurs Grundmann et Kardesch*, *Lebon* p. 1152.

²⁰⁷⁴ CE, 9 December 2003, *Aguillon and others*, *Lebon* p. 497.

²⁰⁷⁵ CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL)*, *Lebon* p. 311.

²⁰⁷⁶ Indeed, it is a constant jurisprudence that the reasons of a decision benefit from the authority of the operative part only if they are 'inseparable' from it (CE, Ass., 10 February 1961, *Ministre de l'Intérieur c/ Consorts Chauche*, *Lebon* p. 108; CE, Sect. 6 May 1983, *Société Distrelec et autre*, *Lebon* p. 179; CE, 30 September 1988, *Ministre du Budget contre Raveau*, *Lebon* p. 323), if they constitute its "necessary support" (CE, 26 November 1958, *Sieur Lot*, *Lebon* p. 588; CE, 23 December 1964, *Consorts Lefèvre*, *Lebon* p. 665; CE, Sect. 9 June 1989, *Dufal*, *Lebon* p. 139) or the 'necessary support' (CE, 30 November 1960, *Sieur Hubert c/ Commune de Berles-Monchel*, *Lebon* p. 653; CE, 5 March 1969, *Sieur Rouet*, *Lebon* p. 134; CE, Sect., 10 March 1995, *Chambre de commerce et d'industrie de Lille-Roubaix-Tourcoing*, *Lebon* p. 127) As the government commissioner Jacomet

In application of this criterion, the educational explanations of the first form, those by which the judge indicates to the administration the concrete measures to be taken when the conditions of granting are satisfied, must be recognised as compulsory. These explanations are in fact the complement of the mechanism; they are inseparable from it. To use the expressions usually used to describe indissociable grounds, they are "one with it"²⁰⁷⁷ and constitute "elements of the award"²⁰⁷⁸. These explanations, intended to apply to the particular case for which they are formulated, are legally binding on the administration. They are binding on the public authority concerned. The administrative authority is legally bound as to the course of action to be taken. In these circumstances, failure to comply with these provisions is tantamount to a violation of the enforceability of court decisions, and is sanctioned as such.

On the other hand, the explanatory reasons by which the judge lays down more general principles, intended to prevent the recurrence of the infringement, are not legally binding on the administration to which the decision is addressed. The authority of the operative part does not usually extend to this type of grounds. Indeed, to recognise them as *res judicata* would be tantamount to conferring on the judge a genuine "general regulatory power"²⁰⁷⁹. From a legal point of view, these explanatory reasons do not enjoy the authority of the operative part because they do not constitute the necessary support. Their indicative nature does not, however, deprive them of effectiveness. Indeed, the administration has the assurance that by following the indications given by the judge, it will act in accordance with the law and in respect of fundamental freedoms. The observance of these indications represents for it a guarantee of legal and contentious security. Consequently, they will be scrupulously followed, not only by the administration to which the decision is addressed but also, beyond that, by all the authorities called upon to intervene in a similar case. Because of their deliberately broad wording, these recitals contain lessons of general application on the way in which the administration should behave in a given situation. This approach also has the advantage, for administrative justice, of preventing litigation.

498. Whether or not this is in addition to a didactic approach, the interim relief judge will exert pressure on the administration in order to combat *a priori* any inclination to resist its decision. Pedagogy then gives way to authority²⁰⁸⁰. The interim relief judge ensures, through authority, that his decision is correctly executed.

2. The authority

499. The decision taken in summary proceedings is, like any judicial decision, enforceable and binding. On the one hand, it is enforceable. It must be enforced, in accordance with the principle governing the implementation of court decisions, recalled in Article L. 11 of the Code of Administrative Justice, which states that "judgments are enforceable". Moreover, Article R. 522-13, paragraph 2, provides that the interim relief judge may decide that his decision "shall be *enforceable* as soon as it has been rendered". The enforcement formula provided for in Article R. 751-1 of the Code of Administrative Justice must appear in the operative part of the order (Article R. 522-13, para. 3)²⁰⁸¹. On the other hand, the interim order is also endowed with a binding force that is imposed on the parties. This binding force is notably recalled in Article R. 522-13, which uses the expression "must comply with it" to qualify the authority of the summary order over the parties. The administration is required to comply with it. These principles, already enshrined under the previous law²⁰⁸², are maintained

emphasised in 1955, "the authority of *res judicata* does not apply only to the operative part, but also to the reasons which are the necessary support and which are, consequently, essential to determine or complete its meaning" (CE, concl. sur CE, Ass., 10 December 1954, *Cru et autres*, D. 1955, p. 200). The scope of *res judicata* is the subject of an identical conception in judicial case law (Com, 21 March 1950, D. 1950, p. 381; Civ. 2^{ème}, 7 January 1956, D. 1956, p. 214), constitutional (CC, n° 62-18 L, 16 January 1962, cons. 1, *Rec.* p. 31; n° 89-258 DC, 8 July 1989, cons. 12, *Rec.* p. 48; n° 92-312 DC, 2 September 1992, cons. 4, *Rec.* p. 76), international jurisprudence (CPIJ, opinion n° 11 of 16 May 1925, series B, pp. 29-30, quoted by J. SALMON, "L'autorité des prononcés de la Cour internationale de la Haye", in *Arguments d'autorité et arguments de raison et de droit*, Nemesis, 1988, p. 24), European (see G. COHEN-JONATHAN, "La convention européenne des droits de l'homme", *Economica PUAM*, 1989, p. 206) and Community (see L. POTVIN-SOLIS, *L'effet des jurisprudences européennes sur la jurisprudence du Conseil d'Etat français*, LGDJ, coll.)

2077 E. GARSONNET and C. CEZAR-BRU, *Traité théorique et pratique de procédure civile et commerciale*, Librairie de la société du Recueil Sirey, 1913, t. III, p. 409.

2078 G. BOURCARD, note under Ccass, req. 24 November 1890 and Ccass, req. 8 July 1891, *S.* 1893, I, p. 316.

2079 D. DE BECHILLON, "Sur l'identification de la chose jugée dans la jurisprudence du Conseil d'Etat", *RDP* 1994, p. 1823.

2080 This is because the jurisdictional function is also a function of authority: it includes, in addition to the power to state the law, the power to impose its implementation. This synthesis is the alliance, in accordance with Pascal's formula, of force and Justice: "Justice without force is powerless, force without Justice is tyrannical (...). It is therefore necessary to put Justice and strength together, without making what is just be strong, or what is strong be just" (PASCAL, *Pensées*, n° 298, 1817, republished in Flammarion, 2000).

2081 As far as private judicial law is concerned, Article 514 of the new Code of Civil Procedure declares summary orders enforceable "by right".

2082 The decision to grant a stay of execution must be executed in accordance with the principles that apply to the implementation of legal decisions. By not complying with it, the administration disregards, if not the *res judicata*, at least the *res judicata*, according to the formula of the government commissioner Dutheillet de Lamothe (concl. on CE, 16 October 1981, *Minister of Defence v. Lassus*, *Lebon* p. 373). Enforceability was recognised for decisions taken in summary proceedings (CE, Sect., 3 October 1958, *Société des autocars garonnais*, *Lebon* p. 468) and for judgments suspending execution (CE, Sect., 9 December 1983, *Ville de Paris*, *Lebon* p. 499). The tribunal des conflits has ruled that the forced execution of a decision which a court has ordered to be suspended has the character of an act of God (TC, 10 December 1956, *Guyard*

identically after the reform of 30 June 2000²⁰⁸³. In a ruling by the *Association convention vie et nature pour une écologie radicale*, the Conseil d'Etat had to solemnly recall the authority that attaches to decisions taken in summary proceedings²⁰⁸⁴. In a recital of principle, the Section affirmed that the decisions pronounced by the interim relief judge have, like all court decisions, an enforceable and binding character. This principle rules out the possibility that the administration may legally take back the same decision without having remedied the defect that the interim relief judge had taken into consideration in reaching his decision.

Therefore, the administration is legally bound to execute the decision taken by the judge of the *référé-liberté*; and the beneficiary of the safeguard measure is entitled to demand its correct execution by the condemned public person. He may, if necessary, request the implementation of the common law provisions of Articles L. 911-4 and L. 911-5 of the Code of Administrative Justice. Firstly, if the interim relief judge has not imposed a penalty on the measures ordered and these have not been carried out, the applicant may refer the matter to the Council of State under Article L. 911-5 in order to have a penalty imposed on the recalcitrant administration. Secondly, a claimant who has obtained a protective measure from a first-degree interim relief judge may apply to the court under whose jurisdiction the judge falls in the event of failure to comply with the prescribed measure. Although the text of Article L. 911-4 refers only to the "judgment" of the administrative court and the "decision" of the administrative court of appeal, the Conseil d'Etat accepted its application to summary proceedings in a decision by *Van Bentum Plasse and Plasse*²⁰⁸⁵. By an order of 26 April 2001, the interim relief judge of the Marseille administrative court had enjoined the mayor of Forcalquier to take, within 48 hours, a police measure ordering the execution of work on the wall bordering the applicants' property in order to remedy the danger created by the deterioration of this wall. In a judgment of 1^{er} July 2003, the Marseille administrative court rejected the request made by the applicants to enforce the order of 26 April 2001 pursuant to Article L. 911-4. To justify its rejection, the court based its decision on the fact that the measure prescribed had been correctly executed. It consisted in setting up a security perimeter around the wall and installing a protective film, not in demolishing and rebuilding it. The applicants appealed this decision to the Council of State²⁰⁸⁶. The latter indicated that the day after the order of 26 April 2001 was issued, the mayor of Forcalquier had issued an order prohibiting access to the wall for the duration of the restoration work and that this work consisted of rebuilding the part of the wall that had collapsed and building several buttresses to guarantee the stability of the structure. For the Council of State, "the mayor thus took protective measures corresponding to those ordered by the order of 26 April 2001". Although the applicants claimed that stones had recently fallen from the wall, the Council stressed that "it is not, in any event, established that these incidents resulted from incomplete execution of the work ordered by the interim relief judge". Consequently, the applicants are not entitled to claim that the municipality of Forcalquier did not execute the order of 26 April 2001.

500. When the safeguard measure takes the form of an injunction²⁰⁸⁷, the judge of the *référé-liberté* may decide, as soon as it is pronounced, to attach to its decision a penalty payment on the basis of the general provisions of Article L. 911-3 of the Code of Administrative Justice²⁰⁸⁸.

Intended to overcome any resistance on the part of the administration, it will be pronounced by the judge in order to guarantee the proper execution of his decision. It should be remembered that the injunction is not a substitution; its pronouncement does not in itself give any satisfaction to the applicant. Admittedly, the injunction pronounced by the summary judgment judge is binding in that its issuance makes it compulsory for the

c/ *Tegny, Lebon* p. 590).

²⁰⁸³ See P. CASSIA, "L'autorité de la chose ordonnée en référé", *JCP G* 2004, I, 164.

²⁰⁸⁴ CE, Sect. 5 November 2003, *Association pour la protection des animaux sauvages et autres, Association Convention vie et nature pour une écologie radicale et autre* (2 species), RFDA 2004, pp. 601-611, concl. F. DONNAT and D. CASAS; *JCP A*, 69, note M. GAUTIER. This decision follows several decisions by the Minister of Ecology that clearly disregarded two suspension measures ordered by the interim relief judge on the basis of Article L. 521-1 of the Administrative Justice Code. The dispute began on 21 July 2003 with an order by the Minister of Ecology setting the dates for the opening of the hunting season, which more than likely contravened the Community directive of 2 April 1979 on the conservation of wild birds. When a petition for interim relief was filed against this decision, the interim relief judge quickly granted the petitioners' request (CE, ord. 4 August 2003, *Association pour la protection des animaux sauvages*, no. 258778). This did not matter to the Minister of Ecology, who immediately issued an order that was almost identical to the previous one and just as likely to be illegal, an order that the interim relief judge also suspended (CE, ord. 19 August 2003, *Convention vie et nature pour une écologie radicale*, no. 259340). However, the Minister did not hesitate to repeat the order two days after this second suspension.

²⁰⁸⁵ CE, 29 October 2003, *Van Bentum Plasse and Plasse, Lebon T.* p. 719, 721, 943 and 956.

²⁰⁸⁶ The remedies available under Article L. 911-4 are the same as those available against the decision whose enforcement the judge is asked to ensure. In this case, the decision concerns the enforcement of an order made on the basis of Article L. 521-2. In accordance with Article L. 523-1 of the Code, it must be challenged by way of an appeal brought, by way of derogation from the ordinary jurisdiction of the administrative courts of appeal, before the Council of State.

²⁰⁸⁷ In the event of a rejection with reservations, the threat is that the court will be called upon again in the event of non-compliance with the requirements set out in the decision that led to the rejection of the application. As regards measures to suspend a positive decision, this simple measure is in principle sufficient to satisfy the applicant, without the need for an enforcement order - and therefore a penalty payment - to be issued.

²⁰⁸⁸ Similarly, in the event of an assault, the civil judge in summary proceedings may attach a penalty to his injunctions. The power to impose penalty payments has been recognised by the Tribunal des conflits (TC, 17 June 1948, *Manufacture de velours et peluches and Société Velvetia c/ Etat, Lebon* p. 513). It can be exercised in summary proceedings on the basis of the provisions of Article 491 of the New Code of Civil Procedure, if necessary *ex officio*.

administration. But, far from exerting an absolute constraint on the administration which would necessarily lead to the expected execution, the injunction makes it partially master of its destiny by reserving it a part of freedom. Faced with the judge's decision, the administration has, *de facto*, the possibility of choosing to comply or not to comply - a relative possibility, but no less real, as shown by the existence of cases in which the administration does not comply with an injunction. The injunction therefore always gives the administrative authority a chance to resist it. When the interim relief judge thinks that the administration will be tempted to exploit this possibility of resistance, he attaches a fine to the injunction. In this respect, the comminatory nature of the penalty payment is a deterrent to failure to comply with the injunction. The *astreinte* has the strong dissuasive character sought by the threat of an injunction with the particularity that instead of being merely virtual, the threat is embodied as soon as it is pronounced and carries its full weight, without its effectiveness being deferred to the subsequent stage of non-performance. It tends above all to "intimidate"²⁰⁸⁹. It makes it possible to exert pressure on the administration by inspiring it with the fear of subsequent sanctions. Intervening before the administration has chosen between execution and non-execution, the *astreinte* influences the terms of this choice in an attempt to obtain the administration's compliance with the injunction. There is a threat of sanction, but no actual sanction²⁰⁹⁰. As the *astreinte* is a conditional sanction, it only becomes effective in the event of non-compliance.

The judge of the *référé-liberté* has a discretionary power to pronounce an *astreinte*. He decides on the basis of the circumstances of each case and is never obliged to impose it. He uses this power when he fears that he will encounter resistance from the administration. Otherwise, the judge does not impose the fine. He may even expressly state that "because of the assurances given by the administration during the hearing, there is no need to attach a penalty to this injunction"²⁰⁹¹. In practice, it is extremely rare that the judge of the *référé-liberté* accompanies his injunctions with the pronouncement of a penalty payment. A similar procedure is followed by the civil judge in summary proceedings in cases of assault. Ms Guillon-Goudray has shown that the judge will only resort to *astreintes* if he considers that there is a risk of non-execution: "As soon as the judge has sufficient guarantees as to the execution of his decision, he will refuse to pronounce an *astreinte*"²⁰⁹². The author underlines that "one can only note the rarity of *astreintes* in this matter, the judicial judge often deciding that it is not necessary"²⁰⁹³.

Once the principle of an *astreinte* has been decided, the judge has a great deal of freedom to set the rate. It is determined according to the aim it is intended to achieve, namely to compel the administration to perform. The judge may take into account the seriousness of the consequences of non-performance for the applicant, the financial capacity of the authority concerned to resist or the repeated nature of the failures observed. The amount is assessed on a case-by-case basis, taking into account all the circumstances of the case. The rate of the penalty payment, fixed per day of delay, is generally moderate: 15 euros per day of delay to return a valid residence permit to its holder²⁰⁹⁴; 150 euros per day of delay to return to the applicants the identity documents that have been illegally taken away from them²⁰⁹⁵ or to complete, within 15 days, the investigation of the applicant's application and to issue her, upon notification of the order, with a receipt valid as a residence permit²⁰⁹⁶; 200 per day of delay in providing the assistance of the public force for the execution of a decision ordering the evacuation of squatters²⁰⁹⁷; 100 euros per day of delay for the same measure²⁰⁹⁸; 300 euros per day of delay in issuing an application for a provisional residence permit when the administration has committed serious negligence²⁰⁹⁹. The setting of the rate of the penalty payment at a relatively low level, in relation to the resources available to public authorities, is explained by a simple consideration: in relation to public power, the amount of the penalty payment is relatively indifferent. Insofar as the financial capacities of public persons are very important, the dissuasive effect cannot be sought on this level because it would imply to fix the *astreinte* at a high rate and, thus, to penalize all the citizens for the benefit of a single litigant. In reality, when dealing with the public authority, "it is not so much the amount of the penalty payment as its principle, which is relied upon to force the administration to put an end to the litigious situation"²¹⁰⁰. However, it is to be noted that the judge of the summary proceedings shows less restraint when the public person in question is a public establishment of an industrial and commercial nature. In their case, the judge may set the rate of the penalty payment at a deliberately high level. Thus, in the *Société Outremer Finance Limited* case, the interim relief judge ordered Aéroports de Paris, under a fine of 50,000 euros per day of

2089 J. BUFFET, "La réforme de l'*astreinte* : premières applications", Rapport de la Cour de cassation, 1997, p. 67.

2090 The solution emerges from the very wording used when it is used: one does not condemn "to" an *astreinte* but "under" an *astreinte* (see B. LOUVEL, "Une proposition qui change tout: on ne condamne pas 'à' mais 'sous' *astreinte*", *GP* 1-2 September 1999, p. 2). When it is pronounced, the *astreinte* does not oblige the administration in any way. What the judge seeks at this stage is to put pressure on the administrative authority. As the etymology of the word indicates, its purpose is to compel performance: the Latin verb *astringere* means "to compel".

2091 CE, ord. 26 April 2005, Minister of the Interior, Internal Security and Local Freedoms v. M'LAMALI, *Lebon T.* p. 1034.

2092 S. GUILLON-COUDRAY, *La voie de fait administrative et le juge judiciaire*, thesis Paris II, 2002, p. 311.

2093 S. GUILLON-COUDRAY, *op. cit.*, p. 312.

2094 CE, ord. 8 November 2001, *Kaigisisi*, *Lebon* p. 545.

2095 CE, ord. 2 April 2001, *Ministre de l'Intérieur c/ Consorts Marcel*, *Lebon* p. 167.

2096 CE, ord. 12 November 2001, *Ministre de l'Intérieur c/ Béchar*, *Lebon T.* p. 1132. The same rate of penalty is fixed for a similar injunction: CE, 7 May 2003, *Bonmaïza*, n° 250002.

2097 CE, ord. 21 November 2002, *Gaz de France*, *Lebon* p. 408.

2098 CE, ord. 27 November 2002, *SCI Résidence du théâtre*, *Lebon T.* p. 874; CE, 29 March 2002, *SCI Stéphane et autres*, *Lebon* p. 117.

2099 CE, ord. 21 December 2004, *Luzolo Kondé*, n° 275361.

2100 C. GUETTIER, "Injonction et *astreinte*", *Jcl. administratif*, fasc. 1114 (2, 1998), n° 182.

delay from the date of notification of the decision, to put an end to the immobilisation of an aircraft²¹⁰¹ .

At the end of the period fixed for the execution or if the execution occurs during this period, it is up to the judge of summary proceedings who pronounced the *astreinte* to proceed to its liquidation in application of article L. 911-7 of the code of administrative justice, either *ex officio*, or at the request of one of the parties²¹⁰² . The jurisdiction for the liquidation lies with the interim relief judge who pronounced the *astreinte*²¹⁰³ . If the liquidation takes place at the request of one of the parties, the interim relief judge can only liquidate an *astreinte* or ensure the enforcement of a previous order after holding a public hearing²¹⁰⁴ ; he can nevertheless order its dismissal under the sorting procedure of Article L. 522-3²¹⁰⁵ . If the judge rules *ex officio* and finds that there are no grounds for liquidating the *astreinte*, he does not have to hold a hearing²¹⁰⁶ . The liquidation is subject only to the failure to comply with the injunction. If the administration has complied with the injunction within the time limit set, there is no need to liquidate the *astreinte*. If the administration has not complied within the time limit, the judge liquidates the penalty²¹⁰⁷ . This liquidation gives rise to a real debt concerning a sum of money, effective and due, which the administration must pay²¹⁰⁸ . In case of persistent unwillingness of the administration, the judge of the *référé-liberté* may increase the rate of the *astreinte* initially foreseen in order to obtain the correct execution of his decision²¹⁰⁹ . The Conseil d'Etat has specified that "the remedies available against the orders of the interim relief judge pronouncing the liquidation of an *astreinte* that he himself has pronounced are the same as those available against the orders pronouncing the *astreinte*"²¹¹⁰ , i.e., for interim relief, the appeal procedure²¹¹¹ .

Conclusion of Chapter 1

501. The interim relief judge has a particularly broad power to put an end to a situation of serious and manifestly unlawful interference with a fundamental freedom. He or she selects the appropriate measure and, if necessary, ensures that it is respected by the explanation and the authority. It will only impose a binding measure if a non-contentious settlement of the dispute has not proved possible. In both cases, the applicant obtains immediate satisfaction. Its intervention gives full and immediate satisfaction to the claimant as soon as he or she meets all the conditions required by Article L. 521-2. Once this satisfaction has been obtained in principle, it is definitive for the applicant.

2101 CE, 2 July 2003, *Société Outremer Finance Limited*, *Lebon* p. 306.

2102 See, rendered on the basis of the provisions of Article L. 521-3: CE, 21 May 2003, *Petit*, n° 252872; CE, 15 March 2004, *Société Dauphin Adshel*, n° 259803.

2103 For the *référé-liberté*, see CE, ord. 5 September 2003, *Keller*, n° 259991. For the *référé-conservatoire*, see the orders cited in the previous note. The solution is classic. See, in the procedures of common law: CE, 14 November 1997, *Communauté urbaine de Lyon*, *Lebon* p. 421.

2104 See for example CE, 28 July 2004, *Société Outremer Finance Limited*, n° 254536, *JCP A* 2004, 1743, obs. J. MOREAU. In a memorandum registered on 4 December 2003, Aéroports de Paris produced a decision by its Director General, dated 10 July 2003, according to which: "The ground detention at Orly of the Airbus A 340 registered F-GTUA belonging to the company Outremer Finance Limited, implemented by DG decision no. 2003/553 of 6 February 2003, is definitively lifted as of today". As this memorandum was communicated to Outremer Finance Limited, the company did not submit any observations. The Conseil d'Etat stated that Aéroports de Paris "must, therefore, be considered to have executed the decision of the Conseil d'Etat ruling on the dispute dated 2 July 2003; that there is, therefore, no reason to proceed with the liquidation of the fine".

2105 See, for a rejection by the judge of appeal of the *référé-liberté*: CE, ord. 5 September 2003, *Keller*, n° 259991. Article L. 522-3 is not mentioned, but it appears from the citations that the judge did not hold a hearing. Implicitly, the appeal was considered to be manifestly ill-founded.

2106 See CE, ord. 2 February 2005, *Luzolo Kondé*, n° 275361, concerning the fine imposed in a decision of 21 December 2004 (CE, ord. 21 December 2004, *Luzolo Kondé*, n° 275361). The judge noted that it was clear from the diligence carried out by the Report and Studies Section of the Council of State that the Prefect of Isère had renewed the applicant's provisional residence permit on 27 December 2004 and that he had been issued with a residence permit application receipt on 11 January 2005. Under these conditions, it naturally deduced that there was no need to liquidate the fine.

2107 See for example CE, 27 September 2002, *SCI Stéphaneur et al.* In a decision of 29 March 2002, the Conseil d'Etat, ruling on contentious matters, enjoined the Prefect of Bouches-du-Rhône to take all necessary measures to ensure, within fifteen days of notification of this decision, the execution of the order of 21 December 2001 of the President of the Tribunal de Grande Instance of Marseilles pronouncing the eviction within ten days of the occupants of the building owned by SCI Stéphaneur et al. In the same decision, the Council of State imposed a fine on the State in the event of failure to comply with the injunction by the end of this period, and set the rate of this fine at 100 euros per day. The decision of the Council of State of 29 March 2002 was notified to the Prefect of Bouches-du-Rhône on 9 April 2002. On 24 May 2002, the prefect evicted the occupants of the building in question. The Council of State's decision of 29 March 2002 must therefore be considered as having been executed on 24 May 2002. The Council stated "that, given the late nature of this execution and the circumstances of the case, it is appropriate, in application of the aforementioned provisions of Article L. 911-7 of the Code of Administrative Justice, to proceed with the liquidation of the fine pronounced on 29 March 2002 in favour of SCI Stéphaneur and others; that, for the period from 24 April to 24 May 2002, the amount of the fine, at the rate of 100 euros per day, amounts to 3,000 euros".

2108 According to Article L. 911-8 of the Code of Administrative Justice, the judge "may decide that part of the penalty payment will not be paid to the applicant"; this part is allocated to the State budget. In the absence of any precision in the liquidation decision, the *astreinte* is paid in full to the applicant (see *SCI Stéphaneur* decision cited above).

2109 This is the case in common law procedures. The administrative judge of summary proceedings may, in case of persistent ill will of the administration, raise the rate of the penalty initially fixed (see, for a doubling of the rate of the initial penalty: CE, 22 November 1999, *Lother*, *Lebon T.* p. 968). See L. ERSTEIN and O. SIMON, *L'exécution des décisions de la juridiction administrative*, Berger-Levrault, 2000, pp. 67-70.

2110 CE, 21 May 2003, *Petit*, n° 252872.

2111 CE, ord. 5 September 2003, *Keller*, n° 259991.

Chapter 2

Effectiveness due to the sustainability of the measures taken

502. The intervention of the interim relief judge does not only provide the applicant with immediate satisfaction. It also provides him or her with a satisfaction that is not precarious, as is usually the rule in summary proceedings²¹¹². This is the case, of course, when the judge declares that there is no need to adjudicate or gives notice of a withdrawal following a rapprochement of the parties. This is then the case, and in a particularly notable way, when the judge himself decides on a measure to put an end to the liberticidal situation. The decision simply puts an end to the dispute. Thus, the effectiveness of the judge's action stems not only from the scope of the powers granted to him or her, but also from the security he or she provides the applicant by definitively clearing up the dispute²¹¹³.
503. On the basis of the provisions of Article L. 511-1 of the Code of Administrative Justice, the Council of State affirms the provisional nature of measures taken in summary proceedings. In law, this means that the solution given in summary proceedings is not binding either on the judge on the merits or on the summary proceedings judge himself. On the one hand, the judge on the merits is not bound by the legal solution given by the interim relief judge and can perfectly well adopt a different solution. On the other hand, the interim relief judge can reverse his own decision if there are new elements. The solution given in summary proceedings is therefore precarious and reversible. In this sense, "the provisional decision is one which, on the fringes of the appeal procedures, can always be revised, modified or retracted by the effect of another decision; one which, in a word, is exposed to all contrary winds"²¹¹⁴. The provisional decision is therefore one that can be challenged either by the judge on the merits or by the interim relief judge himself.

De jure, these principles apply to interim relief: the judge on the merits is not bound by the solution given by the interim relief judge; the interim relief judge may reverse the decision in the event of a new element. From a strictly legal point of view, his decision is not final²¹¹⁵. But in practice, because of the characteristics of this procedure and especially the conditions under which it is initiated, it is impossible for the judge on the merits to rule differently on the question of law, and it is unlikely that any new element will arise that would allow the interim relief judge to reverse his decision. Consequently, its decisions are, if not irreversible, at least endowed with a remarkable stability coefficient. In practice, they can only be called into question outside of the appeal procedure by means of a review, and only in very rare cases. The stability of the measures taken by the interim relief judge raises the question of the nature of this procedure and, more precisely, of its possible qualification as an interim measure on the merits.

Section 1. The possibility of a challenge by the appeal judge

504. Two exceptional remedies may be exercised by the parties to the original proceedings before the judge who issued the decision²¹¹⁶. These remedies are tantamount to a retraction and, consequently, a retrial of the summary judgments. On the one hand, the parties may lodge an appeal for review against the decisions of the

2112 The claimant in summary proceedings must normally wait for the intervention of the judge on the merits to be determined with certainty and finality as to the extent of his rights.

2113 The *référé-liberté* offers full satisfaction to the applicant. The applicant who has obtained a favourable measure no longer has to act before the judge on the merits. Conversely, when a person obtains a stay of execution of a decision under Article L. 521-1, he or she obtains only provisional satisfaction, as the judgment on the merits may always reverse the solution given in summary proceedings.

2114 R. PERROT, "Du 'provisoire' au 'définitif'", in *Le juge entre deux millénaires. Mélanges offerts à Pierre Drui*, Dalloz, 2000, p. 447-448.

2115 As M. Barreau pointed out, the final decision is the one "which puts an end to a dispute in such a way that the court is henceforth divested of all jurisdictional power with regard to it" (C. BARREAU, obs. under Civ. 1^{ère}, 28 April 1987, *JCP G* 1989, II, 21216, n° 20).

2116 The possibility of lodging an appeal for interpretation or an appeal against a decision should also be mentioned. In accordance with established case law, an appeal for interpretation is admissible only if it is lodged by a party to the proceedings which led to the decision whose interpretation is sought and only if it can be validly argued that the decision is obscure or ambiguous. See CE, ord. 24 November 2005, *Moissinac Massenat*, n° 287348. The applicant asked the interim relief judge of the Council of State to interpret a previous order issued in the dispute between him and the administration (CE, ord. 8 November 2005, *Moissinac Massenat, Lebon* p. 491). The judge stated that the injunction addressed to the administration in this decision was not ambiguous. The appeal for interpretation is therefore inadmissible. For an example of an appeal in opposition, see CE, 27 July 2001, *Haddad*, n° 231889: Mr Haddad presented an application in opposition in order for the Council of State to declare null and void a decision previously rendered by the judge of the *référé-liberté* of the Council of State (CE, ord. 24 January 2001, *Université Paris VIII Vincennes Saint-Denis, Lebon* p. 37). As the conditions for opposition were not met, the Council rejected his request.

Council of State under the conditions set out in Article R. 834-1 of the Code of Administrative Justice²¹¹⁷. On the other hand, the applicant may lodge an appeal for rectification of a material error governed by Article R. 833-1. Such an appeal is not admissible when the applicant contests the legal assessments made by the interim relief judge²¹¹⁸. On the other hand, it is admissible if the petitioner claims a material error committed by the interim relief judge, and founded if this error is characterised²¹¹⁹. The Council of State has indicated in this respect, and in accordance with established case law²¹²⁰ that 'the omission to rule on conclusions is likely to give rise to an action for rectification on the grounds of material error'²¹²¹.

505. Apart from these exceptional remedies, safeguard measures ordered by the judge of the *référé-liberté* (interim relief) procedure may be challenged by appeal before the judge of the Conseil d'Etat²¹²². The principle of appeal is the result of a parliamentary initiative. Its regime essentially follows the general rules governing this form of appeal. The safeguard measure is stabilised once the time limit for appeal has been exhausted or exercised by one of the parties.

I. The principle of the appeal: a parliamentary initiative

506. In accordance with the guidelines laid down by the Council of State's working group, the draft law provided for a single appeal procedure for all emergency applications for interim relief. In order to promote a rapid outcome to disputes, the draft bill abolished the intermediate level of the administrative courts of appeal and opted for a system of general cassation applying to all urgent summary proceedings²¹²³. This rule applied in particular to interim relief proceedings, which in this respect did not benefit from privileged treatment compared to other procedures. As there was no presumption of appeal²¹²⁴, the decisions of the interim relief judge were only subject to an appeal to the Supreme Court. Because of the highly sensitive area in which this procedure is used, the members of parliament wished to give the Council of State the powers of an appeal judge, enabling it to deal fully with the dispute in law and in fact. Without calling into question the principle of a single appeal, Parliament will replace cassation with an appeal - still before the Council of State - for decisions rendered by the interim relief judge after a public hearing. For President Labetoulle, this amendment represents "the most important" innovation brought to the bill by parliamentarians²¹²⁵. The principle of appeal is indeed a notable feature of the *référé-liberté*, since the other emergency measures are only subject to appeal to the Supreme Court. Also, "With the institution of this double degree of jurisdiction, considered as a guarantee of good justice, we see once again the very special consideration that the summary procedure enjoys in safeguarding a freedom"²¹²⁶.

507. The appeal was introduced by the Senate at first reading on the initiative of its Law Commission. The amendment, with which Mr Badinter was particularly associated, was adopted by the upper house with the support of the government. It is clear from the preparatory work that the senators wanted to offer litigants the most extensive guarantees when fundamental freedoms are at stake. Mr Garrec stressed that in such an

2117 See CE, 22 June 2005, *Gaiffe*, no. 252090. The applicant asked the Council to annul the order of 8 November 2002 by which the interim relief judge of the Council of State rejected his application for interim relief submitted on the basis of the provisions of Article L. 521-2 of the Administrative Justice Code. The Council rejected the application on the grounds that it did not fall within any of the cases of review provided for by the provisions of Article R. 834-1 of the Code.

2118 CE, 27 October 2003, *Karsenti*, n° 252151.

2119 This is the case when the appeal judge opposes the 15-day time limit mentioned in Article L. 523-1 of the Code of Administrative Justice and rejects her request as late, whereas the interested party was entitled to benefit from the provisions of Article R. 811-5, which increases the time limits for appeals by two months for persons residing abroad at the time of notification of the decision (CE, 3 May 2004, *Dogan épouse Antil, Lebon T.* p. 854). The Conseil d'Etat accepted the appeal for rectification of a material error and ruled again on Mrs Dogan's appeal against the order of the first instance judge.

2120 See CE, 17 April 1970, *DMS Préfontaines, Lebon p.* 260.

2121 CE, 16 February 2004, *Gbouzj, Lebon p.* 79. The application was rejected in this case, as the interested party's request had become irrelevant due to the subsequent intervention of a decision of the Council of State ruling on the contested administrative measure. See, in the same sense: CE, 5 May 2006, *Orizj*, No. 242713 (rejection of the rectification appeal, the conclusions in summary proceedings initially presented having become irrelevant following a change in the applicable legislative and regulatory provisions).

2122 More generally, all orders issued after a public hearing can be appealed. On the other hand, orders made under the sorting procedure can only be appealed to the Supreme Court. Thus, the decisions of the judge of the *référé-liberté* have the particularity of being able, depending on the case, to be challenged either by way of appeal or by way of cassation.

2123 The mission letter of 31 October 1997 specified that the appeal procedures "must allow for a rapid resolution of disputes" (*RFDA* 2000, p. 954). Indeed, as in any judicial procedure, there must be channels of appeal that allow any errors made by the interim relief judge to be rectified in good time and to guarantee the unity of case law throughout the country. However, these must be adapted to the urgency of the summary proceedings. It has become apparent that the traditional system of appeal followed by cassation is unsuitable for urgent cases insofar as it leads to the superimposition of successive instances (an instance at first instance, an instance of appeal, an instance of cassation). By dispensing with an appeal to the administrative courts of appeal, the text made it possible to eliminate one level of proceedings.

2124 In administrative litigation, the right to a second hearing only exists if it is expressly provided for by a text. The Conseil d'Etat considers that "in the absence of any provisions stipulating that decisions are subject to appeal", they must be considered as having been rendered at last instance and can therefore only be appealed to the Supreme Court (CE, 6 June 1949, *Faveret, Lebon p.* 228).

2125 D. LABETOUILLE, "La genèse de la loi du 30 juin 2000", in *Le nouveau juge administratif des référés*, PUS, 2002, *op. cit.*, p. 24.

2126 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1545.

essential area, the possibility of submitting a request for review and of appealing to the Supreme Court did not constitute sufficient guarantees for the individual²¹²⁷. In the first case, it is the same judge who makes the decision: there is therefore no intervention by a new judge. In the second case, the judge's control is limited to the elements of law. The judge of cassation will only be able to examine the factual elements of the case and settle the dispute on the merits on the threefold condition that the appeal is admissible, that a ground for cassation is founded and that the Council of State decides to refer the case. It is because of the lesser guarantees offered by these two legal means that the senators considered it essential to establish the principle of an appeal in matters of summary judgment. According to M. Garrec, "The double degree of jurisdiction cannot suffer any exception when fundamental freedoms are at stake, unless the constitutionally protected rights of the defence are deprived of guarantees"²¹²⁸. The National Assembly rallied to the Senate's position at first reading, despite the reservations expressed by its rapporteur²¹²⁹.

508. On the other hand, a divergence appeared between the two chambers on the competent court to hear the appeal. For reasons of proximity to those subject to the law, the National Assembly defended the competence of the administrative courts of appeal, the ordinary law judge of appeal since the law of 31 December 1987. Mr Blessig thus declared that "To improve access to justice for the individual, it is better for the procedure to take place as close as possible, i.e. before the administrative court of appeal"²¹³⁰. The competence of the Council of State was defended by the Senate. The senators put forward three sets of arguments²¹³¹. Firstly, the immediate intervention of the supreme judge favours a more rapid settlement of cases by allowing the economy of a level of jurisdiction²¹³². Secondly, it has been argued that this solution allows for a rapid unification of case law on the protection of fundamental freedoms. According to Mr Garrec, "The aim is to prevent the dispersion of appeals against injunctive relief decisions among seven administrative courts of appeal from undermining the unity of case law"²¹³³. Thirdly and lastly, the jurisdiction of the Council of State made it possible to align the regime of summary proceedings with that of interim relief, thus promoting the coherence of the texts when the same matter is at issue. These arguments had not convinced the deputies at first reading. The National Assembly had adopted, despite the unfavourable opinion of the rapporteur and the government, the amendment tabled by Mr Blessig and Mr Albertini, bringing the appeal of the *référé-liberté* before the administrative courts of appeal²¹³⁴. Mr Blessig's amendment was proposed again at second reading and finally rejected by the deputies²¹³⁵. Article L. 523-1, paragraph 2, provides that "Decisions rendered pursuant to Article L. 521-2 may be appealed to the Council of State within fifteen days of their notification". The orders by which the judge of the *référé-liberté* pronounces a safeguard measure come after an adversarial investigation and a public hearing. They are, therefore, rendered at first instance.

II. The appeal regime

509. An appeal may be lodged against any decision given by the interim relief judge of an administrative court²¹³⁶

2127 R. GARREC, Senate Report No. 380, p. 30 and pp. 63-65.

2128 R. GARREC, *JO déb. AN*, CR session 8 June 1999, p. 3741.

2129 Mr Colcombet has indeed declared himself "very reserved" on the principle of an appeal in summary proceedings, putting forward three arguments. Firstly, the introduction of an appeal for this procedure alone represents a source of complexity. It runs counter to the bill, which aims to simplify and standardise the rules applicable to the various procedures. Secondly, the appeal mechanism deprives the appellant of an appeal to the Supreme Court which, in accordance with the rules of ordinary law, involves a panel. Lastly, outside the criminal sphere, the appeal does not constitute a requirement that the legislature must respect (F. COLCOMBET, Rapport AN n° 2002, pp. 52-53). These arguments hardly convinced the deputies. The members of the Law Commission opposed the amendment presented by Mr Colcombet aimed at restoring the initial wording of the bill (Report, pp. 53-54). The National Assembly did not go back on the principle of appeal.

2130 E. BLESSIG, *JO déb. AN*, CR session 14 December 1999, p. 10944. The same argument will be taken up again at second reading. During the sitting, Mr Blessig wondered "How can it be justified that the arguments developed in favour of the summary jurisdiction judge in the first instance - speed, orality, simplicity, proximity - should be rejected in the case of appeals" (*JO déb. AN*, CR séance 6 avril 2000, p. 3162).

2131 See R. GARREC, Senate Report No. 210, pp. 21-22.

2132 Decisions by the administrative courts of appeal could have been appealed to the Supreme Court. Furthermore, it was noted that the congestion of the administrative courts of appeal seemed to jeopardise the speedy consideration of the appeal.

2133 R. GARREC, Senate Report No. 210, p. 22. However, it should be noted that the risk of a breakdown in case law was very hypothetical insofar as the orders of the administrative courts of appeal would in any event have been subject to the Conseil d'Etat's judicial review.

2134 *OJ déb. AN*, CR session 14 December 1999, pp. 10943-10944.

2135 *JO déb.* M. Garrec nevertheless pointed out that the solution adopted "does not exclude the subsequent transfer of this litigation to the administrative courts of appeal, once the case law is homogenous" (R. GARREC, Senate Report No. 210, p. 22). The *référé-liberté* would then have the same fate as the procedure for challenging deportation orders, whose appeal was transferred to the administrative courts of appeal after fifteen years of operation. Indeed, appeals from the deportation judge were initially brought before the Council of State. They were transferred to the administrative courts of appeal on 1st January 2005. This transfer was possible even though this procedure represents a mass litigation and requires the judge to rule within an extremely short period of 48 hours. In comparison, for an administrative court, summary proceedings represent several dozen decisions per year. The only obstacle to this transfer could be the desire to avoid the overlapping or stacking of levels of jurisdiction.

2136 The decisions of the Council of State's interim relief judge are not subject to appeal (CE, order of 29 May 2002, *Deynck*, no. 247239). Nor can they be the subject of an appeal in cassation. The Conseil d'Etat has recalled that 'the order issued by the interim relief judge of the Conseil d'Etat on an application referred directly to it on the basis of the provisions of Article L. 521-2 of the Code of Administrative

following a public hearing²¹³⁷.

It is open to the parties to the original proceedings. In the event of a total admission decision, only the administration will have an interest in appealing. In the event of partial admission, both parties may have an interest in exercising this remedy: the administration, firstly, in order to have the interim relief judge of the Council of State annul the measure prescribed in the first instance; the applicant, secondly, with a view to obtaining total satisfaction²¹³⁸. If his claims are accepted in their entirety, the applicant cannot usefully act before the judge of appeal²¹³⁹. Third parties to the proceedings are not entitled to appeal²¹⁴⁰. Similarly, interveners do not have the status of parties and are therefore not entitled to appeal²¹⁴¹.

In the case of summary proceedings, the appeal falls within the jurisdiction of the interim relief judge of the Council of State. An administrative court of appeal that has been wrongly seized must forward the application file to the litigation secretariat of the Council of State²¹⁴². The appeal must be lodged within 15 days of the notification of the contested decision. The rules concerning the time limit for appeal are the same as for an appeal in cassation against a sorting order. Thus, the 15-day time limit is a clear time limit and may be increased by the time limits for distance²¹⁴³. In addition, the appeal is admissible if the application reaches the court registry by fax within the time limit, even if the complete application file does not arrive by post until a later date²¹⁴⁴. However, it is inadmissible if it is lodged after the expiry of the 15-day period mentioned above²¹⁴⁵.

Article R. 523-3 of the Code of Administrative Justice exempts appeals in summary proceedings from the requirement to have a lawyer. By virtue of the combined provisions of Articles R. 411-1 and R. 811-13, any appeal request must, on pain of inadmissibility, be reasoned²¹⁴⁶. In any event, submissions made for the first time on appeal are inadmissible²¹⁴⁷. The appeal must have retained its purpose on the date it was lodged with the Council of State. This is not the case if the decision challenged before the first judge has exhausted its effects²¹⁴⁸ or if the measure ordered by the latter no longer has any purpose²¹⁴⁹. On the other hand, the execution by the administration of the measure prescribed in the contested order does not render the appeal against it moot²¹⁵⁰.

Justice may not be appealed against or appealed to the Conseil d'Etat' (CE, 27 October 2003, *Karsenti*, no. 252151).

2137 Decisions rendered without a public hearing, i.e. according to the triage procedure, are subject to judicial review. Appeals" against triage orders are reclassified as appeals to the Supreme Court and judged by a panel of the Council of State. See *supra*, § 412.

2138 See for example CE, ord. 16 July 2001, *Feuillatey, Lebon* p. 309.

2139 CE, ord. 17 May 2004, *Bouhmidi*, No. 267516. Seized on the basis of Article L. 521-2 of a request that the Prefect of Hauts-de-Seine be ordered to return her identity card and passport, the interim relief judge "ordered the Prefect of Hauts-de-Seine to summon Ms. Bouhmidi upon receipt of this order to examine her situation and allow her to benefit from a temporary residence permit until the competent judge, whom it is up to him to refer to, has ruled on the question of her nationality". The interim relief judge of the Conseil d'Etat stated that "when compared with the conclusions of the first instance of Mrs Bouhmidi, this provision must be considered as not adversely affecting Mrs Bouhmidi, whose appeal request is therefore inadmissible (...)". According to classic case law, the applicant who obtains complete satisfaction before the court of first instance has no interest in continuing the proceedings on appeal (see CE, 22 April 1983, *Ministre des postes et télécommunications, Lebon* T. p. 837).

2140 CE, ord. 29 January 2003, *Ville de Nice*, n° 253665.

2141 CE, ord. 3 January 2003, *Belminar and others*, no. 253045. However, it is settled case law that interveners may appeal if they have had 'standing either to bring the action or, in the absence of intervention, to file a third-party objection' (CE, 9 January 1959, *de Harenne, Lebon* p. 23). Also, the judge of the Council of State's summary proceedings has admitted the appeal lodged by a company against a request "in support of which it had intervened" (CE, order 17 May 2002, *EURL Mandon*, n° 246901).

2142 See, for example, CE, ord. 12 August 2004, *Abdullayev*, No. 271120; CE, ord. 10 April 2006, *Cicek*, No. 292080.

2143 CE, 3 May 2004, *Dogan épouse Antil, Lebon* T. p. 854.

2144 CE, ord. 30 January 2001, *Tauruaatua*, n° 229418.

2145 CE, ord. 16 May 2002, *Auto-école SOS permis*, n° 246813; CE, ord. 27 January 2003, *Chausson*, n° 253548; CE, ord. 28 March 2003, *Latti*, n° 255412.

2146 A petition that does not contain a statement of claim is therefore inadmissible. See for example CE, ord. 14 February 2003, *Société hôtelière de la Calade*, n° 254173.

2147 CE, ord. 19 July 2001, *Société générale bâtiment et habitation (SGBH)*, No. 248742.

2148 The appeal, lodged before the Council of State on 27 October 2001, concerning an administrative decision that had exhausted its effects since 14 October 2001 (CE, ord. 29 October 2001, *SARL Objectif*, no. 239443); the application lodged on 4 April 2003 concerning a decision that had exhausted its effects since 17 March 2003 (CE, ord. 4 April 2003, *Rambour*, No. 255716); the application registered on 28 October 2003 concerning a decision that had exhausted its effects on 9 October 2003 (CE, order 29 October 2003, *Centre hospitalier d'Albi*, No. 261376) or the appeal lodged on 28 February 2006 in a dispute concerning a decision ordering the summoning of certain agents for the week starting on 6 February 2006 (CE, order 8 March 2006, *Centre hospitalier universitaire de Caen*, No. 290771).

2149 See for example CE, ord. 16 March 2001, *Commission de propagande du canton de Grimaud, Lebon* T. p. 1135. By order of 6 March 2001, the first judge ordered the propaganda commission of the canton of Grimaud to distribute the ballot papers and circulars submitted by Mr Sibillat, a candidate in the cantonal elections in Grimaud. By application dated 13 March 2001, i.e. after the first round of voting, the propaganda commission appealed to the interim relief judge of the Council of State against this order. The investigation showed that Mr Sibillat had not obtained a number of votes in the first round of voting that would allow him to stand in the second round. Consequently, the request presented before the judge of appeal is devoid of purpose and is consequently inadmissible. See also CE, ord. 18 June 2003, *Territoire de la Polynésie française et Caisse de prévoyance sociale de la Polynésie française, Lebon* T. p. 877: an appeal against an order suspending two decrees is inadmissible when these decrees have in the meantime been annulled by the judge of excess of power.

2150 CE, ord. 4 February 2004, *Commune d'Yvrac, Lebon* T. p. 828. If, after the commune of Yvrac lodged its appeal, it executed the order of 7 January 2004, this circumstance is not such as to render moot the appeal of the commune, which was responsible for executing the order and which intends to maintain that the order was wrongly issued. It is therefore entitled, in particular, to ask to be discharged from the sum charged to it under Article L. 761-1 of the Administrative Justice Code. This is in line with the rule, regularly recalled by the Council of State in ordinary law procedures, according to which court decisions are enforceable as soon as they are notified, notwithstanding an appeal (see for example CE, 28 May 1993, *Bastien, Lebon* T. p. 972). The postponement of enforcement until the appeal judge has given his decision constitutes a violation of *res judicata* (CE, 13 July 1996, *Ximay, Lebon* T. p. 1063). No more than in proceedings on the merits, the appeal here has a suspensive character (on this rule, see B. PACTEAU, "Paradoxes et périls de l'effet non suspensif de l'appel", in *Mélanges René Chapus*,

510. Article R. 523-3 provides that appeals are subject to the procedural rules applicable to urgent interim relief proceedings, where necessary. The applications are investigated and judged by the interim relief judge of the Council of State. Pursuant to Article L. 523-1, the president of the Administrative Jurisdiction Division of the Council of State or the State Councillor he or she delegates for this purpose decides within 48 hours. He may rule according to the ordinary law procedure of Article L. 522-1 or according to the sorting procedure of Article L. 522-3.

The interim relief judge of the Council of State checks the regularity of the order issued by the first instance judge. He ensures that the first instance judge has ruled according to a regular procedure, in particular by respecting the requirements of contradiction²¹⁵¹, by ruling on all the submissions before him²¹⁵² or by giving sufficient reasons for his decision in the light of the arguments submitted to him²¹⁵³. The court's decision will also be annulled if it has distorted the applicant's submissions²¹⁵⁴, made an error of law²¹⁵⁵, exceeded its jurisdiction²¹⁵⁶ or, more generally, misapplied the applicable rules. In particular, the judge misapplied the provisions of Article L. 521-2 of the Code of Administrative Justice by wrongly considering that the conditions for granting²¹⁵⁷ had been met, in particular the condition of infringement of a fundamental freedom for acts and situations that are not in themselves likely to cause such infringement²¹⁵⁸ or the condition of manifest illegality for an expulsion order based on serious facts²¹⁵⁹.

The judge of appeal, seized by devolutive effect, decides on the case submitted to him. He may add to or subtract from the measures ordered by the first judge. On the one hand, he can go beyond the measures ordered in the contested decision. For example, it can order a safeguard measure when the judge of the first instance considered that the conditions for granting it were not met or that he was not competent to rule on the matter²¹⁶⁰. The court may substitute more restrictive measures for those ordered by the first instance judge if these seem insufficient to safeguard a fundamental freedom. It is thus open to the court to impose a penalty on the injunctions issued by the first court, which is not provided for by the latter²¹⁶¹ or to increase the amount of the fine for abusive recourse to which the first court has condemned the applicant²¹⁶². On the other hand, the appeal judge may reduce or cancel measures ordered in the contested order. If the conditions for granting them are not met, he will terminate the measures ordered by the first judge²¹⁶³. Where the judge of the first instance has ordered a measure which, in the opinion of the appeal judge, conflicts with the provisions of Article L. 511-1, he may modify the content of the injunction²¹⁶⁴. It is also possible for the judge of appeal to amend the order of the first judge in order to limit the scope of the injunction issued by the latter. Thus, in the *Fenillatey* case, the interim relief judge of the Conseil d'Etat added to the reservation mentioned by the first judge that it is incumbent on doctors, before proceeding with a blood transfusion, on the one hand to do everything possible to convince the patient to accept the essential care, and on the other hand to ensure that recourse to a transfusion represents an act that is essential to the survival of the interested party and proportionate to her condition²¹⁶⁵.

Once the appeal judge has ruled, or the time limit for appeal has expired, the decision taken by the interim relief judge acquires a remarkable stability. Its reconsideration by another judge, without being legally impossible,

Montchrestien, 1992, pp. 793-501).

2151 See e.g. CE, ord. 26 March 2002, *Société Route Logistique Transports*, *Lebon* p. 114.

2152 CE, ord. 6 September 2002, *Tetaabi*, n° 250120.

2153 CE, ord. 16 September 2002, *Société GSM*, n° 250312.

2154 Having regard to the terms of the submissions, the arguments as a whole and the fact that no application for annulment or reversal of an administrative decision had been submitted, 'the first judge did not misinterpret the application' in considering that the applicant had intended to rely, primarily, on the provisions of Article L. 521-2 and, secondarily, on those of Article L. 521-1 (CE, ord. 10 April 2001, *Syndicat national unifié des directeurs, des instituteurs, des professeurs des écoles de l'enseignement public Force ouvrière (SNUDI-FO) du Maine-et-Loire*, *Lebon* T. p. 1090).

2155 See e.g. CE, ord. 9 December 2002, *Ministre de l'Intérieur, de la sécurité intérieure et des libertés locales c/ Negmari*, n° 252338.

2156 For example by annulling an administrative decision (CE, ord. 24 January 2001, *Université Paris VIII Vincennes Saint-Denis*, *Lebon* p. 37).

2157 CE, ord. 27 March 2001, *Ministre de l'Intérieur c/ Djalout*, *Lebon* p. 158; CE, ord. 6 April 2001, *Ministre de l'Intérieur c/ SARL Le Vivier*, *Lebon* p. 186; CE, ord. 25 November 2003, *Présidente de l'Assemblée de la Polynésie française*, *Lebon* T. p. 928.

2158 For example, in the case of overlapping timetables for two optional courses in a secondary school (CE, order of 5 October 2001, *Ronquette Lipietz*, no. 238676) or the issue of a building permit (CE, order of 11 October 2001, *Commune de Saint-Bauzille-de-Putois*, *Lebon* p. 462). The same applies, more generally, when the act in question does not, in the circumstances of the case, infringe a fundamental freedom. See for example CE, ord. 16 April 2003, *Lycée polyvalent du Taaone*, No. 256002: "the applicants are entitled to maintain that in the absence of infringement of a fundamental freedom, it is wrong that the judge of the summary proceedings of the administrative court of Papeete made use of the powers provided for by Article L. 521-2 of the Code of Administrative Justice".

2159 CE, Sect. 30 October 2001, *Ministre de l'Intérieur c/ Tliba*, *Lebon* p. 523; CE, ord. 10 August 2001, *Minister of the Interior v. Saddouki*, No. 236969.

2160 CE, ord. 19 August 2002, *Front national et Institut de formation des élus locaux (IFOREL)*, *Lebon* p. 311.

2161 CE, ord. 12 November 2001, *Ministre de l'Intérieur c/ Béchar*, *Lebon* T. p. 1132: fine of 150 euros per day of delay in the execution of injunctions pronounced by the judge of first instance on the dates fixed by the latter.

2162 CE, ord. 12 May 2003, *Pichaut*, n° 256729.

2163 See for example CE, ord. 22 May 2003, *Commune de Théoule-sur-Mer*, *Lebon* p. 232.

2164 See for example CE, ord. 26 April 2005, *Minister of the Interior, Internal Security and Local Freedoms v. M'LAMALI*, *Lebon* T. p. 1034. The first judge had ordered the prefectural authority to renew the applicant's national identity card and passport. The appeal judge substituted an injunction to re-examine the file submitted by the applicant. The contested order is reformed insofar as it is contrary to the decision of the appeal judge.

2165 CE, ord. 16 July 2001, *Fenillatey*, *Lebon* p. 309.

is nonetheless very hypothetical.

Section 2. Unlikely challenge by another judge

511. Once the time limits and remedies have expired, can the decision taken by the interim relief judge be considered final? In law, such a solution must be excluded. But what about in practice? Can the measures ordered by the judge on the basis of Article L. 521-2 really be challenged by a judge? For this to be possible, two elements must be present. Firstly, and logically, there must be "something" to challenge. Secondly, it is necessary that a judge be seized and that the conditions for challenging what has been ordered by the judge of the *référé-liberté* be met.
512. In order for the measure ordered to be considered reversible, there must first of all be "something" left to be called into question after the intervention of the interim relief judge, i.e. the subject matter of the dispute must not have disappeared entirely following his decision. This requirement leads to a distinction being made according to the type of safeguard measure ordered; in practice, it reduces to the extreme the cases in which the question of reconsideration may arise. Firstly, in the case of suspension of a positive decision, the subject matter of the dispute will potentially be maintained after the measure has been pronounced in two cases: on the one hand, if the period during which the decision was to apply has not come to an end, i.e. the term initially set by the administration when it issued the decision²¹⁶⁶; on the other hand, if the decision whose effects are suspended did not include a time limit. Secondly, in the case of an injunction to do, pronounced as a principal or as a complement to a suspension measure, the subject matter of the dispute only continues as long as the administration has not complied. The administration is required to act as quickly as possible, generally within a few days. Once the administration has complied, the dispute is over; the situation that gave rise to the referral to the court disappears²¹⁶⁷. Thirdly, in the case of a restraining order, the subject matter of the dispute disappears when the circumstances that led to the prohibition being imposed cease to exist, as in the *FN IFOREL* case, or when the time limit set by the court for the duration of the obligation expires. These are the only cases in which there may be "something" left to be judged and challenged after the intervention of the interim relief judge. In the other cases, there is nothing left to judge or to challenge. The judge has rectified the litigious situation. His intervention has the effect of emptying the dispute, of extinguishing it definitively, of putting an end to the dispute which had given rise to the initiation of a summary procedure. Once the safeguard measure has been pronounced, the dispute no longer has any object.
513. In the rare cases where the referral to a judge - whether a judge of the merits or a judge of the interim relief procedure - will not be inadmissible (because of the absence of a subject matter), and a judge will therefore rule after the judge of the interim relief procedure, the questioning of his or her decision is likely to be conceivable only in very rare cases. The challenge will not come from the judge on the merits, not only because of the very hypothetical nature of his referral, but also and above all because of the condition of manifest illegality set out in Article L. 521-2 of the Code of Administrative Justice. While the possibility of a challenge by the interim relief judge is not to be excluded in principle, it can only occur in very specific cases.

I. The impossibility of a challenge by the trial judge

514. If a judge of the merits intervenes after the judge of the *référé-liberté*, which in practice is extremely rare, it is certain that he will rule in the same way as the latter and, consequently, without calling into question what has been decided under Article L. 521-2.

²¹⁶⁶ Once the period initially foreseen for its application has expired, the dispute is extinguished.

²¹⁶⁷ Once the administrative authority has removed the bollards obstructing access to the premises of a private company and carried out the work necessary to connect these premises to the public highway (example of the order of 31 May 2001, *Commune d'Hyères-les-Palmiers, Lebon* p. 253), issued the applicant with the national identity card he requested (example of the order of 11 March 2003, *Samagassi, Lebon* p. 119), returned a family's identity documents (example of the order of 2 April 2001, *Ministre d'Intérieur c/ Consorts Marcel, Lebon* p. 167) or provided assistance from the police. 119), returned a family's identity documents (e.g. the order of 2 April 2001, *Minister of the Interior v. Consorts Marcel, Lebon* p. 167), or provided the assistance of the public force to enforce a court decision ordering the eviction of squatters (e.g. the *Stéphaur* case law), there is nothing more to judge. If we take the example of the *Stéphaur* case law, "it is difficult to see how the injunction addressed by the judge to the police authority to use its powers to evict untitled occupants could be qualified as temporary" (T. PEZ, "Le droit de propriété devant le juge administratif du *référé-liberté*", *RFD-A* 2003, p. 380). In order to comply, the administration must take measures of a definitive nature. Similarly, in the *Société Outremer Finance Limited* case, the Council of State had ordered the Aéroport de Paris to put an end to the immobilisation of an aircraft belonging to the applicant company (CE, 2 July 2003, *Société Outremer Finance Limited, Lebon* p. 306). In order to execute this decision, the director general of the establishment took a decision stating: "The detention on the ground at Orly of the Airbus A 340 registered F-GTUA belonging to the company Outremer Finance Limited, implemented by DG decision no. 2003/553 of 6 February 2003, is definitively lifted as of this day" (decision cited in the grounds of the Conseil d'Etat ruling on the liquidation of the fine: CE, 28 July 2004, *Société Outremer Finance Limited*, n° 254536, *JCP-A* 2004, 1743, obs. J. MOREAU).

A. A possible but rare referral

515. When a safeguard measure has been pronounced, the intervention of the judge on the merits will be exceptional because it depends solely on the will of the applicant. The ordinary law judge will only be able to intervene if the applicant so decides, i.e. at the sole instigation of the applicant. This is an important difference with the rules of private judicial law and summary proceedings.

516. In civil procedure, both parties to the summary proceedings have the right and the possibility - but no obligation - to bring the case before the trial judge²¹⁶⁸. The institution of proceedings on the merits is "left to the sole discretion of the parties"²¹⁶⁹. If none of the parties decides to pursue the case on the merits, "the decision of the interim relief judge may stand and become, in practice at least, the law of the parties"²¹⁷⁰. However, the defendant in the summary proceedings may have an interest in subsequently bringing an action before the principal judge. Consequently, the party who has obtained satisfaction in summary proceedings can never be certain that the solution given will be definitively maintained. It is always possible that his adversary will subsequently bring the dispute before the court hearing the case on the merits, since the exercise of an action in the main proceedings may result in the latter's questioning the order given in summary proceedings. Thus, in private judicial law, measures ordered in summary proceedings remain in force only "as long as the party against whom they were prescribed does not bring proceedings before the court on the merits"²¹⁷¹.

In administrative litigation, this risk is inherent in the nature of the summary judgment. By virtue of its accessory nature, and because of the mere likelihood of illegality that the judge is asked to establish, this procedure implies as of right the subsequent intervention of the judge on the merits. The exercise of an appeal on the merits is a condition of admissibility of the conclusions presented on the basis of Article L. 521-1; the judge of summary proceedings may suspend the execution of the contested decision if he only has serious doubts about its legality.

The possible or compulsory intervention of a judge on the merits, in civil procedure and administrative litigation, thus appears to be an obstacle to the permanence of the solution given in summary proceedings. This situation is in line with the purpose of these procedures, the "vocation of the provisional" being to "fade away before the expected definitive"²¹⁷².

517. The situation is different in the context of the *référé-liberté*. The person who has filed an application on the basis of Article L. 521-2 of the Code of Administrative Justice has the sole initiative to bring the case before the ordinary court. He alone has the right to bring an action before the administrative judge of common law, to the exclusion of the defendant administration. The applicant for interim relief is therefore free to decide what to do with the proceedings. He has the legal guarantee that the administration will not be able to bring an action before the ordinary law judge to reverse the decision given in summary proceedings. If the latter is seized, it can only be at its instigation. This fundamental difference gives greater stability to the decisions of the judge of summary jurisdiction. If the applicant for interim relief does not bring the case before the trial judge, the latter can never intervene.

However, when the applicant has obtained the pronouncement of a safeguard measure, the satisfaction obtained in summary proceedings makes it unnecessary to lodge an appeal on the merits under the ordinary procedure. In most cases, the applicant who has obtained satisfaction on the basis of Article L. 521-2 has no practical interest in the intervention of the ordinary law judge. However, the intervention of the latter is not totally unthinkable. First of all, the judge on the merits will intervene in the same case if the appeal on the merits was lodged before the application for interim relief was made or at the same time. He will also be able to exercise this

2168 As M. Strickler reminds us, "Since the presidential order has no *res judicata* authority with regard to the main proceedings, the parties remain free to refer to the judge on the merits an application that is identical in all respects to the one on which the summary proceedings judge has already ruled. The *fin de non recevoir* drawn from the *res judicata* of the summary judgement is therefore unenforceable before the judge on the merits" (Y. STRICKLER, *Le juge des référés, juge du provisoire*, thèse Strasbourg, 1993, p. 433). See for example Civ. 3^{ème}, 9 January 1991, *JCP G* 1991, II, 21729, obs. L. LEVY.

2169 J. NORMAND, "Le caractère provisoire ou le caractère temporaire des mesures prises en référé. Le cas des mesures restrictives de la liberté d'expression", *RTD civ* 1997, p. 501.

2170 Y. STRICKLER, "Réflexions sur le référé judiciaire. Retour sur le provisoire", in *Le nouveau juge administratif des référés*, PUS, 2002, *op. cit.*, p. 74. In his doctoral thesis, the author made a similar observation, noting that it happens that the decision taken in summary proceedings "is affected by a definitive effectiveness. Sometimes the parties are satisfied with the order of the President and decide not to bring the dispute before the court. If the dispute is settled provisionally, it will be extinguished before the main proceedings. This definitive effect of the presidential decision is particularly evident in the field of indisputable rights" (Y. STRICKLER, thesis, p. 436). See on this point the observations of the Magendie mission report, *Célérité et qualité de la justice*, Report to the Minister of Justice 15 June 2004, La Documentation française, 2004, p. 64 et seq.

2171 E. GARSONNET and C. CEZAR-BRU, *Traité théorique et pratique de procédure civile et commerciale*, Librairie de la société du Recueil Sirey, t. VIII, 1925, n° 191.

2172 L. MERLAND, *Recherche sur le provisoire en droit privé*, thesis Aix-en-Provence, 2000, p. 352.

recourse after the order for interim relief if he considers that he has not obtained full satisfaction and wishes in particular to obtain an annulment on the merits or compensation for the damage suffered because of the illegality of an administrative act. However, in order for the appeal to be admissible, it will be necessary to have an administrative decision likely to bind the dispute, and to act within the time limit for contentious appeal under ordinary law. Under these conditions, such a referral appears relatively hypothetical. If by any chance a judge of the merits comes to rule after the judge of the summary judgment, it is absolutely certain that he will adopt the same solution as the latter.

B. A foregone conclusion

518. It is settled case law that the statements of the interim relief judge are not binding on the court of first instance. This rule is a consequence of the principle according to which the interim relief judge does not deal with the substance of the law and leaves intact the legal question that constitutes the subject of the dispute. He rules on the state of the investigation and orders the necessary measures without undertaking the main issue. Consequently, its orders have no authority over the judge in the main proceedings. The latter remains entirely free in establishing his conviction. His freedom is in no way impeded or reduced by the prior intervention of the interim relief judge. In the domestic sphere, the principle is enshrined by the two supreme courts²¹⁷³.

The Court of Cassation considers that the judge in the main proceedings is never bound by the order for interim relief, whether it concerns the assessments of fact or law made by the president, or the consequences that he may have deduced from them. Its decisions do not have the force of *res judicata* with regard to the judge in the main proceedings²¹⁷⁴. According to classic case law, "Whatever the decision of the judge in the case before it, the Court of First Instance remains perfectly free to make its own assessments"²¹⁷⁵. This principle is presented as a consequence of the rule that the interim relief judge does not address the substance of the law. According to First President Estoup, "since the interim relief judge is not seized of the main issue, it is logical to deduce that the main judge will not be bound by what may be decided in the interim proceedings"²¹⁷⁶.

Similarly, the Council of State states that "the decisions taken by the judge of the administrative summary procedure (...) are not binding on the court that may be seized of the main dispute"²¹⁷⁷. The position adopted by the interim relief judge "does not prejudice (...) the merits"²¹⁷⁸. From a legal point of view, the ordinary courts are not bound by the solution given in the summary proceedings and may opt for a different solution. The decision taken by the judge in summary proceedings is deemed to be provisional and therefore not binding on the ordinary courts. Should this principle apply to interim relief? Since the absence of *res judicata* with respect to the main proceedings applies only to provisional decisions that do not deal with the substance of the law, one may wonder whether the ordinary law judge should not oppose an inadmissibility if he is called upon to rule after the summary judgment judge has pronounced a safeguard measure - and thus found a manifest illegality. From a logical point of view, the idea can legitimately be put forward insofar as the interim relief judge rules on the main issue. However, due to the deemed provisional nature of interim relief orders, it can only be rejected²¹⁷⁹. Under strict law, "the court of first instance may decide that the disputed act is not vitiated by any illegality, even though the judge in the interim relief proceedings had concluded that there was a serious doubt as to its legality or that the judge in the interim relief proceedings had considered that this act was vitiated by a serious and manifestly illegal violation of a

2173 It is also the case in Community litigation. Article 86(4) of the Rules of Procedure of the Court of Justice of the European Communities of 19 June 1999, as amended, provides that "the order shall be provisional and shall in no way prejudice the decision of the Court of Justice in the main proceedings". In these conditions, the measures ordered in summary proceedings "do not prejudice the points of law or of fact in dispute or neutralise in advance the consequences of the decision to be given subsequently in the main proceedings" (ECJ, 19 July 1995, No. C-149/95 P(R), *Commission v. Atlantic Container Line*, ECR 1995, I, p. 2165, pt. 22, quoted by P. CASSIA, "L'autorité de la chose ordonnée en référé", *op. cit.* p. 1685).

2174 Ccass. req., 4 November 1863, *D.* 1864, 1, p. 35; Civ. 28 June 1892, *D.* 1892, 1, p. 378.

2175 Y. STRICKLER, thesis, p. 542.

2176 P. ESTOUP, *op. cit.*, p. 26. See also P. BERTIN, "Référé civil", *Répertoire de procédure civile*, 1980, No. 19: "The measure taken in summary proceedings does not bind the judge on the merits. This is a principle that has always been accepted in doctrine and case law and which is based on the fact that the judge in summary proceedings is not seized of the main issue.

2177 CE, 14 November 1997, *Communauté urbaine de Lyon*, *Lebon* p. 421.

2178 CE, 11 February 1977, *Groupe des industries métallurgiques de la région parisienne*, *Dr. soc.* 1978, pp. 39-51, concl. M. GENTOT. For the stay of execution, see CE, Sect. 9 December 1983, *Ville de Paris*, *Lebon* p. 499, concl. B. GENEVOIS: the judge of the merits can consider that a request is admissible whereas the judge of the stay had declared the request inadmissible on the grounds that it was not detachable from a contractual operation.

2179 Moreover, it should be noted that the conclusions presented to the judge of summary jurisdiction and those submitted to the judge of the merits of ordinary law, in excess of power or in full litigation, are different. If the parties are the same and the cause of the dispute identical - even if the judge of the summary proceedings could hear a situation or a behaviour whereas the judge of the merits of common law will necessarily hear a decision -, the conclusions are necessarily distinct. The solution can be compared on this point with the *référé-précontractuel*. As the government commissioner Chantepy stated, 'In the absence of identity of purpose, the authority of the matter judged in summary proceedings cannot be invoked in post-contractual appeals' (C. CHANTEPY, concl. on CE, Sect., 3 November 1995, *Société Stentofon*, *Lebon* p. 393).

fundamental freedom"2180 .

519. Nevertheless, it is perfectly unthinkable that the judge on the merits should adopt a different solution from the judge of the *référé-liberté* when the latter has pronounced a safeguard measure, i.e. when he has previously noted a manifest illegality. Indeed, a *manifestly* illegal decision is, a fortiori, *simply* illegal. The illegality is indisputable and incontestable; it is proven, certain and beyond doubt2181 . It is quite unthinkable that, ruling on the same question of law, the judge of the merits of the case under ordinary law would adopt a different position from the judge of the interim relief procedure. He will necessarily adopt the same position as the latter. It is certain that he will find that the contested act is unlawful, and will confirm the interpretation given by the interim relief judge. The outcome of the proceedings is known with certainty after the intervention of the interim relief judge. Even if the ordinary court is seized, it is certain that it will not contradict the judge of interim release and, consequently, call into question the solution adopted by the latter. The applicant is assured that the solution given in summary proceedings will not be called into question by the judge on the merits.

The situation is strictly identical in civil procedure when the intervention of the interim relief judge is conditioned by the obviousness of the rights in question: "If the interim order must have the force of evidence, how can we then imagine that the judge on the merits can reverse this evidence? This is theoretically conceivable, but much less so in practice..."2182 . When it sanctions the exercise of indisputable rights, the interim order "very often in fact radically and definitively settles the dispute between the parties to the interim order"2183 . In judicial reality, the evidence of the law thus tends to assert itself as "the criterion for the distribution of litigation between the judge in summary proceedings and the judge on the merits"2184 .

Thus, it is strictly unthinkable that the judge of the merits of the case under ordinary law will question the decision of the judge of the *référé-liberté*. Can this challenge come from the interim relief judge himself through the review procedure opened by Article L. 521-4 of the Code of Administrative Justice?

II. An unlikely challenge by the interim relief judge

520. Once the safeguard measure has been prescribed, the interim relief judge is no longer involved in the dispute2185 . He may not question his decision at his discretion2186 . The review procedure in Article L. 521-4 nevertheless allows him, in the event of "new elements", to reverse his decision without disregarding the authority attached to it. It should be noted that this reconsideration procedure, designed to apply to all urgent interim measures, is almost never used in the case of interim relief.

A. The review procedure

521. Article L. 521-4 of the Code of Administrative Justice states that "When a matter is referred to it by any interested party, the interim relief judge may, at any time, in the light of new information, modify the measures he or she had ordered or put an end to them". This procedure, which "does not strictly speaking fall within the category of remedies"2187 , has sometimes been referred to as summary amendment or summary

2180 P. CASSIA, "L'autorité de la chose ordonnée en référé", *JCP G* 2004, I, 164, p. 1687.

2181 On the other hand, the solution given by the interim relief judge can never be taken for granted: it is certain that a judge on the merits will subsequently intervene in the same case and that he or she will be able - which is perfectly justified, given the limited role of the first judge - to adopt a different solution.

2182 R. MARTIN, "Le référé, théâtre d'apparence", *D.* 1979, chron. p. 160.

2183 J.-P. ROUSSE, *GP* 1972, 2, p. 539, quoted by Y. STRICKLER, *op. cit.*

2184 J.-P. ROUSSE, *GP* 1977, 1, p. 250, quoted by Y. STRICKLER, *op. cit.*

2185 As President Marceau Long stated under the previous law, the judge in summary proceedings "is no longer responsible for the dispute submitted to him" (M. LONG, concl. on CE, Sect., 12 October 1956, *Saporta*, *AJDA* 1956, p. 411).

2186 See, in civil matters: Civ. 1^{ère}, 3 October 1984, *JCP G* 1984, IV, 338; Civ. 2^{ème}, 25 June 1986, *Bull. civ.* II, n° 100.

2187 R. VANDERMEEREN, "La réforme des procédures d'urgence devant le juge administratif", *AJDA* 2000, p. 718. It is possible to identify seven main differences between the classic remedies (appeal and cassation) and the review. Firstly, the traditional remedies are intended to correct a possible error committed by the interim relief judge; the purpose of reconsideration is to adapt the initial decision to a new element. Secondly, the usual remedies concern both admission and rejection decisions. Reconsideration, on the other hand, can only be exercised against an admission decision. Thirdly, the request for appeal or cassation must be submitted within 15 days of notification of the decision, whereas the review procedure is not subject to any time limit: it can be initiated "at any time" according to the text of Article L. 521-4. Fourthly, appeal and cassation are not available against the decisions of the interim relief judge of the Council of State, but only against the order made by a judge of an administrative court. Fifthly, only the parties may act in the appeal and cassation, whereas any interested party may submit a request for review. Sixthly, the request for appeal or cassation is made before the higher judge, i.e. the Council of State for summary proceedings; the review decision is submitted to the judge who issued the decision whose review is requested. The latter will examine the application in open court if it concerns a summary application for interim relief. Article L. 522-1 requires a public hearing to be held whenever the interim relief judge is asked "to order the measures referred to in Articles L. 521-1 and L. 521-2, to modify them or to terminate them". Seventh and lastly, unlike the decision taken on appeal, the decision taken on review may, if it is taken by the interim relief judge of an administrative court, be challenged using the appeal procedures available against the initial order, i.e., for interim relief, the appeal procedure (Article L. 523-1 para. 2). The means

review²¹⁸⁸. It makes it possible to modify or terminate a measure prescribed under the procedures of Title II of Book V of the Code of Administrative Justice. This mechanism allows the interim relief judge to reverse his or her own decision if a person submits new circumstances or new information. The possibility of reconsideration, allowing the judge to reconsider his or her position, has been presented as a consequence of the provisional nature of the measures ordered in summary proceedings²¹⁸⁹. In so doing, Article L. 521-4 takes up and extends a possibility that already existed before the reform of 30 June 2000. Inspired by the procedure applicable in private judicial law, the administrative judge of summary proceedings had in fact recognised the possibility of reversing his decision in the event of "new circumstances"²¹⁹⁰. The scope of application of Article L. 521-4 is broader since it uses the notion of "new element".

522. The conditions for implementing this procedure - and, consequently, the possibilities for the interim relief judge to challenge the safeguard measure ordered²¹⁹¹ - are strictly regulated.

First of all, the judge who made the decision²¹⁹² must be expressly asked to reconsider the decision. The judge may not reconsider the measures ordered on his or her own initiative²¹⁹³. The application may be made by "any interested person", i.e. in addition to the parties to the original proceedings, third parties who may have an interest in the modification of the order.

The applicant must then put forward a "new element". A new factor is an argument of fact or law likely to call into question the assessment made by the interim relief judge on the conditions for granting a measure requested on the basis of Article L. 521-2. This notion covers first of all new circumstances, those that occur or are revealed only after the contested order. The following were considered as such, in the context of the summary suspension the granting of an amending permit to the applicant whose first building permit had been suspended²¹⁹⁴; the fact that a draft appointment affecting the applicant in a post that had become vacant was adopted after the order suspending decisions relating to a refusal to transfer²¹⁹⁵; or the production of photographs showing that the

of appeal are assessed according to the rules applicable to the first application. The interim relief judge of the Conseil d'Etat affirmed "that the modifying orders issued by the interim relief judge pursuant to the provisions of Article L. 521-4 are of the same nature as the orders thus modified, which are subject to separate appeal procedures depending on whether they are issued on the basis of Articles L. 521-1 or L. 521-2 of the Code; thus, in the particular case where the interim relief judge, seized on the basis of Article L. 521-4, has modified the measures to be taken, the appeal procedure is the same as that for the orders in question. 521-4, has modified the measures previously ordered by virtue of the powers he has under Article L. 521-2, this amending order is subject to the same appeal procedure as the initial order; it may therefore be appealed to the Council of State under the conditions provided for in the second paragraph of Article L. 523-1 and Article R. 523-3 of the Code of Administrative Justice" (CE, ord. 7 November 2003, *SA d'habitations à loyer modéré trois vallées*, *Lebon T.* p. 911).

²¹⁸⁸ See P. CASSIA, "Le référé-réexamen devant le juge administratif. Premières applications et difficultés d'interprétation de l'article L. 521-4 du Code de justice administrative", *JCP G* 2003, I, 151, p. 1347.

²¹⁸⁹ By emphasising the "provisional and flexible nature" of the decisions handed down by the interim relief judge, the working group provided that "any interested party could ask the interim relief judge to adapt, modify or terminate the measures that he had ordered rapidly, in the light of the evolution of the situation, of a more substantial argument - particularly in defence - or of the elements brought to light by the investigation" ("Report of the Council of State's working group on emergency procedures", *RFDA* 2000, p. 951). The introduction of this mechanism had two main objectives. By giving the interim relief judge the possibility of modulating or withdrawing the measures he orders, it was intended first of all to limit the pressure on the judge when he takes his initial decision and thus to encourage the granting of measures requested in interim relief. The legislator wanted to avoid the judge being paralysed by the fear of an error due to partial information or the speed of the investigation. Secondly, the aim was to limit the prejudicial effects that the summary order could have for a third party who would not have had the material possibility of intervening in view of the shortness of the investigation period.

²¹⁹⁰ Article 488 of the new Code of Civil Procedure states that the interim order "may only be modified or revoked in summary proceedings in the event of new circumstances". In a praetorian way, the Council of State had recognised an analogous faculty to the judge of summary proceedings in case of "new circumstances" (CE, 24 February 1982, *Société Entreprise industrielle et financière pour les travaux publics et le bâtiment et autre*, *Lebon p.* 87; CE, 29 March 1985, *Commune de Sистерon*, *Lebon T.* p. 727)

²¹⁹¹ According to the text of Article L. 521-4, which gives the judge the power to modify or terminate measures "which he or she has ordered", the review can only be used if the initial decision ordered a measure. This procedure cannot be used when no measure has been ordered. Consequently, the request for review presented against a decision rejecting a request for interim relief is inadmissible (CE, ord. 13 October 2004, *Hoffer*, *Lebon T.* p. 816, 817). The solution had been found in the context of summary suspension (CE, 12 April 2002, *Société Brasil Tropical*, n° 242979; CE, 17 May 2002, *Commune de Proville*, n° 239266). Contrary to this case law and in contradiction with the text of Article L. 521-4, a summary proceedings judge of the Conseil d'Etat considered that the review could be implemented even though no measure had been ordered. It was thus affirmed, in a case where the conditions for granting under Article L. 521-2 were not met, that "this order does not prevent the applicants, in the event that a decision on their application is not reached within a short timeframe or due to new elements relating to the situation of their children, from referring the matter to the interim relief judge on the basis of Article L. 521-4 of the Code of Administrative Justice" (CE, order of 13 January 2006, *Rasamoelina*, No. 288434).

²¹⁹² Logically, the competent judge is the one who issued the decision whose review is requested, i.e. the one who last heard the dispute. The application is made to the interim relief judge of the administrative court if his decision has not been appealed. It must be lodged with the interim relief judge of the Council of State if the contested decision emanates from its jurisdiction. Article L. 523-1 paragraph 2 of the Code of Administrative Justice provides that in the event of an appeal against an order of first instance adopted on the basis of L. 521-2, the interim relief judge of the Council of State "shall, where appropriate, exercise the powers provided for in Article L. 521-4". The solution is identical to that found for the enforcement of decisions of the administrative court under Article L. 911-4 (see CE, Sect., opinion 13 March 1998, *Vinderogel*, *Lebon p.* 78).

²¹⁹³ In its initial version, the bill gave the interim relief judge the power to reconsider "ex officio" the measures he had pronounced. The Senate considered that a system of "self-review" would be a source of legal uncertainty and decided to set it aside (*JO déb. Sénat*, CR séance 8 juin 1999, p. 3754). This solution is in line with the traditional case law of the Council of State, which denies the interim relief judge the power to review the case himself (CE, 7 October 1986, *Ministre chargé des P.T.T., Dr. adm.* 1986, n° 581, cited by C. CLEMENT, "Le juge administratif des référés : un véritable juge de l'urgence après la loi du 30 juin 2000", *LPA* 10 August 2000, n° 159, p. 11, note 58)

²¹⁹⁴ CE, 24 February 2003, *Perrier*, *Lebon p.* 50.

²¹⁹⁵ CE, order of 20 September 2002, *Minister of Justice v. Ozoux*, n° 249894.

posting of the building permit whose execution had been suspended was visible from the public highway²¹⁹⁶. The notion of new element also covers information that existed at the time of the court's decision but which was not brought to its attention in good time. The information could have been produced during the investigation, i.e. at the time of the first referral, but the person concerned refrained, neglected or did not have the time to invoke it. This can be both facts²¹⁹⁷ and legal arguments²¹⁹⁸. The notion of new element is therefore broad. However, the review procedure seems in practice to be unsuitable for interim relief. Condemned to be used only in marginal cases, it is unlikely to affect the stability that characterises the safeguard measures ordered by the interim relief judge.

B. The unsuitability of the review for the summary procedure

523. From a strictly legal point of view, the review mechanism concerns all the procedures governed by Title II of Book V of the Code of Administrative Justice. It is therefore likely to apply to the three urgent summary proceedings: not only to suspension and retention proceedings, but also to interim relief. What is the actual situation? Is this mechanism used and, more fundamentally, can it be used in practice to obtain a review of a measure ordered under Article L. 521-2?

The question of whether Article L. 521-4 is suitable for summary proceedings is of crucial importance in determining the nature of this procedure. Indeed, as its decisions cannot be challenged by the judge of the merits of the case under ordinary law, only the possibility of reconsideration can, potentially, overturn a measure ordered by the judge of the *référé-liberté*. The possibility of its application leads to its decisions being deemed provisional, to admit a certain precariousness of these decisions and a non-final character. The impossibility of its application would imply a definitive character of the measures taken by the judge of *référé-liberté* and the irreversible character in practice of his decisions. It is therefore essential to determine whether this mechanism can really lead to a modification or suppression of a measure prescribed by the judge of *référé-liberté* and, consequently, give a reversible character to his decisions. This is a decisive question because it is the last obstacle to the recognition of the final nature of summary judgment measures.

524. What can be observed in litigation practice? Generally speaking, in all proceedings, the possibility of review is used very little. In civil matters, "the summary jurisdiction judges state that they are rarely, if ever, seized of an application under Article 488(2) of the new Civil Procedure Code"²¹⁹⁹. The figures concerning the practice of review before the Council of State lead to a similar finding before the administrative courts. In 2001, of the 349 decisions handed down by the interim relief judge of the Council of State, only two were made under Art. L. 521-4; in 2002, only one request for modification out of 364 decisions rendered. However, although this procedure does not work under the conditions expected by the authors of the reform of 30 June 2000, it has nevertheless given rise to certain positive applications in the context of summary proceedings, as the examples cited above show. On the other hand, if it does *not* work *much* in the context of interim relief, it must be noted that it does *not* work at all in the context of interim relief.

No safeguard measure pronounced - or confirmed - by the interim relief judge of the Council of State has ever been challenged by way of reconsideration. Not one of its decisions has been challenged in this way. As regards the practice of administrative courts, no statistical data are available²²⁰⁰. Nevertheless, it can be observed that in more than five years of application, only one review decision pronounced by a judge of the first instance on the

²¹⁹⁶ CE, 2 June 2003, *Ville de Montpellier c/ Chong*, *Lebon T.* p. 925.

²¹⁹⁷ For example, the administration may, after an initial order suspending an expulsion order on the basis of Article L. 521-1, produce "white notes" from the intelligence services justifying the lifting of the suspension measure initially prescribed (CE, 4 October 2004, *Ministre de l'Intérieur, de la Sécurité intérieure et des Libertés Locales c/ Bouziane*, *AJDA* 2005, pp. 98-101, note O. LECUCQ). The mere fact that the elements produced before the interim relief judge were already available to the interested party during the investigation of the suspension request and that they were not invoked in due course does not prevent them from being invoked subsequently in support of a request submitted on the basis of Article L. 521-4 (CE, 10 April 2002, *Reby*, *Lebon* p. 133, *JCP G* 2003, IV, 1115, obs. M.-C. ROUAULT). Conversely, judicial case law refuses to recognise the character of "new circumstances" - a narrower concept - for facts that the applicant had refrained from invoking (Civ. 3^{ème}, 3 October 1984, *Bull. civ.* III, No. 125).

²¹⁹⁸ It is possible to make use of Article L. 521-4 in view of a new plea, even though this plea could have been presented at the time of the first referral (CE, 26 June 2002, *Charlois-Duméril*, *Lebon* p. 226). This is the case, in the present case, of the plea invoked by the administration in support of a request for the modification of an order prescribing the suspension of a decision of definitive postponement of a trainee school teacher and based on the fact that the academy rector is in a situation of bound competence to pronounce this postponement, so that the plea retained by the first order based on the existence of a manifest error of assessment is inoperative and cannot thus raise a serious doubt on the legality of this decision. The interim relief judge erred in law by rejecting this request on the grounds that the plea raised by the administration was not a new element within the meaning of Article L. 521-4 but a plea that it was up to it to put forward before the interim relief judge hearing the application for suspension or before the court of cassation.

²¹⁹⁹ Y. STRICKLER, thesis, p. 471.

²²⁰⁰ Requests for reconsideration are treated by official statistics as a new application for interim relief.

basis of Article L. 521-2 has been appealed to the Council of State²²⁰¹. This figure is indicative of the lack of review in this area and/or the absence of cases - apart from this single case - in which the review was successfully brought before the *référé-liberté* judge. However, it is reasonable to assume that a person who, as a victim of a serious infringement of his or her fundamental freedoms, obtains a safeguard measure from the interim relief judge and loses the benefit of this measure as a result of a review, will exercise all available remedies to obtain the reinstatement of the measure obtained. The absence of appeals against review decisions before the Council of State therefore shows that this procedure is not used - or never successfully - before the interim relief judges of the administrative courts.

It is worth clarifying this one and only decision brought before the Conseil d'Etat, which could only be made because of a distorted presentation of the facts by the applicant during the initial proceedings. In September 2000, the SA d'habitations à loyer modéré trois vallées acquired a building that had been occupied without title by some twenty families. The assistance of the public force, requested in June 2001, was refused because of threats of public disorder. The company then undertook to offer a rehousing solution to each of the building's unauthorised occupants and undertook the repair work necessary to achieve its objective of creating social housing. On 24 September 2003, the company applied to the interim relief judge on the basis of Article L. 521-2, arguing that since only one family had refused the proposed accommodation without legitimate reason, the police prefect should be ordered to use the public force to evict them. The order of 26 September 2003 having granted this request for an injunction, the police prefect asked for it to be modified on the basis of Article L. 521-4, arguing that, according to the information he had just gathered, the building was in fact still occupied by two families, i.e. a total of sixteen people including twelve children. In the presence of this new element, and taking into account the resulting consequences as to the serious and manifestly illegal nature of the refusal to provide assistance by the public force, the interim relief judge put an end to the injunction measure initially issued. The SA d'habitations à loyer modéré trois vallées appealed against this amending order.

The interim relief judge of the Conseil d'Etat affirmed "that the investigation and judgment of applications submitted to the interim relief judge on the basis of Article L. 521-2, supplemented by Article L. 521-4, cannot replace the investigation and pronouncement of an administrative decision; that in the case where the infringement of a fundamental freedom, within the meaning of Article L. 521-2, results according to the applicant from the administration's refusal to grant a request, the latter is only entitled to invoke such infringement if he is able to justify before the interim relief judge that he has been infringed. 521-2, results, according to the applicant, from the administration's refusal to grant a request, the latter is only entitled to rely on such an infringement if he is able to justify before the interim relief judge the very existence of a decision rejecting this request. The assessment made by the administrative authority, when it is seized of a request for the assistance of the public force in order to execute a judicial decision to evict the occupants of a building, "is closely linked to the conditions of any kind in which this occupation is taking place at the date of the request". Moreover, he notes, "these conditions are evolving". In this case, the last request was sent to the police authority on 20 August 2002, at a time when 28 people, the vast majority of whom were children, had no alternative accommodation. No new request stating the favourable evolution of the situation, linked to the rehousing carried out, was sent to the police prefect until the date of the referral to the interim relief judge on 24 September 2003 with a view to issuing an injunction. On that date, "the applicant company did not therefore justify the administrative authority taking a position in view of the new elements that had emerged in the last year and that could be qualified as a serious infringement of a fundamental freedom". If the request for review could be granted, it was only because the applicant company had given an altered presentation of the reality of the facts in support of its request. Contrary to the allegations of the SA d'habitations à loyer modéré trois vallées, the dispute concerned the eviction of not just one family but two families. In other words, the applicant company loses the benefit of a measure that it was not entitled to obtain, having contested an abstention (the abstention to evict *one* family) whereas, in application of the principles mentioned above by the judge, it should have contested a refusal (the refusal to evict *two* families). She knowingly "omitted" to mention the presence of a family. She was not entitled to a safeguard measure. Obtaining this measure was improper as it was based on a concealment of the truth.

525. How should we interpret this figure of zero reviews in the field of interim relief - or rather only one review, but resulting simply from the deliberate misrepresentation of facts by the applicant? Does this total absence of review mean that this mechanism is radically unsuited to summary proceedings? The latter has never worked outside the very specific case described above. Does this mean that it will never work? Beyond practice and statistical data, can we envisage hypotheses in which this mechanism could be applied in this matter?

There are two reasons for the lack of review. Firstly, the dispute often disappears immediately, or at least in the days following the decision of the judge of the *référé-liberté*. As regards obligations to do, the administration complies within a few days. For obligations not to do, the prohibition lasts only a limited number of days. Only the measures of suspension of a positive decision do not remove the subject matter of the dispute, provided that the administrative authority has not set a term for the decision whose effects are thus suspended. Since in almost all cases there is nothing left to modify or challenge in the days following the pronouncement of the safeguard

²²⁰¹ CE, ord. 7 November 2003, SA d'habitations à loyer modéré trois vallées, *Lebon T.* p. 911.

measure, there can be no reason for a review. This can only be envisaged in two cases: on the one hand, if the administration has not complied with the injunction addressed to it or if the time limit for complying has not yet expired; on the other hand, when the measure consisted of the suspension of a positive decision that did not have a term or whose term has not expired. The discussion on the possibility of implementing the review therefore concerns only a very limited number of measures. Secondly, the reinforced conditions for granting Article L. 521-2 make it in practice almost impossible for a new element to arise. It is difficult to envisage in the abstract what new argument, what new means or what change in circumstances could be strong enough to overturn what has been judged in summary proceedings: a *manifest* illegality, a *serious* infringement and an urgency *at 48 hours*. How could the administration, called upon to defend its case, have neglected an argument of law or fact in such a sensitive dispute, where the repercussions are so important for it?

However, it cannot be deduced from this that this provision is radically and absolutely inapplicable to the procedure under Article L. 521-2. It cannot be said that review will *never be* used in the field of summary proceedings. It is conceivable that in a particular case it could be used. It is unlikely that this new element will come from a change in circumstances. Indeed, one might think that only a substantial change in circumstances could cause the judge to abandon his measure. However, a significant change in the facts would constitute a new legal cause, giving rise to a new dispute. If the legal act or situation that gave rise to the dispute changes, the claimant must bring a new lawsuit. It would seem that only the production of new information will open the doors to review for the claimant. In this respect, in a decision of 26 April 2005, the judge of appeal for the summary proceedings notes that in order to contest the validity of the contested order, the applicant minister invokes two documents drawn up after the contested order, "which could moreover have been submitted to the first judge on the basis of the provisions of Article L. 521-4 of the Code of Administrative Justice"²²⁰². It thus expressly invites the administration to use the review procedure when it has new information. This will be the case in particular when, as in the above-mentioned order of *SA d'habitations à loyer modéré trois vallées*, the judge has ruled on the basis of truncated or deliberately inaccurate factual elements submitted to him by the applicant. But in any event, the likelihood of a review being exercised, and being successful in the context of an interim relief order, is about as low as that of an appeal in opposition or for rectification of a material error in proceedings on the merits under ordinary law.

526. Legally provisional, the decision of the judge of référé-liberté benefits in practice from a remarkable stability, and a definitive effectiveness. Without being absolutely unthinkable, its challenge is in practice quite improbable. As Mr Ricci states, the summary judgment "constitutes a very special summary judgment insofar as, in reality, it settles the main issue and does so definitively"²²⁰³. The durability of the measures prescribed raises the question of the nature of this summary procedure and, more precisely, its possible qualification as a summary procedure on the merits.

Section 3. The impact of the durability of measures on the nature of the procedure

527. The special features of the référé-liberté procedure *bring it closer to* the procedures usually referred to as référés au fond. The decisions pronouncing a safeguard measure therefore benefit from a reinforced authority.

I. A procedure similar to summary proceedings on the merits

528. Is the procedure of Article L. 521-2 a summary procedure in the traditional sense, or on the contrary a summary procedure on the merits, a legal action subject to rapid settlement?

The concept of legal action has been the subject of much controversy among scholars of procedural law and, especially, private judicial law. Negatively, the legal action can be defined as neither the *substantive right* that is the subject of the dispute, nor the legal *claim* itself²²⁰⁴. Positively, legal action can mean either *a right* or, better still, *a*

2202 CE, ord. 26 April 2005, Minister of the Interior, Internal Security and Local Freedoms v. M'LAMALI, *Lebon T.* p. 1034.

2203 J.-C. RICCI, "Quels référés pour quels pouvoirs? Le référé-liberté, la notion de libertés fondamentales, le référé-suspension", *RRJ* 2003/5 *L'actualité des procédures d'urgence*, p. 3096.

2204 As Messrs Cornu and Foyer have pointed out, 'despite the links between it and the claim, which is its exercise, and the substantive right, of which it is, more often than not, the sanction, the action is not to be confused with the former because it is a right, not an act, nor with the latter because it is a specific right, not the right deduced in court' (G. CORNU and J. FOYER, *Procédure civile*, 3^{ème} éd, PUF, coll. Thémis droit privé, 1996, p. 318). In the first place, the action is not confused with *the substantive right* whose recognition or protection the litigant seeks. It is true that the classical doctrine maintained the confusion between the two notions. Thus we find in the writings of M. Demolombe, whose writings on this point have remained famous and are often quoted, that 'Action does not form a property distinct from the right or rather from

power of the plaintiff, the power to bring a claim before the court so that it can rule on the merits of the claim²²⁰⁵, or, by extension, a procedure in which the court rules on the merits of a claim. In this second sense, retained here, "the action is a legal remedy"²²⁰⁶; it constitutes a given type of legal remedy in which the judge rules on the merits of a claim. The court examines whether the claimant's allegation that the challenged acts or conduct violate one or more legal norms is well-founded. If the claim is well-founded, the court draws the appropriate consequences for the legal situation or the act in question.

This criterion makes it possible to draw a dividing line between two categories of summary proceedings: on the one hand, summary proceedings in the classical sense, which are accessory and provisional, and on the other hand, summary proceedings on the merits, which constitute legal actions in their own right, but judged according to an accelerated procedure. Whereas genuine interim measures are an accessory to legal proceedings, interim measures on the merits are autonomous and constitute legal proceedings in themselves. This criterion thus appears to be decisive for drawing the line between traditional summary proceedings and summary proceedings on the merits²²⁰⁷. This difference justifies a clear distinction between these two types of legal proceedings, whose only common feature is that they are judged according to an accelerated procedure²²⁰⁸.

529. Summary proceedings in the classical sense exclude the possibility of the court hearing the case having to rule on the merits of the case. The purpose of its intervention is to temporarily adjust the situation in dispute pending the judgment of a case by the judge on the merits, in other words to preserve the interests of the applicant pending the outcome of legal proceedings. Like the interim injunction, these are ancillary proceedings which allow the court to be asked for interim measures without deciding on the merits of the case. Thus, genuine summary proceedings have three characteristics: they are ancillary to a legal action, they leave the substance of the law untouched and lead to the pronouncement of provisional measures.

Conversely, certain emergency procedures lead the judge to rule on the merits of a claim and are only summary proceedings in name. These procedures have three characteristics that distinguish them from traditional summary proceedings: they are autonomous, lead the judge to decide on the merits of the case and lead to the pronouncement of definitive measures. These procedures were first developed in private judicial law: the texts providing for them state, depending on the case, that the disputes to which they apply are judged "in the summary proceedings form", "in the form provided for summary proceedings" or "as in summary proceedings"²²⁰⁹. Similar procedures were introduced into administrative litigation law in the 1980s with the audiovisual summary procedure²²¹⁰, the procedure for challenging deportation orders²²¹¹ and the summary contractual procedure²²¹². The privatist doctrine has given them the name of 'summary proceedings on the merits'. The

the property itself to which this right applies'; it is 'the right itself set in motion; it is the right in a state of *action*, instead of being in a state of rest; the right in a state of war instead of being in a state of peace' (DEMOLOMBE, t. IX of the *Œuvres complètes*, n° 338, quoted by H. VIZIOZ, *Études de procédure*, Editions Bière, 1956, p. 30, note 1. Underlined). This confusion is no longer prevalent today, as contemporary authors make a clear distinction between the legal action that protects the right and the protected right itself. As Henri Motulsky has pointed out, "all modern doctrine has abandoned this theory of identity" (H. MOTULSKY, *Droit processuel*, Montchrestien, 1973, p. 55) between action and substantive right. Secondly, the action in justice is not confused with *the request in justice*. The claim is *an act*, a procedural act. It is the act by which the action is exercised, 'the act by which a person brings a claim before the courts and asks them to sanction it' (R. MOREL, *Traité élémentaire de procédure civile*, 2^{ème} ed., Sirey, 1949, p. 43). It is distinguished from an action, which is 'a prerogative, a right, not an act (despite the common and etymological meaning of the word)' (G. CORNU and J. FOYER, *op. cit.*, p. 312).

²²⁰⁵ All the elements of this definition are accepted by specialists in procedural law. M. Motulsky defined legal action as 'the ability to obtain from a judge a decision on the merits of the claim submitted to him' (H. MOTULSKY, 'Le droit subjectif et l'action en justice', in *Études et notes de procédure civile*, Dalloz, 1973, p. 95). This definition has been enshrined by the legislator, with Article 30 of the new Code of Civil Procedure stating that "An action is the right of the author of a claim to be heard on the merits of the claim so that the judge can decide whether it is well-founded or not. As summarised by Messrs Cornu and Foyer, it is 'the right to be heard by the judge in relation to his claim, and to obtain from him a decision on the merits of that claim' (G. CORNU and J. FOYER, *op. cit.*, p. 318).

²²⁰⁶ R. MOREL, *Traité élémentaire de procédure civile*, 2^{ème} ed, Sirey, 1949, p. 43.

²²⁰⁷ The other two criteria used to distinguish between the two categories of summary proceedings, namely the autonomous or ancillary nature of the action, and the final or provisional authority of the measures prescribed, are merely a consequence of the first.

²²⁰⁸ As Mr Melleray points out, 'If, for reasons of convenience of presentation, some of the doctrine chooses to study them with emergency procedures, it is undoubtedly more judicious from a conceptual point of view to dissociate them from the latter and, by relying on their most essential character (which is that the judge rules on the merits of a claim and not that he renders his decision quickly), to bring them together with the other actions. In other words, it is advisable to distinguish within the legal remedies often described as emergency procedures between those which aim to preserve or adjust the state of the litigious situation and which are provisional, and those which aim to rule on the merits of a claim and are in fact actions' (F. MELLERAY, *op. cit.*, p. 251). In this sense, Professor Gaudemet distinguishes, within the emergency procedures, those which seek to "accelerate certain trials" and those which aim to "improve the situation of the parties until the decision on the merits" (Y. GAUDEMET, "Les procédures d'urgence dans le contentieux administratif", *RFDA* 1988, pp. 420-431).

²²⁰⁹ For a presentation of the main summary proceedings on the merits in private judicial law, see P. ESTOUP, *op. cit.*

²²¹⁰ Codified in Article L. 553-1 of the Code of Administrative Justice, this "bastard procedure of false administrative summary proceedings" (M. AZIBERT and M. DE BOISDEFRE, *chron.* under CE, Sect., 20 January 1989, *TF1*, *AJDA* 1989, p. 86) gives the president of the litigation section, who "rules in summary proceedings", the powers of a judge on the merits and allows him to order definitive measures. Noting that audiovisual communication services have failed to comply with the legislation, he may issue injunctions against offenders, together with penalty payments and, where appropriate, pay the final penalty payments.

²²¹¹ Although this dispute is dealt with by a single judge at the end of a procedure that derogates significantly from ordinary law, it does not give rise to the intervention of provisional measures. Significantly, Article L. 776-1 of the Code of Administrative Justice designates the decision of the president of the administrative court empowered to rule on deportation measures as a "judgment" and not an "order".

²²¹² Under Article L. 551-1 of the Code of Administrative Justice, the judge rules "in the form of summary proceedings" and is empowered to order final measures. See *supra*, §§ 21 and 487.

authors refer to "under this singular term - as associating two antinomic concepts - the proceedings pursued in the form of summary proceedings, but tending in reality to obtain a decision "in the main" and in any case a decision other than provisional"²²¹³. In reality, these are main proceedings judged under very rapid conditions. The summary proceedings 'in form' only take the form of summary proceedings: the procedure is that of summary proceedings; for the rest, the decision obeys the rules of the main proceedings. In other words, the judge complies with the simplified summary procedure while acting as a judge of the main proceedings. He exercises the function of a judge of the merits and pronounces final measures.

530. The question is whether, in view of its characteristics, the interim relief measure falls into the category of genuine interim relief measures or, on the contrary, is similar to an interim measure on the merits.

Certainly, the summary judgment is not similar to a summary judgment in the classical sense; it is not designed to temporarily adjust the situation of the parties while awaiting a judgment on the merits. First of all, this procedure has an autonomous character; it is not the accessory of an appeal on the merits of common law introduced before the judge of the excess of power or the full litigation. Secondly, the judge of the *référé-liberté* rules on the merits of the claim submitted to him. He determines whether or not a legal norm has been violated, whether an illegality has been committed. Finally, the measures prescribed are in practice definitive and irreversible. Thus, the summary judgment constitutes in itself a legal action judged according to an accelerated procedure. It seems to meet all the criteria of a summary judgment on the merits. According to Professors Ricci and Debbasch, the procedure of Article L. 521-2 "is, in reality, a main action in the form of summary proceedings in view of the urgency"²²¹⁴. The judge rules on the main issue and decides on the merits of the dispute submitted to him in a final manner.

However, the possibility, even if only virtual, of a review is an obstacle to a full and complete assimilation of the interim relief measure to a summary procedure on the merits. If it can be stated categorically that interim relief is not an interim measure in the traditional sense, it is appropriate, because of the existence of Article L. 521-4 of the Code of Administrative Justice, to be more nuanced as to its pure and simple classification as an interim measure on the merits. It would seem preferable to affirm, as do Messrs Bourrel and Gourdou, that the summary proceedings procedure "comes close" to the category of summary proceedings on the merits²²¹⁵. Once again, interim relief has an atypical nature that makes it difficult to categorise it and link it to a pre-existing legal category. It cannot be analysed as a summary judgment in the classical sense, but because of the possibility, even if very hypothetical, of a review, the qualification of summary judgment on the merits must be excluded. Whereas decisions given in the context of an interim injunction on the merits are recognised as having full *res judicata* effect, the decisions of the interim relief judge only benefit (in practice) from its effects and not (in law) from its attributes.

II. The enhanced authority of safeguard measures

531. Should decisions by which the interim relief judge pronounces a safeguard measure be recognised as *res judicata*? Once the decision has *become res judicata*, i.e. after an appeal has been lodged or the time limit for appeal has expired, does it become *res judicata*²²¹⁶?

The authority of *res judicata* is 'one of the most obscure questions in law and the subject of endless and interminable controversy'²²¹⁷. As President Odent pointed out, "its very basis has given rise to a very abundant legal literature and agreement has not yet been reached either on the characteristics or on the effects of the jurisdictional act, or on the nature of the authority of *res judicata*"²²¹⁸. In order to determine whether the orders admitting the summary judgment should be recognised as having such authority, it is necessary first to set out the

²²¹³ P. ESTOUP, *op. cit.*, p. 145.

²²¹⁴ C. DEBBASCH and J.-C. RICCI, *Contentieux administratif*, 8^{ème} éd, Dalloz, coll. Précis, 2001, n° 556.

²²¹⁵ Cf. A. BOURREL and J. GOURDOU, *Les référés d'urgence devant le juge administratif*, L'Harmattan, coll. La justice au quotidien, 2003, p. 87: "The situation is similar (...) to the meaning of the expression 'in the form of summary proceedings' or 'as in summary proceedings' in civil procedure (...)".

²²¹⁶ On the distinction between *res judicata*, *res judicata* and enforceability, see P. DELVOLLE, "L'exécution des décisions de justice contre l'administration", *EDCE* 1983-1984, p. 111. *Res judicata* is the result of a court decision which the judge himself cannot reverse. A decision that has become *res judicata* is one that has become final by the exhaustion of the remedies or by the expiry of the time limits for appeal. The enforceable court decision is the one so designated by the law, without this enforceability being in any way linked to the authority of *res judicata*.

²²¹⁷ P. Leclercq, *Cass.*, 6 March 1930, *Pas.* 1930, I, 149, quoted by L. POTVIN-SOLIS, *L'effet des jurisprudences européennes sur la jurisprudence du Conseil d'Etat français*, LGDJ, coll. BDP, t. 187, 1999, p. 503.

²²¹⁸ R. ODENT, *Contentieux administratif*, Les cours de droit, fasc. III, IEP Paris, 1981, p. 1288. On this topic, see in particular P. LACOSTE, *De la chose jugée en matière civile, criminelle, disciplinaire et administrative*, 2^{ème} éd, Librairie de la société du recueil général des lois & des arrêts, 1904, 594 p.; R. LOTH, *De l'autorité de la chose jugée en matière administrative*, Imprimerie et Librairie Camille Robe, 1911, 255 p.; R. GUILLIEN, *L'acte juridictionnel et l'autorité de la chose jugée*, Imprimerie de l'Université, 1931, 476 p.; D. TOMASIN, *Essai sur l'autorité de la chose jugée en matière civile*, LGDJ, coll. BDprivé, t. 143, 1975, 280 p.; F. HAUT, *Autorité de la chose jugée et effet directif des décisions de justice. Recherche de droit public*, thesis Paris II, 1979; H. ROLAND, *Chose jugée et tierce opposition*, LGDJ, coll. BDprivé, t. 13, 1958, 534 p.; D. DE BECHILLON, "Sur l'identification de la chose jugée dans la jurisprudence du Conseil d'Etat", *RDP* 1994, pp. 1739-1824; G. WIEDERKHER, "Sens, signification et signification de l'autorité de chose jugée", in *Justice et droits fondamentaux. Etudes offertes à Jacques Normand*, Litec, 2003, pp. 507-518; G. DELVOLLE, "Chose jugée", *Répertoire Dalloz de contentieux administratif*, 1989; C. GUETTIER, *Jcl. administratif*, fasc. 1110 (8, 2003).

attributes of *res judicata* and the conditions for its recognition.

532. *Res judicata* is a "quality"²²¹⁹ or an "attribute"²²²⁰ of the judicial decision. As it comes to us from Roman law, it is defined as the presumption of truth attached to the judicial decision - *res judicata pro veritate habetur* - and has the effect of prohibiting the parties from starting the trial again - *non bis in idem*. Positively, the authority of *res judicata* is a quality that attaches to jurisdictional verification: what is judged is imposed as the expression of the truth. As an "absolute presumption of truth"²²²¹, it holds as true what has been judged²²²². The operative part of the decision is regarded as the definitive truth on the point of law decided. The parties may therefore invoke it. For all intents and purposes, the legal situation is now as defined by the operative part of the judgment. In this sense, *res judicata* is protective of the party whose rights are recognised: "he may immediately avail himself of these rights and draw all the consequences from them, without the manner in which they were pronounced being disputed"²²²³. Negatively, the authority of *res judicata* prevents the judgment from being called into question. It becomes indisputable: it is definitively binding on the judge who handed it down, the parties and the other courts. From then on, what is the subject of a judgment is removed from future challenges, thus ruling out "the possibility of infinite questioning of the solution given"²²²⁴. This procedural effect is binding on the judge and the parties²²²⁵. The judge cannot reverse his decision. The litispendence ends and the judge is no longer in charge of the case. He is prohibited from questioning the decision, from ruling again on a case already decided. The judge's powers are exhausted²²²⁶ and any subsequent modification of the operative part of the judgment would be contrary to the authority of *res judicata*²²²⁷. For the parties, the negative effect of *res judicata* is that they are prohibited from requesting a retrial of a case. Such an application is inadmissible whether it is made before the same judge or before another judge²²²⁸. The parties cannot effectively submit their case a second time to the courts. The plea of *res judicata* takes the form of a dismissal in a new trial with the same subject matter, cause of action and parties²²²⁹.

The scope of *res judicata* is attenuated in summary proceedings. On this point, judicial case law and the most recent administrative case law distinguish between *res judicata* in the main proceedings and *res judicata* in the interim proceedings²²³⁰. The authority of *res judicata* "in the main proceedings" is attributed to court decisions that settle the merits of a dispute in a final manner. This presupposes not only that the court rules on the main issue but also that its decision cannot be challenged. As M. de Béchillon points out, "Only the thing that is truly *decided*, with a certain durability, will be said to be effectively judged"²²³¹. In the same vein, M. Delvolvé states that "For there to be *res judicata*, there must be a judicial decision settling all or part of the dispute"²²³². This requirement leads, on the one hand, to the recognition of the authority of *res judicata* in the main proceedings to decisions intervening in the context of an interim injunction on the merits²²³³, and on the other hand to the denial of this authority to decisions which are provisional in nature and do not decide on the merits of the law.

2219 D. TOMASIN, *op. cit.* p. 257.

2220 G. WIEDERKHER, *op. cit.* p. 510.

2221 E. GARSONNET and C. CEZAR-BRU, *Précis de procédure civile*, 9^{ème} ed, Recueil Sirey, 1923, p. 415.

2222 As the government commissioner Corneille stated, 'the essence of *res judicata* is to impose itself as legal truth' (concl. on CE, 8 August 1919, *Toesca, Lebon* p. 740): 'To say that a jurisdictional decision has the authority of *res judicata* is to say that it has decided with the force of legal truth the questions submitted to the judge who rendered it' (R. Odent, *op. cit.*, p. 1288). In other words, *res judicata* "has the force of truth itself in the eyes of the law. The law holds as true what has been decided by judgment" (R. LOTH, *op. cit.*, p. 5).

2223 B. LASSERRE and J.-M. DELARUE, chron. under CE, Sect. 9 December 1983, *Ville de Paris, AJDA* 1984, p. 83.

2224 N. FRICERO, in *Droit et pratique de la procédure civile* (S. GUINCHARD dir.), Dalloz, 2002, n° 4960.

2225 *Res judicata* means that it is impossible to question the point on which a decision has been taken. The second judge must take the content of the first decision as given.

2226 CE, 14 December 1979, *Pointe, Lebon* T. p. 845.

2227 CE, 19 December 1855, *Laboureix, Lebon* p. 753; CE, 30 January 1867, *Commune de Villamblain, Lebon* p. 112.

2228 "With regard to another court, the principle of *res judicata* implies that what has been judged cannot be disregarded or contested even by another judge" (J. RODEVILLE-HERMANN, "L'évolution des fonctions du principe d'autorité de chose jugée dans les rapports du juge administratif avec le juge judiciaire, le Conseil constitutionnel et la Cour de justice des Communautés européennes", *RDJ* 1989, p. 1736).

2229 For Mrs Frison-Roche, "authority is the mechanism which prohibits the parties having participated in a proceeding having led to a decision from again bringing the matter before the courts to obtain another solution on the same question" (M.-A. FRISON-ROCHE, *Généralités sur le principe du contradictoire*, thesis Paris II, 1988, p. 100).

2230 The classic case law denied any authority of *res judicata* to the summary order or the judgment ordering the suspension of execution of an administrative decision. The administrative jurisprudence that developed under the Law of 30 June 2000 tends to join the judicial jurisprudence by admitting a certain authority of *res judicata* to summary orders, an authority "to the provisional".

2231 D. DE BECHILLON, *op. cit.* pp. 1806-1807. Underlined.

2232 G. DELVOLVÉ, "Chose jugée", *Répertoire Dalloz de contentieux administratif*, 1989, n° 14.

2233 It has been stated that when the interim relief judge has ruled on a request for precontractual interim relief and then receives a request for suspension, the authority of *res judicata* in the first instance attaches to the means on which it was ruled and renders them inadmissible in the second instance (TA Saint-Denis de la Réunion, ord. 6 February 2001, *Société Bourbonnaise de travaux publics de construction (SBTCP)*, *Contrats et marchés publics* 2001, comm. no. 211, note by J.-P. PIETRI, "Référé précontractuel: il est revêt l'autorité de la chose jugée" P. PIETRI, "Référé précontractuel: il est revêt de l'autorité de la chose jugée" The Conseil d'Etat did not rule on the question, as the decision to award the contract had been fully executed by the date of its decision: see CE, 22 June 2001, *SBTBC*, No. 230693). Similarly, in civil procedure, 'summary orders made on the merits, in the form of summary proceedings (in particular those of the judge in matrimonial matters, after the divorce has been granted), have the authority of *res judicata* (...)' (P. ESTOUP, *op. cit.*, p. 28).

The case law is constant in private judicial law²²³⁴ and in administrative litigation²²³⁵. These decisions can only be granted *res judicata* status "on the provisional basis", valid as long as another judge does not challenge them²²³⁶.

What is the situation with regard to interim relief? Do the decisions pronouncing a safeguard measure have the authority of *res judicata* on the provisional or the main issue? It seems possible to summarise this authority in two propositions: the decision benefits from the *attributes* of *res judicata* in the provisional phase; in practice, it has strictly identical *effects* to a decision with *res judicata* in the main phase. The virtually reversible nature of safeguard measures means that such decisions cannot be regarded as *res judicata* in the main proceedings. Although the judge rules on the merits of the case, his measure is deemed provisional and, in theory, remains open to challenge by the ordinary courts or the interim relief judge himself. In law, it can always be submitted to the ordinary courts or the interim relief judge without being rejected. Nevertheless, in practice, the order pronouncing a safeguard measure has all the effects of *res judicata*. Obviously, the positive dimension of *res judicata* applies to the decision of the interim relief judge as it does to any judicial decision favourable to the applicant. On the other hand, the decision has an effect which, in practice, is similar in every respect to the negative dimension of *res judicata* in the main proceedings. The pronouncement of a safeguard measure results in the final relinquishment of jurisdiction of the interim relief judge. The application brought before the ordinary courts or the interim relief judge will be admissible; its merits may be examined. Nevertheless, the result will be identical since the measure will not be called into question. The judge on the merits will note the illegality of the situation; the interim relief judge - except in truly exceptional cases - will note the absence of any new element.

533. The intervention of the judge of the *référé-liberté* is remarkably effective. The applicant obtains full satisfaction, which definitively clears the dispute that gave rise to the referral. By dissuading, persuading or pronouncing a safeguard measure, the judge puts an end to the situation of serious and manifestly illegal infringement of a fundamental freedom. The satisfaction thus obtained by the applicant is of exemplary stability, linked to the particular nature of this summary procedure. Although it is not legally impossible to challenge the measure obtained, in practice it is no less unlikely. Satisfaction is immediate and final. The effectiveness of this mechanism raises the question of the maintenance of administrative action within our

2234 Affirmed by the Court of Cassation under the old code (see in particular Civ., 10 January 1939, *S.* 1939, I, p. 93), this principle has been enshrined in the new code of civil procedure. Article 288, paragraph 1, provides that "an order for interim relief does not have the authority of *res judicata* in the main proceedings".

2235 The Conseil d'Etat stated in *Association convention vie et nature pour une écologie radicale* that summary orders "do not have, in view of their provisional nature, the authority of *res judicata* in the main proceedings" (see *supra*, § 499). The administrative court expressly derives the absence of *res judicata* in the main proceedings from the provisional nature of the measures ordered. This solution is in line with classic case law denying *res judicata* authority to decisions taken in matters of suspension of execution and summary proceedings. The Council had thus affirmed "that the authority of *res judicata* cannot be attached to an interim order or to the judgment rendered on an appeal against such an order, the said decisions having a provisional nature and not prejudicing the main issue" (CE, Sect., 3 October 1958, *Société des autocars garonnais, Lebon* p. 468). The rule also applied to judgments and rulings pronouncing a stay of execution of administrative decisions. According to the Council of State's formula, these judgments "are necessarily rendered on the basis of the state of the investigation on the date on which they are made and without being able to prejudge the substance of the law"; consequently, they are "in no case" vested with the authority of *res judicata* (CE, 1983, *Ville de Paris, Lebon* p. 499, concl. B. GENEVOIS).

2236 The Conseil d'Etat now speaks of the authority of *res judicata* 'in the main' (*Association convention vie et nature pour une écologie radicale* judgment, *supra*), implicitly but necessarily admitting the idea of an authority of *res judicata* 'in the interim'. It thus joins the solution prevailing in private judicial law, with the difference, however, that the decision taken in summary proceedings may be revoked in the event of a 'new element' and not only in the event of a new circumstance. First President Estoup states that "Interim orders have *res judicata* authority 'on a provisional basis', in the sense that Article 488, paragraph 2 of the New Code of Civil Procedure, enshrining the case law that had developed under the old code, decides that the interim order may only be revoked or modified in the event of new circumstances. The interim relief judge is therefore bound by his own decision, which he is obliged to maintain insofar as no change has occurred, either in the situation of the parties or in the facts of the case" (P. ESTOUP, *op. cit.*, p. 27). Similarly, M. Wiederkher states that in summary proceedings, "*res judicata* is (...) reduced to the provisional" (G. WIEDERKHER, *op. cit.*, p. 517). According to M. Lacoste, summary orders "have *res judicata* status simply in the sense that they cannot be revoked until there is a change in the facts of the case" (P. LACOSTE, *op. cit.*, p. 62). The summary order is only acquired by the parties on condition that there is no change in their situation or in the facts of the case (Civ. 2^{ème}, 27 April 1936, *GP* 1936, 2, 170). By virtue of article 481 of the new code of civil procedure, the pronouncement of the order removes the jurisdiction of the judge in summary proceedings. However, notes M. Strickler, 'the relinquishment of jurisdiction is the direct consequence of the authority of *res judicata*. We then normally find the positive aspect of *res judicata* (the litigant can avail himself of the decision and obtain enforcement) and its negative aspect (apart from exceptions, it is no longer possible to go back on the order)' (Y. STRICKLER, *op. cit.*, p. 463). A summary judgment judge who retracts a previous order 'without noting any new circumstances since that first order', disregards the authority attributed to him (Civ. 2^{ème}, 20 November 1985, *Bull. civ.* II, n° 177). In the absence of new circumstances, the interim order is binding on the judge who made it, on any other interim judge and on the parties (Civ. 3^{ème}, 29 June 1988, *Bull. civ.* III, No. 118). In this respect, "the provisional nature of the interim order is not in opposition to the final nature generally attached to the authority of *res judicata*. As long as the circumstances that determined the president's decision are identical, there is no reason to refer the matter to the same judge (or to another interim relief judge) so that he or she may modify the previous order" (Y. STRICKLER, *op. cit.*, pp. 464-465). Thus, "as long as the circumstances have not changed, the order cannot be challenged and removes the jurisdiction of the interim relief judge, albeit to a limited extent, but effectively. His decision is binding on him and on the parties, unless the latter return to the president so that he retracts or modifies his previous order, or refer the matter to the judge in the main proceedings so that he decides the dispute on the merits" (Y. STRICKLER, *op. cit.*, pp. 512-513). It is likewise stated in Community law, with regard to Article 86§4 of the Rules of Procedure (the wording of which is unchanged on this point) that "An order for interim measures shall have limited *res judicata* effects" (B. PASTOR and E. VAN GINDERACHTER, "La procédure en référé", *RTDE* 1989, p. 619). "For the parties (...), the *res judicata* nature of the order has full effect. An application for interim relief presented by the same parties with identical heads of claim and the substantive dispute on which it is based, without the situation having changed, will consequently be declared inadmissible" (*ibid.*).

legal system.

Chapter 3

Effectiveness raises the question of continued de facto authority

534. In French positive law, there are currently three procedures whose exclusive purpose is the urgent protection of freedoms against the acts and actions of public authorities. This multiplication of legal remedies for the same purpose may seem excessive. Far from strengthening the guarantees of natural and legal persons, would it not, on the contrary, end up weakening them by making the system for protecting freedoms more complex? In view of the effectiveness of the *référé-liberté*, and its ability to immediately remedy situations of serious and manifestly illegal infringement of fundamental freedoms, it is appropriate to question the appropriateness of maintaining the *déféré-liberté* and *de facto* procedures after the Act of 30 June 2000. Are these procedures still of interest? Should they not be abolished to make way for the *référé-liberté* procedure alone?
535. The *déféré-liberté* offers *a priori* lesser possibilities than the procedure of article L. 521-2: it can only be brought against administrative decisions, and the judge only has the power to suspend their execution. However, it remains of interest despite the creation of the *référé-liberté*. Indeed, the conditions allowing the pronouncement of a measure by this means are much easier to meet than on the basis of Article L. 521-2: not only is the applicant exempt from the condition of urgency but, in addition, he or she must only state a serious doubt as to the legality of the decision and not a manifest illegality. Therefore, as was emphasised during the preparatory work, the *référé-liberté* procedure does not "duplicate" the *déféré-liberté* procedure. Although it will remain of marginal use, as it was before the reform of 30 June 2000, this procedure will nevertheless remain useful in situations where the *référé-liberté* procedure cannot be used because of the rigour of its conditions of grant. To challenge regulatory acts of decentralised authorities that infringe liberties, the prefect has every interest in filing a *déféré-liberté* rather than taking the more difficult route of *référé-liberté*. The possibility of challenging simple behaviour and benefiting from the pronouncement of an injunction on a principal basis is of no real interest to the prefect in the exercise of his mission of administrative control of the acts of decentralised authorities. Insofar as he only challenges administrative acts of a regulatory nature in the area of freedoms, the pronouncement of a suspension is almost always fully satisfactory. Prefects therefore continue to use the *déféré-liberté* procedure despite the creation of the *référé-liberté*. Used wisely, "it appears to be an effective instrument for protecting freedoms". For the authors of the reform of 30 June 2000, there was never any question of abolishing this remedy. On the other hand, the question of maintaining the *de facto* right of appeal is seriously raised after the creation of the *référé-liberté*.
536. From a practical point of view, the existence of the administrative assault raises two main difficulties. First of all, it removes from the administrative judge the settlement of a dispute which, by virtue of his training and knowledge of the administration, he is best placed to deal with, and submits its settlement to a judge who does not have the tools or the knowledge to deal with it under such satisfactory conditions. In addition, the *de facto* procedure disturbs the distribution of competences between the two orders of jurisdiction in the field of fundamental freedoms. This "ancestral and elusive jurisdiction clause" complicates the division of powers between the administrative and judicial courts, to the detriment of the proper administration of justice, the individual and the protection of freedoms. The sometimes shifting and uncertain boundaries of the *de facto* route have led to it being presented as "the madwoman of the house, present where it is least expected, and disruptive beyond what is acceptable", contributing to the fact that it is "the victims of arbitrariness

2237 On the difficulties linked to the proliferation of jurisdictional guarantees, see G. BRAIBANT, "L'avenir de l'Etat", *Etudes en l'honneur de Georges Dupuis*, LGDJ, 1997, pp. 39-46. The author refers in particular to the risk of a degeneration of the rule of law into a "procedural state" (*op. cit.*, p. 44).

2238 E. GUIGOU, *JO déb. AN*, CR session 14 December 1999, p. 10942.

2239 See for example: TA Montpellier, order 25 April 2003, *Préfet des Pyrénées-Orientales*, LPA 5 April 2004, n° 68, pp. 3-5, note J.-M. MAILLOT; CE, 11 March 2005, *Minister of the Interior, Internal Security and Local Freedoms v. Communes d'Avion, de Rouvroy, de Drocourt et de Méricourt, Lebon* p. 101; CE, ord. 17 May 2006, *Commune de Wissous, Lebon* p. 253; CE, ord. 8 August 2006, *Préfet de Seine-et-Marne*, n° 296107. See also the decisions cited *above*, § 270.

2240 R. ETIEN, "Le sursis de quarante-huit heures", *RDJ* 1988, p. 761. M. Dugrip also emphasised the "great effectiveness" of this mechanism (O. DUGRIP, *L'urgence contentieuse devant les juridictions administratives*, PUF, coll. Les grandes thèses du droit français, 1991, p. 185).

2241 On the contrary, the working group stated that it wanted to maintain this procedure. While its members advocated abandoning the majority of the particular regimes of suspension of execution, they nevertheless wished to retain 'certain derogatory suspension procedures, linked to the law of decentralisation', especially those which, like the *déféré-liberté*, 'present notable particularities' ('Report of the Council of State's working group on emergency procedures', *RFDA* 2000, p. 952).

2242 See *supra*, § 347.

2243 T.-S. RENOUX, "Les garanties constitutionnelles de la répartition des compétences", in *La Cour de cassation et la Constitution de la République*, colloquium of 9 and 10 December 1994 (GERJC ed.), PUAM La documentation française, 1995, p. 111.

2244 R. CHAPUS, *Droit administratif général*, t. 1, 14^{ème} éd., Montchrestien, 2000, n° 1087.

who bend under the weight of traditions that have become anachronistic"²²⁴⁵. If, in spite of these disadvantages, the de facto procedure has persisted to this day, it is only because it made it possible to compensate for the shortcomings and inadequacies of the administrative judge in the field of emergency protection of freedoms. Now that the de facto procedure has lost its traditional justifications, one may wonder whether there are still any considerations that could prevent its abolition.

Section 1: Abolition made possible by the disappearance of the traditional justifications for assault

537. "In the muffled world of legal concepts, there are few that can boast of having caused as much ink to flow as assault"²²⁴⁶. At times, criticism has focused on the misuse of this procedure²²⁴⁷. But it concerns, more fundamentally, the very existence of this head of jurisdiction. Indeed, this derogation from the principle of separation of administrative and judicial authorities has no legal justification. Until then, it owed its salvation only to practical considerations: recourse to the judicial judge made it possible to compensate for the powerlessness of the administrative court in matters of urgent protection of freedoms. These practical arguments collapsed with the creation of the référé-liberté. The de facto procedure has no legal justification; it no longer has any practical justification.

I. The total lack of legal justification

538. The revolutionary legislator established the principle that the courts of law are prohibited from hearing administrative disputes²²⁴⁸. The principle of the separation of administrative and judicial authorities is therefore of legislative rank - and even constitutional in some of its aspects²²⁴⁹. Consequently, the exceptions and moderations that may be made to this rule can only result from the law, or even from the Constitution itself for the matters concerned by the constitutional reservation of jurisdiction of the administrative judge. Neither the regulatory power nor the ordinary courts may contravene this principle. However, it is the case law that has considered, in a purely praetorian manner, that certain acts, constituting a "de facto assault", could fall within the jurisdiction of the judicial courts. As no law has ever authorised the civil courts to intervene in such a case, it is the judge himself who has forged this exception to the principle of the separation of administrative and judicial authorities. In order to justify this derogation - because it was essential to give it a basis - the courts developed the theory of denaturation and argued that the judicial authority would be the guardian of freedoms and property rights. The grounds put forward are extremely weak and cannot legally justify the existence of the assault.

A. The theory of denaturation

539. The theory of denaturation is not strictly speaking an *exception to* the principle of separation but rather a *circumvention of* it. It consists in presenting acts constituting an assault as non-administrative acts and, consequently, not exempt from judicial jurisdiction. According to this theory, the act tainted by or constituting an assault is distorted and for this reason loses all administrative character. Since the law of 16-24 August 1790 and the decree of 16 Frébourg III only concern *administrative* acts, they are not applicable to acts that do not

²²⁴⁵ F. BURDEAU, *Histoire du droit administratif*, PUF, 1995, p. 452. According to M. Dran, "The complexity of the rules of procedure is such (...) that it is very difficult, if not impossible, for the victim to know with certainty which court he or she should seize" (M. Dran, *Le contrôle juridictionnel et la garantie des libertés publiques*, LGDJ, 1968, p. 533). The de facto approach is likely to cause hesitations about jurisdiction and, as a result, delays in proceedings that are prejudicial to the interests of the plaintiff.

²²⁴⁶ H. MOUTOUH, "La voie de fait dans le projet de loi relatif au juge administratif des référés : la "folle du logis" enfin domestiquée ?", *D.* 1999, n° 25, last act, p. 1.

²²⁴⁷ See *supra*, §§ 11-12.

²²⁴⁸ Article 13 of the law of 16 and 24 August 1790 on the organisation of the judiciary provides that "Judicial functions are distinct and will always remain separate from administrative functions. Judges may not, under penalty of forfeiture, disturb, in any way whatsoever, the operations of administrative bodies, nor may they summon administrators to appear before them on account of their functions". By virtue of the decree - formally legislative - of 16 Fructidor III, "the courts are forbidden to deal with administrative acts of any kind whatsoever, under penalty of law.

²²⁴⁹ Namely the annulment or reversal of acts taken by administrative authorities in the exercise of public authority (CC, No. 86-224 DC, 23 January 1987, *Rec. p.* 8, *GDCC* No. 41; *GAJA* No. 99).

have this character. Since the acts in question do not fall within the scope of these texts, they are not likely to be covered by the prohibition.

References to this theory appear in old judgments²²⁵⁰, but also in the conclusions of the government commissioners²²⁵¹ and in the writings of some of the most eminent figures in the Council of State²²⁵². The act constituting an assault is affected by a degeneration that causes it to lose its administrative nature. It loses its existence as an administrative act²²⁵³. When the administration is guilty of an assault, it no longer acts as a public person but as a private individual. In this case, "it is no longer the administration that acts in its capacity"²²⁵⁴.

540. In reality, the foundations of the denaturation theory are conceptually fragile. As Mr Abraham points out, this construction represents "an interesting view of the mind, which is not without a certain poetic quality, but which hardly corresponds to reality"²²⁵⁵. The act is authored by an administrative authority, it is attributable to the public authority and it is the public authority which - in the case of a fault not detachable from the service²²⁵⁶ - assumes the harmful consequences²²⁵⁷. As Eisenmann pointed out, "assaults are administrative acts - a category of administrative acts subject to a special regime, i.e. in fact different from that which applies to administrative acts of the same type but not presenting the same kind of irregularities"²²⁵⁸. Moreover, if it were true that the administration no longer acts as such when it is manifestly outside the sphere of its powers, it is difficult to see why this should be the case only in cases where its action has infringed a fundamental freedom or the right to property, and not every time it acts outside the powers vested in it.

B. The principle of the judiciary as guardian of freedoms and property rights

541. A second justification has been put forward to provide a legal basis for the existence of de facto assault. Instead of circumventing the legislative - or even constitutional - prohibition, it is a question of opposing it with a principle of equal or higher rank according to which the judicial authority would be the natural guardian of

2250 In a decision of 1950, the Court of Cassation confirmed the decision of the Court of Appeal which had stated that the contested action "constitutes a de facto assault, an act stripped of any administrative character" (Civ., 27 February 1950, *Maire c/ Philips*, JCP G 1950, II, 5517, note CAVARROC). In 1956, it affirmed that "despite the irregularity with which it could be tainted, the requisition order (...) nonetheless retained its administrative character and that the irregularity invoked could not have the consequence of giving the said order the character of an act of violence" (Civ. 1^{ère}, 13 March 1956, *Bull. civ.* I, n° 132). In a 1958 decision, the supreme court of the judiciary affirmed that "the irregularity invoked could not cause it to lose its administrative character or result in it degenerating into an act of God" (Civ. 8 December 1958, *Testo Ferry v. Couissin*, AJDA 1959, p. 224). Similarly, the Tribunal des conflits has affirmed that the disputed decision had "ceased to be an administrative act to become a de facto act" (TC, 14 November 1960, *Préfet du Calvados c/ Duchène*, AJDA 1961, p. 158).

2251 In his conclusions on the *Randon* judgment, the government commissioner Guionin stated that "the de facto assault, although carried out by the administration, is denatured, disqualified: it is no longer an administrative act" (concl. on TC, 10 December 1956, *Sieurs Randon et autres c/ Sieurs Brunel et autres*, *Lebon* p. 596). More recently, M. Arrighi de Casanova declared that the de facto assault is constituted when "the action of the public power was exercised under conditions which really amount to denaturing it" (J. ARRIGHI DE CASANOVA, concl. on TC 12 May 1997, *Préfet de police de Paris c/ TGI de Paris*, RFD A 1997, p. 523).

2252 Laferrière saw in the de facto way a factor of "degeneration" of an administrative act (E. LAFERRIERE, *Traité de la juridiction administrative et des recours contentieux*, 2^{ème} ed., Berger-Levrault, 1896, t. I, p. 479 and s.). Similarly, President Odent stated that in the event of a de facto action, "we are no longer in the presence of a decision or an act of public authority; this act or this decision, although emanating from the administrative authority, does not have an administrative character; they are 'denatured' and there is no longer any reason to attribute knowledge of them to the administrative jurisdiction" (R. ODENT, *Contentieux administratif*, Les cours de droit, fasc. I, IEP Paris, 1981, p. 540). This theory has also had its supporters in academic doctrine. Hauriou stated that the effect of de facto action is to render an act "non-existent from an administrative point of view, leaving it only with the value it may have, either from a civil or a criminal point of view" (M. HAURIOU, *Précis de droit administratif et de droit public*, 12^{ème} ed. Underlined). See especially the systematisation of this theory by E. DESGRANGES, *Essai sur la notion de voie de fait en droit administratif français*, Société française d'imprimerie et de librairie, 1937, 323 p.

2253 The act constituting an assault is a non-existent act. Instead of simply annulling it, the administrative judge declares it null and void (TC, 13 July 1966, *Guigon*, *Lebon*, p. 476; CE, 6 April 2001, *Djerrar*, *Lebon T.* p. 991 and 1160).

2254 G. BACHELIER, "Le référé-liberté", RFD A 2002, p. 261.

2255 R. ABRAHAM, "L'avenir de la voie de fait et le référé administratif", in *L'Etat de droit. Mélanges en l'honneur de Guy Braibant*, Dalloz, 1996, p. 9.

2256 The qualification of assault does not exempt the judge from investigating whether the act is likely to be linked to the performance of the service (see S. PETIT, *op. cit.* p. 112; S. GUILLON-COUDRAY, *La voie de fait administrative et le juge judiciaire*, thesis Paris II, 2002, pp. 388-391; *GAJA* No. 51, § 10).

2257 Authors have rightly pointed out the paradox or contradiction of declaring the act attributable to the administration while at the same time making it lose its administrative character. Dean Duez thus qualified as "inadmissible subtlety" the engagement of the administration's liability for an act deemed non-administrative (P. DUEZ, *La responsabilité de la Puissance Publique en dehors du contrat*, 2^{ème} ed., Librairie Dalloz, 1938, p. 146), asking "By what mystery could the act which, by hypothesis, has lost its administrative character, engage the administration's liability" (*ibid.*).

2258 C. EISENMANN, Preface to the thesis by M. DEBARY, *La voie de fait en droit administratif*, LGDJ, 1960, p. III. The author continued: "One could meditate (...) on the inadequacy and often dangerous nature of the theses of pure negation: the act, it is said, is not administrative. But what is it positively? If one were willing to ask this question, as one must, one could not fail to recognise that in truth it is state in kind - and not private - and administrative in kind, since it is neither legislative, nor jurisdictional, nor judicial, - nor anything else" (*op. cit.*, p. IV).

freedoms and property rights²²⁵⁹. This title would justify the intervention of the judicial judge for all forms of infringement of freedoms or property rights, whoever the perpetrator, and in particular the administration. This principle would give exclusive jurisdiction to the judicial courts in the event of infringements, and would prevail over the prohibition on their hearing administrative disputes.

542. This principle is no more likely than the previous one to provide legal justification for the existence of an assault. In the first place, it does not explain why the jurisdiction of the judicial court is limited to seriously illegal operations by the administration and does not extend to all those that infringe individual freedom or the right to property. If it is from its capacity as guardian of freedoms and property rights that the court derives its right to intervene in the event of an assault, it is difficult to see why it should exercise this jurisdiction only in the presence of an act taken by the administration outside the exercise of its powers or outside the hypotheses in which compulsory execution is authorised. Secondly, and more fundamentally, the alleged principle simply does not exist in French law. The Constitution certainly gives a privileged role to the judicial authority in *safeguarding* individual freedom and the right to property²²⁶⁰. But for the rest, and contrary to what is sometimes maintained, "it is really impossible to maintain today with any plausibility that the judicial courts are the natural guardians of individual rights in general"²²⁶¹. No norm of positive law makes the judicial authority the guardian of all freedoms. The reservation of judicial jurisdiction or, better still, the privileged judicial jurisdiction concerns only two of the freedoms to which the *de facto* judge grants protection: the right of property and individual freedom. Even if the notion of individual freedom were defined as broadly as possible, i.e. as including, beyond security alone, freedoms intimately linked to the individual such as the inviolability of the home, the secrecy of correspondence, the right to marry and the freedom to come and go, it would be impossible to include all the fundamental freedoms protected in the context of assault. Consequently, this derogation from the Law of 16-24 August 1790 "cannot be based on the constitutional principle that the judicial authority is the guardian of individual freedom, since its field of application extends far beyond that of the principle in question"²²⁶². It cannot rely on an "alleged judicial reservation of jurisdiction under Article 66 of the Constitution"²²⁶³.

543. Thus, no legal consideration can justify the existence of *de facto* assault. Devoid of any legal justification, it has been maintained to this day only for highly practical reasons²²⁶⁴. This practical justification was gradually eroded until it disappeared completely with the law of 30 June 2000.

II. The disappearance of practical justifications

544. If the *de facto* route has emerged and endured, it is only because the judicial judge was the only one capable of effectively defending the fundamental freedoms of those subject to trial²²⁶⁵. It is because of the lack of independence of the administrative justice that it appeared, it is because the administrative judge was not

2259 This principle was forged during the 19th century^e, at the time of the formation of administrative law. Numerous texts, scattered and heterogeneous, entrusted the judicial jurisdiction with certain disputes concerning, for example, the property of emigrants, land tax, expropriation - the placement of the insane (for a presentation of these different texts, see E. PICARD, "Dualisme juridictionnel et liberté individuelle. Le principe selon lequel l'autorité judiciaire est gardienne de la liberté individuelle", in *Le contrôle juridictionnel de l'administration. Bilan critique* (CERAP dir.), Economica, 1991, p. 167; and J.-M. POISSON, *Les droits de l'homme et les libertés fondamentales à l'épreuve de la dualité de juridiction*, L'Harmattan, coll. Logiques juridiques, 2003, pp. 22-23.) At the same time, the civil courts adopted an extensive interpretation of their jurisdiction. And, gradually, a purely jurisprudential definition of certain cases of judicial jurisdiction was imposed, for example for questions of personal status, domicile or property. Some authors, in particular Laferrière and Ducrocq, tried to explain all these cases of judicial jurisdiction in administrative matters by a single idea. These derogatory cases would be explained by the idea that the judicial authority is the guardian of freedom and property. Laferrière states that the difficulties to which the exercise of individual rights such as personal freedom, freedom of the press or freedom of work may give rise "are, in principle, a matter for the judicial authority; it is before it that one must defend oneself against infringements that would be illegally brought against them, either by third parties or by the administration itself" (E. LAFERRIERE, *Traité de la juridiction administrative et des recours contentieux*, Berger-Levrault, 1887, t. I, p. 480). The principle subsequently underwent a change and acquired legal consistency. It would have gone from being a principle explaining a legislative or jurisprudential practice to a principle validating these practices.

2260 Where these freedoms are at stake, the court has a privileged and not exclusive jurisdiction. See *supra*, § 119.

2261 P. COUZINET, *La réparation des atteintes portées à la propriété privée immobilière par les groupements administratifs*, Sirey, 1928, p. 257.

2262 R. ABRAHAM, *op. cit.* pp. 7-8.

2263 S. PETIT, note under TGI Evry, order 26 June 2002, *GP* 2002, 1, p. 1474.

2264 See A. BOCKEL, "La voie de fait: Mort et résurrection d'une notion discutable", *D.* 1970, chron. n° VIII, pp. 29-32, special p. 31: "In reality, devoid of serious legal foundations, this solution is only the result of a "jurisprudential policy" conceived in the name of social utility; the will to sanction the administration and above all the concern to protect its victim seem, in this case, to be the only serious motives.

2265 For M. Rousset, "this theory is a survival of an era, the XIX^e, when the administrative judge was not yet independent and did not inspire confidence; it was thought that the only real protection came from the judicial judge in the face of the arbitrariness of administrative power" (M. ROUSSET, *Droit administratif*, tome I, *L'action administrative*, PUG, 1994, p. 76). It "is only an archaic survival of the mistrust of the liberals of the XIX^e century with regard to the alleged partiality of the administrative courts (...)" (C. DEBBASCH and J.-C. RICCI, *Contentieux administratif*, 8^{ème} éd., Dalloz, coll. Précis, 2001, n° 254).

equipped to react quickly and effectively to liberticide situations that it remained. The administrative judge is now independent; he has the power to intervene quickly and effectively in the event of infringements of freedoms. The de facto route has lost the only justification for its continued existence.

A. The lack of independence of administrative justice

545. Initially, the de facto route appeared because of the lack of independence of the administrative justice system. As Mr Debary recalled, this regime "was born at a time when the only real judge was the judicial judge"²²⁶⁶. Indeed, administrative justice was "initially conceived more as a jurisdictional administration in which the State would be both judge and party"²²⁶⁷. At a time when the administrator-judge system still prevailed, Sirey wrote that to call it justice, "the language would be depraved"²²⁶⁸. Its independence, impartiality and ability to judge power were contested²²⁶⁹. Its ability to protect freedoms was questioned. Thus, Mr Batbie stated: "We do not consider the guarantee resulting from the examination by the Council of State to be in vain. But it is difficult to accept that in our country, after all that has been said to demand that no one be distracted from his natural judges, we have come to place the most essential rights under the protection of a semi-political body made up of revocable members, that after having heard so many times to demand that administrative litigation be restricted or even abolished, we place under the protection of this justice system, which was so much attacked in the past, the essential rights of man living in society"²²⁷⁰. Only the civil courts enjoyed genuine guarantees of independence and impartiality. This superiority, which was real, justified recognising the possibility for the civil courts to intervene exceptionally to hear administrative disputes in cases of serious infringement of freedoms.
546. This initial justification disappeared with the successive reforms of the administrative jurisdiction. In a three-step process, the administrative judge aligned himself with his judicial counterpart in order to offer litigants comparable guarantees in terms of independence and impartiality. Firstly, the Act of 24 May 1872 gave the Council of State jurisdictional status by sealing the transition from retained justice to delegated justice. The *Cadot* ruling of 13 December 1889 further strengthened the jurisdictional status of the institution²²⁷¹. Secondly, administrative judges have a status that guarantees their independence. The members of the Council of State benefit from a de facto guarantee. Although no text formally proclaims their irremovability, it nevertheless exists "by virtue of an age-old custom which has as much, if not more, force than a legislative provision"²²⁷². Members of the Palais-Royal benefit from a protection that 'shields their position within the body from outside influences' and 'any young auditeur de seconde classe knows from the moment he enters the Conseil d'Etat at what age he will become an auditeur de première classe, maître des requêtes and then conseiller d'Etat; thus governmental pressure using personal ambition is excluded at this stage'²²⁷³. As regards judges of the merits, the situation has long remained unsatisfactory. Not only did the management of the body depend on the Ministry of the Interior, but these judges did not benefit from the security of tenure accorded to magistrates in the judiciary. In 1958, Michel Debré declared that "the administrative judiciary does not exist; they are simply administrative civil servants who hold judicial office"²²⁷⁴. The law of 6 January 1986 remedied this situation by aligning the status of administrative court advisers with that of their judicial counterparts²²⁷⁵. Thirdly, the existence and independence of the administrative court are now

2266 M. DEBARY, *La voie de fait en droit administratif*, LGDJ, 1960, p. 169.

2267 B. PACTEAU, "Le contrôle de l'administration par une juridiction administrative. Existence or not of an administrative jurisdiction. La conception française du contentieux administratif", *RA* 2000, special issue 3, p. 91.

2268 J.-B. SIREY, *Du Conseil d'Etat selon la charte constitutionnelle*, 1818, re-edited by Phénix éditions, 2005, p. 484.

2269 See, significantly, the statements of Dupin l'ainé and Béranger during the Restoration (quoted by J. DONNEDIEU DE VABRES in "La protection des droits de l'homme par les juridictions administratives en France", *EDCE* 1949, pp. 30-31). Dupin l'ainé declared in the *Chambre des Pairs*: "At the Conseil d'Etat, everything happens behind closed doors. In this palace, the same official will say of the defendant 'we are not entering' if he is a poor man, and at the same time will present arms to the plaintiff if he is of the quality of those who have their entrance to the Court. Also, gentlemen, please believe me, and perhaps you know this for yourself, nothing equals the despair of the litigant when he is told that he will be judged by the Conseil d'Etat. In the Lower House, Béranger castigated this institution in the following terms: "The Conseil d'Etat is not recognised by the Charter, it constitutes a kind of usurpation which threatens our liberties too much not to be the object of a continual protest".

2270 A. BATBIE, *Traité théorique et pratique de droit public et administratif*, 2^{ème}, 1885-1886, t. VII, p. 409 et seq. quoted by E. DESGRANGES, *op. cit.* p. 154.

2271 CE, 13 December 1889, *Cadot*, *Lebon* p. 1148.

2272 R. PERROT, *Institutions judiciaires*, 9^{ème} éd, Montchrestien, 2000, n° 372, quoted by E. GUERIN-LAPORTE, *Le commandement dans l'office du juge administratif*, thèse Montpellier I, 2002, p. 112.

2273 G. BRAIBANT, N. QUESTIAUX, C. WIENER, *Le contrôle de l'Administration et la protection des citoyens*, Cujas, 1973, p. 22.

2274 M. DEBRE, in Documents pour servir à l'histoire de l'élaboration de la Constitution du 4 octobre 1958, vol. 2, La documentation française, 1988, p. 164.

2275 On this law, see L. RICHER, "Des droits du juge à ceux du justiciable", *AJDA* 1986, pp. 278-283, esp. p. 279-280; B. PACTEAU, "L'indépendance des juges des tribunaux administratifs. Commentaire de la loi du 6 janvier 1986", *RFDA* 1986, pp. 783-791, spe p. 787; M.

constitutionally protected²²⁷⁶. As the administrative court no longer has anything to envy the judicial court in terms of independence and impartiality, the only justification for the de facto procedure was the lack of effective emergency procedures in administrative litigation law.

B. The inability to defend freedoms quickly and effectively

547. As a result of these developments, the existence of the de facto right of appeal was hanging by a thread - albeit a strong one - consisting of the inadequacy of the administrative court in the urgent protection of freedoms. The administrative court had neither effective emergency procedures nor adequate injunctive powers²²⁷⁷. The civil judge of summary proceedings, thanks to the extent of his powers and the flexibility of his procedures, was the only one able to offer victims of administrative arbitrariness effective jurisdictional protection. It was thus possible to "affirm the usefulness of this theory as an irreplaceable 'emergency technique' for the protection of fundamental rights, for eminently practical reasons"²²⁷⁸.
548. By creating the summary procedure, the legislator has given the administrative judge the means to act as quickly and effectively as his judicial counterpart to stop infringements of fundamental freedoms²²⁷⁹. These "now benefit in the person of the administrative judge from a protector whose effectiveness no longer has anything to envy to that of the judicial judge"²²⁸⁰. With the law of 30 June 2000, the last justification for assault and battery has thus collapsed. "Contradictory from the outset in relation to the principle of separation, it is moreover deprived of its pragmatic justification, since it can no longer claim to obviate the powerlessness of the administrative court"²²⁸¹.
549. The administrative judge has remedied an inefficiency which alone justified the intervention of the judicial judge outside his field of competence. As the sole and traditional justification for de facto assault has disappeared, the question of maintaining this head of judicial jurisdiction inevitably arises. Indeed, its invocation to attribute jurisdiction to the judicial judge was only justified by practical considerations. It is because the administrative judge was not independent that it appeared; it is because it was not effective in the face of urgency that it has endured; it is because the administrative judge is now independent and effective that we must now question its maintenance. In other words, by removing all practical justification for the assault, the creation of the *référé-liberté* raises the question of whether the time has not come, to use the famous formula pronounced by the government commissioner Fournier in his conclusions on the *Voskresensky* judgment, to "sound the death knell" for the assault²²⁸².

III. A possible abolition

550. First of all, it should be pointed out that its abolition by the Court of Conflicts is legally possible. Indeed, the law of 30 June 2000 was intended to be neutral from the point of view of the distribution of powers between

TOURDIAS, "Indépendance des membres des tribunaux administratifs. La loi du 6 janvier 1986", *AJDA* 1986, pp. 275-277. A comparison with the status of judicial magistrates has been made on two points. On the one hand, administrative magistrates are recognised as having security of tenure, the law stipulating that they "may not receive a new assignment without their consent, even for promotion". On the other hand, a new body, the High Council of Administrative Courts (which became the High Council of Administrative Courts and Administrative Courts of Appeal after the Act of 31 December 1987) ensures that the management of the careers of administrative magistrates cannot jeopardise their independence. Because of this double guarantee, "there is no doubt that *the members of the administrative courts and administrative courts of appeal constitute a body of independent magistrates*" (R. ABRAHAM, "Les magistrats des Tribunaux administratifs et des Cours administratives d'appel", *RFD* 1988, p. 207. Underlined).

2276 See CC, no. 80-119 DC, 22 July 1980, cons. 6, *Rec.* p. 46, *GDCC* no. 29. On the basis of the fundamental principles recognised by the laws of the Republic, the Constitutional Council enshrines the existence of administrative jurisdiction and its independence from the legislative and executive powers. In this respect, it aligns the status of the administrative court with that of the judicial authority, whose independence is expressly recognised by the text of the 1958 Constitution (Article 64). It gives it a status enabling it to assert itself as a counter-power in its own right, by protecting it from any attempt at reprisals by the authorities subject to its control.

2277 See *supra*, §§ 7-8.

2278 S. TSIKLITIRAS, *La protection effective des libertés publiques par le juge judiciaire*, LGDJ, coll. BDP, t. 155, 1991, p. 87.

2279 See, however, the isolated and in some respects anachronistic position of Mr Goyard. The author defends the principle of the exclusive jurisdiction of the judicial courts, arguing that the civil courts are superior in this area. The author states that "everything militates today for the transfer of litigation concerning administrative infringements of freedoms to the courts of the judicial order, without getting lost in an uncertain and shifting catalogue of irregular infringements of freedoms classified according to the hypothetical degree of protection from which each is supposed to benefit" (C. GOYARD, "Unité et plénitude de juridiction", in *Gouverner, administrer, juger*. Liber amicorum Jean Waline, Dalloz, 2002, p. 602).

2280 M. GUYOMAR and P. COLLIN, chron. under CE, Sect. 18 January 2001, *Commune de Venelles*, *AJDA* 2001, p. 156.

2281 P. WACHSMANN, "Une révolution dans les rapports entre le juge et l'administration?", in *Le nouveau juge administratif des référés. Réflexions sur la réforme opérée par la loi du 30 juin 2000*, colloquium 6 December 2000 (P. WACHSMANN ed.), Strasbourg, PUS, 2002, p. 107.

2282 J. FOURNIER, concl. on CE, Sect. 9 July 1965, *Sieur Voskresensky*, *AJDA* 1965, II, p. 607.

the two orders of jurisdiction. It was presented as a procedural text that did not intend to abolish the de facto route, nor to give it a legislative status. Both before and after its intervention, this concept remains in the hands of the judge of conflicts. As Mr Chapus pointed out, the law did not give "its *imprimatur* to the concept of assault"²²⁸³. Contrary to the wish of the senators, who had called for the inclusion in the law of an express reference to assault and battery or to the competences recognised to the courts of the judicial order in this field²²⁸⁴, this head of judicial competence is mentioned neither explicitly nor implicitly in the law of 30 June 2000. The legislator did not legalise this purely jurisprudential exception to the principle of separation of the administrative and judicial authorities. Since it does not have legislative status, the de facto route is and remains a "jurisprudential institution par excellence"²²⁸⁵. It can, even today, be abandoned by a simple court decision. As Mr Rivero and Mr Moutouh state, 'the judge who created it could give it up tomorrow; a decision by the Court of Conflicts would be enough to remove it from French law'²²⁸⁶. The legislator has not changed anything on this point, leaving it up to the distributing judge to decide whether to maintain or abolish this procedure. Strictly speaking, there is nothing to prevent the abolition of the de facto procedure, in particular Article L. 521-2 of the Code of Administrative Justice.

551. Even before the reform of 30 June 2000, some authors linked the disappearance of the *voie de fait* to the introduction of truly effective summary proceedings in administrative litigation law. It is true that the de facto procedure was conceived at the time of its creation as a temporary remedy making it possible to mitigate the deficiencies of the administrative jurisdiction while waiting for the latter to remedy its insufficiencies. Because of the persistent failure of administrative justice to ensure rapid and effective protection of freedoms in cases where the administration was guilty of serious acts, assault and battery gradually took root in the legal landscape. So much so that it has been forgotten that this procedure, which is in direct disregard of the provisions of the Act of 16-24 August 1790 and the Decree of 16 Fructidor III, was originally only a transitional solution. Shortly before the judgment of the Tribunal des conflits of 12 May 1997, Mr Abraham had stated that 'Once the most serious gap in our administrative litigation is filled, it will be time to sound the death knell, to use the phrase pronounced at the Palais-Royal thirty years ago, for the theory of de facto conduct'²²⁸⁷. In the same vein, Mr Rousset stated that 'it would be enough to grant the administrative judge powers equivalent to those available to the judicial judge in the event of an assault to eliminate both the usefulness of this theory and the practical complications that its use entails'²²⁸⁸.
552. The idea of abolishing assault by the distributing judge was considered or mentioned by members of the administrative court during the discussion and adoption of the law of 30 June 2000. When the text was still in draft form, President Stirn said: "Perhaps it will even sound the death knell for de facto assault, which an efficient handling of emergencies before the administrative court could one day make it possible to avoid"²²⁸⁹. On the eve of the implementation of Article L. 521-2 of the Code of Administrative Justice, members of the administrative jurisdiction were much more categorical, as was the case of the president of the Dijon Administrative Court, who declared that the creation of the *référé-liberté* signalled 'the death of the assault'²²⁹⁰. Such an abolition would make many authors and members of the administrative jurisdiction who, well before the reform of 30 June 2000, were calling for the disappearance of this judicial jurisdiction²²⁹¹, feel comfortable. The question of the abolition of assault was on everyone's mind after the entry into force of this text. In his conclusions on the *Mohamed* judgment, delivered during the first year of application of the new law, Mr Bachelier stated that in this case, the question of jurisdiction submitted to the Court of Conflicts could be settled 'without there being any need to pronounce *today on the* abandonment of the jurisprudential theory of de facto assault'²²⁹². By this incision, the government commissioner implicitly indicated that the question of the abolition of the de facto procedure would inevitably arise in the future.

Abandoning this head of judicial jurisdiction would resolve all the difficulties generated by its existence, in

2283 R. CHAPUS, *Droit du contentieux administratif*, 12^{ème} ed, Montchrestien, 2006, n° 1605.
 2284 See *supra*, §§ 321-322.
 2285 J-F. LACHAUME, *Les grandes décisions de la jurisprudence administrative*, 10^{ème} ed, PUF, coll. Thémis, 1996, p. 214.
 2286 J. RIVERO and H. MOUTOUH, *Libertés publiques*, t. 1, 9^{ème} éd., PUF droit, coll. Thémis droit public, 2003, n° 16.
 2287 R. ABRAHAM, *op. cit.* p. 13.
 2288 M. ROUSSET, *Droit administratif*, tome I, L'action administrative, PUG, 1994, p. 76.
 2289 B. STIRN, "La juridiction administrative: problèmes actuels et réformes", *RA* 1999, special issue 7, p. 138.
 2290 J.-M. LE GARS, Speech at the *Study Days on the implementation of emergency procedures before the administrative courts*, Lyon, 11 December 2001 (Association Justice et administration dir.), University of Lille 2, 2001, p. 6.
 2291 M. Chapus considers that the "situation of disordered slippage" linked to its implementation "should be sufficient to justify that this great leading light of the legal scene be admitted to retirement" (R. CHAPUS, *Droit administratif général*, t. 1, 14^{ème} éd., Montchrestien, 2000, n° 1087; see also P. COUZINET, *La réparation des atteintes portées à la propriété privée immobilière*, thèse Paris, 1928; P. LAROQUE, note au *J.* 1935, 3, 97; P. WEIL, note sous CE, 15 février 1961, *Werguin*, *RDP* 1961, p. 657 et s.; C. LECLERCQ, "Le déclin de la voie de fait", *RDP* 1961, pp. 657-713; J.-C. RICCI, "Feu sur la voie de fait?" This opinion is not limited to the academic community. The idea of abolishing de facto assault is regularly expressed by government commissioners (see in particular concluding remarks by G. BRAIBANT on CE, 15 February 1961, *Werguin*, *AJDA* 1961, p. 197 et seq.; concluding remarks by J. FOURNIER above; concluding remarks by N. QUESTIAUX on CE, 4 November 1966, *Société le Témoignage chrétien*, *AJDA* 1967, p. 40 et seq) Closer to us, and in line with the aforementioned government commissioners, M. Arrighi de Casanova declared in his conclusions on the *Préfet de Police de Paris c/ TGI de Paris* judgment "that the very notion of assault and battery is today no more than an anomaly which it would be desirable to abandon" (J. ARRIGHI DE CASANOVA, concl. on TC, 12 May 1997, *Préfet de police de Paris c/ TGI de Paris*, *RFDA* 1997, p. 522. Underlined).
 2292 G. BACHELIER, concl. on TC, 19 November 2001, *Miss Mohamed v. Minister of the Interior*, *D.* 2002, p. 1449. Emphasis added.

particular the disturbances observed in the distribution of jurisdiction between the two orders of court. There seems to be no real obstacle to this abolition, other than the weight of tradition, which is particularly important in the area of the protection of freedoms.

Section 2. The absence of real obstacles to the abolition of assault

553. For the time being, the Court of Conflicts has confirmed the maintenance of the *voie de fait* after the law of 30 June 2000. After the implementation of this text, the Court of Conflicts wanted to show as quickly as possible its attachment to *de facto* assault and the maintenance of this ground of judicial jurisdiction. The desire to solemnly reaffirm its existence as soon as possible led the distributing judge to develop a questionable line of reasoning in the *Mohamed* decision of 19 November 2001, which was handed down contrary to the conclusions of the government commissioner and harshly criticised by commentators²²⁹³. In this case, the Court of Conflicts had to determine whether the detention of a passport by the air and border police beyond the time strictly necessary to verify the identity of the person concerned was an act of violence, whereas the texts expressly recognise the power of the police to proceed with such detention in order to ascertain the nationality of its holder²²⁹⁴. The government commissioner had proposed a simple and logical solution: since the initial measure of confiscating the passport falls within the powers of the administration, the retention of this document beyond what is strictly necessary simply reflects the continued exercise of its powers²²⁹⁵. Conversely, the Tribunal des conflits has ruled that if the duration of the detention is manifestly excessive, the measure ceases to be linked to the powers of the administration, and enters the realm of *de facto* action²²⁹⁶. This solution requires determining, for each situation, whether or not the duration of detention is manifestly excessive²²⁹⁷. The Court of Conflicts adopted this solution not because it seemed the most coherent or logical, but because this decision was an opportunity, after the law of 30 June 2000, to clearly rule out the idea of abolishing *de facto* assault immediately after the entry into force of this text.

554. It is true that three considerations may lead to hesitation as to whether it should be abolished. Firstly, its disruptive effect has been considerably reduced since the implementation of Article L. 521-2 of the Code of Administrative Justice. Then, its abandonment seems to deprive the litigant of any fast and effective recourse when the administration infringes fundamental freedoms outside the exercise of its powers. Lastly, the *de facto* procedure would have an exemplary character that the recourse to the *référé-liberté* would not have.

I. The return to orthodoxy in the application of the *de facto* route

555. Since the entry into force of the Act of 30 June 2000, assault no longer has the disruptive effect it once had, or at least a disruptive effect of the same magnitude. The applications of assault have logically been restricted by two factors.

The first cause of rarefaction came from the behaviour of litigants. Litigants turn to the administrative judge

2293 TC, 19 November 2001, *Miss Mohamed c/ Minister of the Interior, Lebon* p. 755, D. 2002, pp. 1446-1450, concl. G. BACHELIER; *LPA* 23 July 2002, n° 146, pp. 23-31, note A. BORIES, "Le baroud d'honneur de la *voie de fait*"; *AJDA* 2002, pp. 234-236, note S. PETIT.

2294 The civil judge of the summary proceedings had recognised an assault and ordered the administration to return the passport within 48 hours of the notification of its order (IGI Paris, order of 7 February 2001, *GP* 2001, 2, pp. 481-483, note S. PETIT).

2295 Concl. *supra*, esp. pp. 1447-1448.

2296 Artificially splitting the administrative action in two three distinct phases, it establishes a complicated temporal distinction between the moment when the detention of the passport is simply illegal and the moment when, because of a manifestly excessive duration, it becomes a *de facto* act. The detention of identity documents, which falls within the remit of the air and border police, cannot exceed the time "strictly" necessary to verify nationality, unless criminal proceedings are brought "for the use of false documents and usurpation of identity". In the absence of criminal proceedings, 'the administrative authority is making *unlawful use of its powers* by failing to return the passport to the person who has been checked'. However, the illegality will undergo a change and become a legal non-existence if it is prolonged in time: "in the case where the duration of the retention of this document is manifestly excessive, such behaviour *ceases to be linked to the exercise by the administration of its powers* and constitutes, because of the deliberate infringement without justification of the fundamental freedom of movement, an assault".

2297 In the absence of criteria, it is not certain that the two levels of court will have an identical assessment of this duration. It is therefore regrettable that Mr Bachelier's conclusions were not followed by the Tribunal des conflits. Commentators on this decision have criticised the solution given by the distributing judge. Mr Petit, first of all, did not hide his astonishment at this decision: 'Given the new autonomous means of action conferred on the administrative interim relief judge in matters of infringement of a fundamental freedom by the public authority by Article L. 521-2 of the Code of Administrative Justice, it seemed to us that the conflict order would be upheld by the Court of Conflicts, whose case law is hardly favourable to an extensive application of the theory of *de facto* action' (S. PETIT, *op. cit.*, p. 235). He notes that "paradoxically, it is at a time when the administrative judge, having claimed knowledge of infringements of freedoms, has been endowed with powers giving him the means to put an end to them, that the theory of assault is reborn from its ashes" (S. PETIT, *op. cit.*, p. 236). The judge of the *référé-liberté* could have intervened in this hypothesis and effectively sanctioned the administration's error. "Unfortunately, the Tribunal des conflits did not follow the conclusions of its commissioner and listened to the sirens of those who still see *de facto* action as a guarantee against the administration's blunders" (A. BORIES, *op. cit.*, p. 29).

of summary proceedings in cases where they were traditionally inclined to turn to the judicial judge. It is no longer in their interest to bring a case before the civil judge for interim relief on the basis of an assault or, even more so, to allege the existence of improbable assaults²²⁹⁸. On the one hand, the judge of the *référé-liberté* intervenes under conditions of speed and efficiency comparable to his judicial counterpart and can deal with acts traditionally considered as assault without opposing his incompetence²²⁹⁹. On the other hand, the referral to the civil judge of summary proceedings exposes the litigant to difficulties and lengthening of the procedure that he does not encounter in case of referral to the administrative judge. The first risk is that of a declaration of incompetence if the contested act or behaviour does not meet the conditions for an act of God. The second risk is that of the prefectural authority elevating the conflict and, consequently, lengthening the duration of the procedure²³⁰⁰. Such a risk is excluded in case of referral to the administrative judge²³⁰¹. The person who applies to the judge of *référé-liberté* has the assurance that his or her application will, whatever happens, be examined within a very short period of a few days. The law makes it unnecessary to resort - abusively or not - to assault. This procedure has lost its appeal since the reform of 30 June 2000. As the referral to the judicial judge is fraught with pitfalls, the question facing the litigant is not to choose between the administrative judge and the judicial judge, but rather between the procedure of the *référé-liberté* and that of the *référé-suspension*.

The second factor in the rarity of assault results from the change in the behaviour of the civil judge of summary proceedings with regard to the acceptance of complaints presented by litigants. Before the reform of 30 June 2000, the courts had an extensive interpretation of the scope of assault. This interpretation, which disregarded the case law of the Tribunal des conflits, was explained solely by the inadequacies of the administrative courts and the desire to offer litigants rapid and effective protection in the event of infringement of fundamental freedoms. The law of 30 June 2000 having remedied the shortcomings of the administrative court in this field, the extensive interpretations of this head of judicial jurisdiction no longer have any reason to exist. In order to ensure that litigants are truly protected, it is no longer necessary for the civil courts to be complacent about the complaints made by the latter on the basis of *de facto* abuse. With the introduction of the *référé-liberté*, the Act of 30 June 2000 'implicitly imposes a more orthodox reading of the jurisprudential concept of assault'²³⁰². The refusal to establish an assault is no longer synonymous with the absence of any jurisdictional guarantee for the victim of liberticidal administrative actions. It is no longer the time for extensive or distorted interpretations of the assault. The civil judge of summary proceedings is more demanding than in the past for the establishment of assault. The courts have returned to a stricter interpretation of this ground of jurisdiction, as shown by the decrease in the number of cases of 'false' assault that the judge hearing the case has had to deal with since the reform of 30 June 2000 came into force.

As Mr. Bachelier stated, "the law of 30 June 2000 is the tool that was missing to return the *de facto* route to the narrow bed that it should never have left"²³⁰³. The administrative litigation of freedoms has returned to the administrative judge's courtroom thanks to the effectiveness of its emergency procedures. The situation of foreigners' litigation, which was particularly affected by the flight of litigation before the reform, is revealing on this point²³⁰⁴. As Mr Pugeault observed, 'as soon as the Act of 30 June 2000 came into force, litigation involving foreigners, which until then had constituted a large part of the litigation that the Court of Conflicts had to deal with in order to decide on the existence of a *de facto* act, was almost immediately referred to the administrative

2298 The objective of the drafters of the text was precisely, by attacking the roots of the flight of litigation to the judicial judge, to limit the temptation of litigants to abusively apply to the civil judge of summary proceedings on this basis. M. Garrec emphasised that "By giving the administrative judge of summary proceedings powers equivalent to those of the civil judge of summary proceedings, the present bill would limit the temptation of applicants to refer to the judicial judge for disputes falling within the jurisdiction of the administrative court" (R. GARREC, Senate Report No. 380, p. 52). The introduction of this recourse would thus be likely to "limit the abusive use of this theory" (*op. cit.*, p. 53). As M. Pacteau stated the day after the reform, the *référé-liberté* is "intended to offer the victims of administrative actions whose essential rights have been infringed a remedy that is equivalent in force and rigour to the judicial *référé*, to the point where the theory of *de facto* action would lose all its appeal and reason for being" (B. Pacteau, *Contentieux administratif*, 6^{ème} éd., PUF, coll. Droit fondamental, 2002, n° 278).

2299 See *supra*, §§ 326-333.

2300 When the prefectural authority opposes the judicial authority with a declination of jurisdiction, the latter is obliged to stay the proceedings until the Court of Conflicts has ruled on the jurisdictional competence, which has the effect of prolonging the solution of the dispute by several months. Very often, the judge responsible for hearing the case does not respect the three-month time limit set for him or her to give a ruling from the date of receipt of the documents at the Ministry of Justice (Article 7(1)^{er} of the Order of 12 March 1831, Article 15 of the Decree of 26 October 1849). If the time limit is exceeded by more than one month, the judge is authorised to take over the proceedings and to rule on the case (Article 7(2) of the Order of 12 March 1831), but this possibility of short-circuiting the slowness of the judge of conflicts is only rarely used. The result is a considerable loss of time for the litigant, who in any case delays a possible censure of the administrative action. If the declinatory action was well-founded, the litigant must start the procedure again by referring to the administrative court. If the conflict was wrongly raised, the intervention of the judicial judge often gives the plaintiff only a belated satisfaction, thus purely platonic.

2301 The 'revendication' procedure does allow the minister concerned to have the Conseil d'Etat dismissed by the Tribunal des conflits if he or she considers the administrative court incompetent (Article 26 of the Act of 24 May 1872), but it has never been implemented.

2302 S. TRAORE, "Référé-injonction et voie de fait - Vers un retour à l'orthodoxie en matière de voie de fait", *Dr. adm.* 2001, chron. no. 9, p. 14. This desire to confine the assault within its traditional limits was one of the objectives pursued by the drafters of the reform. M. SUTOUR had notably affirmed that the creation of the *référé-liberté* "will certainly reduce the use of assault. In any case, its extensive interpretations should cease" (S. SUTOUR, *JO déb. Sénat*, CR séance 8 juin 1999, p. 3749).

2303 G. BACHELIER, concl. *supra*, p. 1449.

2304 On the effectiveness of administrative summary proceedings in this area, M. FOUQUET-ARMAND, "Le juge administratif, gardien effectif des droits et libertés des étrangers grâce à la loi du 30 juin 2000", *RRJ* 2002/2, pp. 861-894; C. POULY, "Le référé administratif à l'épreuve du droit des étrangers", *GP* 2005, 1, pp. 2470-2476.

judge for interim relief (...)2305. This reform "has more or less eliminated the elevation of conflict in the case of proceedings relating to the situation of foreigners"2306.

556. Have the uses of assault and battery become marginal, as one might have thought after the adoption of the law of 30 June 20002307? Has the disruptive effect of this ground of jurisdiction completely ceased to the point of making the question of its abolition irrelevant?

In practice, it can be observed that although litigation concerning assault has been restricted, it has not disappeared. It has not dried up; there has not been an end to the assault2308. Consequently, the difficulties linked to its existence and application still remain. The untimely incursions of the judicial judge in the sphere of attribution of the administrative judge have not totally disappeared2309. The maintenance of this ground of jurisdiction still exposes the risk of its misuse by the judges of the first degree.

Moreover, the central question today is not so much that of the orthodox or deviated use of the de facto route but rather that of its very existence insofar as nothing justifies it any more in positive law. The return to normality is very relative because the judicial judge continues to intervene without a legitimate title in a matter that the law and the Constitution reserve for the administrative judge. Ordinary case law cannot prevail over a principle that has a legislative basis and a constitutional foundation. Finally, as Mr Ricci and Mr Debbasch have pointed out, the very principle of the de facto procedure is questionable. As these authors point out, 'is there not a certain impropriety in having a case dealt with by the judicial judge because it is too seriously irregular? As if private law

2305 S. PUGEAULT, "Le juge administratif des référés, gardien des libertés", in *Justice et droits fondamentaux. Etudes offertes à Jacques Normand*, Litec 2003, p. 414.

2306 Y. ROBINEAU, "Regard sur dix années d'activité du Tribunal des conflits (1994-2003)", *RFDA* 2004, p. 1169. President Robineau points out that the judge in charge of settling disputes heard only one assault case involving a foreigner between 2001 and 2003, whereas there were four in 1994 alone.

2307 Some authors have predicted the decline of de facto assault after the adoption of the reform of 30 June 2000, such as Mme Foulletier, announcing the "atrophy" or "marginalisation" of this notion (M. FOULETIER, "La loi du 30 juin 2000 relative au référé devant les juridictions administratives", *RFDA* 2000, p. 973). See in the same sense S. TRAORE, *op. cit.* pp. 10-14.

2308 The Court of Cassation sanctions the judges of the court of first instance who do not retain their competence in the presence of an administrative act "vitiated by a gross irregularity" (Civ. 1^{ère}, 25 January 2005, *M. Picard and others, Dr. adm.* 2005, comm. n° 52, note M. LOMBARD). In this case, the owners of a courtyard enclosed by a gate had been illegally dispossessed of this property by a municipality. The administration had certainly not acted in the absence of any title, since the municipal council had believed it could take a decision classifying this parcel as a municipal roadway, even before any expropriation procedure. The Court of Appeal had 'prudently' (M. LOMBARD, *op. cit.*, p. 23) declared the judicial courts to be incompetent, 'the titles relied on by this local authority being administrative acts whose legality cannot be reviewed by the judicial judge'. The Court of Cassation overturned this decision, on the grounds that 'the classification of a private courtyard as a municipal roadway, which was only subsequently expropriated, is vitiated by a gross irregularity'. It should be noted that if an act of violence is characterized in such a case, its existence is all the more clear when the administration intends to exercise a 'right of repossession' on the basis of a text that does not exist (see *supra*, § 332, the *Abdallah* judgment of 2 February 2004). The Court of Cassation intends that the judicial judge should exercise the full extent of his powers in the presence of a de facto act. Thus, a municipality having built a wastewater treatment plant, the judgment which, in order to refuse to order the demolition of the building encroaching on the plot and to award damages, holds that the judicial judge cannot order the destruction of a public work but has the power to award damages to the person who suffers harm as a result of an act of God must be quashed (Civ. 1^{ère}, 28 June 2005, *Consorts Dabeedin et autre c/ Commune de Cayenne*, n° 03.14.165, *GP* 3-4 August 2005, p. 2721; see already, in the same sense: Civ. 3^{ème}, 30 April 2003, *Mourareau c/ Commune de Verdun-sur-Ariège*, *D.* 2003, pp. 1932-1934, note S. PETIT). The Court of Appeal violates the law of 16-24 August 1790 when, in order to rule out the de facto right of way, it holds that the husband, before donating the bare ownership to his children, had tacitly accepted the opening of the disputed road to public traffic, whereas such authorisation was not such as to allow a road to be built on the disputed parcel (Civ. 1^{ère}, 3 February 2004, *Epoux Pellissier et autres c/ Commune de Saint-Paul le Froid*, *Bull. civ. I*, n° 39). See also CA Nîmes, 1^{ère} ch. civ. B, 28 January 2003, *SA Société immobilière de Caumont c/ SA Grands travaux de Marseille*, juris-data n° 2003-211247, *JCP G* 2003, IV, 1540: the Court considers that it is by relevant reasons that it adopts, that the tribunal de grande instance declared admissible the action brought by the appellant against the SNCF tending to see the assault of which she was victim during the construction of a tunnel on her property for the TGV SUD-EST and retained its competence to deal with it.

2309 See for example TGI Evry, order 26 June 2002, *GP* 26 June 2002, p. 10. On this decision, see the critical commentary by Serge Petit, *GP* 2002, 1, pp. 1474-1475, and the defence of the solution by the applicant's counsel: N. BARBIER, "L'administration pénitentiaire prise au piège de la voie de fait" (Prison administration caught in the trap of de facto assault), *D.* 2002, pp. 2614-2616. Despite a decision by the sentence enforcement judge granting a prisoner a semi-liberty regime, the prison administration had kept him in detention due to a lack of places in a semi-liberty centre. When the prisoner brought the case, the civil judge for interim relief recognised his jurisdiction and found that there had been an act of violence. He considered that the administration had acted outside its sphere of competence insofar as it did not have the power to obstruct a court decision. This solution contravenes the constant jurisprudence of the Tribunal des conflits. Indeed, since a decision of principle in 1960, acts relating to the administrative functioning of the prison service have been considered detachable from the exercise of the jurisdictional function, and, as such, subject to control of legality (TC, 22 February 1960, *Lebon* p. 855). This willingness to recognise a de facto procedure that clearly does not exist has been roundly criticised by Serge Petit. The author affirms that "By wanting to retain its competence for all purposes and to set aside the specific ends of non-receipt in the principle of separation of jurisdictions, the judge of civil summary proceedings weakens the credibility of his jurisprudence in the litigations involving the administration; at the time when the concurrent competence can be exercised before the administrative judge, the very readability of his decisions is at stake" (S. PETIT, *op. cit.*, p.1475).

The Court of Cassation and the Court of Conflicts are, as before the Act of 30 June 2000, obliged to remind the judicial judge of his or her limits in this area. See Civ. 1^{ère}, 8 March 2005, *Agent judiciaire du Trésor c/ Marcellin*, *Bull. civ. I*, n° 124, *JCP G* 2005, IV, 1890 (cassation of the decision of a court of appeal noting the existence of an assault without noting any material act of destruction of the dwelling attributable to State agents); Civ. 1^{ère}, 17 February 2004, *CHU de Fort de France c/ Gacou*, *Bull. civ. I*, n° 54, *JCP A* 2004, 1217, note O. RENARD-PAYEN (violates the law of 16-24 August 1790 when it finds that the measures taken by the director of a university hospital preventing a hospital practitioner from resuming his duties constitute an act of violence, whereas such a decision is related to the general administrative powers conferred by law on the director general of the establishment). The Court of Conflicts continues to confirm conflict decisions in matters of assault (see thus TC, 19 January 2004, *Société SLPK Aircraft funding c/ Aéroport de Paris*, *Lebon* p. 634; TC, 15 November 2004, *Préfet des Hauts-de-Seine*, *Bull. civ. confl.*, n° 27; TC, 23 May 2005, *Haut-commissaire de la République en Polynésie française*, *Lebon* p. 659).

were only a repressive law, the secular arm of the administrative judge; the latter playing the Pontius-Pilate in front of these monsters that would be the administrative acts argued of *de facto*²³¹⁰. However, it is worth asking whether the wording of Article L. 521-2 of the Code of Administrative Justice and the "exemplary" nature of the assault do not represent obstacles to the abolition of this procedure.

II. A defendant who is powerless in cases of assault and battery

557. One might have thought that the assault had recovered a new usefulness thanks to the law of 30 June 2000 by becoming the only procedure making it possible to repress the infringement of fundamental freedoms by the administration outside the exercise of its powers. Instead of killing the assault, the law would have given it a new interest in the matters removed by this text from the jurisdiction of the judge of the *référé-liberté*. Paradoxically enough, the birth of the *référé-liberté* seemed to prevent the disappearance of the assault.

Indeed, the law formulates a reservation that prohibits the judge of the *référé-liberté* from hearing acts committed by the administration outside the exercise of its powers, a hypothesis in which the judicial judge seemed to be the only one able to intervene. Under these conditions, abolishing the *de facto* procedure seemed to be an inappropriate solution, depriving the litigant of access to a fast and efficient judge to whom to turn in extreme urgency for infringements committed by the administration outside the exercise of its powers. The path of the judge of the *référé-liberté* seemed to be closed to him by the law. If that of the judicial judge was withdrawn, the applicant seemed to be able to address only the judge of summary judgment in the hypotheses where the administration infringes fundamental freedoms outside the exercise of its powers, i.e. in conditions of lesser effectiveness because of the requirement of a preliminary decision and its more limited prerogatives. By hypothesis, the civil judge of summary proceedings would no longer have jurisdiction to intervene. The judge of the *référé-liberté* did not seem to be able to deal with it, the law seeming to forbid him to intervene in such a case. As the legislator seemed to exclude that the judge of summary jurisdiction could deal with acts traditionally corresponding to assault by lack of right, one could think that there remained an irreducible place for the competence of the judicial judge when the litigious act is manifestly unsusceptible to be connected with the exercise of powers belonging to the administration.

558. But in practice, the interpretation given by the Conseil d'Etat to the wording of Article L. 521-2 means that this obstacle to the removal of the *de facto* assault has completely disappeared. For the administrative judge, any infringement can be considered as being closely or remotely related to a regular power of the administrative authority. The judge of the *référé-liberté* can therefore intervene perfectly in the hypothesis of an assault by lack of right²³¹¹. The reservation of incompetence formulated against the judge of summary jurisdiction is devoid of substance. This formula does not in any way constitute an obstacle to the removal of the *de facto* action. The administrative judge can usefully intervene in the fields traditionally attributed to the judicial judge under the title of *de facto* assault. Removing this head of judicial jurisdiction would not deprive the litigant of a rapid and effective legal remedy when the administration acts outside the exercise of its powers, because the administrative judge recognises his competence in such cases. The *de facto* procedure can therefore be abolished without weakening the guarantees offered to the litigant. The simplification of the distribution of competences between the two judicial orders would be in line with the interests of the litigant as well as those of a good administration of justice²³¹².

III. The "exemplary" nature of the assault

559. Some authors have argued that despite the creation of the *référé-liberté*, the assault should be maintained in French law because of the exemplary force attached to a sentence pronounced on this basis. This exemplary sanction alone would justify the retention of this ground of jurisdiction.

560. The doctrine has long emphasised a certain exemplary nature of the conviction of the administrative authority for assault. Charles Eisenmann stated that assault "is a means of stigmatising certain acts that have had consequences that are really too serious"²³¹³. According to Marcel Waline, "The mere fact that the act has been qualified by a court as an assault is not in itself without interest. Indeed, this term has a pejorative

2310 C. DEBBASCH and J.-C. RICCI, *Contentieux administratif*, 8^{ème} ed, Dalloz, coll. Précis, 2001, n° 254.

2311 See *supra*, §§ 331-332.

2312 On this theme, see O. GABARDA, "L'intérêt d'une bonne administration de la justice". Etude de droit du contentieux administratif", *RDJ* 2006, pp. 153-184, spe. pp. 163-165 on the prevention of jurisdictional difficulties.

2313 C. EISENMANN, Preface to the thesis by M. DEBARY, *La voie de fait en droit administratif*, LGDJ, 1960, p. 12.

meaning, so that its use in a judgment is already a moral sanction"²³¹⁴. In the same vein, M. Auby recalled "a character too often forgotten in the theory of assault, that which is linked to the idea of a sanction imposed on the administration following a particularly serious irregularity"²³¹⁵. Even today, the assault is presented as a "legal theory which, even in the limited cases where it is likely to be applied, retains its exemplary force vis-à-vis the Administration"²³¹⁶. According to Moutouh, its real function is to 'condemn the administration only when it has acted in a scandalous manner (...)'²³¹⁷.

This thesis can be summarised in two propositions: on the one hand, the intervention of an administrative judge constitutes a privilege for the public power; on the other hand, the conviction for assault deprives the administration of its privileges and thus has an exemplary character. It is true that it is an advantage for the administration to be judged by a specialised judge. A judge who knows its methods, the particularity of its mission and the difficulties it faces in reconciling the imperatives of the general interest with the protection of the rights of individuals. In this respect, "the existence of an administrative court constitutes a guarantee for maintaining a public law regime as a framework for administrative action, whose specific and legitimately specific situation justifies it being subject to a legal regime distinct from that which prevails for the relations of private individuals between themselves"²³¹⁸. However, the guarantees enjoyed by the administration are only recognised because of the nature of its missions. As soon as it is guilty of an assault, it no longer has to maintain an adapted public law regime and must suffer a more severe sanction. According to M. Jéol, 'from the moment it commits an assault, the Administration can no longer invoke the exceptional provisions reserved for it by public law; it is subject in all respects to common law, whether it is a question of the judge's jurisdiction, the applicable procedure or the substantive rules on which the solution of the dispute depends'²³¹⁹. President Odent affirmed that 'By committing an assault, the administration places itself outside the application of the rules of public law; it loses the benefit of the prerogatives recognised for public service activities'²³²⁰. It will appear before the civil courts as an ordinary litigant, and the rules of private law will be applied²³²¹. According to this presentation, it is from the administration's submission to the rules of private law that the assault would derive its exemplary character²³²².

561. Today, this exemplary character is presented by certain authors as the justification and even the only justification for assault. M. Serrand notes that "The practical justifications for assault now being unfounded, its existence is now based solely on case law tradition, with the judge perhaps wishing to maintain a concept likely to have, because of its legal consequences, an "educational" role with regard to the administration"²³²³. Similarly, Ms Guillon-Coudray states that "The scope of a conviction for assault remains incomparable and to remove such a theory from our legal system would largely limit the range of means ensuring respect for legality"²³²⁴.

While this reasoning is not without interest, it is doubtful that it can in itself justify the maintenance of the de facto procedure, for two main reasons. First of all, it is questionable and anachronistic to say the least to maintain today that the existence of an administrative justice constitutes a "privilege" for the administration. As Mr Melleray points out, "the very existence of the administrative judge does not constitute for the administration a sort of privilege of jurisdiction, in other words a protective prerogative, a guarantee for the administration"²³²⁵. The administrative judge does not show the slightest complaisance towards the administration. Secondly, the exemplary nature of the sanction for assault or, in any case, more exemplary than a sentence pronounced by the judge on the

2314 M. WALINE, note under CE, Sect. 19 October 1969, *Consorts Muselier*, in Notes d'arrêts de Marcel Waline, vol. 1, judgment no. 89, Dalloz, 2004, p. 475.

2315 J.-M. AUBY, "Emprise et voie de fait", *JCP G* 1955, I, 1259, n° 8.

2316 J. SAINTE-ROSE, concl. on TC, 23 October 2000, *D.* 2001, *Boussadar*, p. 2334.

2317 H. MOUTOUH, "La voie de fait dans le projet de loi relatif au juge administratif des référés : la "folle du logis" enfin domestiquée ?", *D.* 1999, n° 25, last act, p. 1.

2318 J.-H. STAHL, "Le juge administratif, garantie de l'administration?", *AJDA* 1999, special issue Puissance publique ou impuissance publique?

2319 Concl. on Com. 25 February 1992, *D.* 1992, p. 266, quoted by S. GUILLON-COUDRAY, *La voie de fait administrative et le juge judiciaire*, thesis Paris II, 2002, p. 261.

2320 R. ODENT, *Contentieux administratif*, Les cours de droit, fasc. I, IEP Paris, 1981, p. 554.

2321 C. GUETTIER, "Injonction et astreinte", *Jel. administratif*, fasc. 1114 (2, 1998), n° 22: "Once the administration has committed an assault, its action is "denatured", and it is deprived of all the privileges granted to it in the general interest. The court may then assume the right to inflict on it the same treatment as on an ordinary litigant in a dispute under ordinary law.

2322 For Ms Guillon-Coudray, "the judgment by a court of common law, not specialised in administrative matters, even though the administration did not intend to act in the framework of private law, can in our opinion only be analysed as a sanction, largely reinforced by the application of common law" (S. GUILLON-COUDRAY, *op. cit.*, p. 253). The idea, also expressed by Dean Vedel, is that "there are certain abuses that the judge cannot and must not tolerate, which must be sanctioned by forfeiture of the privilege of jurisdiction normally enjoyed by the Administration" (G. VEDEL, "La juridiction compétente pour prévenir, faire cesser ou réparer la voie de fait administrative", *JCP G* 1950, I, 851, No. 7. Underlined). The government commissioner Guionin had declared, in the same sense, that the consequence of the finding of an assault "is to remove the administration from its natural judge, to strip the public service of its privilege of jurisdiction" (concl. GUIONIN on TC, 10 December 1956, *Sieurs Randon and others cf. Sieurs Brunel and others, Lebon.* p. 596).

2323 P. SERRAND, "Voie de fait", in *Dictionnaire de la culture juridique* (D. ALLAND and S. RIALS dir.), PUF, Quadrige, Lamy, 2003, p. 1523.

2324 S. GUILLON-COUDRAY, *op. cit.*, p. 260.

2325 F. MELLERAY, "L'exorbitance du droit du contentieux administratif", in *L'exorbitance du droit administratif en question*, colloquium of 11 and 12 December 2003, Poitiers, LGDJ, 2004, p. 300.

basis of Article L. 521-2 of the Code of Administrative Justice should be put into perspective. A censure pronounced by the judge of the *référé-liberté* has a symbolic, even moral dimension that should not be neglected, and which has as much force, if not more than a sentence pronounced by the judicial judge. Under these conditions, it appears that the exemplary force of the assault represents a very weak motive for maintaining the assault alone, in view of the difficulties generated by its existence and especially in consideration of its lack of legal justification. "If the assault remains a moral condemnation of the administration, this is no longer sufficient to justify it legally and to make its use judicious"²³²⁶.

562. Thus, nothing really seems to prevent the abolition of the *de facto* right of action. Although the Court of Conflicts has decided to maintain it for the time being, there is no indication that this solution is definitive. Nevertheless, the Court of Conflicts still has to free itself from the weight of tradition, which is particularly important in this area²³²⁷. The *de facto* procedure has proven its effectiveness in guaranteeing the protection of freedoms²³²⁸ - admittedly at a time when the administrative judge was not in a position to do so. It is therefore understandable that the distributing judge may feel some hesitation before making a reversal of case law on such a scale. Nevertheless, everything points to the abolition of this head of jurisdiction insofar as its justification has disappeared and its disruptive effect remains. The situation would then be simple for the litigant: all administrative infringements of fundamental freedoms would fall within the jurisdiction of the administrative judge, without having to get lost in a complex process to determine the competent court. The only question for the litigant would be to choose the appropriate summary procedure for his or her situation: either the ordinary emergency procedure under Article L. 521-1 or the special emergency procedure under Article L. 521-2.

Conclusion of Title II

563. When it is established that the administrative authority has seriously and manifestly infringed a fundamental freedom, the judge has the power to react effectively to put an end to the situation that justified his referral. With a wide range of prerogatives at his disposal, he selects the appropriate solution and ensures that the administration complies with it by providing an explanation and authority. Where possible, he settles the dispute between the parties by persuasion or conciliation. These two methods of intervention guarantee the effectiveness of his intervention. This is further enhanced by the fact that the measures prescribed by the summary judgment judge are in practice final. This character, together with the fact that the judge rules on the main issue, brings the procedure under Article L. 521-2 closer to the category of summary proceedings on the merits. However, it cannot be equated purely and simply with an action in court because of the legally provisional nature of its decisions. Moreover, the originality of this procedure is reinforced by the fact that the judge of the *référé-liberté* intervenes in a logic of excess of power but with a clearly affirmed subjective coloration. In the end, the remarkable effectiveness of his reaction could, or even should, lead to the questioning of the existence of the *de facto* procedure, a judicial jurisdiction that is no longer justified.

²³²⁶ A. BORIES, "Le baroud d'honneur de la voie de fait", *op. cit.*, p. 31.

²³²⁷ In his conclusions on the *Voskresensky* judgment, the government commissioner Fournier explained the persistence of the *de facto* right of way "only by the sole weight of tradition, a respectable weight certainly, but one day or another you will no doubt feel you must unburden yourself (...)" (concl. J. FOURNIER on CE, Sect. 9 July 1965, *Sieur Voskresensky*, *AJDA* 1965, II, p. 607).

²³²⁸ It has been presented as "one of the most precious guarantees for public liberties and the right of movable and immovable property" (G. VEDEL et. P DELVOLLE, *Droit administratif*, 11^{ème} ed, PUF, 1990, t. II, p. 147).

Conclusion of the second part: is the *référé-liberté* a remedy of *amparo*?

564. Article L. 521-2 of the Code of Administrative Justice constitutes an original mechanism for protecting freedoms. By its characteristics, this procedure upsets in many respects the canons of contentious administrative procedure. Its asserted particularities lead to a difficulty, tested on several occasions, to *qualify* this procedure and to determine to which *type of* legal remedy it is attached. What legal category does this appeal fall into, beyond its borrowing from different procedures? In view of the powers vested in the judge and the modalities of his intervention, how can the *référé-liberté* be classified in procedural law and, in particular, with regard to the other mechanisms for protecting the freedoms of individuals and legal entities with regard to the acts and actions of public authorities?

The difficulty of fitting the summary procedure into the classic structure of administrative litigation and the fact that it transcends the traditional categories can be explained by the particularity of its purpose, which is to protect fundamental freedoms seriously disregarded by the administration. Nevertheless, it can be observed that all the procedures with this object have the same characteristics. Indeed, if the *référé-liberté* is a procedure which escapes the traditional classifications, it presents identical characteristics to the legal means having the same object. This situation therefore leads to the idea of attaching it to a legal category that escapes traditional classifications but has a real unity because it is made up of procedures with certain specific and constant characteristics. Looking abroad, a comparison with the Latin American *amparo* is natural.

565. The comparison between the fundamental summary judgment and the *amparo* appeal was quickly made by the doctrine²³²⁹. However, contrary to what is sometimes claimed, the interim relief procedure is not comparable to an *amparo* as it exists in Europe, i.e. a subsidiary remedy, mainly directed against judicial acts and falling within the competence of the constitutional court²³³⁰. If the *référé-liberté* can be compared to an *amparo* appeal, it is not in its European variant, but in its Latin American variant. A clear distinction must be made between these two forms of *amparo*²³³¹. The differences between the European constitutional *amparo* and the Latin American ordinary *amparo* are fundamental: "These instruments of protection have only their name in common"²³³². In view of its characteristics, the *référé-liberté* is not similar to a constitutional *amparo* but to an ordinary *amparo*.

The référé-liberté is not the same as a European amparo

566. The fundamental summary judgment does not meet any of the characteristics of a direct appeal. Nor does it allow the constitutionality of a law to be challenged before the constitutional court. Consequently, it cannot be assimilated, directly or indirectly, to a constitutional appeal.

The référé-liberté is not a direct appeal

567. The direct appeal²³³³ has been defined by M. Pfersmann as "a procedural act by which a person (natural or

²³²⁹ Thus, shortly after the implementation of Article L. 521-2, Professor Ghévontian declared that with this procedure, "an embryo of Spanish-style *amparo* recourse could be set up, which would be a great innovation in the French legal system, even if, unlike the Spanish model, the judge only intervenes here in summary proceedings" (R. GHEVONTIAN, note under CE, ord. 24 February 2001, *Tibéri*, D. 2001, p. 1751).

²³³⁰ In Europe, *amparo* is synonymous with direct appeal or constitutional appeal. Significantly, the Spanish Constitution makes a clear distinction between the protection of constitutional rights and freedoms by the ordinary courts and the protection of the same rights and freedoms by the constitutional courts, reserving the term *amparo* for the latter. Article 53.2 states that 'Any citizen may invoke the protection of the freedoms and rights recognised by Article 14 and Section 1 of Chapter 2 before the ordinary courts by means of a procedure based on the principles of priority and urgency and by means of the remedy of *amparo* before the Constitutional Court'. Doctrine sometimes refers to the former as judicial or ordinary *amparo*, but the Constitution reserves the term *amparo* for the constitutional remedy only.

²³³¹ The distinction between these two forms of *amparo* is well established in the literature. See for example: R.A. BREWER CARIAS, "La justice constitutionnelle et le pouvoir judiciaire", in *Etudes de droit public comparé*, Bruylant, 2001, pp. 935-1167; A.-C. SEPULVEDA, "La protection des droits fondamentaux en Amérique latine", *V^e AFDC Congress*, Toulouse, 6, 7 and 8 June 2002, Workshop No. 6, 5 p.

²³³² A.-C. SEPULVEDA, *op. cit.* p. 5. It should be noted that the two forms of *amparo* are not mutually exclusive and may coexist in the same legal order. See *above* the wording of Article 53.2 of the Spanish Constitution of 27 December 1978.

²³³³ On this subject, see in particular: *Le recours des particuliers devant le juge constitutionnel* (F. DELPEREE dir.), Journées d'études du 9 février 2000, Louvain, Economica PUAM, coll. DPP, 1991, 221 p.; *La saisine du juge constitutionnel. Aspects de droit comparé* (F. DELPEREE and P. FOUCHER eds.), Bruylant, 1998, 201 p.; *L'accès au juge constitutionnel: modalités et procédures*, 2^{ème} Congrès des cours constitutionnelles ayant en partage l'usage du français, Libreville, September 2000, ACCPUF, 2000, 823 p.; Dossier des CCC n° 10, 2001, *L'accès des personnes à la justice*

legal) refers, without intermediary, to the constitutional court with a view to reviewing the constitutionality of an act²³³⁴. Born in countries with a Germanic tradition²³³⁵, this type of appeal is now widely used in European countries as a technique for a *posteriori* constitutionality review²³³⁶. In very exceptional cases and because of the urgency of the situation, it can be implemented under an accelerated procedure²³³⁷. The main characteristics of the direct appeal are that it is a subsidiary appeal, exercised before a constitutional court.

568. The European *amparo* is, first of all, an appeal to a constitutional court, i.e. a jurisdictional body that must include among its competences the exercise of control over the constitutionality of laws²³³⁸. The European *amparo* is, secondly, a subsidiary legal remedy. The exercise of this remedy is in fact only subsidiary to the protection granted by the ordinary courts²³³⁹. It can only be used as a last resort, only if the applicant has not been able to obtain satisfaction by using the other means available to him. Therefore, the applicant who intends to bring such an action against an administrative act must first have challenged its effects before the ordinary courts. As a result of this subsidiarity requirement, and apart from the rare cases in which the claimant challenges a legislative act, the remedy of *amparo* is in fact directed against the decision of the court that had to rule in the last instance on the challenged measures. In this respect, "the *amparo* appeal is like an appeal for review of the judgments of the administrative courts"²³⁴⁰.
569. The *référé-liberté* does not meet either of the two criteria of a direct appeal. It is not a subsidiary remedy brought before a constitutional court, but an independent remedy brought before an ordinary court. First of all, it is an autonomous appeal. In order for an application lodged on the basis of Article L. 521-2 of the Code of Administrative Justice to be admissible, it is not required that the applicant first use the other legal means available to him. Moreover, the judge of the summary judgment is not a constitutional judge. He does not consider himself competent to review the constitutionality of a law or, by extension, the constitutionality of

constitutionnelle. Droit, pratique, politique (O. PFERSMANN ed.).

2334 O. PFERSMANN, "Le recours direct entre protection juridique et constitutionnalité objective", CCC no. 10, 2001, p. 66. In Germany, the constitutional appeal can be lodged against legislative, administrative and judicial acts. In Spain, the remedy of *amparo* may be brought against administrative and judicial acts. In Austria, federal constitutional law allows the challenge of administrative and legislative acts, but not of judicial acts. In Belgium, the remedy can only be used against norms having the force of law.

2335 Introduced into Austrian constitutional law in 1920 (see G. KUSKO-STADLMAYER, "Les recours individuels devant la Cour constitutionnelle en droit constitutionnel autrichien", CCC no. 10, 2001, pp. 82-89), the procedure was introduced into the Basic Law of the Federal Republic of Germany in 1949.

2336 It was introduced in Spain in the 1978 Constitution. The most recent constitutions in Central and Eastern Europe have also introduced such a mechanism (see K. STERN, "La protection des droits fondamentaux dans les nouvelles Constitutions d'Europe centrale et orientale", in *Les droits individuels et le juge en Europe*. STERN, "La protection des droits fondamentaux dans les nouvelles Constitutions d'Europe centrale et orientale", in *Les droits individuels et le juge en Europe. Mélanges en l'honneur de Michel Fromont*, PUS, 2001, pp. 415-442, esp. pp. 437-438). Mention must also be made of the Swiss public law appeal. Existing since 1874, it has the particularity of being exercised before the supreme court (the Swiss Federal Tribunal) and not before a constitutional court. It can be directed against laws, decrees and jurisdictional and administrative decisions of cantonal authorities (see P. SALADIN, "Rapport suisse", *AIJC* 1991/VII, *Cours constitutionnelles et droits fondamentaux*. Colloque Aix-en-Provence, 12-13 July 1991, pp. 149-151; C. ROULLER, "Protection contre l'arbitraire et protection de la bonne foi en droit constitutionnel suisse", in *Droit constitutionnel suisse* (D. THÜRER, J.-F. AUBERT, J.-P. MÜLLER ed.), Schulthess, 2001, pp. 677-690).

2337 In Germany, the Constitutional Court is empowered to issue an interim order by which it prejudices the main issue when the time limits for exhausting legal remedies are likely to be too long and make it impossible to effectively protect the applicant's fundamental rights. The order procedure is thus applied during an election campaign when a political party is excluded from a debate organised by a public audiovisual service a few days before the election. The order will be issued by the Constitutional Court on the grounds of urgency on the basis of the right to effective judicial protection of fundamental rights and the principle of equality of parties during the election campaign (cf. B. PETER, "Spécificités au regard du droit français des procédures d'urgence en droit allemand", *RDJ* 1993, pp. 185-214, special pp. 208-209). Similarly, the Spanish Constitutional Court may, ex officio or at the request of the applicant, suspend "the execution of the act of the public authorities in respect of which constitutional *amparo* is claimed" (article 56.1 of the Organic Law of the Constitutional Court no. 2/1979). See P. BON, "Le pouvoir de suspension du juge constitutionnel: l'exemple du Tribunal constitutionnel espagnol", in *Juger l'administration, administrer la justice. Mélanges en l'honneur de Daniel Labetoulle*, Dalloz, 2007, pp. 65-79, esp. pp. 73-76.

2338 As M. de Béchillon points out, "only one factor will prove to be totally indisputable" in identifying constitutional justice: "the jurisdictional review of the constitutionality of laws" (D. DE BECHILLON, *Hierarchie des normes et hiérarchie des fonctions normatives de l'Etat*, Economica PUAM, coll. DPP, 1996, p. 180). The majority of contemporary doctrine adheres to this definition centred on the standard that is the object of the review (see in particular L. FAVOREU, and T.-S. RENOUX, "Contrôle de la constitutionnalité des actes administratifs", *Répertoire Dalloz de contentieux administratif*, 1992, p. 4; K. BUTERI, *L'application de la Constitution par le juge administratif*, thesis Aix-en-Provence, 2000, p. 126 et seq.) The classic definition, defended in particular by Francine Batailler, placed the constitutional judge and the judge responsible for applying the Constitution in the same category. According to this author, 'the constitutional judge is the one who applies and interprets constitutional laws, according to the needs of the case law'. Thus, "it is not the object of the review that is important - i.e. the law - but the rule of reference, - i.e. the Constitution" (F. BATAILLER, *Le Conseil d'Etat juge constitutionnel*, LGDJ, coll. BDP, t. 68, 1966, p. 18). As the author pointed out, the definition adopted makes it possible to consider that "all judges are constitutional judges" (*op. cit.*, p. 17). This broad conception, based on the nature of the rule applied, has been abandoned by the majority of contemporary authors. As M. Favoreu has pointed out, "it would be naive (...) to consider that any judge applying constitutional norms is a constitutional judge" (L. FAVOREU, "La notion de Cour constitutionnelle", *De la Constitution. Etudes en l'honneur de Jean-François Aubert*, Helbing et Lichtenhahn, 1996, p. 19).

2339 In Germany, the Court of Karlsruhe has recalled that it is primarily up to the ordinary courts to "protect the fundamentals and ensure their effectiveness" (BVerfGE 49, p. 252, ff. (258), quoted by A. DITTMANN, "Le recours constitutionnel en droit allemand", CCC no. 10, 2001, p. 76). In Spain, the Constitutional Court has stated that "The remedy of *amparo* is a strictly subsidiary remedy (.../...). The protection of the legitimate rights and interests of citizens, which includes fundamental rights and freedoms, is presented as a jurisdictional protection, expressly assigned to the courts of justice" (Sentence of 12 May 1994, No. 147/1994, extract reproduced in L. BURGORGUE-LARSEN, *Libertés fondamentales*, Montchrestien, coll. Pages d'amphi, 2003, p. 39).

2340 R.A. BREWER CARIAS, *op. cit.* p. 1072. In practice, it constitutes an appeal against a judicial act, which transforms the constitutional court into a "fourth level" of jurisdiction, so to speak. As M. Pfersmann states, "Constitutional justice is here administrative justice or extraordinary judicial justice" (O. PFERSMANN, *op. cit.*, p. 69).

an administrative act that constitutes its direct application²³⁴¹. It should be specified that if the judge of the *référé-liberté* is not a constitutional judge, he is not a judge of application of the Constitution either, as has been envisaged²³⁴². Indeed, not only are not all the fundamental freedoms within the meaning of Article L. 521-2 norms of constitutional origin, but even the constitutional norms that constitute the basis of fundamental freedoms are not strictly speaking *applied as such* by the judge in charge of interim relief²³⁴³.

Thus, the *référé-liberté* does not constitute a direct appeal. Moreover, insofar as it does not allow the constitutional court to initiate a review of the constitutionality of laws, the summary application for interim relief cannot play the role of an indirect direct appeal²³⁴⁴.

The référé-liberté is not a direct indirect remedy

570. In France, referral to the Constitutional Council is said to be "closed" as regards the review of the constitutionality of laws. Under Article 61(2) of the Constitution, this review can only be initiated by political authorities, namely the President of the Republic, the Prime Minister, the President of the Senate, the President of the National Assembly and a group of 60 deputies or 60 senators. Individuals do not have access to the constitutional judge in this area²³⁴⁵. As the Constitution has not established a direct appeal to the Constitutional Council, natural and legal persons do not have access to the constitutional court, which would allow them to challenge the constitutionality of a law *a priori* or *a posteriori*. As the Constitution has listed the authorities entitled to refer cases to the Council in a restrictive manner, the latter logically rejects appeals lodged by private individuals²³⁴⁶. Since natural and legal persons do not have direct access to the Constitutional Court via the rue de Montpensier, one petitioner ingeniously thought of gaining indirect access to it via the Palais-Royal. The idea was, no more and no less, to make the *référé-liberté* an indirect direct recourse, giving access to the constitutional court via a qualified referral authority. Referred to on the basis of Article L. 521-2, the administrative judge would order the competent authority to refer to the Council the law containing provisions infringing certain fundamental constitutional freedoms. In the event of a failure to refer constituting a serious and manifestly illegal infringement of a fundamental freedom, an injunction could be issued.

²³⁴¹ The interim relief judge of the Conseil d'Etat has affirmed that "the plea, by way of exception, of the unconstitutional nature of the law of 27 February 2004 cannot be usefully invoked before the administrative judge" (CE, ord. 21 May 2004, *Hoffer*, n° 267792), that "it is not the role of the administrative judge to control the conformity of a text having the force of law with the Constitution" (CE, ord. 20 December 2004, *Gaiffe*, no. 275076; CE, ord. 23 June 2005, *Laurent X*, no. 281774) or that the legislator's decision to extend the state of emergency "is binding on the administrative judge, whose task it is not to assess the law's conformity with the Constitution" (CE, ord. 9 December 2005, *Allouache and others*, *Lebon* p. 562). This solution constitutes the application of the traditional case law known as the *loi-écran*. See the leading case of CE, Sect. 6 November 1936, *Arrighi*, *Lebon* p. 966. For a recent analysis, see in particular B. GENEVOIS, "Le Conseil d'Etat n'est pas le censeur de la loi au regard de la Constitution", *RFD-A* 2000, pp. 715-724.

²³⁴² Some authors have seen in the *référé-liberté* a concrete and *a posteriori* constitutionality control of administrative acts and behaviours, likely to be assimilated, to use the famous formula of F. Werner, to a hypothesis of *concretised constitutional law* (F. WERNER, "Verwaltungsrecht als konkretisiertes Verfassungsrecht", *DVBl* 1959, p. 527 et seq., quoted by S. CASSESE, *La construction du droit administratif. France et Royaume-Uni*, Montchrestien, coll. Clefs, 2000, p. 11).

²³⁴³ They serve as a support for the fundamental freedom but fade away after its consecration. The judge of the *référé-liberté* does not immediately confront an administrative act with a constitutional norm. He does not exercise a constitutionality review in the *strict sense*. The protection of a fundamental freedom by the judge of summary proceedings can be compared to the application of a general principle of law by the judge of excess of power. The fundamental freedom, like the general principle of law, can materially find their source in the Constitution. Nevertheless, the administrative judge does not immediately confront the administrative act with the Constitution, but in one case with the general principle of law, in the other with the fundamental freedom.

²³⁴⁴ Since it is neither a direct appeal nor a substitute for a direct appeal in the field of reviewing the constitutionality of laws, the *référé-liberté* leaves unchanged the terms of the debate concerning the introduction of such an appeal in French constitutional law. On this question, see L. FAVOREU, "Sur l'introduction hypothétique du recours individuel devant le Conseil constitutionnel", *CCC* n° 1, 2001, pp. 99-102.

²³⁴⁵ The Constitutional Council's courtroom is only open to them in electoral matters. See T.-S. RENOUX, "Le recours des particuliers devant le Conseil constitutionnel", in *Le recours des particuliers devant le juge constitutionnel*, *op. cit.*

²³⁴⁶ CC, no. 82-146 DC, 18 November 1982, cons. 1, *Rec.* p. 66; no. 84-178 DC, 30 August 1984, cons 1, *Rec.* p. 69. The Constitutional Council states that individuals are not, under the terms of Article 61(2) of the Constitution, entitled to submit to it the examination of the conformity with the Constitution of the text of a law adopted by Parliament before its promulgation. It affirms 'that this designation of the authorities empowered to submit to the Council the examination of the conformity with the Constitution of the text of a law adopted by Parliament before its promulgation, prohibits this referral to any other person'. At most, they are authorised to intervene informally when a referral has been triggered by a qualified authority, either to support the conclusions of this request or to defend the constitutionality of the law under review. This practice, known as the 'narrow door', according to the expression of Dean Vedel (G. VEDEL, "L'accès des citoyens au juge constitutionnel. La porte étroite", *La vie Judiciaire*, no. 2344, 11-17 March 1991, p. 1 and pp. 13-14) developed on the fringes of the constitutional text from 1991 onwards, after the abortive attempt to institute a preliminary question on constitutionality. It is defined as "the avenue opened up empirically by the constitutional court, allowing any person to produce in writing legal observations supporting the constitutionality of the regulation referred to the Council or, on the contrary - and more generally - challenging it by means of grievances of unconstitutionality" (P. JAN, *La saisine du Conseil constitutionnel*, LGDJ, coll. BSCP, vol. 93, 1999, p. 255). These notes are registered with the secretariat of the Constitutional Council and communicated to the rapporteur and the other councillors. These writings represent informative memoranda that invite the judge to use his or her power of invocation *ex officio* to censure the provision or provisions criticised.

The infringement of fundamental freedoms would be indirect. A referral authority that refrains from referring the law allows, by not opposing it, the entry into force of a text containing provisions that infringe fundamental freedoms. It makes possible, by its abstention, the occurrence of an infringement. For its abstention to be considered manifestly unlawful, it was necessary for it to have an obligation to act and, more specifically, an obligation to refer the unconstitutional law. No such obligation can be identified in relation to the Prime Minister, the President of the Senate or the President of the National Assembly²³⁴⁷. Their refusal or abstention to act cannot therefore be criticised from a strictly legal point of view. On the other hand, Article 5 of the Constitution states that "the President of the Republic shall ensure that the Constitution is respected". By conferring on the Head of State this mission of constitutional oversight, "The Constitution obliges him to oppose any act that is contrary to the fundamental law. (...). The article does not envisage any legal means for the implementation of its missions. However, all of them find an echo, in particular in the procedure for triggering the constitutionality review of international commitments and ordinary laws"²³⁴⁸. With such an interpretation of Article 5, it could be envisaged that the abstention of the President of the Republic could satisfy the requirement of manifest illegality. As for urgency, it could result from the imminence of the application of the law.

571. The effectiveness of the mechanism was put to the test in November 2001 following the vote on the law on daily security²³⁴⁹. In a petition registered with the Council of State's legal secretariat on 6 November 2001, Mr Tabaka asked the interim relief judge to order the President of the Republic to refer this law to the Constitutional Council on the basis of Article 61(2) of the Constitution. His request was rejected the next day, pursuant to the sorting procedure of Article L. 522-3, as clearly not falling within the jurisdiction of the administrative court²³⁵⁰. Applying its case law on 'acts of government'²³⁵¹, the interim relief judge affirmed that the decision to refer a law to the Constitutional Council 'affects (...) relations between the constitutional public authorities and therefore falls outside the jurisdiction of the administrative court'. The prescient applicant had sought to guard against the application of this case law by arguing that the decision to refer a matter to the Council "is not (...) discretionary and totally political in nature; it is dictated by the Constitution and is of a purely legal nature (...)". This argument had to be rejected since referral to the Council is a simple option and cannot be dissociated from the legislative procedure.

The interim relief judge asserted, first of all, that referral to the Constitutional Council represents, for the Head of State, an 'option'. The second paragraph of Article 61 of the Constitution, supplemented by the provisions of the organic ordinance of 7 November 1958, only establishes a right and not an obligation to refer a matter to the Constitutional Council. By using the verb 'may', this provision never intended to institute anything other than a prerogative of totally discretionary use for the benefit of the President of the Republic. The interim relief judge then asserts that the decision to refer a law to the Constitutional Council is "indissociable from the entire legislative procedure". The legislative procedure comprises four stages: initiative, deliberation, review (if any for ordinary laws) and promulgation. The review of the constitutionality of a law takes place before the act of promulgation which definitively closes the legislative procedure. Therefore, constitutionality review is an integral part of the legislative process²³⁵². The decision to initiate or not to initiate this review necessarily interferes with the law-making process. The decision to refer or not to refer to the Council concerns the relationship between the

2347 The question did not arise for the category of 60 deputies or 60 senators insofar as an appeal is by hypothesis impossible against this referral authority. Indeed, this grouping is composed and recomposed on the occasion of each referral and does not have, as such, a legal personality.

2348 P. JAN, *La saisine du Conseil constitutionnel*, op. cit., p. 192-193.

2349 The text, which was adopted in its final reading by the National Assembly on 31 October 2001, contained some provisions whose constitutionality was open to discussion. For political reasons, the parliamentary opposition had publicly renounced any action before the Constitutional Council. No initiative could reasonably be expected from the government coalition, the Prime Minister or the presidents of the assemblies. As for the Head of State, there was no doubt that he would refrain from submitting the examination of the constitutionality of this law to the Constitutional Council. It should be noted in this respect that under the Fifth Republic^e the President of the Republic has never made use of his prerogative with regard to laws.

2350 CE, ord. 7 November 2001, *Tabaka, Lebon T.* p. 789, p. 1125, *RDP* 2001, pp. 1645-1657, note P. JAN; *LPA* 22 March 2002, n° 59, pp. 15-19, note O. CURTIL.

2351 The concept of an act of government was forged by the Council of State in a purely praetorian manner. It consists of a list of acts of the executive power which the administrative judge considers should benefit from jurisdictional immunity. As soon as the executive authorities exercise a constitutional competence that puts them directly or indirectly in contact with other institutions, the people (CE, 29 April 1970, *Comité des chômeurs de la Marne, Lebon* p. 279) or Parliament (CE, 29 November 1968, *Tallagrand, Lebon* p. 607), the administrative judge declines his competence to assess the legality of acts that relate to them. Without using the expression "act of government", the use of which is the prerogative of the doctrine and the government commissioners, the Council of State notes, through various periphrases, that the act "escapes any jurisdictional control" (CE, 30 June 1999, *Guichard, Lebon* p. 218), "that it is not up to the administrative jurisdiction to know the decision by which..." (CE, 9 April 1999, *Dame, Lebon* p. 218). (CE, 9 April 1999, *Dame Ba*); that the act is insusceptible of "being the object of a contentious action" (CE, 30 July 2003, *Société Crédit industriel et commercial*); etc. See, among the most recent works, the study by P. SERRAND, *L'acte de gouvernement*, thesis Paris II, 1996, 772 p., and F. MELLERAY, "L'immunité juridictionnelle des actes gouvernements en question", *RFD A* 2001, p. 1086 et seq.

2352 The assimilation of the constitutionality review as a separate stage of the legislative process is also enshrined in constitutional case law. The presidential request for a new reading of a law in order to replace provisions deemed to be contrary to the Constitution with new provisions that comply with his decision does not imply 'the passing of a new law, but the intervention, in the legislative procedure in progress, of a complementary phase resulting from the constitutionality review' (CC, no. 85-197 DC, 23 August 1985, cons. 23, *Rec.* p. 70). The Constitutional Council has also ruled that 'the effect of a referral is to implement, before the legislative procedure is closed, the verification by the Constitutional Council of all the provisions of the law referred to it...' (CC, no. 96-386 DC, 23 August 1985). (CC, No. 96-386 DC, 30 December 1996, cons. 4, *Rec.* p. 154).

constitutional authorities at the penultimate stage of the legislative process²³⁵³. It thus constitutes an act of government²³⁵⁴.

572. The *référé-liberté* cannot be equated with a constitutional *amparo* either directly or indirectly. Although the norms protected by the remedy are largely similar, there are fundamental differences between them in terms of the acts that can be challenged, the court competent to hear them and the applicable procedure. Although the *référé-liberté* is not similar to the European *amparo*, it can be linked to the Latin American *amparo* family.

The référé-liberté is similar to a Latin American amparo

573. In Latin America, the generic term for the action specially instituted for the protection of constitutionally guaranteed rights and freedoms is *amparo*, which can be translated as 'protection' or 'safeguard'. This action is known by different names in three countries: *accion de tutela* for Colombia, *accion de proteccion* for Chile (where the name *amparo* is reserved for the *habeas corpus* action) and *mandado de segurança* for Brazil²³⁵⁵. This refers to proceedings created specifically and exclusively for the urgent protection of liberties against the administrative authority. Some of these actions may also, in varying ways, be brought against legislative or jurisdictional acts, or even against the acts of private individuals. These legal remedies are of interest to us here only insofar as they are exercised against administrative acts and behaviour. The *amparo* procedure originated in Mexico²³⁵⁶ and was subsequently adopted in most Latin American countries: El Salvador (1886), Honduras (1894), Nicaragua (1894), Guatemala (1921), Brazil (1934), Panama (1941), Costa Rica (1949), Argentina (1957), Venezuela (1961), Bolivia (1967), Chile (1976), Peru (1979), Uruguay (1988), Colombia (1991), Paraguay (1992) and Ecuador (1998).

The *amparo* procedure has characteristics similar to the *référé-liberté*. "It is an extraordinary procedure characterised by urgency"²³⁵⁷. In Argentina in particular, "The guiding idea of expedition is embodied in the primary objective of *amparo*: to *immediately* restore the integrity of the constitutional right that has been infringed"²³⁵⁸. The wording of the constitutional provisions enshrining the existence of these procedures reveals the proximity of the mechanism to that of the fundamental summary procedure. In Venezuela, Article 49 of the Constitution provides that "The courts shall protect all inhabitants of the Republic in the enjoyment and exercise of the constitutional rights and guarantees established by the Constitution, in accordance with the law. The procedure shall be brief and summary, and the competent judge shall have the power to immediately restore the legal situation that has been violated"²³⁵⁹. In Colombia, Article 86 of the Constitution provides that "Any person shall have the right to claim before the judge, at any time and in any place, by means of a privileged and summary procedure, by himself or by whoever intervenes on his behalf, the immediate protection of his constitutional and fundamental rights, in any circumstance in which these are infringed or threatened by the action or omission of any public authority (...)"²³⁶⁰. In Chile, the remedy of protection is contained in Article 20 of the Constitution:

2353 See P. JAN, *supra* note, special p. 1650.

2354 According to constant jurisprudence, measures of the executive which affect the exercise of the legislative function of Parliament must be qualified as acts of government. The refusal to present a bill to Parliament (CE, 29 November 1968, *Tallagrand, Lebon* p. 607), the decision to table a bill (CE, 9 May 1951, *Mutuelle nationale des étudiants de France, Lebon* p. 253), the withdrawal of a bill (CE, Ass., 19 January 1934, *Compagnie marseillaise de navigation à vapeur Fraissinet, Lebon* p. 98), the refusal to take the necessary steps for the rapid adoption of a bill (CE, Sect., 25 July 1947, *Société l'Alfa, Lebon* p. 344), the decision to submit a bill to a referendum (CE, Ass., 19 October 1962, *Brocas, Lebon* p. 553) or the decree of promulgation of a law (CE, Sect., 3 November 1933, *Desreumeaux, Lebon* p. 993). What these acts have in common is that 'they are all stages in the legislative process which, although they are the responsibility of the government, are nonetheless inseparable from the drafting of the law. It is because they contribute to this objective that they constitute acts of government' (chron. M. GUYOMAR and P. COLLIN, *AJDA* 2000, p. 120). The failure of the President of the Republic to refer a law to the Constitutional Council cannot be detached from the legislative procedure and therefore constitutes an act of government.

2355 Through this remedy, the claimant can obtain a court order (a '*mandado*') that will guarantee his or her right. This recourse represents the assurance (in Portuguese, the "*segurança*") that the beneficiary of a right will be able to demand that the public authority respect it. On the legal regime of this procedure, see T. MORAIS-DA-COSTA, "Le droit constitutionnel: la protection des droits fondamentaux", in *Introduction au droit brésilien* (D. PAIVA DE ALMEIDA dir.) L'Harmattan, 2006, pp. 56-60.

2356 First, in the Constitution of the State of Yucatan of 1841 (articles 8, 9 and 62), then in the Federal Constitution of 5 February 1857 (articles 101 and 102). The first sentence of *amparo* was handed down on 13 August 1848: the judge admitted the complaint lodged by Mr. Manuel Verastegui against an exile order issued by the governor of one of the States of the Union. See A.-C. SEPULVEDA, *op. cit.* p. 3.

2357 A.-C. SEPULVEDA, *op. cit.* p. 4.

2358 P.M.E. SAMMARTINO, Principios constitucionales del amparo administrativo. El contencioso constitucional administrativo urgente, Lexis Nexis, coll. Derecho administrativo, 2003, p. 434. Underlined.

2359 In this country, and by virtue of article 1^{er} of the Organic Law of *Amparo* on Constitutional Rights and Guarantees, "Any natural person living in the territory of the Republic, or legal person domiciled therein, may apply to the competent courts for the *amparo* provided for in article 49 of the Constitution, for the enjoyment and exercise of constitutional rights and guarantees, including those fundamental rights not expressly provided for in the Constitution, so that the legal situation that has been violated may be restored or re-established as far as possible" (see R.A. BREWER CARIAS, *op. cit.*, pp. 1062-1063).

2360 See R.A. BREWER CARIAS, *op. cit.*, p. 1073.

"Anyone who, as a result of arbitrary or illegal acts or omissions, suffers deprivation, disruption or threat to the legitimate exercise of rights and guarantees (...) may apply personally or through his representatives to the respective Court of Appeal, which shall immediately adopt such provisions as it deems necessary to restore the rule of law and ensure the legitimate protection of the affected person, without prejudice to any other right that he may assert before the corresponding authority or courts"²³⁶¹. In Peru, Article 295 of the Constitution provides that "The action or omission of any authority, public servant or person that infringes or threatens personal liberty shall give rise to the action of *habeas corpus*. The action of *amparo* safeguards the other rights recognised by the Constitution, which are infringed or threatened by any authority, official or person"²³⁶². These provisions are specified by the sub-constitutional texts organising the practical arrangements for the procedure. In Argentina, Article 1^{er} of Law 16986 provides that "The action of *amparo* shall be admissible against any act or omission of the public authority which, in a present or imminent form, infringes, restricts, alters or threatens, in a manifestly arbitrary or illegal manner, the rights or guarantees, explicitly or implicitly recognised by the national Constitutions, with the exception of the individual liberty protected by *habeas corpus*"²³⁶³. In Uruguay, Article 1^{er} of Law 16011 provides that "Any natural or legal person, public or private, may allege the action of *amparo* to defend any act, omission or fact of the authorities of the State or collateral to it, as well as of private individuals, which, which, in its present and imminent form, in its opinion, infringes, restricts, alters or threatens, with manifest illegitimacy, any of its rights and freedoms recognised explicitly or implicitly by the Constitution, with the exception of those cases in which the remedy of *habeas corpus* is admitted"²³⁶⁴.

Apart from Chile and Costa Rica, where *amparo* operates as a parallel procedure to other legal remedies, which can be exercised without prejudice to the other remedies available to the applicant, this mechanism is subsidiary in nature, and can only be used if there is no other effective mechanism for protection or if the ordinary courts have been exhausted. However, the texts governing them provide that the condition of subsidiarity is waived in cases of urgency and seriousness and if the ordinary law procedures do not allow an equally satisfactory result to be achieved²³⁶⁵. With regard to the measures that may be appealed, it has been observed that "In general, all the constitutional systems that establish the institution of *amparo* admit the action of *amparo* against administrative acts and facts and against the omissions of the administration"²³⁶⁶. The field of justiciables is wide open: "in general, all natural or legal persons may make use of the *amparo* remedies or actions established in the constitutional orders for the protection of rights and freedoms"²³⁶⁷. The action is in principle autonomous and is brought before the territorially competent court of first instance, with the exception of Chile and Costa Rica: in the former, the *amparo* is brought directly before the court of appeal, in the latter before the Supreme Court. The constitutional texts and procedural laws provide that the judge must hear the case as a matter of extreme urgency and decide it very quickly. In Colombia, the judge has five days to decide the case from the moment it is ready for trial. This period is reduced to two days for the right to life and integrity of the person, the right to be judged by the natural judge, freedom of expression and the right of assembly²³⁶⁸. The judge's powers are formulated very broadly and allow him or her to neutralise the act that caused the violation or to issue injunctions to the public authority. For example, in Mexico, where this procedure has appeared, "The granting of *amparo* entails the inapplication of the norm (particular or general) but its effects are merely *inter partes*. Decisions granting *amparo* not only annul (for the claimant) the act or rule that has been prejudiced, but also have the force of a sentence, in fact, if the injury originates in a positive action, they may constitute an injunction to the defendant authority to return things to their previous state, and if the injury originates in an omission, the defendant authorities must comply with the legislative or constitutional provisions"²³⁶⁹.

574. Similar procedures have been established in Europe. The Spanish Constitution recognises the complainant's right to request protection from the ordinary court using a special procedure based on the principles of priority and urgency - *preferencia y sumariidad* - when a so-called primary right is at stake. Applying on a transitional basis, Law 62/1978 of 26 December 1978 on the judicial protection of fundamental human rights provided, in its

2361 See R.A. BREWER CARIAS, *op. cit.*, p. 1081.

2362 See R.A. BREWER CARIAS, *op. cit.*, p. 1068.

2363 See R.A. BREWER CARIAS, *op. cit.*, p. 1067.

2364 See R.A. BREWER CARIAS, *op. cit.*, p. 1069.

2365 In Argentina, in order to bring the action of *amparo*, it is necessary to have exhausted all judicial or administrative remedies for obtaining protection of the constitutional right or guarantee in question. If these exist, *amparo* is inadmissible, except in cases where they are not suitable to remedy the damage and where the process they require could cause serious and irreparable harm (see R.A. BREWER CARIAS, *op. cit.*, pp. 1067-1068). In Peru, the action of *amparo* is only admissible if the pre-existing channels have been exhausted, so that, when it is a question of an administrative activity injuring constitutional law, the corresponding administrative procedures must first be exhausted. However, if the exhaustion of the pre-existing route would render the aggression irreparable, this requirement of exhaustion of pre-existing routes is not required (see R.A. BREWER CARIAS, *op. cit.*, p. 1068). In Uruguay, the action of *amparo* is admissible only when there is no other judicial or administrative means to achieve the same result of protection or *amparo* or, if there is, when it proves clearly ineffective in the given circumstances for the protection of the infringed right (see R.A. BREWER CARIAS, *op. cit.*, p. 1069). The interim relief procedure is not subject to this subsidiarity requirement. Nevertheless, the situation is very similar to that of ordinary *amparo*, since, in order to be validly implemented, the applicant must demonstrate the urgency of the situation and the seriousness of the infringement - conditions which, in *amparo*, make it possible to waive the subsidiarity requirement.

2366 R.A. BREWER CARIAS, *op. cit.*, p. 1093.

2367 R.A. BREWER CARIAS, *op. cit.*, p. 1083.

2368 Number 6 of the *autoacordado* of 24 June 1992.

2369 C. RUIZ MIGUEL, "L'*amparo* constitutionnel en Espagne: droit et politique", CCC no. 10, 2001, p. 91.

articles 6 to 10, for rules that derogated quite substantially from the usual rules of administrative litigation²³⁷⁰. Law 29/1998 of 13 July 1998 on contentious administrative jurisdiction follows on from this provision, confirming the need to remove litigation concerning serious infringements of freedoms from the rules of ordinary law²³⁷¹. In Portugal, Law No. 15/2002 of 22 February 2002 on the Code of Procedure of the Administrative Courts introduced an autonomous mechanism for imposing positive or negative conduct on the administration in order to guarantee the exercise of fundamental rights, freedoms and guarantees²³⁷². In cases of extreme urgency, i.e. imminent and irreversible violation of a right, freedom or guarantee, the time limits of the proceedings may be reduced or an oral hearing may be requested in order to obtain a judgment within 48 hours²³⁷³. The hearing of the claimant may even be done by any other means of communication when the particular circumstances so require²³⁷⁴.

The *référé-liberté* has similar characteristics to these legal remedies. By its object, its procedural originality and the singularity of its mechanism, it is unquestionably part of the family of ordinary *amparo*.

2370 See P. BON, "Les droits et libertés en Espagne. Eléments pour une théorie générale", in *Dix ans de démocratie constitutionnelle en Espagne*, CNRS editions, 1991, pp. 35-67, esp. pp. 66-67. In the first place, whereas in administrative litigation under ordinary law, a judicial appeal can only be lodged after an administrative appeal has been lodged, this requirement is set aside and the judicial appeal can be lodged directly. Secondly, "while, in principle, judicial appeals against administrative acts do not have suspensive effects, this rule is set aside when a right of first rank is at issue : it is automatically set aside - i.e. the judicial recourse suspends *de plano* the application of the administrative act - when the contested act is a pecuniary sanction taken in application of the law of public order; it is set aside by decision of the judge in the other cases, it being understood that the latter has the obligation to grant the suspension of execution except if this is likely to seriously compromise the general interest" (P. BON, *op. cit.*, p. 67). Thirdly, the law shortens a certain number of procedural deadlines in order to speed up the investigation and judgment of appeals whose urgent nature it proclaims.

2371 See J.G. PEREZ, *Commentarios a la ley de la jurisdiccion contencioso-administrativo (Ley 29/1998, de 13 de julio)*, Civitas, 1998; P.P. TREMPS, *El recurso de amparo, Tirant lo blanch*, 2004, 430 p.; L. ORTEGA et alii, "Spain", *Towards a unified judicial protection of citizens in Europe (?). Towards a common judicial protection of citizens in Europe (?)* (E. SPILIOPOULOS ed.), Bruylant, European public Law series. Library of European Public Law, vol. XIII, 2000, pp. 647-666, esp. p. 657; C. MIALOT, *Les nouveaux pouvoirs du juge administratif en France et en Espagne*, thesis Paris I, 2003, p. 99, pp. 222-223.

2372 See J. de CAMPOS AMORIM, "La nouvelle réforme du contentieux administratif portugais", *RFDA* 2005, pp. 1159-1171, special p. 1168.

2373 Article 111, No. 1 of the Code of Administrative Court Procedure.

2374 Article 111, no. 2 of the Code of Administrative Court Procedure.

General conclusion

"The possibility for the citizen to find a judge is the first of the freedoms because it is the guarantee of all the others"²³⁷⁵ .

575. At the end of this study, the contribution of the fundamental summary judgment can be appreciated both from the point of view of the litigant and from that of the administrative judge.

576. The fundamental summary judgment is a success. First of all, it is a success in terms of litigation, since on average, one in ten emergency applications brought before the administrative courts is a summary judgment. From a statistical point of view, the procedure under Article L. 521-2 represents 1% of the litigation submitted annually to the administrative courts²³⁷⁶ . This rate is likely to decrease significantly insofar as a large number of applications submitted on the basis of Article L. 521-2 are clearly not covered by this procedure. The *référé-liberté* is a success, then, in terms of the effectiveness of the protection mechanism instituted. Within a period of a few days, the person who is the victim of a serious and manifestly unlawful infringement of fundamental freedoms obtains the immediate and definitive cessation of the incriminated acts.

Its effectiveness in remedying unacceptable situations is made possible by the exorbitant and atypical nature of the procedure put in place. Article L. 521-2 of the Code of Administrative Justice is designed to respond to serious situations, those in which the administration is guilty of a serious and manifestly illegal infringement of a fundamental freedom requiring the intervention of a judge within 48 hours. Its strict scope of application - limited to fundamental freedoms - and its draconian conditions of granting characterise an exceptional situation. Access to this legal remedy must be reserved for those legitimately seeking a safeguard measure. In order to respond quickly and effectively to the particular situation characterized by Article L. 521-2, and to provide the appropriate jurisdictional response, the *référé-liberté* is organized according to a particular procedure that largely derogates from the ordinary law of administrative proceedings.

However, this doubly exceptional nature is not at all unusual. In France as well as abroad, procedures of this type all have the same characteristics: procedural flexibility for greater speed, extensive powers of the judge for greater efficiency, restrictive conditions and scope of application as a safeguard against trivialisation. All the procedures belonging to the Latin American *amparo* or ordinary *amparo* family - of which the *référé-liberté* is a part - have similar characteristics.

The fundamental summary judgment is rarely used, as the particular situations for which it was designed rarely arise. Nevertheless, when they do occur, the existence of this remedy constitutes a precious and irreplaceable guarantee for the effective safeguarding of fundamental freedoms. The procedure called for by Maurice Hauriou more than a century ago now exists and makes recourse to the *de facto* procedure unnecessary, if not the very existence of this derogation from the principle of separation of the administrative and judicial authorities.

577. Within the contentious administrative procedure, the *référé-liberté* has become, so to speak, a *model*. Not in the sense that it represents an ideal procedure towards which all others should aim, but - the word model being understood here in the primary sense - in that it constitutes a fully-fledged type of legal remedy, the procedural characteristics of which are likely to be used as a reference for defining other procedures. This model character was expressed in 2005 when the regulatory authority defined the procedural regime of the "summary procedure for information technology and civil liberties". The existence of this procedure is provided for, in principle, by Article 45 of the amended Act 78-17 of 6 July 1978 *on data processing, files and freedoms*, resulting from Article 7 of Act 2004-801 of 6 August 2004. This law was adopted with a double objective: on the one hand, to transpose into domestic law the Community Directive 95/46 of 24 October 1995 *on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, and on the other hand, to adapt the law on information technology and civil liberties to the major upheavals in the role of information technology in contemporary society that have occurred since 1978. To this end, the new Article 45 of the 1978 Act reinforces the powers of sanction available to the National Commission on Information Technology and Civil Liberties (CNIL) in the context of its *a posteriori* control of processing²³⁷⁷ . Above all, and this is the point that interests us, the CNIL may, in the

2375 J. DONNEDIEU DE VABRES, "La protection des droits de l'homme par les juridictions administratives en France", *EDCE* 1949, p. 43.

2376 See P. Fombeur, "Les Tribunaux administratifs dans la société française", *AJDA* 2004, p. 628.

2377 The range of prerogatives granted to the independent administrative authority is considerably strengthened. The Commission may impose warnings on offenders, as under the 1978 Act. But it may also, after an adversarial procedure and when a prior formal notice has remained without effect, impose financial penalties or withdraw the authorisations it has previously granted. In case of urgency, the Commission may, if the

event of serious and immediate infringement of the rights and freedoms guaranteed by the law, refer the matter to the competent interim relief judge (civil judge in the case of processing carried out by a private person, administrative judge for processing carried out by public services) so that he or she may take, if necessary under a fine, the security measures necessary to safeguard the rights of individuals²³⁷⁸ .

Since the law does not specify the regime of this legal remedy, it was up to the regulatory authority to set out the procedure in detail, both before the administrative courts and before the civil courts. In defining its procedural regime, the Government intended to confer certain characteristics on the legal remedy instituted, in particular - given the importance of the interests at stake - an extreme celerity of the judicial intervention and an ability to put an immediate end to the conduct in question. Rather than instituting a new procedure from scratch, with the appropriate characteristics to achieve these objectives, the regulatory power has favoured legislation by reference by deciding to simply copy this new recourse on the one - already tried and tested and having proved its ability to guarantee a rapid and effective intervention of the administrative judge - of the *référé-liberté*. Thus, Article 81 of Decree No. 2005-1309 of 20 October 2005 created a chapter V in Title V of the Code of Administrative Justice (regulatory part) entitled "Summary proceedings in matters of information technology and civil liberties" and including an Article R. 555-1 worded as follows: When the administrative judge is seized by the president of the National Commission for Information Technology and Civil Liberties, on the basis of Article 45 III of Law No. 78-17 of 6 January 1978 on information technology, files and civil liberties, of an application for interim relief concerning the implementation of a processing operation or the use of personal data by the State, a local authority, any other public person as well as any private person entrusted with a public service mission, it shall be decided in accordance with the interim relief procedure instituted by Article L. 521-2" - i.e., "the administrative judge shall decide on the application for interim relief. 521-2" - i.e., in particular, that the judge rules within 48 hours and may order any measure necessary to safeguard the protected rights and freedoms²³⁷⁹ . The two main characteristics of the summary procedure are the speed of the judge's intervention and, thanks to the scope and flexibility of his powers, the effectiveness of the judicial response. By adopting the procedure applicable to Article L. 521-2 of the Code of Administrative Justice, the text ensures that the judge of the summary procedure "informatique et libertés" will intervene under comparable conditions of speed and effectiveness.

578. However, is there not a certain paradox in setting up the summary judgment as a model at a time when, according to some commentators, the European Court of Human Rights has condemned this remedy and, more precisely, called into question its effectiveness in the *Gebremedhin* decision of 26 April 2007²³⁸⁰ . While a somewhat hasty reading of this decision may lead one to believe this, a closer analysis of it shows that it does not in fact concern the summary application for asylum specifically, but rather a shortcoming in French procedural law as a whole, namely the lack of suspensive effect of appeals available to asylum seekers at the border whose application is deemed manifestly ill-founded by the administration, while the person concerned believes that he or she is running a risk in the country of return of the type covered by Article 3 of the European Convention on Human Rights.

It should be remembered that in order to submit an asylum application to OFPRA, a foreigner must be on French territory. Consequently, if he presents himself at the border, he can only submit such an application if he is first granted access to the territory. If they do not have the necessary documents, they must submit an application for access to the territory on the basis of asylum; they are then held in a "waiting zone" for the time necessary for the Ministry of the Interior to examine whether or not the asylum application they intend to submit is "manifestly unfounded". If the administration deems the asylum application to be "manifestly unfounded", it rejects the person's application for access to the country, who is automatically "re-routed" without having had the opportunity to submit his asylum application to OFPRA.

The central issue before the Strasbourg Court in *Gebremedhin* was whether the legal remedies available to a rejected asylum seeker at the border are effective when the State decides to return the person concerned to a country where there are substantial grounds for believing that he or she would face a risk qualifying under Article 3 of the Convention. In such a case, the European Court requires that the remedies available to the applicant have suspensive effect as of right²³⁸¹ .

implementation of a processing operation leads to a violation of the rights and freedoms guaranteed by law, pronounce provisional measures to interrupt the processing operation or block certain data or, in the case of processing operations related to sovereignty activities, refer the matter to the Prime Minister so that he may take the appropriate measures.

²³⁷⁸ Article 45-III of the Act of 6 July 1978 as amended: "In the event of serious and immediate infringement of the rights and freedoms mentioned in Article 1 [i.e. respect for human identity, human rights, private life and individual or public freedoms], the president of the commission may request, by way of summary proceedings, the competent court to order, if necessary under a fine, any security measure necessary to safeguard these rights and freedoms.

²³⁷⁹ With regard to summary proceedings against infringements attributable to private persons not responsible for the management of a public service, Article 82 of the decree provides that "The president of the tribunal de grande instance or the judge delegated by him shall rule under the conditions of Articles 484 et seq. of the New Code of Civil Procedure" (Article R. 312-4 of the Code of Judicial Organisation).

²³⁸⁰ ECHR, 26 Apr. 2007, n° 25389/05, *Gebremedhin v/ France*, *Procédures* 2007, comm. n° 150, note S. DEYGAS; *Les cahiers juridiques* n° 112, June-July 2007, pp. 24-26, note D. PIETTE.

²³⁸¹ § 58 of the decision. This is also the position of the UN Committee against Torture (see Recommendation CAT/C/FRA/CO/3 of 3

The Court states that French procedural law does not satisfy this requirement for a rejected asylum seeker at the border who challenges the ministerial decision of non-admission. None of the remedies available to the applicant, whether an appeal for misuse of power, suspension or interim relief, has suspensive effect as of right. Even if, with the interim relief procedure, the asylum-seeker at the border has "at his disposal a procedure which a priori offers serious guarantees", the Court "notes, however, that referral to the interim relief judge does not have suspensive effect in its own right, so that the person concerned may lawfully be re-routed before the judge has given a ruling (...)" (§ 65). Consequently, the Court concluded that French law was unconventional on this point: "since he did not have access to an automatic suspensive appeal in the 'waiting zone', the applicant did not have an 'effective remedy' to pursue his complaint under Article 3 of the Convention. There was therefore a violation of Article 13 of the Convention in conjunction with that provision.

What can we learn from this judgment? Not, as some commentators suggest, that the summary application for judicial review is generally an ineffective remedy²³⁸². If it can be concluded that the remedy provided for in Article L. 521-2 of the Code of Administrative Justice is ineffective, it is only when the said remedy is not only brought by a rejected asylum seeker at the border, but also when the person concerned justifies running a risk of the kind covered by Article 3 of the Convention. The Court does not condemn the interim relief procedure outside this particular field; moreover, even in this very specific case, it does not specifically condemn this procedure but, in general, the lack of suspensive effect of appeals against a ministerial decision of non-admission. Consequently, this judgment does not in itself call for a reform of this procedure but either the establishment of a specific channel in this field with suspensive effect, or, more simply, the recognition of a suspensive effect to any appeal lodged in this field, whether it is an appeal for excess of power, a summary suspension or a summary release.

579. This procedure is and remains a symbol. On the occasion of a colloquium preceding the entry into force of the reform, Professor Moderne stated: "Of all the summary proceedings instituted by the Act of 30 June 2000, the summary proceedings were undoubtedly the most awaited. It is very likely to be the one that will most clearly mark, in the eyes of public opinion, the real aggiornamento of administrative summary proceedings and will sanction their ability to respond appropriately to the aspirations of contemporary society for a fast and efficient administrative justice that protects freedoms"²³⁸³. This is how the *référé-liberté* was presented on the eve of its implementation: the emblem of a renovated administrative justice system in phase with the aspirations of litigants²³⁸⁴. As a symbol of this renovation of administrative justice, of which emergency procedures were the "last and necessary component"²³⁸⁵, the fundamental summary procedure allowed the administrative judge to recover a legitimacy that had been eroded by the crisis following the decision of the Court of Conflicts on 12 May 1997. This decision had, in fact, awakened the unifying desires of the critics of jurisdictional dualism²³⁸⁶. The inadequacy of the powers conferred on the administrative judge with regard to the administration was one of the main arguments of this attack against the continuation of a separate administrative justice system²³⁸⁷. Therefore,

April 2006, §7; available at <http://www.unhchr.ch>). Similarly, in France, the National Consultative Commission on Human Rights has adopted a recommendation that "Any refusal of entry into the territory resulting in the refoulement of the asylum seeker must be subject to a suspensive appeal before the administrative court within a reasonable period of time" ("Avis sur les conditions d'exercice du droit d'asile en France", 29 June 2006, § 6; accessible at <http://www.commission-droits-homme.fr>).

2382 Thus, according to Dorian Piette, it is the "regime" itself of the *référé-liberté* that "is called into question by the judgment of 26 April 2007" (*op. cit.*, p. 26).

2383 F. MODERNE, "Le *référé-liberté* devant le juge administratif", in *Le nouveau juge administratif des référés. Réflexions sur la réforme opérée par la loi du 30 juin 2000*, colloquium 6 December 2000 (P. WACHSMANN dir.), Strasbourg, PUS, 2002, p. 131.

2384 The modernisation of administrative litigation began at the end of the 1980s in order to remedy the serious crisis affecting administrative justice, which was becoming increasingly congested due to the influx of appeals and whose slowness was becoming less and less acceptable to the public. It resulted in a number of very important innovations: restructuring of the administrative jurisdictional order through the creation of administrative courts of appeal and the strengthening of the regulatory role of the Council of State; extension and trivialisiation of summary proceedings; development of the judge's powers through the use of the injunction and substitution procedure. On this metamorphosis of administrative justice, see R. DRAGO, "Un nouveau juge administratif", in *Jean Foyer, auteur et législateur. Ecrits en hommage à Jean Foyer*, PUF, 1997, pp. 451-462.

2385 B. STIRN, "La juridiction administrative: problèmes actuels et réformes", *RA* 1999, special issue 7, p. 138.

2386 Cf. *supra*, § 26. For a presentation of this recurring theme, see, among the abundant literature, A. VAN LANG, *Juge judiciaire et droit administratif*, LGDJ, coll. BDP, t. 183, 1996, p. 310 and s.; G. BIGOT, *L'autorité judiciaire et le contentieux de l'administration. Vicissitudes d'une ambition (1800-1872)*, LGDJ, 1999, 516 p.; B. PACTEAU, "Le contrôle de l'administration par une juridiction administrative. Existence or not of an administrative jurisdiction. La conception française du contentieux administratif", *RA* 2000, special issue 3, pp. 91-105; *AJDA* 2005, pp. 1760 et seq.

2387 The other arguments against jurisdictional dualism were not really significant. The argument most often put forward is that the existence of a separate administrative court would raise insoluble difficulties for the litigant in determining the competent court. However, as President Woehrling points out, "This is in fact a false problem: although administrative law textbooks devote interminable developments to this question, from a statistical point of view it is not of considerable importance. In everyday litigation practice, appeals that raise a difficult problem of jurisdiction are rare. Moreover, to abolish administrative justice would result in transferring the difficulties of distribution of jurisdiction to the judicial jurisdiction, with the same or almost the same disadvantages for the litigants, since this transfer would not go without creating special structures within this jurisdiction" (J.-M. WOEHRLING, "Réflexions sur une crise : la juridiction administrative à la croisée des chemins", in *Service public et libertés, Mélanges offerts au professeur Robert-Edouard Charlier*, éditions de l'Université et de l'Enseignement Moderne, 1981, pp. 350-351). Secondly, administrative justice is presented as an exceptional form of justice, whose existence would have no other purpose than to preserve the interests of the administration. While this presentation may have corresponded to a reality at the time of the founding of administrative justice, it is now completely anachronistic. As Mr Pacteau points out, the administrative court has "lost the characteristics that once made it rejected and repelled. From being an instrument and protector of power, it has become the first of our counterpowers. Born to reassure the State, it now makes it tremble,

as it had done during previous crises, the administrative court had to reform itself, otherwise it would become increasingly contested and its very existence would be threatened. As Ms Bechtel pointed out after the judgment of 12 May 1997, "the future of administrative jurisdiction will be played out not on the terrain of theoretical controversy but on that of the very proof of its merits"²³⁸⁸ .

The creation of the *référé-liberté* and, more generally, the improvement of the treatment of urgent cases before the administrative court was the best response to the detractors of jurisdictional dualism. In this sense, Ms Lepage had pointed out that 'In the face of the growing challenge to the very existence of administrative jurisdiction, it goes without saying that it can only be justified insofar as it is called upon to provide the same guarantees to citizens as those that would be conferred on them by the judicial procedure'²³⁸⁹ . Professor Chapus himself had stated, well before this crisis, that a better response to urgency "would have repercussions on the very institution of administrative justice, whose importance it would increase at the same time as it would strengthen its credibility and legitimacy"²³⁹⁰ . Thanks to the reform of the summary procedure, the administrative court has demonstrated its efficiency and its ability to protect fundamental freedoms in very effective conditions. As Mr Wachsmann stated, "By giving the administrative judge ruling in summary proceedings powers to intervene quickly in the event of the illegality of an administrative act and *a fortiori* in the event of an infringement of a fundamental freedom, the legislator has disarmed those who oppose the administrative court by denouncing the inadequacy of the guarantees it offers to litigants"²³⁹¹ . In view of the powers it has and the procedural conditions under which it exercises them, the administrative judge is now in line with society's expectations.

580. "By their very nature, freedoms are fragile and deserve constant attention"²³⁹² . It is not the task of the administrative judge, who may not refer cases to himself, to ensure this vigilance. This role falls primarily to citizens and, more generally, to individuals and legal entities who consider themselves to be victims of infringements by the administration. Nevertheless, when the latter apply to the interim relief judge, justifying a really serious and manifestly illegal infringement of fundamental freedoms, they find in him a remarkably effective defender of their freedoms.

All the ingredients are there for this procedure to be sustainable. On the one hand, the *référé-liberté* is an instrument of flexibility. Thanks to the particularly broad wording of the provisions governing it and the extensive formulation of the judge's powers, the procedure under Article L. 521-2 can and will be able to be adapted to the diversity of situations that may arise. Its potential is considerable and remains partly unexplored. On the other hand, the *référé-liberté* has become an irreplaceable tool, which has proved its usefulness and effectiveness in responding to the particular situations for which it was designed. It has found its place in the architecture of legal remedies available to individuals and legal entities against the acts and actions of public authorities: that of a flexible, rapid and effective procedure, making it possible to remedy immediately the most unacceptable situations.

581. Georges Burdeau wrote that "it is by the degree of perfection of the procedures that ensure it that the effectiveness of the rule of law can be measured"²³⁹³ . By putting legal technique at the service of freedoms, as it does, the procedure of Article L. 521-2 makes a significant contribution to the consolidation of the rule of law.

tremble its institutions, tremble its men, tremble its acts, tremble its finances" (B. PACTEAU, *op. cit.*, p. 93).

2388 M.-F. Bechtel, "Le juge administratif, protecteur des droits et libertés", *RFAP* July-September 1997, No. 83, p. 530.

2389 C. LEPAGE, "La réforme des procédures d'urgence devant le juge administratif", *Coll. ter.* 2000, chron. n° 7, p. 5.

2390 R. CHAPUS, "Le juge administratif face à l'urgence", in *L'administration et son juge*, PUF, coll. Doctrine juridique, 1999, p. 292. See, in the same sense: F. THIRIEZ and A. LYON-CAEN, "Pour un vrai 'référé' administratif", *Le Monde* 26 February 1998, p. 13; J.-P. COSTA, "L'image du Conseil d'Etat dans la société de demain", *RA* 1998, no. 301, pp. 54-60; J.-P. COSTA, "L'effectivité de la justice administrative", *RA* 1999, special issue no. 8, p. 137; M. GENTOT, "La réforme du contentieux administratif", *RFAP* no. 84, 1997, pp. 609-617.

2391 P. WACHSMANN, "Une révolution dans les rapports entre le juge et l'administration?"

2392 B. STIRN, "L'état des libertés: bilan critique", *Pouvoirs* n° 84, 1998, p. 99.

2393 G. BURDEAU, *Les libertés publiques*, 4^{ème} éd, LGDJ, 1972, p. 78, quoted by S. TSIKLITRAS, *La protection effective des libertés publiques par le juge judiciaire*, LGDJ, coll. BDP, t. 155, 1991, p. 1.

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