

Maintaining Legality

The Grounds of Review

The fundamental purpose of judicial review in France is to secure the rule of law. French terminology is different from English terminology. The concept of *l'Etat de droit* or *le règne du droit* focuses on legality.¹ The administration must have legal authority for its actions and must comply with the requirements of the law. In this, the sovereignty of the people is ensured – the people make the law through their representatives in the legislature and the courts ensure the law is obeyed.² This differs from the common law conception of Dicey, which includes statute and common law within the concept of 'law' and is focused on subjecting officials to the ordinary law of the land.³ It is also different from more modern international conceptions which include the enforcement of fundamental rights as an integral element of the rule of law.⁴ The French concept is much closer to the German *Rechtsstaat*. As was mentioned in Chapter 2, the protection of fundamental rights has become an important feature of French public law since the Liberation of France in 1944. But the framework of French judicial review of administrative action was already established. In more recent years, there has also been a wider concern that the executive respects principles of good administration, especially those laid down in the Code des relations entre le public et l'administration (Code on the Relations between the Public and the Administration, CRPA) of 2015. It is best to explain contemporary judicial review first in terms of the formal

¹ J. Rivero, 'Etat de droit, Etat du droit', in *L'Etat de droit Mélanges en l'honneur de Guy Braibant* (Paris, 1996), p. 609.

² See J.-L. Autin, 'Illusions et vertus de l'état du droit administratif', in D. Collas, ed., *L'Etat de droit* (Paris, 1987), p. 149: 'Sovereignty of *la loi* and sovereignty of the people are inseparable in French public law.'

³ See A. V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, edited by J.W.F. Allison (Oxford: Oxford University Press, 2013), p. 188.

⁴ See the Delhi Declaration of 1959 and T. Bingham, *The Rule of Law* (London: Allen Lane, 2011).

grounds of review and then in terms of the values judicial review is now seeking to ensure the administration respects.

7.1 GROUNDS OF REVIEW

The formal grounds of review in French law are lack of competence, breach of an essential procedural requirement (or of a required formality), breach of the law and abuse of power. Indeed, lack of competence was the only ground at the creation of judicial review by the Law of 7–14 October 1790. These four grounds found their way into art. 263 (2) of the Treaty on the Functioning of the European Union as the grounds of review of the institutions of the European Union. This illustrates the importance of French administrative law in shaping the European Union. As in European Union law, it is necessary to add a fifth ground of review, the declaration of the non-existence of the administrative decision in question in the case of a material inexistence or of a very serious illegality. Each of these grounds is connected to the idea of legality. Lack of competence, breach of a procedural requirement and breach of required formality relate to the external legality of a decision (*légalité externe*) in that they relate to the external circumstances in which the decision was made. The court here seeks to ensure that the proper person made the decision according to the proper procedure. Breach of law and abuse of power relate to the internal legality of a decision (*légalité interne*), which is seen from the terms of the decision itself, especially the reasons given for it. The court here is checking that legally valid reasons are given to justify a decision and that it was made for the purposes laid down by law and not for an improper purpose. French judicial decisions will frequently focus first on the external legality and then on the internal legality. The difference has a practical impact. Each category is called a *cause juridique distincte*. Therefore, if ever the judicial review was founded on grounds belonging to one sole category, the claimant will not be able to develop a new legal argument after the timing for action has expired in the name of the *crystallisation du contentieux* principle, unless it is a *moyen d'ordre public*.

7.1.1 Non-existence (Inexistence)

If what is claimed as an administrative decision never actually happened, then it is treated as never having existed. If a court intervenes, it will declare the non-existence of the decision, but it cannot annul it since there is nothing to deprive of its legal effect. In *Anticor* in 2016, the Conseil d'Etat succinctly set out the conditions for holding a decision as non-existent: 'A decision can only

be held to be non-existent if it lacks physical existence or if it is so seriously vitiated that this affects not merely its legality, but its very existence.⁵

In that case, a claim failed that rules governing the treatment of former Presidents of the Republic did not exist because they were contained in a private letter written by the Prime Minister and were not published in the *Journal Officiel de la République*. The leading case is *Rosan Girard*.⁶ Here in April 1953, Dr Rosan Girard, the communist mayor of a commune in Guadeloupe, declared the results of the elections on the basis of counting the votes of only three of four ballot boxes, the fourth having been seized by the police after disturbances. Rather than referring the matter to the Conseil de préfecture, the prefect simply declared the election non-existent and ordered new elections for July. In those elections, the non-communists obtained a majority. In 1957, the Conseil d'Etat declared the prefect's decision non-existent. Due to the seriousness of his failure to leave the decision on the validity of the elections to the Conseil de préfecture, the election judge, the prefect's decision was void and non-existent. Despite subsequent attempts by the government to get around the effects of the decision, Rosan Girard and his communists were eventually elected as the majority party.

As the statement in *Anticor* makes clear, the decision should exist materially. That does not always mean there should be a record, but any evidence must show a decision, not merely a discussion. For example, *Commune de Lavaur v Lozar* concerned a claimed agreement signed by the mayor to acquire a local *château* and its park for 850,000 F.⁷ The *tribunal administratif* heard witnesses and decided that the commune council's meeting had debated the acquisition of the *château*, but it had not passed a resolution to buy it and authorising the mayor to sign a contract. Accordingly, the claimed decision was non-existent.

Where an actual physical decision is taken by an apparently authorised person, it is more difficult to determine when it is non-existent or merely unlawful. The *Rosan Girard* case shows a situation where the wrong person was making a decision about the validity of the local election. Often non-existent decisions will constitute a *voie de fait*, a topic discussed in Chapter 5, Section 3. For example, in *Auger*, the police ordered the closure of premises used by the claimant on the ground that they were being used for immoral purposes.⁸ They then engaged a contractor to block the entrance to the

⁵ CE 28 September 2016, *Association pour la prévention de la corruption et pour l'éthique en politique (Anticor)*, no. 399173.

⁶ CE Ass. 31 May 1957, nos. 26188, 26325, Leb. 355 concl. Gazier.

⁷ CE 9 May 1990, no. 72384, Leb. 115.

⁸ CE 11 March 1998, *Ministre de l'intérieur c Mme Auger*, no. 169794, Leb. 676.

premises. The claimant succeeded in showing that the police had no authority to block the entrance because such powers were limited to emergency situations. This was such a flagrant breach of her right to property as to be both null and void and a *voie de fait*. But this is not always the case. Some implementing actions may be *voies de fait* without having an underlying decision – for example, a wilfully wrong police operation. Other decisions may be *voies de fait* but be the result of a merely illegal decision.

7.1.2 *Lack of Competence (Incompétence)*

A decision maker must have the legal authority to make the decision or to take the action affecting a person. Sometimes an official is too eager to achieve a policy objective and acts beyond his authority. This is shown by *Mann Singh* in which a minister was delegated the power by legislation to enact rules which determined the granting of driving licences.⁹ By circular the Minister of Transport required that a driver's photograph had to show him with a bare head. The claimant was a Sikh. He challenged the prefect's refusal to issue him with a driving licence on the ground that he was not bareheaded on his photograph. Adult Sikhs wear turbans as part of their religious practice. Although he challenged the decision on the basis of failure to respect his freedom of religion, the Conseil d'Etat quashed it on the ground that the rule the prefect applied was contained in a circular and the Minister was not legally authorised to issue rules in that way. In a more recent case, the mayor of Sceaux issued an order requiring face masks in public places during the early days of the Covid-19 pandemic. His decision was quashed on the ground that he did not have authority to make such orders.¹⁰ The emergency legislation on Covid-19 had given powers under the Public Health Code to the national government to order measures to combat the spread of the infection. At that point, the Prime Minister had decided not to require face masks in public due to a lack of masks. The Conseil d'Etat ruled there can be exceptions to the competence of the national government entrusted with special public health powers, based on the general power of mayors for ensuring public order in their communes 'when imperative reasons linked to local circumstances make their enactment indispensable and provided that, in so doing, they do not compromise the coherence and effectiveness of those taken for this purpose by the competent State authorities', but that the mayor was not empowered to impose face masks in his area in the absence of special circumstances.

⁹ CE 5 December 2005, no. 278133, Leb. 545.

¹⁰ CE ord. 17 April 2020, *Commune de Sceaux*, no. 440057, AJDA 2020, 1013.

Of course, wearing face masks in public did become compulsory some three months after this ruling, but the decision to require them was taken by the Prime Minister.

Officials can show lack of competence not only by taking action, but also by failing to take action. In *Syndicat des médecins de l'Ain*, the government used its power to make an *ordonnance* under which social sickness insurers were to issue electronic cards to their members.¹¹ But the *ordonnance* left the details to a decree. The Conseil d'Etat held that the government had failed to exercise its competence because it failed to make provision for consent to and limits on the storage of the insured's medical data.

Only material breaches of the rules on competence will lead to nullity of the decision.¹²

7.1.3 *Breach of an Essential Procedural Requirement (Vice de procédure et vice de forme)*

A lawful decision must be made not only by the authorised person, but also by following the required procedure. Procedure ensures the recording and publicity of decisions, as well as the opportunity for interested parties to contribute to the decision-making process. Procedural requirements may relate to formality and to process. Some requirements are essential (*les formes substantielles*), and some are non-essential (*les formes non substantielles*). Only failures to comply with essential requirements vitiate a decision. For example, the failure to mention the favourable opinion of the Architect des Bâtiments de France in a demolition permit was not such as to invalidate the decision to authorise a building's demolition when its approval was uncontested.¹³

Breach of formality may well be significant. If a decision has not been authorised by an appropriate person, then it may not simply be irregular, but non-existent. There are frequent cases where decisions are challenged because the power to sign them off has been delegated too far down the administrative hierarchy. Formalities not only ensure that the hierarchy of authority is respected, they also provide guarantees that affected individuals are allowed some participation in decisions that affect them before they are made. Whilst lawyers and bureaucrats may appreciate the value of formality, this is not always the case among policymakers and citizens. As a result, often formalities

¹¹ CE Ass. 3 July 1998, no. 188004.

¹² CE Ass. 21 December 2012, *Groupe Canal Plus*, no. 362347, AJDA 2013, 215 on the collegiality of the Competition Authority.

¹³ CAA Paris 6 February 1996, *Société de Promotion et de Distribution Touristique*, no. 94PA02130.

are not scrupulously respected, and the court is left to sort out the situation. Respect for the law might suggest that the decision should be quashed and taken again respecting the proper formalities in full. On the other hand, decisions may have been implemented and it would be against legal certainty to undo the new situation. A compromise has to be made to avoid excessive formalism, but also to ensure that the values are respected for which the formalities have been created.

The leading case on this issue is *Danthony*.¹⁴ In this case, the merger of two higher education institutions in Lyon was planned. The legal rules stated the governing bodies of the two institutions needed to meet separately and request the merger. The legal rules also required consultation with the staff liaison committees (*comités techniques paritaires*) before the governing bodies made their decision. In this case, the governing bodies made their request at a joint session with a single chairperson. A joint meeting of the staff liaison committees of both bodies then approved the merger. The staff liaison committee of the merged establishment gave its approval to the enlarged powers of the new organisation only after it had been created. Staff from one of the colleges challenged the legality of the ministerial decree approving the merger and the granting of wider powers to the new establishment. Clearly, the procedure preceding the decree was irregular. The Conseil d'Etat considered that the purpose for consulting the staff liaison committee protected a constitutional value – the right of workers to participate in decisions governing their conditions of work set out in paragraph 8 of the preamble to the 1946 Constitution. Therefore, the prior consultation of the staff representatives was an essential procedural requirement because it provided them with an important safeguard. Its omission invalidated the deliberations of the governing bodies and the ministerial decree. The requirement that each governing body approve a merger was a fundamental safeguard for the autonomy of each establishment. This was also an essential procedural requirement. The problem for the administrative courts was that the merger had been agreed in May and June 2009, concluding with a ministerial decree in December 2009 setting up the new college on 1 January 2010. By the time the Conseil d'Etat was deliberating in December 2011, the new structures had become embedded. Accordingly, although there had been breaches of essential procedural requirements, an annulment with retrospective effect was not appropriate. The Conseil d'Etat therefore ordered the nullity of the decision with effect

¹⁴ CE Ass. 23 December 2011, *Danthony*, no. 335033; CE Sect. 23 December 2011, *Danthony*, no. 335477, AJDA 2012, 195 and 1684 comment Mailot.

from 30 June 2012, giving time for the situation to be regularised through new, lawful procedures.

Article 70 of the Law of 17 May 2011 provided that a factor vitiating a preliminary administrative procedure is not such as to affect the legality of a decision taken unless it is clear from the evidence on file that it was capable of having an influence, in the case at hand, on the outcome of the decision taken or unless it deprived the person affected of a safeguard. The Section du Contentieux of the Conseil d'Etat expanded its application to the omission of procedures.¹⁵ But in this case, it was clear that the procedures omitted did provide essential safeguards. It was therefore necessary for the Assemblée plénière of the Conseil d'Etat to consider moderating the application of the ruling in time:

If it appears that the retroactive effect of a nullity is capable of having manifestly excessive consequences by reason of the effects the decision has produced and the situations which have arisen whilst it was in force that it is in the public interest to keep in place its effects for a time, it is for the administrative judge . . . to take into account, on the one hand the consequences of the retroactivity of the nullity for the various public and private interests at stake, and on the other hand the disadvantages which would arise with regard to the principle of legality and the rights of litigants to an effective remedy of a limitation in time of the effects of a nullity.

There are thus two ways of attenuating the effects of a procedural irregularity. First, it may be declared not substantial enough to affect the validity of the decision. Second, even if it is substantial, its effects may be moderated by delaying the nullity pending rectification by the administration.

The ability for the administration to regularise procedural errors is frequently necessary. An example is *Commune de Sempy*.¹⁶ Here a commune adopted a planning scheme which involved greater house building and a reduction in agricultural land within its area. Planning legislation required it to obtain the opinion of two bodies, the committee on the use of agricultural spaces and the chamber of agriculture. The commune obtained the opinion of neither body before it decided in 2012 to adopt the planning scheme. The *tribunal administratif* duly annulled the decision in 2014. The commune appealed and, before the *cour administrative d'appel*, it then presented opinions given by the two bodies, one favourable and one not. All the same, the appeal was rejected on the ground that the decision could not be regularised.

¹⁵ The legislator was content with this and repealed art. 70 by art. 51 of the Law of 10 August 2018, leaving the matter to the case law of the Conseil d'Etat.

¹⁶ CE Sect. 22 December 2017, *Commune de Sempy*, no. 395963.

The Conseil d'Etat disagreed with this point as a matter of law. But, in order to regularise the decision, it was still necessary for the commune to meet and reaffirm its approval of the planning scheme in the light of the observations it had now received from the bodies who had finally been consulted. So the Conseil d'Etat ordered the decision on the appeal by the commune to be suspended for three months to see if a new decision by the commune could be made which might regularise the original approval of 2012.

That decision also repeated the principle used in *Danthony* and originally based on art. 70 of the Law of 2011 setting out the limits for regularisation. It is now applied as a general principle. So a procedural irregularity in the levying of taxes will only be annulled if it deprives the taxpayer of a legal safeguard and if it would have had a material influence on the decision to impose a tax.¹⁷

A decision which provides inadequate reasons will also be procedurally defective. For example, Lars von Trier's film *Antichrist* was very controversial. The Minister granted it a film certificate for viewing by people over sixteen years of age. The Minister simply repeated the reasons given by the film certification board, which were held to be inadequate, stating that the film was too violent, but not explaining how this justified the age restriction. The decision was therefore quashed.¹⁸

7.1.4 *Abuse of Power (Détournement de pouvoir)*

Détournement de pouvoir enables a court to review not the formalities of an administrative decision, but its content. In particular, this ground of review examines the purposes and motives for which a power has been used. Until the ground of illegality (*violation de la loi*) was expended in the twentieth century, this was a significant control of power. But rather like the English tort of malicious abuse of office, it has tended to fall out of favour. Litigants frequently allege a *détournement de pouvoir*, but it is rarely found as substantiated by the courts. In the four years from 2017 to 2020, some two hundred cases before the Conseil d'Etat alleged this ground of review, and not one was substantiated. That is not to say that abuse of power is not happening. In the past decade, two Presidents of the Republic and one presidential candidate have been convicted for abuse of their public office. Rather, it is that the ground of *détournement de pouvoir* is difficult to prove and it is easier to use illegality as a ground of review when a decision has been made for an improper purpose. Moreover, the case law tends to admit that a decision is lawful if

¹⁷ CE Sect. 16 April 2012, *Epoux Meyer*, no. 320912, AJDA 2013, 1733.

¹⁸ CE 25 November 2009, *Association Promouvoir*, nos. 328677 and 328769.

grounded on a lawful motive despite the existence of another unlawful motive, at least when the latter is not of private nature. For instance, an expropriation might be lawful if motivated by a financial interest as long as there is also a general interest.¹⁹

Détournement de pouvoir is, in many ways, like the French civil law abuse of power or the English abuse of trust. It involves a decision being made for a purpose other than that for which it is authorised by law. In most cases, the abuse of power will be intentional. The French case law recognises three typical situations.

First and most extreme, the decision is taken for a purpose different from any public interest. For example, in *Fabrègue* the mayor was authorised by law to suspend a rural guard for up to a month from his post.²⁰ The mayor of Cotignac decided to suspend the claimant by ten successive orders each lasting one month as an act of vengeance. The orders were accordingly quashed. Similarly, the decision of a bodybuilding association to refuse to allow an athlete to participate in a European championship team because of her public criticism of one of the directors of the association was quashed.²¹ The decision was not motivated by any sporting consideration, but only by a desire to punish her for unwarranted criticism.

Abuse of power occurs not only in personnel matters, but also in powers such as on public order and planning, which are taken by the mayor of a commune. As we have seen, many communes are small and so personal rivalries can spill over into policy decisions. For example, in *Rault* a mayor used public order powers to limit the hours for balls and dancing.²² The hours chosen favoured his two establishments and disadvantaged the inn of the claimant. The orders on the timing of balls and dancing were quashed for abuse of power. In France, the local communes have a right of pre-emption in certain circumstances when landowners put their property up for sale. In *Guillec*, the local council of Tignes (Savoy) claimed to exercise that right when the claimants put their property up for sale.²³ It emerged that the council did this for the sole purpose of preventing people from outside the local area acquiring property in the municipality. The Conseil d'Etat ruled that a local authority could only exercise powers of pre-emption for the public interest and the purpose in this case was not of that kind. Similarly in *Baron*, the local

¹⁹ CE 11 January 1957, *Louvard*, Leb. 27.

²⁰ CE 23 July 1909, nos. 33151, 33335, 33336, Leb. 727; S. 1911.3.121 note Hauriou.

²¹ CE 25 May 1998, *Fédération française d'haltérophilie, musculation et disciplines associées*, no. 170752, JCP 1999.II.10001 note Lapouble.

²² CE 14 March 1934, no. 22256, Leb. 337.

²³ CE 1 February 1993, *M et Mme Guillec*, no. 107714, JCP 1993.II.22088 concl. Vigoroux.

commune sought to expropriate a property recently bought by a local businessman when he applied for planning permission to build a hotel and commercial complex on the site.²⁴ The commune argued that it wanted to protect the rural character of the neighbourhood. But this was not a recognised public interest and so the power of expropriation had been abused.

Second, *détournement de pouvoir* may be used where the administrative decision is taken for a different public interest than the one for which the power is authorised. In the leading case of *Pariset*, a law was passed in 1872 creating a state monopoly on the production and sale of matches.²⁵ The law provided for the expropriation of existing factories with resultant compensation. The Ministry of Finance decided that where a factory merely had a permit of limited duration to manufacture matches, the permit need not be renewed. The factory would then have to close under dangerous factories legislation (and thus no compensation was due). Following the Ministry's guidance, the prefect issued an order to close the factory. The Conseil d'Etat quashed the decision on the ground that the prefect's power had been used for a purpose which was different from that for which it was conferred. In another case, *Bes*, the mayor used his public order powers covering public health to prevent the claimant landowner damming his part of a canal, thereby ensuring that waste water continued to flow away from land further up.²⁶ The principal reason for this measure was not public health, but to save the commune the expense of dredging its part of the canal. This amounted to an abuse of power and the mayor's order to the claimant was annulled.

Attempts to use powers to evade the consequences of a judicial decision are common. A flagrant example was *Bréart de Boisanger*.²⁷ The Minister sought to terminate the claimant's role as administrator of the Comédie française before the end of his term of office. This was annulled by the administrative courts. The Minister then passed a general decree amending the rules on that post and a new appointment was made to this position which was identical to one that had been annulled. The claimant was able to obtain the annulment of the general decree because it was not promulgated in the general interests of culture, but to get around a judicial decision.

A third and common issue is the abuse of procedure. Here the administration hides the real content of its decision through a false appearance of a lawful procedure. Often this will occur where the administration does not have the

²⁴ CE 16 February 1973, *Ministre de l'équipement et du logement c Baron*, nos. 82689, 82765, Leb. 139.

²⁵ CE 26 November 1873, no. 47544, Leb. 934.

²⁶ CE 24 June 1987, no. 47260, Leb. 568.

²⁷ CE Ass. 13 July 1962, *Bréart de Boisanger*, nos. 57498 et 57499, Leb. 484.

powers it wishes to have. For example, in *Guillemet*, the administration used powers to expropriate a business's goods because it did not have the power to punish it for breach of economic legislation.²⁸ In *Keddar*, the power to requisition people and limit their freedom of movement in the interests of public order was used to intern them in camps.²⁹ In both cases, the decisions were quashed.

7.1.5 Illegality

Illegality, based on the content of decision, is a common ground of review. It represents the heart of legality review – the administration must abide by the law. At the same time, if the administration has legal competence to make a decision, a court should not challenge its assessment of the merits of a case. Conceptually at least, there is an important distinction between review of legality and review of the merits (*opportunité*). This distinction leads both to the categories of grounds of review (error of fact, error of law and so on) and the degree of scrutiny to which a decision is subjected (the so-called sliding scale of review).

7.1.5.1 Error of Fact

In principle, facts are to be assessed by the decision maker. It is here that judicial review is different from appeal. Where an appeal lies to a court in the *contentieux de pleine juridiction*, then it can consider the facts and come up with its judgment. For example, in tax matters, the question before a court is whether the taxpayer owes tax on income for a particular tax year and that depends on the facts underpinning the assessment. In judicial review (the *recours pour excès de pouvoir*), the decision about the facts is a matter for the decision maker, and the court intervenes rarely.

All the same, the court does examine the existence or materiality of facts which give rise to the competence of an administrator to take a decision. This was stated by the Conseil d'Etat in *Camino* in 1916:³⁰

Whereas the Conseil d'Etat cannot assess the merits of the measures submitted to it by way of judicial review, it is its role on the one hand to verify the existence of the facts which justify the decision and, on the other hand, in the

²⁸ CE Sect. 21 February 1947, *Guillemet*, no. 77529, Leb. 66.

²⁹ CE Ass. 3 February 1956, *Keddar*, no. 36771, Leb. 46.

³⁰ CE 14 January 1916, *Camino*, nos. 59619, 59679, Leb. 15; S.1922.2.10 concl. Comeille.

case that the facts do exist to see if they could legally justify the application of the sanctions provided for [by law].

In this case, the mayor of Hendaye, Dr Camino, was suspended by the prefect for not ensuring the decency of a funeral where he was present. It was alleged that he had required the coffin to be brought into the cemetery by a hole in the wall, rather than through the gate, and that the grave he had arranged for the body was not deep enough. The Conseil d'Etat rejected the allegations on the ground that the documents in the case file demonstrated that they were wrong in fact. This shows the source of evidence on which the court relies – the material submitted on file. The second set of facts in that case also shows the issue of the burden of proof. It was alleged that Dr Camino had caused problems for a private ambulance on the beach at Hendaye. Here the Conseil found the facts not to have been fully established in the file and, in any case, these were matters which were not connected with his official functions as mayor, and so they did not justify the sanction imposed by the prefect. This decision marked a change from the established approach of not treating errors of fact as justifying judicial review.

Apart from examining the materiality of facts, administrative courts may also review the classification of facts (*qualification juridique des faits*). In *Gomel*, legislation permitted the prefect to refuse planning permission where a proposed construction affected an existing view of architectural value (*une perspective monumentale*).³¹ The claimant's application for planning permission was refused for a building in Place Beauvau (opposite the Elysée Palace, the official residence of the President of the Republic). The Conseil d'Etat quashed the refusal on the ground that 'taken as a whole, the Place Beauvau could not be considered as forming a view of architectural value'. This approach to facts giving rise to competence to make a decision is applied today. For example, in *Société Edilys*, a very similar planning rule (then contained in art. R 621–21 of the Code du patrimoine) was used by the prefect to refuse planning permission in another part of central Paris, the Place Vendôme.³² His argument was that the planned alterations would change the character of the building from its state when it was classified in 1862. The Conseil d'Etat held that the rule was not designed to protect the character of a building at the moment of classification, but to protect the public interest and the place of the building in French architectural heritage. The prefect should have examined the changes as they affected the perspective of the building as originally constructed at the beginning of the eighteenth century.

³¹ CE 4 April 1914, *Gomel*, no. 55125, S. 1917.3.25 note Hauriou.

³² CE 5 October 2018, *Société Edilys*, no. 410590, Leb. 365, AJDA 2019, 184.

In examining documents from this period, the *cour administrative d'appel* had concluded that no harm to architectural heritage could be shown in relation to the proposed alterations to the claimant's clock shop, and the Conseil d'Etat upheld its quashing of the prefect's decision.

The courts will quash decisions based on a fundamental error in assessing facts. For example, in *Bouhanna* the claimant foreign national was applying for naturalisation.³³ To qualify, he had to show he was 'resident' in France. Under judicial interpretation, this term meant he must establish that France was his 'centre of interests'. He had been living in France with his family since 1979, but his principal source of revenue came from work abroad. The Minister declared his application inadmissible on the ground that he was not resident in France and this was quashed.

Although the administration does not have to provide a full set of facts justifying its decisions, it needs to provide enough to demonstrate that there was enough evidence on which it was possible to conclude that the necessary facts were established. This was shown very firmly by the Conseil d'Etat in *Barel*.³⁴ In that case, students applied to the Ecole Nationale d'Administration. Under the legal rules, the Minister was required to draw up a list of candidates allowed to take part in the competitive entrance examination on grounds of their suitability for the civil service. The claimants were rejected on grounds of their political opinions (communist leanings). To deal with their claim for review of the decision, the Conseil d'Etat requested the file of information on which the decision was taken. The Minister refused, and so the Conseil quashed the decision. The Conseil accepted that the Minister had discretion in assessing candidates, but it rejected the idea that the Minister could escape any review simply by keeping silent about the reasons for his decision.

7.1.5.2 Error of Law (*Erreur de droit*)

Error of law is a basic failure of a judge or decision maker and needs to be sanctioned by a court in order to maintain the principle of legality. As in English law, an error of law can take several forms. Three particularly merit attention. The first is an error of law concerning the powers the decision maker has. The second is applying a rule which does not relate to the facts. For example, in *Tabouret et Laroche*, a Law of 1940 required the prefect to approve sales of land.³⁵ Prefects frequently refused approval to industrialists who

³³ CE Sect. 28 February 1986, *Bouhanna*, no. 57464, Leb. 53.

³⁴ CE Ass. 28 May 1954, *Barel*, no. 28238, Leb. 308 concl. Letourneur.

³⁵ CE Ass. 9 July 1943, nos. 71607, 71720, Leb. 182; D. 1945, 163 note Morange.

wished to buy agricultural land. The Conseil d'Etat quashed a prefect's decision for error of law on the ground that the legislation was intended to avoid speculation and not to prevent a change from agricultural to industrial uses. The third error is failing to apply a rule relevant to the facts. An example of failing to apply a relevant legal provision is *Mann Singh*, where the administration failed to take account of a person's right to religious belief and expression in designing the rules on photographs for driving licences.³⁶ An error of law may also arise from taking into account irrelevant considerations. For example, in *Université de Dijon c Picard et Brachet*, the university disciplinary panel found two students guilty of misconduct in the examination.³⁷ Appeal lay with the national panel of the Conseil supérieur de l'éducation nationale, which acquitted them on the ground that the exams had taken place under poor conditions and the assessments were more continuous assessment than end-of-course exams. The university successfully appealed to the Conseil d'Etat, which quashed the decision of the national panel on the ground that its decision was based on the irrelevant consideration of how the exams were conducted, rather than on the relevant consideration of the conduct of the students. Error of law is different from *violation directe de la loi*, which is a direct breach of a law.

7.1.5.3 Manifest Error in Evaluation (*Erreur manifeste d'appréciation*)

Most difficulties with administrative decisions arise not because of mistakes about the meaning of the legal text or the evidence for the existence of essential facts but because of assessments made by the administration about whether those facts meet the legal requirements. Because legal texts are often deliberately couched in vague or general language, the administration inevitably has considerable latitude in assessing how the legal terms apply to facts. The concept of manifest error in evaluation recognises both the latitude for judgment by the administration and the limits of any exercise of power.³⁸ The term 'manifest error' suggests that little fact-finding is needed. But, as was clear in *Barel*, the fact that the French administrative courts can require the decision file of the administration to be made available does enable serious scrutiny of the basis for the decision taken.

This ground of review was developed in litigation about measuring 'equivalence'. In *Lagrange* in 1961, for budgetary reasons a commune decided to

³⁶ See note 9.

³⁷ CE Sect. 17 January 1992, nos. 68756, 68757, Leb. 24.

³⁸ S. Rials, *Le juge administratif français et la technique du standard* (Paris: LGDJ, 1980), p. 249.

abolish the post of rural policeman and create a second post of road mender.³⁹ Under the law, Lagrange, the rural policeman, was only entitled to compensation if he was not offered equivalent employment. He refused to accept the job of road mender and claimed compensation, but the Conseil d'Etat rejected this because there was no manifest lack of equivalence between the two roles. On the other hand, in the area of the reorganisation of rural landholdings, the Conseil d'Etat in *Achart* was willing to declare there had been a manifest error in offering the claimant one plot of land in replacement for the agricultural land taken from her.⁴⁰

The distinct character of this ground of review was recognised in *Société de la Plage de Pamplonne*.⁴¹ The prefect had given planning permission to the claimant for the building of two hotels close to a natural beach. The local residents challenged the decision, and the Minister withdrew the planning permission. The law entitled him to do this if the decision of the prefect was illegal. The Conseil d'Etat ruled the prefect was entitled to award planning permission on the merits of an application, but 'the decision which he makes must not be based on materially inaccurate facts, on an error of law, on a manifest error of evaluation or be vitiated by a misuse of power'. Here the prefect had failed to take appropriate account of the character of the neighbouring properties which would be affected by the building of the hotels. Accordingly, the Minister was right to quash the prefect's decision.

The delicate balancing act of the Conseil d'Etat represented by this ground of review is seen in the 'theory of the balance sheet' (*le bilan*) developed in the leading case *Ville Nouvelle Est*.⁴² The case concerned a new development for the University of Lille on the outskirts of the city. As experience had shown that segregating students from the rest of the population had serious disadvantages, the proposed development included a new town alongside the university campus. A local defence association was formed of residents and property owners, and they contested the decision to declare this a 'public interest development' and to expropriate the land needed for the project. The relaxation of the procedure for expropriation in the late 1950s had been controversial but had been approved by the Conseil d'Etat in legal advice in 1957.⁴³ That

³⁹ CE Sect 15 February 1961, *Lagrange*, no. 42260, Leb. 121. On a similar issue with a similar approach see CE 13 November 1953, *Denizet*, no. 8304, Leb. 489.

⁴⁰ CE 13 July 1961, *Demoiselle Achart*, no. 50609, Leb. 476.

⁴¹ CE Ass. 29 March 1968, *Société du Lotissement de la Plage de Pamplonne*, no. 59004, Leb. 211; AJDA 1968, 341.

⁴² CE Ass. 28 May 1971, no. 78825, Leb. 409 concl. Braibant, RDP 1972, 454 note Waline.

⁴³ See generally T. Perroud, J. Caillosse, J. Chevallier and D. Loschak, *Les grandes arrêts politiques de la jurisprudence administrative* (Paris: LGDJ, 2019), pp. 367–9.

relaxation had left the decision to the government and not to Parliament. But the extent of the judicial control over such decisions remained to be clarified until *Ville Nouvelle Est*. Whereas the judges had been reluctant to intervene, the decision shows that the availability of judicial review was a necessary counterbalance to greater executive power in this area. Guided by the *commissaire du gouvernement* Braibant, the Conseil ruled:

An operation cannot be legally declared as of public utility unless the interference with private property, the financial cost and, where it occurs, the attendant inconvenience to the public is not excessive having regard to the benefits of the operation.

This theory of the balance sheet (*le bilan coût-avantages*) provided a framework for assessing whether the concept of public utility had been properly applied. At the same time, Braibant made clear this was not an attempt by judges to rule on the merits of a project:

There is no question that you should exercise discretions that belong to the administration; questions such as whether the new airport for Paris should be built to the north or the south of the capital, or whether the eastern motorway should pass close to Metz or close to Nancy remain matters of *opportunité*. It is only above and beyond a certain point, that is, where the cost, whether in social or financial terms, appears abnormally high, that you ought to intervene. What matters is that you should be able to review decisions which are arbitrary, unreasonable or ill-considered, and that you should compel local authorities to put before the public in the first place (and later, if need be, before the court) solid and convincing reasons for their proposals.⁴⁴

The balance sheet was to be drawn up by the administration and the role of the court was merely to see that the costs to private individuals were not excessive in relation to the public interest. The claimants here had not shown that the decision to build the new town was excessive. The decision marked an important change in approach to expropriation which deferred less to the administration than earlier decisions had, but the actual result in the case favoured the administration.

It is important to stress that *erreur manifeste* is not seen as an intrusion into merits or into the *qualification juridique des faits*.⁴⁵ So the courts will not engage in the comparison of the action proposed by the administration with other alternatives which the claimant alleges have less cost associated with them. This point was made by *commissaire du gouvernement* Braibant in the

⁴⁴ Translation in L. N. Brown and J. Bell, *French Administrative Law*, 5th ed. (Oxford: Oxford University Press, 1998), p. 264.

⁴⁵ M. Guyomar and B. Seillier, *Contentieux administratif*, 5th ed. (Paris: Dalloz, 2019), §123.

quotation just given. In *Adam, commissaire du gouvernement* Gentot clearly regretted the choice of route for a motorway chosen by the administration, but he was clear that it was not the role of the court to interfere unless the choice was manifestly unfounded in relation to the evidence.⁴⁶

In the area of expropriation, few decisions have been quashed for failing the balancing test. The courts have been willing to examine whether the declaration of an expropriation to be of public utility is justified. A clear example of an unjustified expropriation was *Grassin*.⁴⁷ Planning permission was given for an aerodrome for a local flying club. It failed to find land it could buy, and the council moved to expropriate land. Despite the views of local industry and property owners, the prefect declared the project to be of public utility as a category D airport. The Conseil d'Etat quashed this decision on the ground that little potential use had been shown other than the use by the flying club. The cost of 700,000 F was disproportionate for a commune of only a thousand inhabitants. The Conseil d'Etat was also willing to consider annulling an expropriation where its necessity was not shown since the public authority already possessed property of its own with which to deliver the project in an equivalent way.⁴⁸ The court thus proceeds in two stages: first to examine the necessity of the expropriation in terms of public utility, and then to examine the balance between the different interests to ensure the costs are not excessive relative to the gain from the proposed project in the public interest.⁴⁹

Subsequent decisions have amended the list of factors included in the balance of interests to include other public interests, as well as social disadvantages other than those to the people expropriated, including effects on the environment assessed through the principle of precaution.⁵⁰

The formulation of the balance of interests in more recent decisions confirms the analysis of leading scholars that 'the control over the balance [of interests] amounts to a control over manifest error'.⁵¹ The point was also

⁴⁶ CE Ass. 22 February 1974, *Adam*, nos. 91848, 93520, Leb. 145, RDP 1975, 486 concl. Gentot; see also CE Ass. 28 March 1997, *Fédération des comités de défense contre le tracé de l'autoroute A 28*, no. 165318, Leb. 123, RDP 1997, 1433 note Waline.

⁴⁷ CE Sect. 26 October 1973, *Grassin*, no. 83261, AJDA 1974, 34.

⁴⁸ See CE 20 November 1974, *Epoux Thony and Epoux Hartman-Six*, nos. 91558, 91559; CE 19 October 2012, *Commune de Levallois-Perret c Boyer*, no. 343070, AJDA 2012, 1982; CE 11 May 2016, *Commune de Levallois-Perret*, no. 375161, AJDA 2016, 2015 note Hostiou.

⁴⁹ See CE 19 October 2012, note 48, point 3.

⁵⁰ See CE Ass. 12 April 2013, *Association coordination interrégionale Stop THT*, no. 342409, RFDA 2013, 610 concl. Lallet, para. 43.

⁵¹ P. Wachsmann, 'Un bilan du bilan en matière de l'expropriation. La jurisprudence *Ville Nouvelle Est* trente ans après', in *Gouverner, administrer, juger. Liber amicorum J. Waline* (Paris: Dalloz, 2002) p. 744 at p. 745.

made by *rapporteur public* Lallet in 2013 that ‘As far as the control over the balance [of interests] is concerned, when there is a declaration of public utility, an examination of your case law shows that only a marked imbalance, if not to say a manifest one, is capable of leading to a nullity.’ As long as the relevant interests have been considered, then the court will only interfere with an obvious misjudgment, and such cases are rare. Although this might appear to be an interference with the merits of decisions, it is actually very cautious.⁵²

There are a few examples of a court quashing decisions due to the balance being manifestly wrong. For example, the case of *Ste Marie de l’Assomption* involved the building of a slipway which would render an important mental hospital unusable as well as depriving it of all its green space.⁵³ Only once has the Conseil d’Etat quashed a governmental motorway project where the cost and the number of properties expropriated exceeded the public interest. Here the Swiss had cancelled building a motorway on the other side of the border.⁵⁴ On the whole, however, the main influence has been on the decision-making process, which is more careful to avoid successful challenge.⁵⁵ It encourages a management style of decision-making which is perhaps less in tune with contemporary concerns over matters such as the environment, where a more holistic approach is needed to what is ‘excessive’. This concept is close to proportionality, to which we now turn.

7.1.5.4 Proportionality

In 1974, Guy Braibant wrote that French judges were using the concept of proportionality without knowing it.⁵⁶ He attributed its origins to the administrative tribunal of the International Labour Organization.⁵⁷ He suggested the idea lay behind the review of public order measures which affected an

⁵² P. Janin, ‘Principe de précaution et contrôle de l’utilité publique’, RFDA 2017, 1068. J.-M. Pontier, ‘La balance des intérêts’ AJDA 2021, 1309.

⁵³ CE Ass. 20 October 1972, no. 78829, RDP 1973, 843 concl. Morisot.

⁵⁴ CE Ass. 28 March 1997, *Association contre le projet autoroute transchablaisienne*, no. 170856, AJDA 1997, 645. Also CE 28 June 2021, *Département des Alpes Maritimes*, no 434150, AJDA 2021, 1356.

⁵⁵ See Perroud et al., *Les Grands arrêts politiques*, pp. 390–4. Also Delvolvé et al., *Grands Arrêts*, p. 556, para. 14, which notes how often the administrative sections of the Conseil d’Etat refer to this principle.

⁵⁶ G. Braibant, ‘Le principe de proportionnalité’, in *Mélanges offertes à Marcel Waline : Le juge et le droit public*, 2 vols. (Paris: LGDJ, 1974), vol. 2, p. 297 at p. 302. Essentially, this line of argument is carried forward by S. Roussel in her more recent review of the topic in which the explicit character of the concept is made clear: S. Roussel, ‘Le contrôle de proportionnalité dans jurisprudence administrative’, AJDA 2021, 780.

⁵⁷ See the conclusions of R. Latournerie, CE 5 July 1929, *Ministre de travail*, RDP 1931, 319.

individual's civil liberties. In *Benjamin* (discussed in Section 7.1.5.5), the Conseil d'Etat quashed a mayor's ban on a public lecture on the ground that the facts showed that 'the likelihood of disorder did not show the degree of seriousness such that [the mayor] could not maintain order without banning the lecture'.⁵⁸ Indeed, others see this idea shown in the much earlier case of *Abbé Olivier*.⁵⁹ Here the mayor of Sens banned clergy wearing vestments to accompany a funeral cortège along a public road on the ground that this would cause problems of public order at a time when feelings about the separation of church and state were high in the town. But the Conseil d'Etat held that customs and local traditions could only be interfered with where it was 'strictly necessary for the maintenance of order', which was not evidenced in this case.

Similarly, the idea that disciplinary penalties needed to be proportionate was found in civil service matters – for example, whether a finding that a nurse 'lacked tenderness towards patients' justified her dismissal, especially when the idea of manifest error of evaluation was extended to this area.⁶⁰

Although there are elements of proportionality thinking contained in *erreur manifeste* cases, the full adoption of proportionality has only come in the past ten years or so, under the influence of both European courts and also of the Conseil constitutionnel. The leading case was *Association pour la promotion de l'image*.⁶¹ The case involved the French implementation of an EU policy on adopting biometric passports. The French decree authorised the automatic collection and storage of digital photographs and the imprints of eight fingers. The justification for this storage of personal data was that it enabled replacement of passports and also the combatting of fraud. The Conseil d'Etat set out the principle of proportionality:

The interference with the right of any person to respect for his private life which is constituted by the collection, storage and processing by a public authority of nominate personal information can only be justified legally if it fulfils legitimate purposes and that the choice, collection and processing of the data are carried out in a manner appropriate and proportionate in relation to these objectives.

In this case sufficient safeguards were in place to protect the data from misuse, but not for the number of fingerprints, which was deemed excessive. The case

⁵⁸ CE 19 May 1933, nos. 17413, 17520, S. 1933.3.1, note 83.

⁵⁹ CE 19 February 1909, no. 27355, D. 1909.3.34 concl. Chardenet.

⁶⁰ Conclusions of Kahn, CE 22 November 1967, *AGAP de Paris c Chevreau*, no. 68660, *Droit ouvrier* 1968, 113. See earlier *Latourmerie* in note 57.

⁶¹ CE Ass 26 October 2011, no. 317827, *Leb.* 506, *AJDA* 2012, 35.

shows clearly the influence of the case law of the European courts for which the concept of proportionality has been used regularly for many years.⁶² The Conseil constitutionnel has adopted the triple test of necessity, appropriateness and proportionality since 2008.⁶³

This approach was followed in *Canal Plus*, which involved injunctions by the Competition Authority to deal with the dominant position of Canal Plus.⁶⁴ The Conseil d'Etat rejected the complaints of the company by examining in detail the proportionality of the injunctions relative to the purpose of opening up the market in matters such as the distribution of films.

The level of intensity involved in contemporary proportionality reasoning can be seen from decisions in relation to Covid-19. The *Church Gatherings* case, discussed in Chapter 4, Section 3, involved a decree of 28 April 2020 on relaxing the confinement restrictions in France.⁶⁵ The Prime Minister decided not to relax the rules, which permitted individual prayer in places of worship but did not permit gatherings, except for funerals, until 2 June. The necessity to restrict the freedom of civil liberties because of the health emergency was accepted given its gravity. But the claimants contested that an outright ban was needed. The Minister of the Interior drew attention to an outbreak of Covid-19 which had followed a large religious gathering in Mulhouse in February 2020. But the Conseil d'Etat challenged the relevance of this on the ground that social distancing measures were not being applied at that time. Furthermore, it pointed to the measures taken in other parts of the contested decree dealing with other activities. Public transport was limited to a gathering of ten people on the street and shops and education establishments could receive the public respecting social distancing measures defined as four square metres of space per person. The evidence did not show that places of worship presented a greater risk than these places and that safety measures could not be developed for them to received groups of people. As a result, the total ban on gatherings in the decree represented a disproportionate interference with the freedom of religion, and the Prime Minister was ordered to draw up new rules within a week of the Conseil d'Etat's decision. The decision shows how far the evidence of necessity and the possibility of a lesser

⁶² See ECHR 4 December 2008, App. Nos. 30562/04 and 30566/04, *S and Marper v UK* [2008] ECHR 1581 on the use and storage of digital fingerprints. Also see CJEU, Cases C-465/00, C-138/01 and C-139/01, 20 May 2003, *Osterreichischer Rundfunk*, ECLI:EU:C:2003:294 on storage of data.

⁶³ CC decision no. 2008-562 DC of 21 February 2008, *Detention for Security*, Rec. 89, para. 13.

⁶⁴ CE Ass. 21 December 2012, *Société Groupe Canal Plus et Société Vivendi*, no. 362347, Leb. 430, esp. paras. 108-13.

⁶⁵ CE ord. 18 May 2020, *W and Others*, no. 440366, AJDA 2020, 1733 note Rambaud.

interference with fundamental rights is now taken. Weaknesses in the justification offered by the government are probed. The Conseil constitutionnel took a similar approach to subsequent legislation on deconfinement.⁶⁶

As mentioned at the beginning of this section, it is clear that the reasoning of administrative courts in relation to human rights has long involved proportionality between the administrative measure and the consequences for the person affected (see the cases of *Abbé Olivier* and *Benjamin*). A similar approach was adopted when considering the application of the European Convention after it was ratified and took effect in domestic law in 1974, even if decisions were formally based on the ground of manifest error in evaluation.⁶⁷ The Conseil constitutionnel had long examined the necessity and proportionality between the criminal penalties imposed and the offence committed in the light of art. 8 of the Declaration of the Rights of Man of 1789, starting with the *Security and Liberty* decision of 1981, but formally referred to the concept of manifest error in evaluation.⁶⁸ But in more recent years it has moved explicitly to using proportionality.⁶⁹ The administrative courts make decisions in both of these areas, and it is natural that the use of proportionality by these courts would influence the reasoning of the administrative courts as well. The area of competition law involves both national and European Union courts, and, again, it is natural that there will be an alignment of reasoning.

French commentators, like Roussel,⁷⁰ would not see anything revolutionary in the assessment of the appropriateness of the measures for the objective to be achieved, of the necessity of a decision and the proportionality between the benefits and the burdens imposed. In her view, each of these has been found in decisions of the Conseil d'Etat for many years, especially in the control of police powers, of the *bilan* and of disciplinary sanctions. The 'principle of proportionality' brings these elements together in a structured way. It would be fair to say that all the French supreme courts have now adopted the principle as of general application and that they use it to

⁶⁶ See CC decision no. 2020-803 DC of 9 July 2020, *Deconfinement Law*, ECLI : FR : CC : 2020 : 2020.803.DC, paras. 20–6.

⁶⁷ See CE Ass. 19 April 1991, *Babas and Belgacem*, nos. 117680 and 107470, Leb. 152 and 162 on the balance between the expulsion of a migrant and the right to family life under art. 8 of the Convention. See generally E. Borge, *Domestic Application of the ECHR. Courts As Faithful Trustees* (Oxford: Oxford University Press, 2015), pp. 157–60.

⁶⁸ CC decision no. 80-127 DC of 19 and 20 January 1981, *Security and Liberty*, Rec. 15, paras. 7–12.

⁶⁹ CC Decision no. 2008-562 DC of 21 February 2008, *Indefinite Sentences*, Rec. 89, para. 22. See further Borge, *Domestic Application of the ECHR*, pp. 160–2.

⁷⁰ S. Roussel, 'Le contrôle de proportionnalité dans jurisprudence administrative', AJDA 2021, 780.

structure decisions.⁷¹ All the same, the intensity of review is not the same in every branch of law, even within the concept of proportionality, since the courts sometimes refer to '*disproportion manifeste*'.⁷² Proportionality is best used as a framework for the balancing of incommensurable interests – for example, the interests of the public and the consequences for private individuals where a significant element of subjective judgment must come into the decision. It enables questions to be examined in sequence: whether a measure is appropriate to achieve the legitimate objective, whether it is necessary to take this measure and whether the benefits outweigh the harms. The question of necessity includes an element of comparison between options that was not allowed in the ground of the manifest error in evaluation, so that already increases the intensity of review. On the whole, this ground will be used in relation to the interference with vested rights and interests and, increasingly, in relation to the environment.

7.1.5.5 The Sliding Scale for Review

When dealing with the review of the administration's exercise of discretion in the legal classification of facts, French authors distinguish between intensities of scrutiny. The significance of some decisions is such that they should be examined more carefully than others. The intensity of scrutiny depends on the nature of the discretion given and the subject matter about which decisions are taken.

Courts will exercise self-restraint in relation to some subjects. An obvious example is a very technical subject on which the administration will have undoubted expertise. Here the court will intervene only where there is a very obvious error in evaluation. For example, the courts will normally be very reluctant to intervene with assessments of whether a product is toxic. But the Conseil d'Etat did quash a decision where a total ban on a product was imposed, but the toxic effects were rare and occurred when the product was used with other products.⁷³ No study was included in the file to justify a total

⁷¹ See the dossier 'Actualité du contrôle de proportionnalité', AJDA 2021, no. 14, especially Roussel, note 70, and V. Goesel-Bihan, 'Le contrôle de proportionnalité au Conseil constitutionnel', AJDA 2021, 786.

⁷² See CE 26 July 1991, *Fédération nationale des syndicats de producteurs autonomes d'électricité*, no. 91956, for the first use of the expression by the Conseil d'Etat.

⁷³ CE 15 May 2009, *Société France conditionnement*, no. 312449, AJDA 2009, 1668 note Markus; cf. CE Ass. 27 April 1951, *Toni*, Leb. 236 where the court refused to intervene with the classification of a product as toxic.

ban. Other powers existed to require labelling or other measures to deal with the identified harms.

A second area for restrained scrutiny is public service promotion and discipline. These involve assessment of performance and are best undertaken by those within the service. For example, the decision by a university committee that an applicant for a post in Italian studies was more suited to a post in Corsican studies could only be quashed if there was a manifest error in evaluation. Since the committee had carefully examined his research record, he could not successfully challenge its decision.⁷⁴ Similarly, a civil judge was unsuccessful in challenging the negative assessment made by the Conseil supérieur de la magistrature of his qualifications for being appointed a vice president at the *cour d'appel* of Paris, since no manifest error had been shown in that assessment.⁷⁵ But in *Syndicat Parisien des Administrations Centrales*, the Conseil d'Etat quashed a decision by a minister to appoint a person from outside the civil service to the corps of the Inspection général des finances.⁷⁶ The advisory committee on such external appointments had examined his experience and interviewed him, but it had concluded that he was not appropriately qualified for the role. Nonetheless, the Minister had appointed him. Given the evidence on file, especially from the advisory committee, which the Minister had not contradicted, the Conseil d'Etat concluded the Minister had committed a manifest error in evaluation in using his discretion to appoint the senior executive of an airline company to a role in financial audit. On the other hand, dismissal from a position will be more carefully scrutinised to see that the facts justifying the dismissal actually exist. In *SAFER d'Auvergne c Bernette*, the head of a farming support service had been accused by his superiors of running his service at a deficit and was sacked.⁷⁷ Because he was a union representative, his dismissal required the approval of the board of the service and the works inspector, neither of which gave it. On representations by his superiors, the Minister approved the dismissal. But the administrative courts quashed the Minister's decision on the ground that the faults alleged against him were not sufficiently serious to justify dismissal. This stricter scrutiny applies where vested interests or rights are affected.

A third area traditionally for restrained scrutiny has been public order measures because these are matters of policy. But in more recent years, there has been an increased emphasis on human rights. As a result, public

⁷⁴ CE 9 February 2011, *Piazza*, no. 317314, Leb. 956.

⁷⁵ CE Ass. 8 June 2016, *Prats*, no. 382736, Leb. 236 concl. von Coester.

⁷⁶ CE 23 December 2011, *Syndicat Parisien des Administrations centrales, économiques et financières*, no. 346629, AJDA 2012, 607 note Dord.

⁷⁷ See CE Ass. 5 May 1976, *SAFER d'Auvergne c Bernette*, nos. 98647, 98820, D. 1976, 563.

order decisions which affect human rights will be subject to full scrutiny, as is shown in the *Napol* case.⁷⁸ The same is true for public order measures to expel a person from the country or to refuse a residence permit.⁷⁹

Finally, where the administration is given a broad and vague discretion, then the court will typically leave a wide area for discretion (*un large pouvoir discrétionnaire*). That is what we have already seen in Section 1.5.3 in relation to the application of the concept of ‘public utility’ in expropriation. A clear example where rights are not involved is the decisions of the Ministry of Education over the school curriculum. The Conseil d’Etat rejected a challenge to the refusal of the Minister to change the history curriculum in relation to the topic of the Armenian genocide of 1915. The complainants suggested the framing of the topic in the current curriculum was contrary to the duty of neutrality in teaching, but this was not considered to demonstrate a manifest error in evaluation.⁸⁰

In rare cases, there will be *minimal* scrutiny which involves restricting scrutiny to an error of law, material error of fact or *détournement de pouvoir*. This is limited to decisions which are both sensitive and involve broad discretion such as the award of honours⁸¹ and the decisions of juries in competitive examinations – which court would dare to review thousands of student exam scripts? – or the awarding of degrees.⁸²

A *normal* intensity of scrutiny (*contrôle normal*) involves an examination of the materiality of facts and the absence of error of law or *détournement de pouvoir*. There is some latitude in the assessment of facts, but they must be capable of justifying the decision reached. The approach adopted by the Conseil d’Etat in *Gomel* illustrates this very clearly.⁸³ It required that the decision of the administration be based on correct facts and interpretation of

⁷⁸ CE Ass. 6 July 2016, *Société Napol et autres*, no. 398234, Leb. 320 concl. Bourgeois-Machureau; AJDA 2016, 1635, Chapter 8, Section 4.4.

⁷⁹ CE 12 February 2014, *Ministre de l’Intérieur c Barain*, no. 365644, Leb. 30 (insufficient evidence of the circumstances surrounding the convictions for sexual assault to amount to a serious threat to public order); CE Sect. 17 October 2003, *Bouhsane*, no. 249183, Leb. 413 (the court found the claimant’s convictions for drug trafficking and use of false identity justified considering him a serious threat to public order and expelling him).

⁸⁰ CE 4 July 2018, *Association pour la neutralité de l’enseignement de l’histoire turque dans les programmes scolaires*, no. 392400, AJDA 2018, 1894.

⁸¹ CE 10 December 1986, *Lorédon*, no. 78376, Leb. 516 (claim to be granted the Légion d’honneur).

⁸² CE 20 March 1987, *Gambus*, no. 70993, Leb. 100 (refusing to review the decisions of an exam board for legal studies); CE 26 September 2018, *Joublot*, no. 405473, Leb. 709 (rejecting a challenge to questions in a university oral exam in history).

⁸³ Note 31.

the law such that the application of the legal classification of a ‘view of architectural value’ was justified.

A *maximum* intensity of scrutiny gives little latitude for the assessment of facts by the administration. It examines how far the measures adopted by the administration are appropriate. This is used particularly where public order measures interfere with fundamental rights. The leading case is *Benjamin*, a case dealing with a version of no-platforming of speakers.⁸⁴ A notorious right-wing speaker was banned from addressing a public meeting organised by a literary society on the ground that left-wing groups had threatened public disorder if he spoke. The Conseil d’Etat quashed the mayor’s decision to ban the meeting on the ground that there was no evidence that the threatened public disorder would be sufficiently serious to justify such a ban nor was it shown that a ban was the only way of dealing with the problem. The idea of maximum scrutiny is contested. Many scholars consider it identical to normal intensity.⁸⁵ What is certain is that sometimes a decision maker is said to have no room for discretion (what is called *compétence liée*). For example, if the President of the Republic wants to dismiss a member of an independent administrative agency, this can only be done for the reasons set by the law and strictly interpreted.⁸⁶

There has been a significant movement of areas that, in the past, were subject to minimum to normal control. A good example is civil service discipline. This was traditionally seen as an internal measure over which very limited review was exercised. For example, in 1978 in *Lebon*, a teacher’s claim against a disciplinary penalty imposed for indecent acts with children was upheld simply on the ground that the facts alleged on file were ‘material’.⁸⁷ But in 2007 in *Arfi*, a motor vehicle expert assessor was struck off the list of approved experts by a public disciplinary panel on the ground that he had certified repairs had been made to three vehicles when this was not the case.⁸⁸ He had been an expert for sixteen years and none of the vehicles was dangerous when it went back on the road. Given that the panel had available to it a range of sanctions and had chosen the most draconian, the Conseil d’Etat struck down the decision for manifest error in evaluation. Finally, in 2013, the Conseil d’Etat applied normal control to disciplinary matters. In *Dahan*, the Conseil d’Etat declared that in the discipline of public officials,⁸⁹

⁸⁴ CE 19 May 1933, nos. 17413, 17520, S. 1933.3.1.

⁸⁵ See Guyomar and Seillier, *Contentieux administratif*, § 249.

⁸⁶ CE 19 October 2020, *M. B.*, no. 438620.

⁸⁷ CE Sect. 9 June 1978, *Lebon*, no. 05911, Leb. 245.

⁸⁸ CE Sect. 22 June 2007, no. 272650, *Arfi*, Leb. 263.

⁸⁹ CE Ass. 13 November 2013, no. 347704, AJDA 2432; RFDA 2013, 1175 concl. Keller.

it is the role of the court in judicial review . . . to examine whether the facts alleged against a public official that are the subject of a disciplinary penalty constitute faults of a kind that justifies a penalty and whether the penalty imposed is proportionate to the seriousness of the faults.

In this case the findings of sexual harassment against an ambassador justified his forced retirement from office. This extent of control has subsequently been applied to prison discipline, where it was held insufficient for a lower court to limit its review to manifest error and that it should have considered whether the penalty imposed was proportionate.⁹⁰

7.2 VALUES ENFORCED THROUGH JUDICIAL REVIEW

Judicial review is concerned with enforcing legality. In most cases, this will involve ensuring that the powers and procedures laid down in specific legislation are respected. But there are some more generally applicable values which serve to interpret legislation and to act as benchmarks for the way the administration should act. This section will deal with two groups of provisions. First, it will deal with values connected with the protection of fundamental rights. Second, it will deal with principles of good administration. The need for general principles arises from the very nature of administrative law. Laferrière wrote that decisions of the Conseil d'Etat were inspired by 'traditional principles, written or unwritten, which are in some sense inherent in our administrative public law'.⁹¹ These days, many such principles are codified, but they remain a significant part of judicial review.

7.3 FUNDAMENTAL RIGHTS

Chapter 2, Sections 6.1, 6.4 and 6.5 considered the place of fundamental rights within public law. These days, there are rights recognised as of constitutional value identified predominantly by the Conseil constitutionnel. Indeed, the *question préalable de constitutionnalité* will ensure that the Conseil constitutionnel plays a dominant role in determining the standards to be applied by the administrative courts. Not all fundamental rights are constitutional rights. In particular, the European Convention on Human Rights contains some different rights to those in the French constitution. The general principles of (administrative) law provide additional protections to individuals.

⁹⁰ CE 1 June 2015, *Boroméé*, no. 380449, Leb. 105 concl. Bretonneau.

⁹¹ Preface to the *Traité de la juridiction administrative*, 1st ed. (Paris: Berger-Levrault, 1887), p. xiii.

7.3.1 Constitutional Rights

Since the Conseil constitutionnel undertook the review of laws enacted by Parliament on the ground of their compatibility with fundamental rights, the role of the administrative courts in the application of general principles of law has been less significant. That is even more the case since the *question préjudicielle de constitutionnalité* (QPC) was introduced, allowing the compatibility of enacted laws to be challenged in the course of litigation. So, on the whole, it is not the place of the administrative courts these days to define new fundamental liberties. That said, the administration makes many decisions which affect fundamental rights, and this requires the administrative courts to trace the detailed boundaries between the freedom of the administration to implement policies in the public interest and the fundamental rights of those whom their action affects. The contemporary work of the administrative courts is thus closely linked to the decisions of the Conseil constitutionnel.

The important background to any study of the work of the administrative courts in judicial review is the consultative role of the administrative sections of the Conseil d'Etat in advising on legislation (both draft laws and draft decrees or *ordonnances*), which was discussed in Chapter 3, Section 3.3.2. In this consultative role, the Conseil d'Etat's advice has to draw attention to any possible incompatibility of legislation with the Constitution alongside other superior norms. It will thus read attentively the case law of the Conseil constitutionnel. When it comes to judging cases on the application of such laws and decrees, the judicial section of the Conseil d'Etat will have available the advice given to the government by its administrative sections, as well as any rulings on a law by the Conseil constitutionnel.

In broad terms, when faced with a challenge to an administrative decision, the administrative courts will be looking not so much at the existence of a right as at its scope and at how far the requirements of the public interest justify interference with those rights. Furthermore, in relation to decrees, the Conseil d'Etat has the responsibility to ensure that the government has competence to make rules which interfere with individual rights. In principle, under art. 34 of the Constitution, legislation affecting the fundamental freedoms of the individual must be made by Parliament and not by the executive.

In Chapter 2, Section 6.1, it was explained that there is no single consolidated statement of fundamental rights. Instead, these are gleaned from the four written documents: the Constitution of 1958, the Declaration of the Rights of Man and of the Citizen of 1789, the Preamble to the 1946 Constitution, and the Charter of the Environment of 2005. In addition, fundamental principles are recognised by the laws of the Republic and other

‘principles of constitutional value’. It is not possible here to summarise all the different rights recognised in the past fifty years by the Conseil constitutionnel. Other works attempt this, and the reader interested in a particular fundamental right is advised to look on the Conseil constitutionnel’s own website with translations of major cases into English, German and Spanish.⁹² This section will merely illustrate some of the ways in which the administrative courts serve to define fundamental rights.

The imposition of criminal penalties was an early topic in the Fifth Republic in which the authority of the Conseil constitutionnel made itself clear. Article 8 of the Declaration of the Rights of Man and of the Citizen provides ‘no one may be punished except according to a *loi* passed and promulgated prior to the offence’. The Conseil d’Etat took the view that this applied only to serious criminal offences (*crimes* and *délits*) but did not apply to minor criminal offences (*contraventions*) and regulatory offences. But the Conseil constitutionnel decided subsequently that a *loi* was required for any offence that led to imprisonment.⁹³ In a contrasting example, the Conseil d’Etat has a well-established principle that reductions in the sentences for any crime or regulatory offence would be applied immediately, even to offences committed before the rule establishing the lower sentence came into force.⁹⁴ The Conseil constitutionnel later considered that this was actually a constitutional principle inherent in art. 8 of the 1789 Declaration.⁹⁵ The influences are thus reciprocal in terms of which court takes a lead, even if the Conseil constitutionnel has the final say on constitutional matters.

The freedom of association was recognised as a fundamental principle recognised by the laws of the Republic by the Conseil d’Etat in 1956. In *Annamites de Paris*, the Conseil d’Etat annulled a decree of the Minister of the Interior declaring unlawful an association formed by Vietnamese citizens because it breached this principle.⁹⁶ The principle was then recognised famously by the Conseil constitutionnel in its path-breaking decision in 1971, the *Associations Law*.⁹⁷ It was in this decision that the Conseil

⁹² See S. Boyron, *The Constitution of France* (Oxford: Oxford University Press, 2012) and, earlier, J. Bell, *French Constitutional Law* (Oxford: Oxford University Press, 1992).

⁹³ Compare CE 12 February 1960, *Société Eky*, no. 46922, Leb. 101 with CC decision no. 73–80 L of 28 November 1973, *Criminal Penalties (Rural Code)*, Rec. 45; D. 1974, 269; Bell, *French Constitutional Law*, Material 6 and Decision 10.

⁹⁴ See CE 23 July 1976, *Secrétaire d’Etat aux Postes et Télécommunications*, no. 99520.

⁹⁵ CC decision no. 80–127 DC of 19 and 20 January 1981, *Security and Liberty*, Rec. 15, para. 71.

⁹⁶ CE Ass. 11 July 1956, *Amicale des Annamites de Paris*, no. 26638, Leb. 317.

⁹⁷ CC decision no. 71–44 DC of 16 July 1971, *Associations Law*, Rec. 29; Bell, *French Constitutional Law*, Decision 1.

constitutionnel declared the principles recognised by the laws of the Republic enforceable as law in a kind of *Marbury v Madison* moment.

Freedom of religion (*liberté du culte*) remains very contested in France. On the whole, French public law adopts a privatised conception of freedom of religion – it is a permissible activity undertaken in private. But when people wish to express themselves in public, then concerns of public order and secularism constrain it without suppressing it. The principle of secularism tends to trump it, especially in the public service. So public employees are banned from wearing clothing or insignia that demonstrate their adherence to a religious belief.⁹⁸ Indeed, volunteers, such as parents accompanying children on a school outing, must also respect these requirements, but can only be sanctioned for breaching public order, which is rarely the case.⁹⁹ The Conseil d'Etat also did not find a 2004 law banning the wearing of religious signs in state schools contrary to the European Convention,¹⁰⁰ which was an outcome similar to the European Court of Human Rights decision in *Leyla Şahin* a few months earlier.¹⁰¹ That law was subsequently upheld directly by the European Court of Human Rights.¹⁰²

The administrative courts have the role not merely in enforcing the freedom of religion, but also in defining its scope. A good illustration is *Association Civitas* in 2020.¹⁰³ Regulations made to deal with the Covid-19 crisis restricted church services to thirty participants irrespective of the size of the building. This was challenged by a Catholic association and by the French Catholic bishops. The Conseil d'Etat emphasised that freedom of religion was not only an individual right but included as an essential component the right to participate collectively in 'ceremonies', especially in places of worship. But the individual and collective aspects of the right had to be reconciled with the public interest, in this case the constitutionally recognised value of the protection of public health. But the government was found to have acted disproportionately to the risk in imposing a blanket ban, rather than permitting a limit to

⁹⁸ CE avis 3 May 2000, *Mlle Martaux*, no. 217017, RFDA 2001, 146 concl. Schwartz.

⁹⁹ TA Nice, 9 June 2015, *D*, no. 1305386, AJDA 2015, 1933.

¹⁰⁰ CE 8 October 2004, *Union française pour la cohésion nationale*, no. 269077, RFDA 2004, 977 concl. Keller.

¹⁰¹ ECHR (Grand Chamber), App. no. 44774/98, *Leyla Şahin v Turkey* [2004] ECHR 299.

¹⁰² ECHR (Grand Chamber), App. no. 43835/11, *SAS v France* [2014] ECHR 695. Further: J. Bell, 'Secularism French Style' [2017] *European Public Law* 237, and Ilias Trispiotis, 'Two Interpretations of "Living Together"' [2016] C.L.J. 580.

¹⁰³ CE ord. 29 November 2020, *Association Civitas, Conférence des Evêques de France*, no. 446930, AJDA 2021, 632. The commentary in that report suggests that the decree reflected a misstatement by the Minister in a press conference and that the limit should have been up to 30 per cent of the capacity of the building, not thirty people.

be set in relation to the size of the building, as was set out in the decree in relation to other premises open to the public, such as shops. In this respect, the decision in this case followed the approach on proportionality seen in the *Church Gatherings* case earlier in the same year.¹⁰⁴

The definition of rights may not be clearly based on a constitutional text and therefore the Conseil d'Etat may appeal to 'general principles of law', as was noted in Chapter 2, Section 6.5. The leading example is *GISTI* (1978).¹⁰⁵ A decree of 1976 gave the right for families of foreign workers to come to France and to obtain a residence permit except in limited circumstances. Eighteen months later, given rising unemployment as a result of an economic crisis, the rights under the 1976 decree were suspended for three years except for those who did not seek to work in France. The decree was challenged by an immigration non-governmental organisation, GISTI, on the ground that it breached the right to a normal family life found in the tenth paragraph of the preamble to the 1946 Constitution: 'The Nation shall ensure the individual and the family the conditions necessary for their development.' The *commissaire du gouvernement* argued that a general principle of law giving a right to a normal family life could be found in that text, especially in the light of a number of international agreements France had signed, notably the European Social Charter of the Council of Europe which France had ratified in 1973. By reading the preamble broadly, a right to a normal family life could be found not only for French citizens, but for foreign workers also. The Conseil d'Etat found that the government had failed to respect this principle by enacting a general ban on foreign workers bringing their families. It did, however, hold that the government had the role of defining the way in which this right could be exercised as long as it complied with international agreements France had signed (particularly EU law) and concerns of public policy and the social protection of foreigners, but always subject to the control of the courts. In this way, the government enjoys a margin of appreciation in determining the rights of families, as in many other rights. The case also shows clearly that constitutional rights cannot be seen in isolation from the international treaties on rights France has signed. Since both constitutional rights and treaties are binding on the Conseil d'Etat, it is not surprising it seeks to ensure interpretations of both that are consistent with each other.

The *GISTI* decision effectively shows how the Conseil d'Etat has been able to contribute to the recognition (if not the creation) of constitutional norms.

¹⁰⁴ See note 65.

¹⁰⁵ CE Ass. 8 December 1978, *Groupe d'Information et de Soutien des Travailleurs Immigrés*, no. 10097, D. 1979, 661 note Hamon.

This was shown even more sharply by *Koné* in 1996, where the Conseil d'Etat declared a new 'principle recognised by the laws of the Republic'.¹⁰⁶ In this case, courts in Mali sought the extradition of the claimant for a variety of offences involving complicity in diverting public funds and unlawful enrichment from them. The extradition treaty between France and Mali contained an exclusion for political and connected offences. The Conseil d'Etat stated this provision must be read in the light of a general principle recognised by the laws of the Republic that extradition must not be sought for a political purpose. This was a principle the Conseil d'Etat had expressed in its administrative capacity in the previous year.¹⁰⁷

7.3.2 *European Convention on Human Rights*

As noted in Chapter 1, the European Convention on Human Rights has been a major reference point on fundamental rights in the past fifty years. Since French lawyers were among the major authors of the Convention, there is a natural continuity between the Convention and French law, though the Convention has encouraged a greater focus on the rights of the citizen, rather than the need to promote the public interest represented by the administration. As an illustration, freedom of the press has been protected by administrative law for a long time. But the state is given broad scope to restrict it in the public interest. In 1973 (before France ratified the European Convention) in *Librairie François Maspéro*, the Minister of the Interior banned the *Revue Tricontinental. Edition Française* on the ground that it essentially reproduced the content of a journal published in Cuba which the Minister had already banned.¹⁰⁸ The journal was a French translation and so could come under powers to ban journals of foreign origin, even though the French edition was totally produced in France. The Conseil d'Etat moved from reviewing on ground of error of material fact to announcing it would review manifest error in evaluation. On the facts of this case, no such error was found. But, under the influence of the European Court of Human Rights, it decided to increase its level of scrutiny. In *Société Ekin* in 1997, the claimant company published a French-language version of a Basque journal under the title *Euskadi en guerre*.¹⁰⁹ The Minister of the Interior banned it using the same powers as in the *François Maspéro* case. But here, noting the provisions on the freedom of

¹⁰⁶ CE Ass. 3 July 1996, *Koné*, nos. 394399, 400328, Leb. 355.

¹⁰⁷ *Etudes et Documents du Conseil d'Etat* 1995, p. 395.

¹⁰⁸ CE Ass. 2 November 1973, *Librairie François Maspéro*, no. 82590, Leb. 611.

¹⁰⁹ CE Sect. 9 July 1997, no. 151064 AJDA 1998, 374 note Verdier. A further example is CE 10 June 2021, *Syndicat national des journalistes*, no. 444849, AJDA 2021, 1791 and 1803 where

the press in the European Convention, the Conseil d'Etat decided it would 'examine whether the banned publication is of a nature to harm [the public interest] in such a way as to justify the interference with civil liberties'. In that case, the Minister did not sufficiently demonstrate the harm caused and his decision was quashed. The structure of this later judgment shows clearly how the Convention has altered the approach to review of decisions on the freedom of press. Whereas *François Maspéro* basically upheld the decision of the administration to invade a basic liberty unless it was obviously wrong, the *Société Ekin* decision only upheld the decision of the administration if it has shown a sufficiently strong case to justify the interference with a basic liberty.

The cases on clothing reflecting religious beliefs discussed in the previous section show the relationship between French administrative law and the European Convention. The French judge at the Strasbourg court was questioned by the French Parliament before it voted on the 2004 law, and his view on the likely approach of the European Court of Human Rights was then reflected in the *Leyla Şahin* judgment a few months later, in which he took part.¹¹⁰ As Bjorge points out, that case and the subsequent SAS case in relation to France relied on the margin of appreciation doctrine which gave a wide discretion to national authorities.¹¹¹ But he also explains that this scope extends to the right to life. In the *Lambert* case,¹¹² the Conseil d'Etat was asked to rule on whether a public hospital should be allowed to end treatment for a tetraplegic in a total state of dependence. The doctors had followed the procedure laid down in French law and so had done nothing unlawful. On careful examination of the Strasbourg case law, it concluded that the Convention left the French authorities a significant margin of appreciation in such circumstances and that it was the Conseil d'Etat's role to examine the French law in detail. It carefully reviewed the legally authorised procedures and was satisfied that they provided safeguards to protect the rights to life and privacy. Having carefully examined the facts, including specially commissioned expert evidence, the Conseil d'Etat concluded there was no reason to question the decision taken by the doctors and the public hospital. The decision was not found incompatible by the European Court of Human Rights.¹¹³ The case shows the close interaction between the

public order considerations were held not to be sufficiently strong to justify restrictions on giving public information to journalists.

¹¹⁰ See note 101.

¹¹¹ Bjorge, *Domestic Application of the ECHR*, pp. 26, 30, 190.

¹¹² CE Ass. 24 June 2014, *Mme Rachel Lambert, M. François Lambert & Centre hospitalier de Reims*, nos. 375081, 375090, RFDA 2014, 657; Bjorge, *Domestic Application of the ECHR*, pp. 187–90.

¹¹³ ECHR (Grand Chamber) 5 June 2015, App. no. 46013/14, *Lambert v France* [2014] ECHR 605.

French administrative courts and the European Court in trying to apply the European Convention to specific situations.

7.3.3 *General Principles of Law*

As seen in Chapter 2, Section 6.5, the general principles of law emerged as an idea during the Third Republic and at the Liberation in 1944–6. Unlike most French regimes since the Revolution of 1789, the Third Republic had no written constitutional text. When legality was restored after the Vichy period in August 1944, it took until October 1946 for a new constitution to be adopted and no legal effect was given to the provisions on fundamental rights contained in the preamble, which also referred to the Declaration of the Rights of Man and of the Citizen of 1789. In particular, in dealing with the problems related to the Vichy regime and its aftermath, it was necessary to formulate French republican legal values more precisely. As Batailler explained,

The ‘republican constitutional tradition’ permits the consecration of the principles of political organisation, whereas the general principles of law reflect the principles of individual civil rights (such as equality, individual and public liberty).¹¹⁴

The term formally appeared first in *Aramu* in 1945 when the Conseil d’Etat talked of ‘general principles of law applicable even in the absence of a text’ in relation to the actions of the Liberation administration.¹¹⁵ In his substantial thesis on the topic, Jeanneau argued that the general principles articulated in the 1940s and 1950s could be traced in Conseil d’Etat decisions since before the First World War, but it was during the Vichy regime that they needed to become more explicit, since the Conseil d’Etat was the sole constraint on the government of that time.¹¹⁶ All the same, during the Vichy period the control exercised over government decisions was limited.¹¹⁷

The status of general principles is important in the Fifth Republic because they constrain the executive both in its decisions and in its legislation. As the

¹¹⁴ F. Batailler, *Le Conseil d’Etat juge constitutionnel* (Paris: LDGJ, 1966), pp. 151–2.

¹¹⁵ CE Ass. 26 October 1945, no. 77726, *Aramu*, S. 1946.3.1 concl. Odent (the right of a civil servant to present a defence to a *commission d’épuration*).

¹¹⁶ See B. Jeanneau, *Les principes généraux du droit dans la jurisprudence administrative* (Paris: Sirey, 1954), p. 3; G. Morange, ‘Une catégorie juridique ambiguë : les principes généraux du droit’, RDP 1977, 761 at pp. 764–5. See also the conclusions of Letourmeur in *Barel* RDP 1954, 509 at p. 526 where he argued that the Declaration of 1789 ‘serves as the basis for many of your decisions’.

¹¹⁷ Notwithstanding the valiant effort to give a positive account in T. Bouffendeau, ‘Le juge de l’excès de pouvoir jusqu’ à la libération du territoire métropolitaine’, EDCE 1947, 23.

Conseil d'Etat made clear in 1959, 'the general principles of law ... as they follow especially from the Preamble to the Constitution, are binding on every regulatory authority even in the absence of legislative provisions'.¹¹⁸ They bind the decree-making power of the administration, including when the government is empowered to legislate by *ordonnances* before they become a law. The idea of general principles as a supplement to legal texts was adopted early on by the European Court of Justice.¹¹⁹ The approach of using international treaties to establish general principles of (domestic) law was shown in the *GISTI* (1978). It was also shown in *Bereciartua-Echarri*, which recognised the non-constitutional general principle that a political refugee could not be extradited to his original country.¹²⁰ It derived the principle from the definition of a refugee in the Geneva Convention on Refugees of 1951. So the sources of general principles these days can be varied. Since the Conseil constitutionnel can only base constitutional principles on domestic constitutional documents, there is scope for the Conseil d'Etat to establish a wider range of non-constitutional principles incorporating the full range of sources of law applicable in French law.

In 1951, Rivero identified four sources of general principles of law.¹²¹ First, there were the traditional principles of the Revolution of 1789, such as equality, freedom of trade, freedom of conscience and the secular character of the state. Second, there were principles drawn by analogy with private law – basically to make up for the absence of written texts in administrative law. These included the binding nature of judicial decisions and the right to be heard in your defence. Third, there were principles derived from the nature of things, the logic of institutions, such as the need to ensure the continuity of public services. Fourth, there were the necessary ethical principles, such as the requirement that the administration serve the common good. Certainly, the last three sources and some elements of the first typically do not give rise to constitutional principles and so remain very much to be developed by the administrative courts.

Traditional principles are mainly laid down in the Declaration of the Rights of Man of 1789. In particular, the principle of equality has been a major source of general principles. These general principles are additional to specific treaty or legislative rights to equality contained, for example, in art. 21 TEU, which

¹¹⁸ CE Sect. 26 June 1959, *Syndicat général des ingénieurs-conseils*, no. 92099, RDP 1959, 1004 concl. Fournier.

¹¹⁹ See ECJ Cases 37, 38, 39 & 40/59, 15 July 1960, *Präsident Ruhrkolen-Verkaufsgesellschaft mbH* ECLI:EU:C:1960:36, para. 2.

¹²⁰ CE Ass. 1 April 1988, no. 85234, RFDA 1988, 499 note Genevois.

¹²¹ J. Rivero, 'Le juge administratif français : un juge qui gouverne', D. 1951 Chr. 21 at p. 22.

prohibits discrimination of a wide variety of kinds, such as sex, race, disability or age. Three main areas for the use of general principles can be identified within public services: equality among the providers of public services (the civil servants or procurement contractors), equality among the recipients of public services (the users), and both for the access and in the treatment given by public service. The basic idea of equality before the law is that those who are in the same situation have to be treated equally without preference or favour, but that different situations may be treated differently.¹²² To take a simple example, all road users should be treated equally. It is not legitimate to discriminate between religious processions on the highway and other processions.¹²³ By contrast, it is permissible to have different arrangements for parking on the highway for different kinds of transport.¹²⁴ This is very different from ensuring equal treatment in practice. For example, uniform restrictions on the production of a specific kind of cheese may affect differentially those who can diversify and traditional cheesemakers who could not.¹²⁵ The typical formulation is:

The principle of equality neither prevents the legislator (or the regulatory power) regulating different situations differently nor derogating from equality for reasons of public interest, provided that the difference in treatment resulting in each case is directly related to the purpose which the law authorises.

Put in this way, differences are fine provided there is an objective difference in situation related to what the law is trying to achieve.

Equality takes various forms which are presented here in terms of classic headings found in French administrative law texts.

Equal access to public office was a key principle of the Revolution (art. 6 DDHC). In 1912, this was extended by the *conclusions* of *commissaire du gouvernement* Heilbronner to include equal access to the civil service, which was no longer to be at the discretion of ministers.¹²⁶ This was formally recognised in the *Barel* case in 1954, where discrimination on grounds of political allegiance was rejected as a relevant ground for excluding candidates to ENA.¹²⁷ Judicial interpretation enabled the equality of women for access to

¹²² CE 27 July 1928, *SA des usines Renault*, no. 79735, Leb. 969.

¹²³ CE 4 December 1925, *Charton*, no. 77765, Leb. 972.

¹²⁴ CE 4 May 1945, *Syndicat des entrepreneurs des transports de la Riviera*, no. 38517, Leb. 94.

¹²⁵ CE 27 April 1987, *Comité interprofessionnel du Gruyère de Comté*, no. 49854, Leb. 146; also CE 22 February 1950, *Société des ciments français*, nos. 87957, 87958, Leb. 175.

¹²⁶ CE 10 May 1912, *Bouteyre*, no. 46027, D. 1914.3.74 concl. Heilbronner.

¹²⁷ See note 34.

central government employment well before they were given the vote in 1944.¹²⁸ In more recent times, this gives rise to a way of interpreting legal rules in the absence of a specific text so as to ensure civil servants are treated equally. For example, rules on work accidents allowed compensation for a second work invalidity happening to a civil servant to take account of a previous work injury which had caused an invalidity when she was in a different civil service position. Despite the absence of a specific provision, the rule was applied to a case where a second invalidity resulted during work in a civil service and a previous invalidity occurred on military service.¹²⁹ A similar example occurred when the rules of the SNCF pension scheme allowed parents of a severely handicapped child to retire within three years of the birth of the child and to receive an immediate pension payment. It was held that there was no justification in the public interest that justified the three-year limit and so discriminated between those who retired within three years of the birth of the child and those who retired later in the life of the child.¹³⁰

Equality in taxation (égalité devant l'impôt) is something the Revolution was very keen to secure, rather than the different tax obligations of the different estates of society (aristocrats, clergy and others). It found its expression in art. 13 DDHC. It was recognised by the Conseil d'Etat in 1922 and confirmed in 1936.¹³¹ Where taxes are set by a law, then the Conseil constitutionnel has a very rich case law on equality in taxation.¹³² In its view, equality before taxation does not at all mean tax rules should be the same for everyone. Different taxes or tax rates for different people is perfectly constitutional. For example, the taxation of private individuals and companies can legitimately differ.¹³³ As long as the difference is justified by a difference in situation or by a different reason of public interest, then a difference is justified, but not where having an arbitrary date for the treatment of those benefiting from a usufruct could not justify different treatment.¹³⁴ Equally, different rates of tax on

¹²⁸ See CE 3 July 1936, *Bobard*, no. 43239, D. 1937.3.38 concl. Latoumerie.

¹²⁹ CE 20 November 2020, no. 431508.

¹³⁰ CE 9 October 2019, no. 428634.

¹³¹ See CE 5 May 1922, *Sieur Fontan*, Leb. 386 (tax on vehicles in Hanoi); CE 23 November 1936, *Abdouloussan*, Rec. 1015 (differential taxation).

¹³² See Bell, *French Constitutional Law*, chapter 6, section C 3; L. Ayrault, 'Le principe d'égalité en matière fiscale' (April 2020): www.conseil-constitutionnel.fr/publications/titre-vii/le-principe-d-egalite-en-matiere-fiscale (visited 15 March 2021).

¹³³ See CC decision no. 2014-425 QPC of 14 November 2014, *Special Tax on Fire Insurance*, ECLI : FR : CC : 2014 : 2014.425.QPC.

¹³⁴ See CC decision no. 2017-758 DC of 28 December 2017, *Finance Law for 2018*, ECLI : FR : CC : 2017 : 2017.758.DC, para. 59.

alcoholic beverages depending on whether the premises had signed an agreement with the local tourist agency was held to be an excessive interference with the public health purpose of the tax measure.¹³⁵ By contrast, it is not required that companies in different situations should be taxed at different rates. Thus, in *Société Baxter* pharmaceutical companies complained about special taxes introduced to balance the social security budget.¹³⁶ The tax rates did not distinguish between companies that had signed agreements with the government about the supply of pharmaceutical products (and thus their price) and those that had not. But this was held not to be an unjustifiable inequality of treatment. The non-constitutional features of equality in taxation focus on equality in the application of tax rules and equality in the recovery of taxes.¹³⁷

Equality before public services (égalité devant les services publics) is not found in the Declaration of 1789 at all. But the idea was already found earlier in the eighteenth century. Thus, the courts of Marseille argued that “The letter post is an institution created for the public and for the utility of all the subjects of the King. They all contribute to the costs of the institution according to their means and from the product of general taxation. They should thus all equally receive its fruits.”¹³⁸ Accordingly, no preferential treatment could be given to the chamber of commerce in Marseille in the distribution of letters.

The first case in which this principle was discussed before the Conseil d’Etat was *Chomel* in 1911, where a postmistress objected to delivering post to the complainant on the ground that he had a dog and to delivering to his valet, because he had an even more ferocious dog.¹³⁹ The matter was referred to the Minister in Paris who decided Mr Chomel should not receive letters or telegrams at home until he installed either a post box or a bell at the perimeter of his property. Chomel sought judicial review and the decision was quashed on the ground that only exceptional circumstances could justify refusing him the application of the general rules of the public service. The decision of the

¹³⁵ CE 22 March 2006, no. 288757.

¹³⁶ CE Ass. 28 March 1997, nos. 179049, 179050, 179054, RFDA 1997, 450 concl. Bonichot, note Melin-Soucramani.

¹³⁷ CE 4 February 1944, *Guiyesse*, no. 62929, RDP1944, 169 concl. Chenot (a claim that tax rates were different between goods produced in Senegal and those imported there).

¹³⁸ See J.-L. Mestre, *Introduction historique au droit administratif français* (Paris: Presses Universitaires de France, 1985), pp. 270–1.

¹³⁹ CE 29 December 1911, *Chomel*, reported in RDP 1912, 26 at pp. 35–8, note Jèze. The first explicit reference to the principle was in CE 10 February 1928, *Chambre synodical des propriétaires de Marseille*, Leb. 222 (division of water services into two tariff zones where there was only a single source).

Minister was quashed because he was unable to establish the existence of such a reason.

The principle had its classic application in *Société des concerts du conservatoire*.¹⁴⁰ In this case, the orchestra company had sanctioned two members for taking part in a concert organised by the national radio broadcaster, Radiodiffusion française. Radiodiffusion française responded by suspending the broadcasting concerts given by the orchestra. The orchestra company was successful in challenging this decision. The Conseil d'Etat held that Radiodiffusion française had failed to respect the principle of equality in public services and had used its powers for an extraneous purpose – to punish the orchestra for its treatment of its members. This decision established the idea of equality in the functioning of public services, even if it had earlier roots.

This principle continues to be recognised both in legislation and in judicial decisions. For example, in 2021 a decision concerned the application of a legal obligation on communes to provide a connection for drinking water to properties. In this case, the commune refused to connect a group of new houses on its boundaries. When this decision was challenged, the *tribunal administratif* annulled the decision, but the *cour administrative d'appel* reversed it. The Conseil d'Etat quashed the *cour administrative d'appel* and remitted the case to be considered in the light of whether the commune had examined the need to make provision for access to water, and if so, whether its decision was vitiated by a manifest error in evaluation.¹⁴¹

The principle does not always require the same treatment for all users of a public service. Indeed, the failure to respect actual difference of situations will often be a breach of the principle in very specific circumstances. A good example is *Commune de Chalons-sur-Saône*, where the mayor announced by a press release that primary school canteens would only have one menu option and no substitute menu would be available when pork was served.¹⁴² The decision was endorsed almost unanimously by the council on the ground that it was required by the principle of secularism (*laïcité*) and the neutrality of public services. This was challenged by a Muslim organisation and parents for its failure to make provision for their children. This was an optional public service, but once it had been set up, it had to be operated taking account of the public interest and the interests of all users. Secularism did not prevent or

¹⁴⁰ CE Sect. 9 March 1951, no. 92004, Leb. 151; S. 1951.3.81. The commentary in *Grands Arrêts*, pp. 388ff., gives details of the wide application of this principle.

¹⁴¹ CE 26 January 2021, no. 431494.

¹⁴² CE 11 December 2020, *Commune de Chalons-sur-Saône*, no. 426483.

oblige the commune to provide meals which respected the religious beliefs of children, but the commune had failed to prove that a substitute meal was not practically possible, and so the decision was quashed.

On the whole, the administration is left with a wide latitude for its own assessment of how equality should be applied, and the courts will sanction only manifest errors in evaluation.

Principles borrowed from private law are particularly important in public law contracts, liability law and employment law (including the civil service). For example, in *CCI de Meurthe et Moselle*, the Conseil d'Etat identified a general principle of law illustrated by the (private law) Labour Code under which an employee who became physically unable to continue in her present work should be found suitable alternative activity within the organisation by her public employer and only be dismissed if this could not be found.¹⁴³ Earlier public employment cases had also borrowed from private law to establish basic terms and conditions. For example, in *Peynet*, a nurse was dismissed at a public hospital while pregnant.¹⁴⁴ Drawing on a general principle of law illustrated in the Labour Code, the Conseil d'Etat held that no employer could dismiss a pregnant employee, except in special circumstances, such as public service emergencies, which did not apply here. Similarly, in *Ville de Toulouse c Mme Aragnou*, the Conseil d'Etat found that there was a general principle of law illustrated in the Labour Code that any employee should not be paid less than the minimum wage, and that this applied to public employment, even in the absence of a text.¹⁴⁵ A more significant general principle was established in *Berton*, where it was held that the alteration of the essential terms and conditions of employment in the public sector could only occur with the agreement of both the employer and the employee.¹⁴⁶ This general principle was found illustrated in the Civil Code and the Labour Code, which held that collective agreements are binding. The old model of unilateral power on the part of the administration was limited to exceptional circumstances. Accordingly, the SNCF could not introduce a new rule into the collective agreement allowing it to demote an individual in the case of proven lack of competence in his role without the agreement of the unions. On the whole, the Conseil d'Etat is reluctant to economic and social rights on the ground that they are more specific and changing. That is particularly the case

¹⁴³ CE 2 October 2002, *CCI de Meurthe et Moselle*, no. 227868, AJDA 2002, 1294.

¹⁴⁴ CE Ass. 8 June 1973, *Dame Paynet*, no. 80232, Leb. 406 concl. Suzanne Grévisse.

¹⁴⁵ CE Sect. 23 April 1982, no. 36851, Leb. 152 concl. Labetoulle, AJDA 1982, 440.

¹⁴⁶ CE Ass. 29 June 2001, no. 222600, AJDA 2001, 648 chr. Guyomar and Colin.

in economic matters where the boundaries of what remunerative activities public bodies can undertake changes over time.

The nature of things is a label used to describe principles necessary for the public service to work. On the one hand, this may justify certain prerogatives of the administration to act in the public interest. For example, in *Films Lutetia*, legislation of 1945 established a national system of film certification, characterised as a public order special power.¹⁴⁷ Despite certification by the Minister that they were permitted to be shown, the mayor of Nice banned several films on the ground that they were contrary to decency and good morals. Various organisations had campaigned against the laxity of the national certification. The Conseil d'Etat upheld the power of the mayor to use his public order general powers under a law of 1884 in this way. It held that the local situation described in evidence could legally justify the use of this power to protect public order in his locality. Although not appealing to any general principle, the powers of the President of the Republic to manage national public order, even in the absence of an express power, had been recognised in *Labonne*.¹⁴⁸ Although the law of 1884 gave express general powers on public order to the mayor and the prefect, the President of the Republic was held to have the power to introduce a national system of driving licences in order to maintain public order on the roads, even without any specific text. This power included setting out the circumstances justifying the removal of the driving licence which the claimant contested.

The Conseil constitutionnel has suggested that there are some public services 'whose necessity follows from principles and rules of constitutional value'.¹⁴⁹ The extent of this remains debated. The idea is mainly used to determine whether a particular activity is a public service. For example, it has been held that horse racing is a public service as an implicit consequence of a law of 1891 and so the discipline of trainers is governed by principles of public law.¹⁵⁰

The *continuity of the public service* was first a general principle of law. The right to strike was recognised in the preamble to the Constitution of 1946, but in an ambiguous way, stating that this right exists 'in the framework set by the law'. In *Dehaene*, six heads of section in a prefecture were sanctioned as a result of taking part in a strike of civil servants in 1948.¹⁵¹ They challenged

¹⁴⁷ CE 18 December 1959, nos. 36385, 36428, D. 1960, 171 note Weil.

¹⁴⁸ CE 8 August 1919, no. 56377, Leb. 737.

¹⁴⁹ CC decision no. 86-207 DC of 25 and 26 June 1986, *Privatisations*, Rec. 61; Bell, *Constitutional Law*, Decision 30, para. 53. See further J. Waline, *Droit administratif*, 28th ed. (Paris: Dalloz, 2020), para. 393.

¹⁵⁰ CE 12 October 2018, *Boutin*, no. 410998, AJDA 2018, 2338 concl. Odinet.

¹⁵¹ CE Ass. 7 July 1950, no. 01645, JCP 1950.II.5681 concl. Gazier. The notes in *Grands Arrêts*, pp. 371-2, explain the strong case law of the Conseil d'Etat against strikes in the public sector during the Third Republic.

the sanction on the ground that it breached the right to strike recognised by the Constitution. The Conseil d'Etat rejected the claim on the ground that, even in the absence of a specific text, the government's responsibility for public services entitled it to determine the limitations on the right to strike necessary for public order. The Conseil d'Etat then went on to uphold the right of a minister to prescribe the terms of a minimum service to be maintained in public services (in this case, the national radio and television stations).¹⁵² This restriction on the right to strike to protect continuity in the public service was recognised as a constitutional principle by the Conseil constitutionnel in 1979, also in relation to national radio and television stations.¹⁵³

A different principle is the duty of the public service to provide protection in their functions to civil servants. In a case in 2019, the French army in Afghanistan employed an Afghan as an interpreter.¹⁵⁴ When the French army withdrew, he faced threats as a result of his work for the French and sought a visa for himself and his family. The Conseil d'Etat held that there was a general principle requiring the state to offer protection to civil servants who were the subjects of litigation or threats relating to their service and that this might, in some cases, include the duty to provide a visa for him and his family to reside in France.

Ethical principles would include the obligation to serve the common good. This idea is reflected in the decisions we have seen already on *détournement de pouvoir* where decisions of public officials were quashed because they were seeking to obtain a private advantage rather than to promote the public good.

Another major ethical principle is the *neutrality of the public service*. That requires that the public service is not attached to any particular political, religious or ethical movement within society. For example, in *Fédération des parents d'élèves de l'enseignement public*, a decree required all associations providing sporting activities for primary state school pupils to belong to an association which was avowedly secular.¹⁵⁵ This requirement had no necessary connection with the good functioning of the public service and was contrary to the neutrality of the public service. This principle is often invoked so as to prevent support for religious bodies. In a series of decisions in 2011, the Conseil d'Etat concluded that the principle did not prevent the grant of public funds to support the maintenance or even the construction of a religious building. But

¹⁵² CE 12 November 1976, *Syndicat unifié de radiodiffusion et de télévision CFDT*, no. 98583, Leb. 484.

¹⁵³ CC decision no. 79–105 DC of 25 July 1979, *Strikes in Radio and Television*, Rec. 33; Bell, *French Constitutional Law*, Decision 23.

¹⁵⁴ CE 1 February 2019, *L*, no. 421694, Leb. 13 concl. Henrad.

¹⁵⁵ CE Ass. 21 October 1988, no. 78462, RFDA 1989, 124 concl. Faugère.

the support had to be given to an association constituted under a law of 1905 which held the property of building rather than promoted religious services and activities. So a commune could construct a multipurpose building and then lease it out to an association for use as a place of Islamic religious worship, or it could acquire and hire out equipment to be used in a temporary abattoir for the festival of Eid, or to fund a lift to help disabled people gain access to a Catholic basilica, or to fund an organ which would be placed in a church and be used both for religious services and public concerts.¹⁵⁶ The French conception of the neutrality of the public service can lead to strange results. For example, it has been held that a priest might not teach in a school as this is incompatible with neutrality,¹⁵⁷ but that it is perfectly compatible for a Minister of Religion to be the head of a university.¹⁵⁸ The difference is explicable by the fact that the latter case took place in the Alsace region and that the cornerstone principle of secularism, though not all the rules, were laid down by a law of 9 December 1905, which came into force at a time when Alsace (and the *département* of Moselle) was German. As a result, when the region was returning to France after the First World War, the 1905 law was not introduced and is still not applicable.

The principle of neutrality requires civil servants to abstain from any partisan comment when they perform their functions, to show loyalty to state institutions and to obey their political superiors.¹⁵⁹ But this does not prevent civil servants belonging to political parties outside their duties. Indeed, many leading civil servants and judges have become prime ministers, Presidents of the Republic and members of Parliament. On the contrary, since their position is secure once they return to civil service, it naturally leads to an overrepresentation of civil servants among politicians which is often criticised.

7.3.4 *Modern Emerging Principles*

Rivero was right in 1951 to emphasise the place of traditional principles drawn from the 1789 and 1946 declarations of rights or found in principles recognised in the laws of the Republic, especially the Third Republic from 1870 to 1940.

¹⁵⁶ CE Ass. 19 July 2011, *Commune de Montpellier*, no. 313518; *Communauté urbaine du Mans* no. 309161; *Fédération de la libre pensée du Rhône*, no. 308817; *Commune de Trélazé*, no. 308544, Leb. 372 concl. Geffray; RFDA 2011, 967.

¹⁵⁷ CE 10 May 1912, *Abbé Boutèyre*, no. 46027, Leb. 553 concl. Heilbronner; S.1912.3.145 note Hauriou (rejecting a claim by a priest excluded for the competitive examination to teach philosophy in a secondary school).

¹⁵⁸ CE 27 June 2019, *SNESUP-FSU*, no. 419595 (rejecting a claim that a Minister of Religion could not be appointed president of the University of Strasbourg).

¹⁵⁹ CE Sect. 3 March 1950, *Jamet*, no. 98284, Leb. 247.

But society has evolved a lot since 1946. The Constitution of 1958 did not add many new principles and international treaties are necessarily limited, notwithstanding the 'living instrument' approach of the European Court of Human Rights. The question arises whether further fundamental principles can be identified that deal with contemporary problems. The approach of the administrative courts is often innovative. It is often called upon to declare something a fundamental freedom in the context of the *référé-liberté* procedure. As discussed in Chapter 2, Section 3, under art. L 521-2 CJA, the judge is empowered to make an order to safeguard a fundamental freedom which the decision of a public body or a private body carrying out a public service has seriously and manifestly unlawfully infringed. The scope of 'fundamental freedom' is interpreted very broadly and goes beyond constitutional liberties or those recognised by the European Convention on Human Rights or by the European Charter of Fundamental Rights. The use of contemporary legislation as the source of *fundamental* rights can be illustrated in two areas: the rights of the handicapped and the right to housing.

There is no explicit constitutional right of disabled people, as the issue was not salient before 1946. Instead, it has fallen to the legislature to enact a law of 2005 on the equality of those with disabilities, thereby improving on a law of 1975. The Conseil d'Etat has also used its interpretation of general principles to recognise this development. For example, in *Pehrilhé*, the Conseil d'Etat held that the failure to provide any schooling or adapted schooling could constitute a serious breach of a fundamental freedom, in this case the right of equal access to education.¹⁶⁰ But such a breach was not found where the teaching assistant had resigned and had not been replaced for several months.

The right to housing was created by legislation, in particular by a law of 1990 which the Conseil constitutionnel upheld.¹⁶¹ The Conseil constitutionnel then went on to recognise the right to housing as 'an objective of constitutional value'. In a decision of 2004, it declared that the principles laid down in paragraphs 10 and 11 of the preamble of the 1946 Constitution guaranteeing individuals and families the conditions necessary for existence led to the constitutional objective of 'the possibility for every person to have available decent lodging'.¹⁶² The Conseil d'Etat then turned this 'objective' that the administration should legitimately pursue into the right of an individual. In a *référé-liberté* case of 2012, the Conseil d'Etat found, contrary to the judge at

¹⁶⁰ CE ord. 15 December 2010, *Ministre de l'Education Nationale c Pehrilhé*, no. 344729, AJDA 2011, 858 note Prélot.

¹⁶¹ CC decision no. 90–274 DC of 29 May 1990, *Housing Law*, Rec. 61.

¹⁶² CC decision no. 2004–503 DC of 12 August 2004, *Law on the Freedoms and Responsibilities of Local Authorities*, Rec. 144, para. 21.

first instance, that the failure to provide emergency accommodation as required by several provisions of the Code of Social Action and Families could constitute a breach of a fundamental freedom where the breach caused serious consequences for the person in question.¹⁶³ In this case, the state argued that it had taken adequate measures to meet the need for emergency accommodation and gave a large amount of detail to the court, but in the end the court did not need to rule on the matter. It did, however, rule against the state in a later case involving homeless failed asylum seekers.¹⁶⁴ Here the *tribunal administratif* of Clermont-Ferrand ordered the prefect to find accommodation for an Albanian couple and their three children within forty-eight hours. The state objected they were failed asylum seekers and it did not have to accommodate them. The Conseil d'Etat upheld the order of the lower court on the ground that, even if there was no general duty to house those required to leave French territory, the failure to provide accommodation could amount to a serious breach of a fundamental right to decent lodging in exceptional cases. On the facts, this was an exceptional case because it involved very young children and the social services had not been able to find a more suitable alternative arrangement for them than to be housed with their parents. So the principle of a right to decent housing combined with the rights of the children to justify the lower court's order.

Thus the combination of national legislation and international treaties is expanding the fundamental rights which the administrative courts recognise to be at a level lower than constitutional rights.

7.4 PRINCIPLES OF GOOD ADMINISTRATION

The concept of 'good administration' has long underpinned the decisions of the administrative courts. After all, the Conseil d'Etat has an important hierarchical role within the administration in its advisory capacity. But principles of good administration have not been systematised until recently. Most clearly, the Code on the Relations between the Public and the Administration (Code des relations entre le public et l'administration (CRPA)) sets out both principles and rules to guide the diverse parts of the administration. It brings together rules from various pieces of prior legislation and government circulars. The CRPA now sets out the main rules in this aspect of how the

¹⁶³ CE ord., 10 February 2012, *Fofana*, no. 356456, AJDA 2012, 716 note Duranthon. The claimant was provided with accommodation just before the hearing of the case and so the Conseil d'Etat did not need to decide whether there had been a manifest breach of the right in this situation.

¹⁶⁴ CE Sect. 12 July 2016, *Ministre des affaires sociales c Rumija*, no. 400074, Leb. 363.

administration should deal with citizens by codifying different texts and the case law with slight adjustments. Over the years, the Conseil d'Etat has also developed principles that govern how the administration should deal with the public. France is not alone in thinking about these matters. The right to good administration is laid down in art. 41 of the Charter of Fundamental Rights of the European Union, which acquired legal force with the Treaty of Lisbon in 2009. The European Commission adopted the Code of Good Administrative Behaviour in 2000, and it was adopted by the Parliament in 2001.¹⁶⁵ Several academic studies have sought to identify principles of good administration across the states of the Council of Europe.¹⁶⁶ Looking just at the European Union Code, in brief, the principles cover how officials will behave, how they will handle requests from the public and how they will make decisions. Officials should act lawfully (art. 5), impartially and independently (art. 8), objectively (art. 9), fairly (art. 11), courteously (art. 12) and with respect for data privacy (art. 21). In handling requests from the public, they will reply in the language of the recipient (art. 13), acknowledge receipt (art. 14), transfer misdirected requests to the competent official (art. 15), give the affected person an opportunity to be heard (art. 16), take decisions within a reasonable time (art. 17) and set out the avenues for appeal (art. 19). The decisions will be made without discrimination (art. 6), without abuse of power (art. 7), respecting the legitimate expectations of the public (art. 10), with outcomes that are proportionate (art. 6), giving reasons for a decision (art. 18). In addition, the European Ombudsman set out in 2012 a number of principles in its Code of Public Service: commitment to the European Union (loyalty), integrity, objectivity, respect for others and transparency. Many of these principles are found in French expectations of public servants and public decision-making, but not all of them are considered legally enforceable.

7.4.1 *The Conduct of Public Officials*

As far as the conduct of public officials is concerned, we have already seen that respect for legality is essential and neutrality is the focus of attention in the area of impartiality and independence. Art. L100-2 CRPA expresses the core values thus:

The administration acts in the public interest and respects the principle of legality. It is bound by the duty of neutrality and to respect for the principle of

¹⁶⁵ See European Ombudsman, *The European Code of Good Administrative Behaviour* (Strasbourg, 2013).

¹⁶⁶ See U. Stelkens and A. Andrijauskaite, *Good Administration and the Council of Europe: Law, Principles and Effectiveness* (Oxford: Oxford University Press, 2020), esp. chapter 1 and Emilie Chevalier's chapter 5 on France.

secularism. It complies with the principle of equality and guarantees each person impartial treatment.

The principle of legality is reinforced by the duty to withdraw or repeal decisions which are or have become illegal. This duty was laid down in modern terms in *Compagnie Alitalia*.¹⁶⁷ The company asked the Prime Minister to repeal provisions in the tax code enacted by decree in 1967 and 1979 on the ground that they were incompatible with the Sixth VAT Directive of the European Union dated 17 May 1977. His refusal was quashed because there was a principle under which the competent public authority is bound to repeal an illegal decision or decree, whether it was illegal when signed or has become so subsequently. This principle was reflected in a decree of 28 November 1983 on relations between the administration and users of public services, which explicitly laid down that the administration should withdraw an illegal regulation. The duty to withdraw or replace an illegal rule or decision is now contained in art. L243-2 CRPA. It requires the withdrawal of any illegal rule. It also requires the withdrawal of non-regulatory decisions which have not created a vested right. This principle of legality does not, however, withdraw rights acquired on the basis of the validity of the legal provision in question. As was decided in *Ternon*, the withdrawal of an order must not affect vested rights, unless adopted within a period of four months and only if the order is unlawful.¹⁶⁸ Here an individual working for the regional government was originally entitled to become a civil servant, but a later decree appointed him merely as a contractual employee. When he was subsequently dismissed, he claimed the dismissal was unlawful because it failed to respect the procedure for dismissing civil servants. The region was ordered to reinstate him and to reconstitute his career on the basis of the original nomination order. The principle in this case is now codified in art. L242-1 CRPA. *Ternon* illustrates the importance of the principle of legal certainty, which will be discussed in what follows. Where an unlawful decision can be rectified applying the *Danthony* principle,¹⁶⁹ then it cannot be revoked, but where the defect in the decision cannot be rectified, then the decision has to be withdrawn and the individual is left to obtain compensation against the administration, rather than insisting the decision be maintained.¹⁷⁰

¹⁶⁷ CE Ass. 3 February 1989, no. 74052, RFDA 1989, 391 concl. Chahid Nourai. The date for assessing whether a decision is unlawful is the date of the court judgment, not when it was originally taken: see CE Ass. 19 July 2019, *Association des Américains accidentels*, no. 424216; CE, 28 February 2020, *Stassen*, no. 433886.

¹⁶⁸ CE Ass. 26 October 2001, no. 197018, Leb. 497 concl. Séners.

¹⁶⁹ Note 14.

¹⁷⁰ CE 7 February 2020, B, no. 428625, AJDA 2020, 1795.

7.4.2 Transparency and Data Protection

The Vice President of the Conseil d'Etat remarked in 2011 that 'transparency and secrecy are both features of public action'.¹⁷¹ In his view, transparency has to be balanced against efficiency and effectiveness of the administration. It is for that reason that it is not a general principle of law. In the case law of the Conseil constitutionnel, attention is paid particularly to the intelligibility and comprehensibility of legislation.

Respect for data privacy has been a long-standing concern in France and predates European developments. The Commission nationale de l'informatique de des libertés (CNIL) was created in 1978. A key aspect of transparency has been the access to public documents. The Commission d'accès aux documents administratifs (CADA) was also set up in 1978. Its work is now governed by the provisions set out in Book 3 Title IV of the CRPA. But powers of these bodies to impose sanctions on the administration only came in 2004 and 2005, respectively. These are supervisory bodies which set standards for how public bodies handle data and how far documents are made available. Data privacy is driven far more by EU requirements, notably the GDPR, rather than by agreements within the Council of Europe.¹⁷²

Transparency is not, as such, a general principle of administrative action. Rather, Book 3 of CRPA sets out a basic duty of the administration to place administrative information online and to communicate documents to interested persons on request, subject to a number of detailed conditions. Any large administration is required to place most of its general information and policies online (art. L312-1-1 CRPA). Circulars and instructions from ministers which interpret the law or set out administrative procedures should also be made public (art. L312-2 CRPA). Subject to data protection and security law, a person has a right to know the information a public body holds in relation to them (art. L311-3 CRPA). She also has the right to know if a decision is taken on the basis of an algorithm. A large number of exceptions to accessibility are laid down in arts. L311-5 to 311-8 CRPA, often relating to the nature of the information or the nature of the agency holding it (e.g. health information and security information). Some administrative information may be licensed for use and the administration may charge for this. This is especially true for statistical information the administration gathers.

Data protection is not a general principle, but is ensured by a number of specific rules. For example, different administrative bodies should only share

¹⁷¹ J. M. Sauvé, Discours (2011): www.conseil-etat.fr/actualites/discours-et-interventions/transparence-valeurs-de-l-action-publique-et-interet-general (accessed 18 March 2021).

¹⁷² See Chevalier, note 166, at paras. 5.27–5.29.

data when it is strictly necessary, and the public are informed about the data held on them and are given the right to correct them (art. L114-8 CRPA).

7.4.3 *The Handling of Requests from the Public*

The CRPA sets out principles for the handling of requests and complaints from the public. Book 1 Title II deals with the procedure for electronic communication. It sets out when this procedure may be used and for what purposes. It deals with the practical matters identified in the European Code of Good Administration such as the acknowledgement and dating of receipt, and the duty to transmit misdirected correspondence to the correct addressee (art. L114-2). Given the French administration's preoccupation with proving identity and other matters which it considers necessary before considering a request, the Code helpfully clarifies which pieces of information satisfy requests for information (art. L113-4 and following CPRA), thus saving a hapless citizen from a relentless paper chase in order to satisfy the bewildering requirements of the administration.

The right to a hearing (droit à une procédure contradictoire préalable) was established as a general principle of law in *Trompier-Gravier* in 1944.¹⁷³ In this case, the prefect withdrew Mme Trompier-Gravier's permit to sell newspapers from a kiosk on the streets of Paris on the ground that she had committed a wrong against her manager. This was not a matter of public interest, and she was not given the opportunity to give her account of what had happened before the licence was withdrawn. The decision of the prefect breached her rights to a defence (*droits de la défense*). Under the Code, such a right is guaranteed for individual decisions (art. L121-1 CPRA). Exceptions are made for urgency or public order and international relations reasons, or where a specific procedure is laid down under which the decision is to be taken. Art. L122-1 CPRA makes clear that normally representations are written, but may be oral in some cases. The right to be represented is also specified. In the cases of sanctions or discipline, the right to know the charges and to have access to the file of information is a prerequisite for the validity of any decision against the person in question (art. L122-2 CPRA).

This communication of information may then lead the citizen to correct their request by specifying a different legal provision or by supplying more information. This process of correcting errors is specifically permitted (art. L123-1 and following). The right of the citizen to receive and provide

¹⁷³ CE Sect. 5 May 1944, *Dame Veuve Trompier-Gravier*, no. 69751, D. 1945, 110 concl. Chenot, note de Soto.

information is balanced against the right of the administration to conduct checks and use the information gained in making decisions, providing this is legally authorised (art. L 124-1).

The advantage of the codified provisions is that they are more detailed than general principles such as the right to contradict evidence (*le droit au contradictoire*: the equivalent of *audi alteram partem*) and avoid litigation.

When it comes to more general or group decisions, the rights of citizens change from being able to challenge information that mentions them to being able to participate in the decision-making process and express a view. The general principle laid down in the CRPA goes further than any judicial principle on participation. Article L131-1 CPRA states:

Outside cases governed by provisions of law or decree, when the administration decides to involve the public in drawing up a reform or in developing a project or a decision, it shall publicise the details of this procedure, make available to the people concerned the necessary information, give them a reasonable time to participate and ensure that the results or follow-up envisaged are made public at an appropriate moment.

The Code then goes on to provide detail on consultation by the Internet, by consultative committees and by public inquiries. There is much to be said for the provision that consultative committees cannot go on for longer than five years (art. R133-2). These sets of rules provide for written and sometimes oral submissions. These rules do not govern inquiries into expropriation or the environment, which are governed by special rules. In the case of the environment, the Charter of the Environment of 2004 includes in art. 7 the right of every citizen to participate in the development of any project which has an effect on the environment. The CPRA thus broadens the scope of the right to participate.

Nothing in these provisions or in the equivalent provisions governing expropriation and the environment can avoid the controversy to which many large projects give rise. The story of the proposed airport at Notre-Dame-des-Landes exposes the limits of the legal process. The building of a new airport near Nantes was conceived in 1963 when it was expected that air travel would increase. The airport and transport links covered a substantial area of natural beauty and scientific interest, and it was expensive. Examination of sites and costs carried on until a final site was chosen in 1992. The plan was relaunched in 2000 with a public consultation in 2002-3 and the confirmation of the site by a minister in 2003. Following approval after a public inquiry, the expropriation was declared to be of public utility in 2008. The concession was then made to an airport operator. But by this time the

environmental impact, as well as that on agriculture, became more prominent. In 2016, the government used its powers to conduct a local plebiscite to gather opinion, a procedure not provided for specifically in planning law. Opponents challenged this procedure and sought an interim order suspending the consultation. This was rejected by a collegial formation of the Conseil d'Etat. In the end, the government appointed 'mediators' to re-examine the options. They reported in December 2017, and the government abandoned the project the following month. So, after nearly fifty-five years and no fewer than 179 cases brought at various times before the courts, the project came to nothing. Those decisions and especially the Conseil d'Etat decision of 2016 rejecting the objections of the opponents to the government's procedure did not calm the acrimonious controversy associated with the project.¹⁷⁴

7.4.4 Time Limits and Appeals

We have already seen that there is a general principle that courts will decide cases in a reasonable time, a principle laid down in *Magiera*, following case law of the European Court of Human Rights.¹⁷⁵ There is also the obligation to bring a challenge to the decision of the administration in a reasonable time, but the Code of Administrative Justice (art. R421-1 CJA) specifies that this is two months from the decision. The general principle of a right to appeal is limited to judicial decisions. But the right to bring judicial review was firmly established in *Lamotte* in 1950, as seen in Chapter 6, Section 5.¹⁷⁶ In that case, a law of 1943 provided that the award of a concession of uncultivated land by a prefect was not susceptible of any judicial or administrative redress. But the Conseil d'Etat held that this did not exclude judicial review. The right to judicial review was a general principle of law which is part of respect for legality.

The Code provides that the acknowledgement should state whether the decision is governed by the rules that entitle a person to a decision in their favour unless the administration responds within two months, and sets out the ways of challenging a decision (art. R112-5 CRPA).

¹⁷⁴ CE 20 June 2016, *Association citoyenne intercommunale des populations concernées par le projet d'aéroport de Notre-Dame-des-Landes*, no. 400364, Leb. 838. See commentary by M. Torre-Schaub in *Grands arrêts politiques*, pp. 526ff.

¹⁷⁵ CE Ass. 28 June 2002, *Garde des Sceaux c Magiera*, no. 239575, Leb. 247, concl. Lamy; Chapter 4, Section 1.4.

¹⁷⁶ CE Ass. 17 February 1950, *Ministre de l'Agriculture c Dame Lamotte*, no. 86949, Leb. 110.

7.4.5 Principles Governing the Decision Taken

The European principles on how decisions are taken reflect French law in many respects, not least because French advocates general and judges were very influential in the creation of the European Court of Justice (as it then was). The principles of judicial review were drawn heavily from French and German laws.

The traditional French principles excluding discrimination and abuse of power have already been seen. The imported German principle of proportionality has already been discussed. The two other European principles of good administration involve respect for legitimate expectations and the duty to give reasons. Both of these have met resistance from the French administrative courts.

7.4.6 Legitimate Expectations and Legal Certainty

French administrative law has been willing to accept legal certainty as a general principle, but not the protection of legitimate expectations. The basic argument is that legal certainty is objective. As the Conseil d'Etat wrote in its annual report for 2006:

Without it requiring impossible efforts on their part, citizens should be able to determine what is permitted and what is prohibited by the law. To reach this result, the norms enacted have to be clear and intelligible, and must not be subject to changes over time that are too frequent nor above all unpredictable.¹⁷⁷

Legitimate expectations are subjective, based on individual expectations and reliance on what the administration has said or done. Each tries to ensure a degree of stability and predictability in the relations between the citizen and the state. Both principles have their origins in German law and have been accepted by both the Court of Justice of the European Union and the European Court of Human Rights. Legal certainty (*sécurité juridique*) was accepted first.¹⁷⁸ The protection of legitimate expectations (*confiance légitime*) came later.¹⁷⁹ Because EU law is directly applicable and the European Convention has priority over national legislation, the French courts became familiar with applying these standards when giving effect to the supranational

¹⁷⁷ Conseil d'Etat, *Rapport Annuel 2006: La Sécurité Juridique* (Paris, 2006), p. 281.

¹⁷⁸ See Case 13/61, *Kledingverkoopbedrijf De Geus en Uitdenbogerd v Bosch GmbH* [1962] ECR 74 and ECHR, 13 June 1979, App. no. 6833/74 *Marckx and Marckx v Belgium* (1980) 2 EHRR 330.

¹⁷⁹ See Case 112/80, *Firma Anton Dürbeck v Hauptzollamt Frankfurt am Main-Flughafen* [1981] ECR-I 1096 and ECHR, 15 June 2006, App. no. 33554/03, *Lykourazos v Greece* [2006] ECHR 1179.

systems. But, when they applied purely domestic law, they have adopted different concepts. The Conseil constitutionnel also came to recognise that the accessibility and intelligibility of the law were 'objectives of constitutional value' but did not thereby accord legal certainty the status of a constitutional principle.¹⁸⁰

The clarity and predictability of the law is essential for the citizen to plan her life. Legal certainty requires that the rule be intelligible and comprehensible, that it is accessible, and the citizen must be able to determine whether it is valid. Legitimate expectations arise more often from the practices and assurances of the administration. Both are features in allowing the individual to plan their lives, but they constrain the ability of the administration to change policies in the light of emerging public interests. It is the way that particularly protecting the legitimate expectations of citizens potentially privileges these over the public interest that has led the French to be wary of giving this goal the status of a general principle of law.¹⁸¹

The position of the Conseil d'Etat was made clear in *KPMG*.¹⁸² In this case a French law of 2003 implemented a European Union Directive of 1984 dealing with the authorisation of accountants. A decree of 2005 then gave effect to the provisions of the law by enacting a code of conduct for accountants which was to come into effect immediately. In the wake of accountancy scandals in the United States, the code of conduct provided that accountants were not to audit the accounts of firms to whom they provided other professional services. An accountancy firm challenged this on the ground that it breached both legal certainty and legitimate expectations. The Conseil d'Etat gave the latter point short shrift. It stated that 'the principle of legitimate expectations, which is a general principle of European Community law, only applies in domestic law in the situation where the case before the French administrative court is governed by Community law', which was not the case in *KPMG*. But it then went on to decide that the absence of transitional provisions in the decree breached the principle of legal certainty. The code applied to contracts already in progress and the disturbance of such arrangements was excessive in relation to the objective of ensuring the independence of accountants. There was no imperative need to affect existing

¹⁸⁰ See CC decision no. 99-421 DC of 16 December 1999, *Codification*, Rec. 136 and CC decision no. 2010-102 QPC of 11 February 2011, *AJDA* 2011, 303. But some of its decisions come close to accepting the importance of respecting established legal situations: see CC decision no. 2013-682 DC of 19 December 2013, Rec. 1094.

¹⁸¹ See B. Bonnet, 'L'analyse des rapports entre administration et administrés au travers du prisme des principes de sécurité juridique et confiance légitime', *RFDA* 2013, 718.

¹⁸² CE Ass. 24 March 2006, no. 288460, *AJDA* 2006, 1028; *Grands Arrêts*, no. 104.

contracts. A few days before this decision, the annual report of the Conseil d'Etat was published in which it wrote that 'legal certainty is one of the foundations of the rule of law'.¹⁸³ But if there are transitional arrangements, then it is unlikely that the courts will require greater protection.¹⁸⁴

7.4.7 *Duty to Give Reasons*

The Conseil d'Etat never required the administration to provide reasons for its decisions. For example, in *Lang* it stated that a committee certifying whether a person was qualified to be a finance officer of companies did not have to provide reasons for its refusal to include the claimant on the approved list of qualified individuals.¹⁸⁵ The decision showed, all the same, that the Conseil d'Etat itself would look at the decision file to see if improper factors had been taken into account, and this follows the approach adopted in *Barel*. But it did require that professional bodies justify their decisions, for example, in allocating shipping routes.¹⁸⁶ But a law of 1979 listed decisions for which reasons had to be given, but without laying down a general principle.

The duty to give reasons was enshrined in the treaty creating the European Coal and Steel Community in 1951 and is now found in the Charter of Fundamental Rights, art. 41, written in 2000. The inclusion of a formal principle in the CRPA of 2015 reflects both domestic and European influences. Article L211-2 CRPA asserts the right of any person to be informed without delay of administrative decisions which are adverse to them. That article then lists the types of decision in which this duty applies. The list covers decisions which restrict civil liberties, impose sanctions, impose conditions on authorisations, withdraw or repeal a decision that has created right, raise an objection that an application is out of time, refuse a right-creating benefit to someone, refuse an authorisation or reject an appeal against a decision. The CPRA thus goes further than previous legislation and further than the administrative courts.

As far as the content of the duty to give reasons is concerned, art. L211-5 CRPA provides that the reasons must list the considerations of law and fact which constitute the basis of the decision. This broadly repeats the approach of the Conseil d'Etat in *Maison Genestal*, where it was said that the Minister's refusal to give a tax concession on the ground that the project put forward by

¹⁸³ See note 177, p. 227.

¹⁸⁴ See CE Ass. 18 May 2018, *Louvion*, no. 400675, Leb. 168 concl. Dutheillet de Lamothé.

¹⁸⁵ CE Sect. 26 January 1973, no. 87890, D. 1973, 606 note Pacteau.

¹⁸⁶ CE Ass. 27 November 1970, *Agence maritime Marseille-Fret*, nos. 74877, 75123, RDP 1971, 987 concl. Gentot.

the claimant did not offer sufficient economic advantages provided reasons which were too general to enable the court to verify compliance with legality.¹⁸⁷ The Minister had to provide the reasons of law and fact which demonstrated that it did not offer the necessary economic benefits to justify the tax concession.

Exceptions to the duty to give reasons are limited. The CRPA does provide exceptions for security. For example, in a decision of 2019, the *cour administrative* of Versailles upheld a refusal by the prefect to explain why an individual involved in logistics was refused authorisation to have access to Charles de Gaulle Airport.¹⁸⁸

7.5 CONCLUSION

French administrative law began as a very French development. It was driven by the practice of the Conseil d'Etat and the textbooks used in university and civil service courses.¹⁸⁹ By the end of the nineteenth century, that domestic product was seen as a model for others of how to exercise control of the administration in a democracy. The Strasbourg professor Otto Mayer wrote a long book on the subject which made available French ideas as a reference point for the development of a German administrative law.¹⁹⁰ Dicey specifically wrote and lectured on French administrative law, whilst not wishing to have the equivalent in England. He wrote, 'On the whole it appears to be true that if administrative law is to exist it is seen at its best as French *droit administratif*.'¹⁹¹ It continued to be a major point of reference even in common law countries well into the 1960s.¹⁹² As has been mentioned, it had a clear influence on the judicial structure of European Union law. So French administrative law, despite its distinct roots, was exported quite widely.

Some of the approaches of the early French administrative law reflected both the particular deference of courts to the administration as the arbiter of the public interest and the role of the administrative judge as part of the public service and thus a kind of hierarchical superior of lower administrative bodies, prepared to correct their mistakes. This reflected the role of organs of central

¹⁸⁷ CE Sect. 26 January 1968, *Société Maison Genestal*, no. 69765, Leb. 62 concl. Bertrand.

¹⁸⁸ CAA Versailles, 3 December 2019, no. 16VE03652, AJDA 2020, 964.

¹⁸⁹ See J. Bell, 'The Role of Doctrinal Writing in Creating Administrative Law: France and England Compared' (2018) 15 *Glossae* 141 at p. 150.

¹⁹⁰ See M. Stolleis, *Public Law in Germany* (trans. T. Dunlap) (Oxford: Oxford University Press, 2017), pp. 70–1. Strasbourg was a German territory at that time.

¹⁹¹ A. V. Dicey, *Lectures on Comparative Constitutionalism*, edited by J. W. F. Allison (Oxford: Oxford University Press, 2013), p. 314.

¹⁹² See Bell, 'The Role of Doctrinal Writing', at p. 149.

government, such as the Conseil d'Etat and the prefects, in keeping the large number of dispersed communes and administrations in order.

French administrative lawyers were significant in the early days of the European Court of Justice and have regularly been the judges on the Court. But the European influence has been a two-way involvement. The ideas developed in European courts have found their way into French law firstly and directly because European Union law or the European Convention have been directly applicable on a particular matter. Secondly and less directly, those systems have developed grounds of scrutiny and legal standards which have inspired developments in French law as a kind of 'spillover' effect. French judges do not consider that they can apply one set of standards in European cases and lesser standards in purely domestic cases. In terms of grounds of review, manifest error and proportionality are particular influences. As stated in Chapter 6, the scope of judicial review, especially in relation to institutions such as schools and prisons, has widened. In terms of values, fundamental rights in France have been developing at much the same time as the European Union developed its Charter of Fundamental Rights and the European Convention has been interpreted broadly by the European Court of Human Rights. Throughout this chapter, there have been illustrations of where fundamental rights have been shaped by understandings emerging from Strasbourg. But Strasbourg takes its ideas from the laws of the members of the Council of Europe. It leaves a significant margin of appreciation on many issues. Issues remain, such as secularism, the fight against terrorism and immigration, where many of the standards applied are developed primarily in France. In the area of principles of good government, there has clearly been a sharing of ideas and good practice at the European level, if not more broadly within the Organisation for Economic Co-operation and Development. It is not surprising that the current synthesis in the Code of Relations between the Public and the Administration reflects both French experience and the lessons from other European countries. It is not worth attempting to suggest how far European supranational law has influenced French administrative law. It is best to see European law as a regular factor in shaping the thinking and practice of French law.