



Serving citizens

Guardian of the rule of law



The Conseil d'État is a judge that settles disputes between citizens and administrative authorities. It ensures that the rights and freedoms of each citizen are respected by administrative authorities. It also serves as a legal advisor to the Government and Parliament, suggesting improvements to their bills and legislative proposals to ensure the new laws entering into force are clear, effective and comply with the existing body of law.

Serving citizens, the Conseil d'État safeguards the rule of law.

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INTERVIEW

"Administrative justice is a justice that serves citizens"

One of Didier-Roland Tabuteau's ambitious goals for the future is to assert the crucial role played by administrative justice in appeasing society and guaranteeing rights and freedoms. Interview with the new Vice-President of the Conseil d'État.

| You have been Vice-President of the Conseil d'État for 6 months. How do you view administrative justice?

Didier-Roland Tabuteau: Administrative justice is central to our country's history. Its fulfilment goes hand in hand with our rule of law, which means subjecting administrative authorities to the law and increasing the guarantee of rights and freedoms.

Today, what I see most in administrative justice is a justice that serves citizens. Justice on a daily basis that can easily be referred to when a dispute pits us against an administrative authority. Taxation, urban planning, environment, public freedoms, social benefits: all of these topics affect the daily lives of citizens and, in these respects, the administrative judge is a privileged contact point, an independent and impartial third party with the ability to protect their rights.

I also see an administrative justice that acts as the guardian of public service. At the turn of the last century, it was the Conseil d'État that defined what public service is and the principles that govern it: accessibility, equal treatment, neutrality, continuity, etc. And the administrative judge has since monitored its proper operation: in schools, in hospitals, as well as by social, cultural and economic services. It oversees all this by stating the law,



In 2021, the Conseil d'État handed down decisions on 11,633 cases opposing citizens, companies or organisations against an administrative authority, including 1,000 as urgent cases.



punishing administrative authorities whenever they stray, but also by guiding them, supporting them, and offering solutions to any difficulties they encounter.

Because the administrative judge is not only an enforcer. This constructive approach is in the administrative judge's very DNA, as a judge that checks but also appeases. A judge that offers solutions.

How can we face future challenges while guaranteeing this service on a daily basis?

D.-R. T. : Climate and environment, digital technology, social issues: the challenges we are set to face are huge. The administrative judge is preparing for these as it will play a key role as an interface between citizens and public authorities.

In this context, it is first crucial that administrative

justice continues to adopt a long-term perspective. **This is the role of an institution such as ours: not to yield to the alarm bells of current events, not to bend to adverse winds and passion.** To remain upright and look far ahead while sticking to the foundations of our rule of law. This is what must guide the administrative court when performing its three missions: when it judges, when it advises the Government and the Parliament on the creation of laws, and when it conducts studies on major topics that shake our society, such as recently on bioethics, on states of emergency, artificial intelligence or social networks.

But this does not mean the administrative judge is an unmoving judge. On the contrary: they must listen to citizens and be open to the surrounding world should they intend to fulfil their missions with effectiveness and relevance. **I will, therefore, never stop encouraging this openness which must enable the judge to be in harmony with the society he or she serves while constantly adjusting, evolving and transforming.**

In fact, the history of administrative justice is one of permanent transformation: one only needs to cite the creation of administrative courts of appeal in 1987, the granting of the power to compel in 1995, the introduction of emergency procedures in 2000, and

more recently, the digital turn we have taken with the opening of the Télérecours and Télérecours citoyens portals, for example, which enable citizens to refer matters to the judge in electronic format and to track the processing of their cases remotely.



It is vital for the administrative court to represent society

Thus, new tools, new ways of working and, sometimes, new ways of viewing issues will be needed to tackle tomorrow's challenges. By remaining faithful to its principles but continually moving and ready to reform, the administrative court will succeed in this task.

You are particularly attached to the openness of the administrative court and the diversity of those that work there. What are your priorities? And how do you plan to achieve them?

D.-R. T. : Our institution's openness is the result of several initiatives: the symposia and conferences we organise every year and which bring together

academics, legal experts, heads of organisations, representatives from the economic world and from administrative authorities, all discussing current events. It also comes from events such as Heritage Days or the Law Night, which bring us closer to the general public, and particularly youths, to discuss the law, our country's institutions and the role of administrative justice. I would also like to continue the fruitful meetings with members of Parliamentary commissions initiated by my predecessor.

But we must not stop there. We must continue to think of new ways to open ourselves up to the outside world. **I would especially like the administrative court to strengthen its ties with "natural" partners such as lawyers and universities** which train future legal professionals all over the territory, by increasing the number of forums for dialogue, by welcoming more academics to the court, by working together on joint projects. I would also like to deepen our discussions with trade unions and major organisations, who have long been contact points and have much to teach us.

In terms of diversity, it is vital for the administrative court to represent society so as to continue to better fulfil its missions. Our institution already includes a very diverse range of profiles: women and men of all generations with varying experience, personalities and viewpoints. In this respect, the senior public service reform adopted in 2021 offers new opportunities that we intend to seize.

In a society in which the word of the scientific community and that of democratic institutions are undermined, how can we win back citizens' trust?

D.-R. T. : As an intermediary between citizens and administrative authorities, the administrative judge must contribute towards fuelling trust in our democratic society. By striving to make its decisions intelligible, legible, constructive and realistic. **This is the only way it can ensure a justice that provides peace.**

This objective explains, for example, why we reformed our method for drafting our decisions, which are now more didactic, more educational. Decisions that we also combine with communication efforts to ensure they are understood by all. This guides initiatives to make justice and law accessible to citizens. This is why our legal opinions are available on our website *via* the ConsiliaWeb platform and why, since 2021, all our legal decisions have been available as *open data*.

Stating the law clearly, explaining the ins and outs of our decisions, ensuring they effectively settle the disputes between individuals and administrative authorities: this is the administrative judge's duty.

To what extent do the administrative court and the Conseil d'État play a central role in today's society?

D.-R. T. : In current times, marked by crises and doubts, the presence of an independent and impartial judge capable of effectively upholding the rule of law is vital. As we witnessed during the anti-terrorist and health emergencies: there is a great need for justice among citizens. More generally, there is a deep need for guides. **The administrative judge is that trusted third party who embodies the continuity of our principles and gives us a collective direction.** This is why the role it plays is so important in our society. ●

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The administrative judge is a judge that checks but also that appeases. A judge that offers solutions.”

↓
4,021 people work in the administrative justice system.







Behind the scenes at the Conseil d'État

From public hearings to section sessions, including the welcoming of young people on school trips and journalists at press conferences... At the Conseil d'État, everyone works hard to safeguard citizens' rights on a daily basis. A look back on 2021 in pictures.



10 December 2021. François Molinié, the chair of the Association of lawyers at the Conseil d'État and Court of Cassation, speaks during a litigation Assembly gathered to examine a case on the compatibility between working times in gendarmeries and European law.



↑ **15 June 2021.** The Conseil d'État opens its doors to journalists to present its annual report and discuss its activity during the health crisis.



↑ Top – **12 July 2021**. In partnership with the Ligue de l'enseignement, the Conseil d'État welcomes 100 middle school students from Marseille as part of their "Republican Tour de France".
Bottom – **18 November 2021**. For "Duoday", persons with a disability teamed up with Conseil d'État staff for a day.



During the "Republican Tour de France", middle school students discover the Conseil d'État's missions and the daily lives of those working there.



↑ **4 February 2021.** General Assembly session. Members of the Conseil d'État discuss a bill to improve preventive healthcare at work (see page 57).



↑ Top — **February 2021**. Members of the Conseil d'État mostly work "in open spaces", such as here in the library.
Bottom — **9 September 2021**. First public hearing in the litigation room, on minimum hierarchical wages (see page 29).



16 July 2021, Paris. 2020-2021 cycle closing conference on states of emergency (see page 20). Philippe Bas, Anne Levade and Pascal Perrineau spoke on the issue: how does one exit a state of emergency?





A year of administrative justice

From the landmark "Municipality of Grande-Synthe" decision in environmental matters, to its opinion on the bill to improve child protection, through its discussions on improving social benefit schemes... In 2021, the Conseil d'État issued opinions, decisions and studies relating to every aspect of our daily lives.

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Guaranteeing fundamental freedoms

How can we protect individual rights without infringing on the rights of others? In 2021, the Conseil d'État maintained this difficult balance central to its mission as the guardian of public freedoms.



November 2021, Pointe-à-Pitre. During a visit by the Minister of Overseas France, demonstrators make their voices heard amidst gendarmes and journalists. A few months earlier, the Conseil d'État reviewed several measures infringing the freedom of demonstration.

Demonstrating freely

How can outbursts be avoided during demonstrations? Since the first "gilet jaunes" ("yellow vests") demonstrations in 2018, this question has been propelled to the forefront of the public debate.

Encircling demonstrators is illegal

In September 2020, the Minister of the Interior published a new national law enforcement plan. This document sets out the framework for law enforcement during all demonstrations on national soil, applicable to all law enforcement authorities. After an appeal was lodged by several organisations and trade unions—including the CGT, the Human Rights League, the Syndicat de la magistrature and the Syndicat national des journalistes—, the Conseil d'État cancelled four of the measures provided for in this plan, starting with the encirclement of demonstrators. The Conseil d'État acknowledges that such a measure may be necessary in some situations in order to control, challenge or prevent the continuance of public disturbances. However, the plan does not provide sufficient details regarding the conditions under which such recourse is permitted. Thus, failing such, there are no safeguards to ensure the use of this tactic is adapted and proportionate to the circumstances. **As it stands, this measure could infringe on the fundamental freedoms of movement and demonstration, thereby rendering it illegal.**

Protecting the freedom of the press

The other measures cancelled concerned journalists. The text had planned for journalists to be required to obey any law enforcement orders to disperse, to the same degree as other demonstrators. **However, the Conseil d'État believed that journalists must be able to continue to freely perform their duty of information, even in such circumstances.** Further, the Minister cannot require these professionals to provide "confirmed identification" and demonstrate behaviour "exclusive of any offence or provocation" to authorise them to wear protective equipment. **Not only do these vaguely formulated conditions exceed that which is provided for by the criminal code, but, in addition, the minister is not authorised to issue such rules via circular.** Lastly, the information channel used by law enforcement authorities during certain demonstrations to share real-time information with the press cannot be restricted to journalists "approved by the authorities". For the Conseil d'État, this measure could infringe the freedom of the press by allowing approved journalists to be selected at its own discretion. ●

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While implementing encirclement tactics [...] may be necessary in some situations [...], it is likely to significantly affect the freedom to demonstrate, discourage the exercise of this right and infringe on freedom of movement.

Decision no. 444849



FIND OUT MORE

DECISION no. 444849 of 10 June 2021, "Law enforcement plan"

Better protecting whistleblowers



1/3 of French nationals

have witnessed fraudulent activity in the workplace

Source: Conseil d'État study "The right to whistle-blow: reporting, tackling and protecting", 2016.

Panama Papers, Wikileaks, LuxLeaks... Whistleblowers play an increasingly important role in denouncing illegal activity. Since 2016, the Conseil d'État has published a study entitled "The right to whistle-blow: reporting, tackling and protecting" to better govern their rights. The same year, the "Sapin 2" act drew from this study to legally define who a whistleblower is, organise reporting procedures and set out protective measures for these individuals.

Despite this, in 2021, a report noted that while this act is a "considerable step forward in terms of rights", the process is not effective enough to truly protect whistleblowers, including in respect of their employers.

Widening the definition of a whistleblower

Following this report, and when transposing a European directive on the topic into French law, a bill to improve whistleblower protection was submitted to the Conseil d'État for its opinion. Among other innovations, this bill extended the level of protection offered to whistleblowers by the European directive: in France, anyone who reports the breach of any legal norm, regardless of its content, is protected, while the EU restricts such protection to reports of European law breaches. In its opinion, the Conseil d'État approved this choice which ensures the clearness and intelligibility of whistleblower protection while avoiding differences of rules based on the nature of the breaches reported.

On the whole, **this new bill reprises the recommendations made by the Conseil d'État in its 2016 study in a more detailed manner.** In particular, it strengthens the guarantee of confidentiality offered to whistleblowers and to those concerned by their reports before the merit of their report is even confirmed.

Extending the role of the Defender of Rights

At the same time, the Conseil d'État studied an organic bill to increase the Defender of Rights' role in terms of whistle-blowing. The 2016 study had already suggested extending the scope of this key actor, by entrusting it with protecting whistleblowers who consider themselves victims of reprisals as from the time of their report. **Henceforth, the Defender of Rights will play an expanded role which includes informing and advising whistleblowers, defending their rights and receiving their reports.** It is also entrusted with certifying their status as a whistleblower—via an opinion—in order to facilitate their access to the protective measures provided for in the other act. These two complementary acts were enacted in March 2022. ●



FIND OUT MORE

OPINION of 18 November 2021, "Bill to improve whistleblower protection"

OPINION of 18 November 2021, "Organic bill to increase the role of the Defender of Rights in matters of whistle blowing"

STUDY "The right to whistle-blow: reporting, tackling and protecting", adopted on 25 February 2016



↑ **November 2021, Grande-Synthe.** Evacuation of a migrant camp in the Nord département. In February 2021, the Conseil d'État handed down a ruling on the exercise of freedom of the press during such evacuations.

IN BRIEF **Protecting the freedom of the press, the safety and dignity of persons**

In December 2020 and January 2021, police authorities evacuated illegal migrant camps on the coast of Dunkerque and Calais. A security perimeter was established to enable this operation. In February, two journalists appealed the matter to the Conseil d'État after their first appeal was rejected by the administrative court of Lille: they argued that they were not able to provide sufficient coverage of these evacuations, having been prevented from freely accessing the camps during the operations. **The Conseil d'État insisted that prefects are required**

to ensure that freedom of the press is respected during the evacuation of such camps. However, in this specific case, witness reports and photographs collected during the operations, as well as discussions having occurred during the Conseil d'État hearing, show that the security perimeter did not prevent journalists from providing coverage of said events. The purpose of the perimeter was to ensure respect for the dignity of the evacuated persons and to protect them from third parties without exceeding that which was necessary. Freedom of the press was indeed respected. ●



FIND OUT MORE

DECISION no. 448721 of 3 February 2021, "Journalist access to migrant camp evacuation operations"

IN BRIEF **Right of asylum: better assessing risks in countries of origin**

To assess asylum-seekers' situations, we must take into account applicants' living conditions in their country of origin. To this end, the French Office for the Protection of Refugees and Stateless Individuals (OFPRA) relies on a list of "safe" countries which comply with human rights, i.e., the principles of the Rule of Law and fundamental freedoms. By definition, nationals of these "safe" countries have a low chance of being granted asylum in France. In July

2021, the Conseil d'État removed Senegal and Ghana from this list. To explain this choice, the Conseil d'État based its decision on the existence of laws punishing homosexual relations, and continued behaviour sanctioned or tolerated by authorities exposing LGBT people to serious risks. **Requests from asylum-seekers from these two countries must now be reviewed in depth, which should promote their success.** ●



FIND OUT MORE

DECISION no. 437141 of 2 July 2021, "List of safe countries of origin"

States of emergency: better handling future crises

Since 2015, France has spent half of its time in a state of emergency—first for terrorist reasons and subsequently due to the sanitary crisis—a state in which our freedoms are more easily undermined. What can we expect in the future? New crises will likely result in new states of emergency being declared.

State of emergency not to be confused with crisis management

To prepare for this possibility, the Conseil d'État issued 15 proposals in its 2021 annual study, "State of emergency: the democracy under pressure". Its aim was to improve the effectiveness of action taken by public authorities in the face of a crisis, while protecting

our freedoms and republican principles. In particular, it noted the crucial need to eliminate the dangerous confusion between the notions state of emergency and crisis management. To this end, it recommended reserving states of emergency for major crises which the Government cannot address using its usual legal tools. At the same time, it suggested establishing a general legal and crisis management framework.

Improving steering at the highest State level

In practice, the state of emergency declared as from March 2020 demonstrated that, when faced with a crisis, the State's organisation could be improved. **The Conseil d'État notably underlined insufficient anticipation capacities and inadequate interministerial steering structures in a context in which decisions are centralised at the highest State level.** It suggested entrusting the General Secretariat for Defence and National Security (SGDSN) with the power and necessary means to oversee crisis management when the President of the Republic or Prime Minister have taken over operations. It also recommended clarifying how responsibilities are divided between the State and territorial authorities by providing a specific action plan for each main type of crisis.

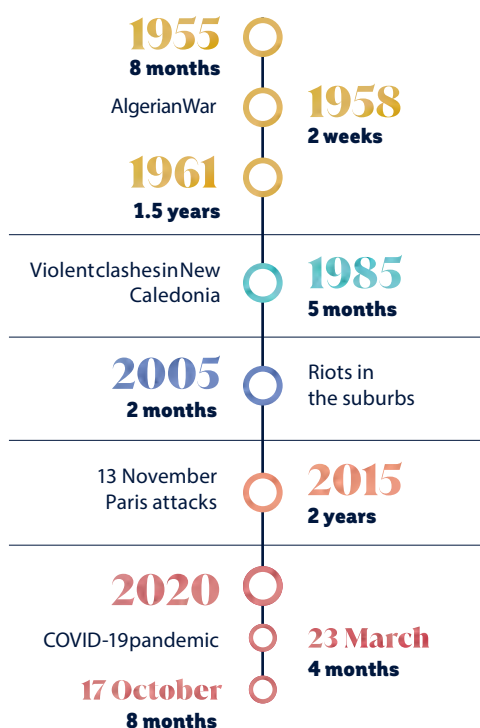
Better monitoring the powers entrusted to the Government

Moreover, by definition, a state of emergency gives a considerable boost to the executive power's prerogatives. **While temporary and justified by circumstances, this boost nonetheless requires increased supervision by the Parliament and by constitutional, judiciary and administrative judges so as to protect the Rule of law.** Thus, the Conseil d'État suggested including new procedural rules in the Constitution relating to the triggering, extension and constitutional review of states of emergency. Among other things, it suggested consolidating Parliamentary control over the exceptional powers entrusted to the executive branch, as well as introducing a liaison committee comprised of the Conseil d'État and the Court of Cassation, in charge of examining any legal matters which may require their joint views. ●

[FIND OUT MORE](#)

2021 ANNUAL STUDY,
"State of emergency: the
democracy under pressure"

States of emergency in France since their creation



Repairing **historical prejudices**



↑ **February 2022, Laudun-l'Ardoise.** The French Government ordered the excavation of land on which Harki children had been buried in undignified conditions 60 years before. In November 2021, the Conseil d'État issued an opinion on a bill to recognise and repair the harm suffered by Harkis.

How can we repair the prejudice suffered by populations throughout history? In 2021, the Conseil d'État tackled this issue on two occasions.

In November, it studied a bill recognising the State's responsibility for the undignified conditions under which Harkis and other persons repatriated from Algeria were repatriated and accommodated as from 1962. To repair these losses, the Conseil d'État considered that the payment of a fixed amount based on the time spent in a State accommodation structure is justified. Years after the events, these individuals may be unable to provide proof of the specific prejudices they suffered. **This system ensures reparation, which, according to estimates, could benefit up to 50,000 people.**

Restituting looted works

Simultaneously, the Conseil d'État studied the bill on the restitution or provision of certain cultural assets to the rightsholders of victims of antisemitic persecution between 1933 and 1945. Among such looted works kept in public collections were paintings by Gustav Klimt and Maurice Utrillo. The Conseil d'État strove to specifically determine the circumstances under which each work of art was dispossessed in order to confirm whether they had been looted when placed in the public domain. After this examination, restitution was required in the name of overriding public interest.

The Conseil d'État further recommended drafting a law on the restitution of looted works, and establishing an administrative procedure to remove them from public collections. ●



FIND OUT MORE

OPINION of 3 November 2021, "Bill recognising and repairing the losses suffered by Harkis and other people repatriated from Algeria"

OPINION of 3 November 2021, "Bill on restitution of cultural assets to the rightsholders of victims of antisemitic persecution"



Protecting access to culture

Because cultural works are not like other types of property, the Conseil d'État ensures that they are protected against certain private interests. A key role ensuring their accessibility, protecting our heritage and defending the cultural diversity that characterises our country.

↑ Faced with competition from online retail platforms, many bookshops now offer delivery services. In 2021, the Conseil d'État examined a bill to better protect bookshops by introducing a minimum delivery rate.

Adjusting to the digital era

In this digital era, our means of accessing culture are different: new private platforms compete with the traditional players that are bookshops and cinemas. In this ever-changing environment, the Conseil d'État is tasked with overseeing our shared heritage.

Public interest must prevail. This means protecting cultural diversity. Supporting libraries is also a way of preventing the uniformisation of content.

Supporting bookshops to ensure cultural diversity

In March 2021, members of the Conseil d'État examined a bill put forward by a senator with the aim of improving fairness between players in the book sector. The bill's key measure was the implementation of a minimum price for book home deliveries. The aim was to protect libraries against competition from major online retail platforms offering delivery at almost no cost. Despite this minimum price infringing on the freedom of enterprise, **the Conseil d'État considered that it was justified.**

Protecting French audiovisual heritage

One month later, the Conseil d'État handed down a decision on a Government bill aiming to defend cultural works in a digital era. This bill provided for the implementation of a scheme to protect French cinematographic and audiovisual works when acquired by foreign players such as Netflix or Amazon. In practice, a French work acquired by a foreign on-demand video platform must remain available to the French public at all times. The Conseil d'État confirmed the need to protect this heritage which is part of our cultural identity and to disseminate it to as wide an audience as possible. However, the entities acquiring such content must not be



FIND OUT MORE

OPINION of 11 March 2021, "Bill to improve the book economy and increase fairness between players"

OPINION of 1 April 2021, "Bill on regulating and protecting access to cultural works in the digital era"



IN BRIEF

The Kiss is a part of **national heritage**

Paris, 1910: Tatiana Rachewskaia, a 23-year-old medical student, ended her own life. Her parents chose to adorn her grave in the Montparnasse cemetery with *The Kiss*, a statue purchased from the roman sculptor Constantin Brancusi. Unknown at the time, he would later become a leading artist. In 2005, when contacted by art dealers, Tatiana Rachewskaia's descendents started taking steps to remove and sell the sculpture.

In order to protect the public's access to this major piece of work, the State took action: it made it impossible to remove the sculpture by classifying the entire grave as a historical monument in 2010. When challenged by the family, this decision was confirmed by the Conseil d'État. Having been purchased with the sole aim of being affixed to the young woman's grave, the sculpture and the grave form an indivisible funerary monument, according to the judge. As such, the whole must be considered "*immovable by nature*", a legal category that allows the State to protect it by registering it as a historical monument—even without its owners' consent. ●

**FIND OUT MORE**

DECISION no. 447967 of 2 July 2021, "Brancusi's *The Kiss* cannot leave Montparnasse cemetery"

disproportionately forced: after a legal review by the members of the Conseil d'État, the Government amended its text with more appropriate rules and sanctions. An

initiative applauded by the Conseil d'État in its advisory opinion. This new measure has now been made law and was enacted on 25 October 2021. ●

IN BRIEF

An agreement on **media chronology**

"Media chronology" refers to the set of rules for broadcasting films released in the cinema. In December 2020, the Government required that TV channels and video on demand platforms come to an agreement to revise such rules before April. After this period, it would impose its own rules. The challenge was to reduce asymmetry between platforms and certain channels with the rights to broadcast films before others. Believing April to be too soon, Canal+ asked the Conseil d'État to suspend this measure and expressed its fears of seeing platforms benefit from

favourable rules should the Government have the final say. However, the judge rejected its request: the calendar in itself is not disadvantageous to the channel, and nothing indicates that the measures the Government might take in the event of a breakdown in negotiations would be either. It reiterated that the competitive pressure weighing on Canal+ is not only tied to media chronology, but also to the arrival of new players on the market and to significant changes to consumption patterns. In January 2022, an agreement was ultimately entered into, including Canal+. ●

**FIND OUT MORE**

DECISIONS nos. 450638-450645 of 1 April 2021, "Calendar to define a new chronology for broadcasting films shown in the cinema"



Safeguarding **social** rights

Rise in self-employed worker numbers, multiplication of short-term contracts, growing insecurity... Faced with the challenges posed by an ever-changing economic world, the Conseil d'État ensures a balance is maintained between changes to labour law and the defence of social rights.



April 2021, Paris. Anti-unemployment insurance reform demonstrators protest in front of the Odéon. When referred to on several occasions throughout the year, the Conseil d'État considered it necessary to postpone the reform once, taking account of the pandemic's repercussions on the labour market.

Overseeing the unemployment insurance reform

In 2021, a Government decree established new rules to calculate unemployment insurance, three years after a breakdown in negotiations between employee and employer unions. To promote stable employment and encourage recourse to long-term contracts, these measures made unemployment allowances less favourable for individuals having alternated between short-term contracts and periods of inactivity. At the same time, they encourage employers to offer long-term contracts based on a bonus/penalty system applied to unemployment contributions.

Adjusting the calendar

In June, several unions asked the Conseil d'État to suspend the decree as a matter of urgency, with it set to apply to employees having lost their jobs as from 1st July. The judge hearing applications for interim measures granted their request. **In a context marked by the repercussions of the COVID-19 pandemic, the economic situation and the employment market were too uncertain in the short term.** For the Government's stated objective to be achieved, economic conditions must offer employees the ability to access long-term contracts. This reform pushed back the entry into force of measures relating to employers, it must therefore apply the same time period to measures relating to employees.

However, it did not dispute the principle of the reform: it's only reservation related to the calendar for said reform. Hence, the Government set a new date for entry into force of 1st October. Once again, several unions asked for the urgent suspension of the decree. Yet this time, the Conseil d'État refused. It found that when setting this new date, the Government had taken account of the latest indicators on the economic situation and labour market evolutions. In fact, the situation had significantly improved over the previous months and no longer prevented the reform's implementation. Furthermore, the Conseil d'État noted that jobseekers continued to benefit from prolonged support measures.

Measures in compliance with the principle of equality

When questioned on the substance of the reform in December, the Conseil d'État confirmed that the latter does not contradict the principle of equality (see page 41). In particular, the differences in benefits which aim to encourage employees to favour long-term contracts are not disproportionate and comply with regulations. In addition, despite the unions' fears, these new rules did not result in any discrimination against women: in the first year, 45% of the individuals benefitting from the new benefit calculation method were women and 55% were men. ●



FIND OUT MORE

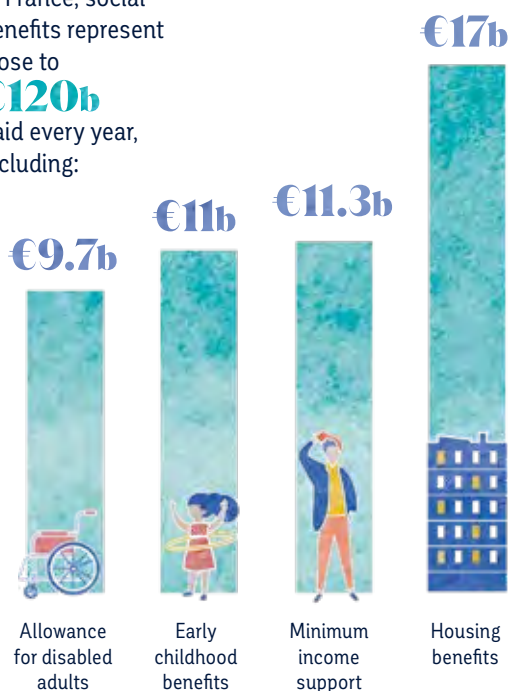
DECISION n° 452210 of 22 June 2021, "Unemployment insurance: new benefit calculation rules"

DECISIONS nos. 457300, 457313, 457321, 457337, 457343, 457345 of 22 October 2021, "Unemployment insurance: new benefit calculation rules will not be suspended"

DECISION no. 452209 of 15 December 2021

Promoting access to **social benefit** schemes

In France, social benefits represent close to **€120b** paid every year, including:



Source: Conseil d'État study, July 2021.

Minimum income support (RSA), Elderly solidarity allowance (ASPA), early childhood benefits, zero-interest loans and energy cheques: many social benefit schemes are based on "income criteria". However, the method used to calculate such income differs according to the administration in charge and the benefit in question. The complex nature and inconsistency of these rules penalise beneficiaries, resulting in renunciations and good faith mistakes. It also makes the work of the departments in charge of granting these benefits much harder.

Facilitating citizens' applications

Tasked by the Prime Minister, the Conseil d'État proposed a roadmap as part of a study published in November 2021

to simplify consideration of beneficiaries' resources, with a view to making benefits more accessible to those in need. To this end, it intended to promote the principle of "Tell us once", ensuring that citizens are not asked to declare the same income several times to various administrative departments.

While there are currently a dozen methods for evaluating income, it recommended converging towards two types of "income bases": a unified base for all family, RSA, ASPA and legal social aid benefits, and another tax income base for benefits granted based on declared income.

15 proposals to rationalise all rules

These objectives resulted in 15 concrete proposals. Among these, the proposal to improve management of the income evaluation system: a general coordination role should be entrusted to the Directorate of Social Security. The Conseil d'État also recommended improving consideration of income from employed activity. Rather than referring to an obscure notion such as "net received income", which does not match any line on the payslip, using the line "net to be paid before tax", which does indeed exist would provide more clarity.

Moreover, the rules for consideration of property income and property not producing income must be made fairer: the Livret A (savings account) return rate should be used as a reference, and small savings should not be included when calculating beneficiaries' resources, as these provide a vital security net. As for self-employed workers, the Conseil d'État suggested using the previous year's income as a basis rather than that of the year before last. It also suggested unifying the rules applicable to maintenance allowances and other transfers of money, notably by excluding modest assistance provided by loved ones from income bases for RSA and the employment bonus ("prime d'activité"). ●

FIND OUT MORE

STUDY published in July 2021, "Income criteria in social policies: more simplicity, more consistency"



INTERVIEW

"Educating about solidarity to protect our social rights"

With **COLETTE BEC**, professor emerita of sociology at the university of Paris.

A French specificity, the Social Security scheme plays a key role in ensuring our fundamental rights. Despite this, we struggle to understand its pillars and operation. A lack of knowledge that must be rectified according to Colette Bec.

What was the aim of the Social Security scheme upon its creation?

Colette Bec: As the country was emerging from two world wars and an economic crisis, a remarkable political consensus appeared: the society that was to be rebuilt should be based on social justice. For the first time, there was an understanding that there can be no peace or freedom without national solidarity. The Social Security scheme was created in 1945 with this aim in mind. By combining policies on full employment, health facilities and the redistribution of income, its purpose was to ensure access to fundamental rights and the common good for all citizens. It quickly transformed our society: between 1890 and 1960, life expectancy rocketed from 45 to 70 years old.

How do you explain its failure to achieve all of its objectives?

C. B.: It is clear that many citizens, while they praise the Social Security

scheme, do not understand how it works. Since its creation, the institution has attracted less and less interest and mobilisation from its beneficiaries. Worse still, it is often seen as a mere reimbursement fund. This has caused drifts, including an increase in bureaucracy, which causes us lose sight of the aim of solidarity.

Can we replace solidarity at the core of our view of the Social Security scheme?

C. B.: Solidarity is a political principle that aims to combine collective cohesion and individual independence. It cannot be implemented effectively if citizens are not aware of the role they have to play. Pierre Laroque, State Councillor and founder of the Social Security scheme, once said: to be efficient, social law advances must go hand in hand with education on solidarity and our civic obligations.

With the pandemic, the reality of this interdependency has rushed into our

lives. Without respect for common rules and collective mobilisation, we could not have retained our individual freedom and safety.

How can the institution's governance serve this principle?

C. B.: By entrusting the management of their interests to those concerned, notably through trade unions. Basing Social Security governance on more active participation from insureds is protecting it from a technocratic rationale and ensures its democratic operation. Significant efforts are still required to establish such a dynamic. ●



FIND OUT MORE

SYMPOSIUM "Social protection governance and financing", 12 February 2021.

Supporting and protecting self-employed workers

Craftspeople, traders, liberal professions... Self-employed workers now account for 3 million people in France. How can we ensure their statuses are both simple on an administrative level and more protective? This is the balance sought by the draft law for self-employed activity, submitted to the Conseil d'État for its opinion in September 2021 before being voted on by the Parliament and enacted in February 2022.

Safeguarding all entrepreneurs

In particular, this bill creates a new simplified status replacing the status of limited liability individual entrepreneur (EIRL), which was until now rarely used by self-employed workers. **The Conseil d'État acknowledged the major legal innovation offered by this new status but proposed some adjustments.** In particular, the principle of "singularity of estate" was brought into question. This principle provides that a person can only have one estate, and therefore an individual entrepreneur's personal and professional estate form a whole. In this case, how can we specifically distinguish between what belongs to one's

personal estate and what constitutes "assets used for a professional activity" in order to protect entrepreneurs against any potential creditors? How should any assets shared by the entrepreneur and his or her spouse be considered?

The Conseil d'État also invited the Government to improve its bill as regards the allowance for independent workers (ATI) which was created in 2018 to facilitate career changes for former self-employed workers having been placed under receivership or court-supervised liquidation. The bill extends access to such an allowance to self-employed workers having definitely ceased their activity when said activity is no longer viable.

However, according to the Conseil d'État, this new form of access creates inequality because it is reserved for only some categories of self-employed workers. As a result, it proposed a model under which all potential beneficiaries of the ATI could access this allowance, regardless of their business sector. With this measure, almost 30,000 self-employed workers could benefit from the allowance every year, compared with only one thousand before the change. ●



FIND OUT MORE

OPINION of 30 September 2021, "Bill promoting self-employment"

Self-employed workers: highly unequal monthly income*

*Business income in the meaning of Insee
Source: Insee, 2020.



€330

Home delivery



€470

Micro-entrepreneurs



€3,850

Traditional non-employees

€8,800



Doctors



↑ Craftspeople, freelance graphic artists, grocers, independent midwives... Today, 3 million French nationals are self-employed. Their often complex statuses make them particularly vulnerable to life's uncertainties. In 2021, the Conseil d'État issued an opinion on a bill to improve their circumstances.

Specifying instructions for **minimum hierarchical wages**

Minimum hierarchical wages are minimum wages paid to employees based on their level in the company's hierarchy. But is the amount determined at the industry or company level? And are these minimum wages only comprised of the basic wage? Or do they include wage supplements?

More favourable industry-wide agreements for employees

Since 2017, industry-wide agreements have prevailed over company agreements when it comes to defining MHWs. Their task is an important one: industry-wide agreements are negotiated with trade unions, who represent employees during discussions, and any progress made applies to all companies in the industry.

In 2018, trade unions and an employer organisation in the retail industry established MHWs for their entire

industry. The MHWs they established were comprised not only of a basic wage but also included an end-of-year bonus and remuneration for breaks. An order of the Ministry of Labour opposed this decision: it considered that MHWs must only be comprised of basic wages, without supplements.

When an appeal was lodged by the industry's trade unions and employer organisations, the Conseil d'État provided clarifications on the rules. **It deemed that the notion of MHW refers to the remuneration actually received by employees, i.e. their basic wage and any supplements.** As regards the link between industry-wide agreements and company agreements, it reiterated that a company agreement may freely determine the bonuses paid to employees, provided that the actual remuneration of such employees is at least equal to the MHW established at the industry level. The ministry's order was cancelled. ●



FIND OUT MORE

DECISION no. 433053, "Minimum hierarchical wages (MHW)"

An aerial photograph of a city, likely Lyon, France, showing a multi-lane highway and a large bridge with two prominent arches spanning a river. The sky is blue with scattered white clouds. The image is partially obscured by a green rectangular overlay containing text.

Environment: taking action today

From combatting air pollution to ruling on pesticide use, the Conseil d'État has the power to force the State to act in line with its own environmental commitments. In 2021, it continued to play a key role in ensuring compliance with sustainable development goals and protecting the future for all.



October 2021, Lyon. Alongside Paris, the city of lights is one of the two French cities in which the concentration of nitrogen dioxide continues to exceed the limit thresholds set out in the French Environmental Code in 2020.

Air pollution: a historical penalty

How can we force the State to respect its commitments to combat air pollution? On 4 August 2021, a new step was taken: the Conseil d'État sentenced the State to pay the highest penalty in the history of administrative case law for its failure to comply with European regulations on air quality.

Persistent pollution

It all started in 2017: the Conseil d'État ordered the Government to implement concrete action plans to bring concentrations of nitrogen dioxide and fine particles below the limit values set out by European law and reiterated in the French Environmental Code across thirteen zones in France.

Yet, in 2020, the Conseil d'État noted that the limit values had once more been exceeded in several of these zones in 2018. Consequently, it ordered the State to comply with the rules that it had itself established: should it fail to take necessary measures within six months, the State would be required to pay the unprecedented penalty of 10 million euros per semester of delay. **In August 2021, the administrative judge reviewed the issue:** in 2019, the limit thresholds had once more been exceeded in Paris, Lyon, Marseille, Toulouse and Grenoble for nitrogen dioxide, and in Paris for fine particles. 2020 data also showed that these exceedances continued in Paris and Lyon. They had only slightly dropped in other zones, despite several sources of pollution having been reduced as a result of the health crisis.

Insufficient measures

In its defence, the Government stated that it had implemented measures as of July 2020. An assessment of public policies on air quality had been launched. New low-emission zones had been introduced. Oil boilers were in the process of being banned. **Nonetheless, the Conseil d'État doubted that these initiatives would improve the situation quickly enough.** It noted that no new air protection plan has been adopted for the relevant zones when such a tool had proven useful in the past.

A historical penalty

In this context, it could not determine that the 2017 decision had been applied. **Exercising its enforcement power, the Conseil d'État sentenced the State to pay a penalty of 10 million euros for the first semester of 2021.** This amount is to be divided among the various associations and entities involved in environmental protection. And this chapter is far from being closed: every semester, the Government will need to account for its actions. ●

100 billion euros

This is the annual cost of air pollution in France

Source: Sénat.



FIND OUT MORE

DECISION no. 394254 of 12 July 2017, "Air pollution"

DECISION no. 428409 of 10 July 2020, "The Conseil d'État orders the Government to take measures to reduce air pollution, under penalty of 10 million euros per semester of delay"

DECISION no. 428409 of 4 August 2021, "Air pollution: the Conseil d'État sentences the State to pay 10 million euros"

Guaranteeing the effectiveness of climate laws

To ensure the law has a concrete impact on reality, the Conseil d'État monitors the applicability and effectiveness of measures set out to protect citizens from climate risks. Its task is to rigorously formulate their content and better anticipate the tracking and assessment of their effects.

Clarifying the State's responsibilities

In January 2021, while working on the constitutional bill derived from efforts made by the Citizens Convention for Climate, the Conseil d'État drew the Government's attention to the sentence "[France] guarantees the preservation of biodiversity and the environment, and combats climate change". It recommended clarifying this sentence to better define the scope of this constitutional obligation and believed the impact of the verb *guarantee* on the State and its local authorities' legal responsibility should be examined. Its opinion was not followed. Yet, a few months later, it was, in fact, this phrase, and this verb, that caused a disagreement between the National Assembly and the Sénat. A disagreement that resulted in the text being abandoned.

Guaranteeing the applicability of measures

In an opinion issued in February 2021 on the "Climate and resilience" bill, also derived from proposals made by the Citizens' Convention, the Conseil d'État deemed that some measures were too vague to be actually applied. For example, as regards the ban on advertising fossil energies provided for in the bill, it highlighted the ambiguity of the formulations used. Does this ban only apply to energy sources (petrol, gas, etc.) or energy-consuming products also? Without further clarification, the measure cannot be applied.

To encourage the use of soft modes of transport, the bill also proposed banning air connections when a railway alternative in less than two and a half hours is available. But how can we assess the viability of this alternative for citizens? While the Conseil d'État approved this measure which complies with the purpose of the bill, it suggested clarifying that the travel in question must be provided by the national railway network, with several daily connections. ●



FIND OUT MORE

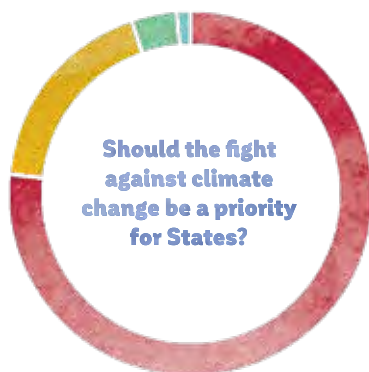
OPINION of 21 January 2021 on a constitutional bill completing Article 1 of the Constitutional and concerning environmental protection.

OPINION of 4 February 2021 on a bill on the fight against climate change and its effects

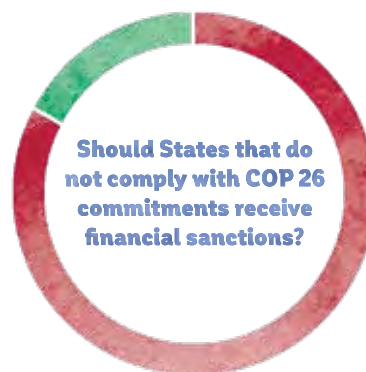
OPINION of 25 November 2021 on a bill reforming climate risk management tools in the farming sector

What do the French think of climate issues?

Source: Opinion Way survey.



76% Yes | **18%** It's an important topic but there are other priorities
4% No | **1%** Do not know



83% Yes | **17%** No



↑ **April 2021, Piacé, Sarthe.** A farmer sprays pesticides on his corn crops. In 2021, the administrative judge ordered the Government to change regulations on the use of such products to improve the protection of persons.

IN BRIEF

Regulating pesticide use

In late 2019, the Government clarified the rules for the use of pesticides in farming at the Conseil d'État's request. To better protect citizens, new spraying distances were defined for zones located near houses. The conditions for drafting pesticide user commitment charters were also set out. But in 2021, these measures were challenged: joint and organic farming organisations argued that they did not provide enough protection, while farmers and a chamber of agriculture considered them excessive.

Referring to ANSES' recommendations, the Conseil d'État asked the Government to complete its regulations within six months. The same 10-meter safety distance must now be applied to all high-risk products, whether such risks are proven or merely suspected. In addition to inhabitants, those working near spraying zones must also be protected. Meanwhile, pesticide use commitment charters must include accurate information for all such individuals. ●



FIND OUT MORE

DECISION no. 437815 of 26 July 2021, "Rules for pesticide use in farming"



LEARN MORE

CÉCILE DUFLOT

Executive Director of Oxfam France, former Minister of Territorial Equality and Housing

"The law is a democratic tool"

"For environmental NGOs, the law has long been an obstacle to legislative progress. We have had to carve out a place for ecology in law and, once carved out, render it enforceable, effective...

This is where we are now. But even if we were all exemplary with our consumption and transport patterns, we would only achieve 25% of the Paris Agreement goals, 75% rely on public policies such as a reform of the agricultural model, a transport policy, etc. In this respect, and in this respect, the shared framework provided by the law could be the tool to create this obligation, thereby enabling public policies to unfold."

Law night at the Conseil d'État, 4 October 2021



FIND OUT MORE

WATCH the Law Night discussions

Climate: the State ordered to take more action



↑ **January 2021, Paris.** The collective L’Affaire du Siècle demonstrates before the hearing at the administrative court of Paris. The latter sided with the collective in October 2021, referring in particular to the Conseil d’État’s “Municipality of Grande-Synthe” decision which confirmed the binding nature of climate commitments.

How can we ensure our global warming commitments actually come to fruition? In June 2021, the Conseil d’État examined the actions taken by the Government to achieve our aims of reducing greenhouse gas emissions.

Ensuring the Government can meet its commitments

The issue arose in November 2020: the Conseil d’État had decided to force the Government to be held accountable, recognising for the first time the binding nature of the climate commitments made by France when signing the Paris Agreement in 2015, which had been transposed into an act providing for decrees for implementation.

This historic decision came in response to legal action taken by the coastal municipality of Grande-Synthe

(Nord), which was threatened by the rising sea level as a result of global warming and faced with the Government’s refusal to take additional measures. With the backing of associations and other local territorial authorities, it accused the Government of postponing a significant part of its efforts to reduce emissions it had committed to with the Paris Agreement. **The administrative judge sided with the municipality: due to the postponement of the efforts set out by the Government in the Decree of 21 April 2020, it is uncertain whether the goal of a 40% reduction by 2030 can be met.** Especially given that France had already fallen behind: despite the need to reduce emissions by 2.2% per year over the 2015–2018 period, it struggled to achieve a reduction of more than 1%. Can 2030 goals be met without immediate additional measures? The judge ordered the Government to provide an explanation.



FIND OUT MORE

DECISION no. 427301 of 19 November 2020, “Municipality of Grande-Synthe/Greenhouse gas emissions”

DECISION no. 427301 of 1 July 2021, “Municipality of Grande-Synthe/Greenhouse gas emissions cont.”

Act today for tomorrow

In June 2021, the explanations provided by the Government were examined during a new hearing. Where do we stand in terms of meeting climate goals? Is the Government's strategy sustainable?

For the Conseil d'État, the figures do not indicate a certainty of following the trajectory set out in the 2020 decree to meet the goals for 2030. In 2019, the drop in emission levels was too slow, estimated at around 0.9%. In 2020, this decline appeared higher. However, this was mostly due to the effects of the lockdown on the French population's activity. Relying on the findings of the High Council for Climate (HCC), the Conseil d'État considered this decline "transitional".

It also underlined the importance of adopting a more long-term view. The greenhouse gas reduction strategy, revised by the decree of April 2020, provides for a 12% reduction of emissions for the 2024-2028 period when this reduction was only 6% between 2019 and 2023. **There is no way that there can be such an acceleration in the decrease over the 2024-2028 period without new actions being taken in the short term.** This opinion is also shared by the General Council for Environment and Sustainable Development (CGEDD), the Economic, Social and Environmental Council (CESE) and the HCC. The Conseil d'État also reiterated that the European Parliament and the Council of the European

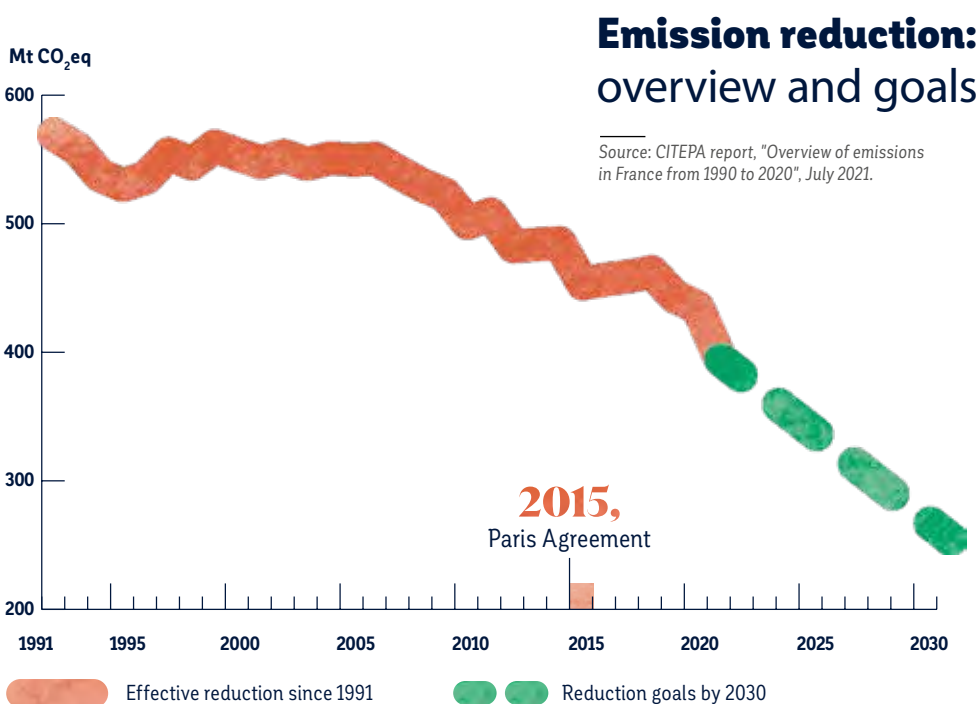
Union had reinforced the obligation to reduce greenhouse gases in April 2021: the required reduction is now 55% compared to the level in 1990, instead of 40%. In the face of such urgency, the Conseil d'État ordered the Government to take additional measures before 31 March 2022.

Administrative justice in the heat of climate justice

With these decisions, the Conseil d'État gave a historical boost to all administrative courts. It revealed the crucial role they play on topics relating to the climate and asked them to fully exercise their power to enforce.

Thus, the administrative court of Paris referred directly to these decisions in the "Affaire du Siècle" case. When appealed to by environmental protection associations challenging the State's failure to act, in February 2021, the court found that the latter was responsible for failings in the fight against global warming. In October, it ordered the Government to quickly develop and implement measures to compensate for the exceedance of greenhouse gas emission thresholds over the 2015-2018 period. Efforts to compensate for said exceedance, representing 15 million tons of carbon dioxide equivalent, must be effective on 31 December 2022. These must include a series of measures to repair the ecological damage caused within a relatively short period to prevent further worsening. ●

 **FIND OUT MORE**
DECISION of the Paris Administrative Court of 3 February 2021, "L'Affaire du Siècle"
DECISION of the Paris Administrative Court of 14 October 2021, "L'Affaire du Siècle"



Assessing the environmental impact of all **land development projects**

How can we ensure the impact of land development projects on the environment is anticipated and therefore controlled? Since 2011, European law has been clear: whenever there is a possibility of real effects on the environment and on citizen health, all public or private land development projects must first be subject to an environmental assessment.

Assessing all projects that require attention

The criteria used to identify which projects fall under this requirement include the project's location, its size, and the magnitude and reversibility of its impact on the environment (use of natural resources, production of waste, pollution, etc.). Yet, when this measure was transposed into French law in 2018, only one of these

criteria was kept: the project's size. As a result, "small" projects—in terms of size or the installation's planned capacity—were automatically exempt from any environmental assessment.

Referred to on this matter by France Nature Environnement, the Conseil d'État condemned this approach. Not only does it go against European law, but it also has no relevance on an environmental scale, given that small projects may also have a notable impact on the environment, particularly depending on their location. **The Conseil d'État ordered the Prime Minister to review the list of criteria within a period of nine months**, keeping the purpose of the text in mind: that all projects with an impact on the environment or on citizens' health must first be subject to a dedicated assessment. ●



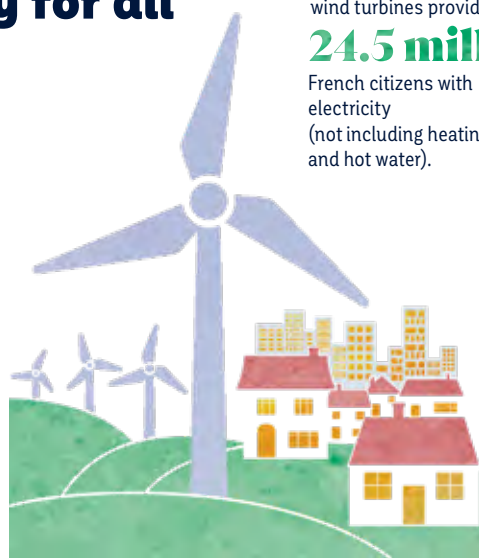
FIND OUT MORE

DECISION no. 425424 of 15 April 2021, "Environmental assessment of small land development projects"

IN BRIEF Promoting access to **renewable electricity for all**

In April 2021, local residents and environmental and landscape protection associations asked the administrative judge to stop the creation of a wind farm comprised of 16 to 17 wind turbines in the Lanouée forest in Forges (Morbihan). But in the Conseil d'État's view, public interest must prevail. The aim of this project was to promote access to renewable, safe and long-term energy for as many as possible. Indeed, the creation of this wind farm was to supply electricity to over 50,000 people in a region where local electricity production is particularly low, covering only 8% of the population's needs. The Conseil d'État further noted that the site chosen to accommodate the wind farm was not in a classified natural zone. It was also over one kilometre from any houses, a situation especially rare in a region where urban sprawl is an important issue and houses are few and far between. ●

In France,
8,000
wind turbines provide
24.5 million
French citizens with
electricity
(not including heating
and hot water).



Source: Ministry of Ecological Transition.



FIND OUT MORE

DECISIONS nos. 430497, 430498 and 430500 of 15 April 2021, "Construction of a wind farm in the Lanouée forest (Morbihan)"



INTERVIEW

"We must give meaning to environmental measures"

With **PATRICE GEOFFRON**, professor of economy at the universit  Paris-Dauphine, Director of the Centre of Energy Geopolitics and Raw Materials (CGEMP).

How can we redirect the economy towards a more sustainable model? For Patrice Geoffron, the transition must necessarily go hand in hand with new regulatory tools and a better understanding of their benefits among citizens.

Has our carbon-based energy model reached its limits?

Patrice Geoffron: First, we must remember that our wonderful economic growth since 1800 is the result of this carbon-based model. However, we must now come to terms with its cost, which had gone unknown until the end of the 20th century. Any doubts we might have had regarding humankind's responsibility for global warming have disappeared: the IPCC's reports are final. We are also now witnessing the local impact of our energy system: in France, air pollution kills nearly 40,000 people and costs between 30 and 70 billion euros per year. All clues that force us to set limits to this growth model.

Is the current context suited to a transition towards a more sustainable economy?

P. G.: Unlike the subprime crisis, the health crisis

has not forced us to postpone our environmental commitments. On the contrary, it revealed an alignment of health, economic and climate goals. The fracture with Russia, our main supplier of raw materials, has increased the urgency of this transition.

What are the economic costs and advantages of this transition?

P. G.: Obstacles to the energy transition are tied to the very "successes" of the model in place. A large portion of the equipment we use is designed to work in a carbon-based economy: infrastructures, buildings, household equipment, etc. But we are slowly measuring the full benefits of a new energy model. While the price of petrol and gas is rising sharply, decarbonizing is a winning economic calculation. Less dependency on external resources is a precious guarantee in terms of access to energy, as proven by the current conflict. Finally, improving air, water, or food quality will result in reduced costs, for example, in the health sector.

What role will regulations play in this change in direction?

P. G.: An undeniably essential one. Recently, the State committed to subordinating public policies to environmental goals. One thing is certain: for the measures taken to be truly effective, their meaning must be made clear to citizens, and their climate, economic and social benefits must be highlighted. This implies a better collective understanding of the challenges posed by the transition: it will not only be "blood and tears". ●



FIND OUT MORE

SYMPOSIUM "How to finance a sustainable economy", 5 November 2021



Protecting the rights of families and children

Family gatherings, child protection, a quality education... In 2021, despite the pandemic, the Conseil d'État ensured a balance between respecting the rights of families and children, and acting in the public interest.

Avoiding family separations

How can our fundamental freedoms coexist with health risk management? In the midst of the COVID-19 pandemic, while the Government was issuing international travel restrictions, the Conseil d'État was handing down several decisions to ensure that the measures taken did not disproportionately affect our fundamental freedoms, among which the right to return to one's home country and the freedom to marry.

Protecting the right to return to one's home country...

To minimise the virus' spread, a decree issued at the end of January required that travellers between France and countries outside of the European Union demonstrate a compelling personal or family reason, an urgent

health reason or a professional reason that could not be postponed. The Union des Français à l'Étranger (Union for French citizens living abroad) disputed this text in March. The reason: it prevented French citizens residing outside of the European Union from returning to their home country.

The administrative judge deemed **that requiring a compelling reason for such travel was a disproportionate infringement on each French citizen's fundamental right to access the national territory.** Furthermore, those French individuals affected by the measure represented only a small amount of entries on metropolitan territory; as such, they do not pose a health risk that would justify such restrictions. The Conseil d'État therefore suspended the Government's measure.



November 2020, Paris. At the Roissy-Charles de Gaulle airport, air traffic all but comes to a standstill to prevent COVID-19 from spreading. On several occasions in 2021, the Conseil d'État rendered decisions on the restrictive measures taken by the Government.

IN BRIEF

Putting an end to the isolation of **EHPAD residents**

Early 2021: to protect EHPAD residents from a new wave in the COVID-19 pandemic, the Ministry for Solidarity and Health prohibited all resident outings.

In March, when an appeal was lodged by the children of one such resident, the Conseil d'État deemed that such a prohibition was disproportionate and suspended it. In fact, at the time, over 80% of residents and 43% of carers had received at least their first vaccination dose. Available scientific data had already demonstrated the effectiveness of vaccination in reducing the risk of contamination and preventing serious forms of the illness. Further, several studies underlined the harmful psychological consequences of the isolation forced on EHPAD residents.

Outings must, therefore, be permitted for vaccinated residents when combined with suitable protective measures to ensure the safety of other residents and staff. The administrative judge invited the directors of establishments to make this decision on a case-by-case basis, depending on the local status of the epidemic and the characteristics of their establishment. ●



FIND OUT MORE

DECISION no. 449759 of 3 March 2021, "General and absolute ban on EHPAD resident outings"

... without risking a resurgence of the epidemic

However, the administrative judge noted that authorities retain the power to take all necessary measures to safeguard public health once the person is on national soil, including implementing a lockdown. It also maintained the requirement to present a negative antigen test taken less than 72 hours prior to boarding. The decree ordering such was taken in the context of a health emergency based on the recommendations of the High Council for Public Health: the judge confirmed that it was indeed legal.



Everyone has the right to leave any country, including his own, and to return to his country.

Universal Declaration of Human Rights, Article 13, § 2

Two months prior, the judge had ordered the Government to resume issuing family reunification visas to

the spouses and children of foreign non-European citizens residing in France. The aim: to defend children's best interests.

In April, very few visas were issued to foreign individuals wishing to enter France to marry a French national. The Conseil d'État ordered the Government to change these new rules as they disproportionately infringed on the freedom to marry.

The aim shared by all these decisions: **to ensure our rights are respected, even during a pandemic.** ●



FIND OUT MORE

DECISIONS nos. 449743-449830 and no. 449908 of 12 March 2021, "Requirement to have a compelling reason to travel"

DECISION no. 450884 of 9 April 2021, "Binational marital unions"

DECISIONS nos. 447878-447893 of 22 January 2021, "Issuance of family reunification visas"

Guaranteeing children's right to education



12,257,200 students are enrolled in public and private schools



approximately

55,000 children are home schooled

In France, families are free to choose to "home school". However, they must also ensure that children acquire basic knowledge and skills. To ensure this, an annual inspection is conducted by the National Education Department on a date notified to the family in advance. Since 2019, surprise inspections are also permitted.

Surprise inspections justified by children's rights

This measure was challenged by the association Les Enfants d'Abord: in April 2021, it asked the Conseil d'État to quash it. In its view, these surprise inspections infringed the freedom of education and the right to privacy and family life. It also claimed the measure

resulted in inequality between families depending on whether they were subject to a surprise or scheduled inspection. Yet, the Conseil d'État considered that these inspections do not infringe on the freedom of education as they do not prevent families from choosing to home school. Further, the infringement on the right to privacy and family life is justified: the purpose of the inspections is to ensure that the education provided at home complies with the child's rights and is indeed provided to all children of the same family. Families are also informed in advance of the conditions of the inspection at each stage of the procedure. As for the principle of equality, it does not prevent the administration from resolving situations that are not identical in different manners when justified by public interest. In this case, **the child's right to education prevails.** ●

FIND OUT MORE

DECISION no. 435002 of 2 April 2021, "Surprise home schooling inspections"

IN BRIEF Improving child protection

Designing public policies that better protect children is the aim of the draft act examined by the Conseil d'État in June 2021. Among the bill's key measures was that reorganising how public policies on child protection are steered on a national scale. To improve the consistency and coordination of actions nationwide, the bill plans to create a new cross-cutting public interest group to replace the French Agency for Adoption and the "GIP enfance en danger" public interest group. This new public interest group would be competent in all matters

relating to child protection, national and international adoption, and access to personal origins. In its opinion, the Conseil d'État expressed its puzzlement as to the effectiveness of such a measure. While it applauded the intent to rationalise the organisation currently in place, it considered the proposal overly complex. **The objectives pursued cannot be fully achieved with such an organisational reform.** To assess the actual impact of the reform, it recommended conducting an evaluation in the near future. ●

FIND OUT MORE

OPINION of 10 June 2021, "Draft law on child protection"



↑ **May 2021, Lyon.** How can we choose which children may or may not access school restaurants when spots are limited? This was one of the questions put to the administrative judge in March 2021.

IN BRIEF Ensuring **access to school restaurants for all**

In Besançon, a child was not allowed to register for a school restaurant. The reason given: not enough spots. Referred to by the child's mother, the administrative court of Besançon deemed that the child's exclusion by the town hall was illegal, stating that access to school restaurants is a right. The administrative court of appeal of Nancy confirmed this decision. **When the municipality appealed in cassation, the Conseil d'État adopted a more nuanced view.** It reiterated that the provision of a school restaurant service is optional: no law requires local authorities to ensure access to all children requesting such a service. However, local authorities that do provide this service are required to take account of public interest, which implies that all students must be able to benefit from it. Thus, they must make all efforts to adapt the size of their school restaurants to demand, but they cannot be ordered to accept children beyond their maximum capacity on the date of the decision. Children registered for school restaurants must be selected based on criteria in line with the principle of equality (*see right*). The decision handed down by the administrative court of appeal of Nancy was annulled by the Conseil d'État. ●



FIND OUT MORE

DECISION no. 429361 of 22 March 2021, "School restaurant"

BY THE WAY...

What is the **principle of equality?**

It is one of the key principles of public service and stems from the principle of equality before the law as set out in the Declaration of the Rights of Man and the Citizen. The principle of equality also implies that all citizens must have the same ability to access public service, and must be treated equally by said service.

In 1951, the Conseil d'État made this a general principle of law with its "Société des concerts du conservatoire" decision. In practice: it fills a gap by formalising this principle which is highly valued in the hierarchy of legal norms, placed just below the law but above decrees and orders.



FIND OUT MORE

DECISION of 9 March 1951,
"Société des concerts du conservatoire"



Ensuring animal welfare

With global diversity at risk now more than ever, animal well-being is entering the public debate as an important concern for citizens. In 2021, the Conseil d'État ensured that the regulations protecting animals were effective and complied with.



March 2021, Paris. In front of the Conseil d'État, activists from the association La Confédération Paysanne demonstrate against the derogation relating to the use of neonicotinoids for sugar beets granted by the Government. The administrative judge handed down three decisions on the topic in 2021.

Regulating the ban on neonicotinoids

This is a key measure to protect biodiversity: the act of 8 August 2016 and European law both prohibit the use of pesticides containing neonicotinoids. Referred to on three occasions in 2021 on this topic, the Conseil d'État verified the legality of the texts ensuring implementation on a daily basis.

Banning is the rule

In July 2021, it approved the decree of 30 July 2018, in which the Government listed the substances concerned by the ban. The text was challenged by the Union of plant protection industries and by producer organisations. To help with its decision, the Conseil d'État put the question to the Court of Justice of the European Union, which confirmed the legality of the ban under European law. By relying on scientific research, the judges underlined that neonicotinoids pose a threat to animal and human health. The fact that other EU member states have not adopted similar laws does not bring into question the French ban.

An exception for sugar beets...

Although rare, there are some derogations to the rule. When sugar beet crops were threatened by mass aphid infestations in December 2020, a law temporarily authorised the use of neonicotinoids. Referred to in early 2021 by environmental associations and beekeeper and farmer representatives, the Conseil d'État confirmed that this derogation for 2021 is entirely legal. It highlighted that the Constitutional Council considered that the law enabling this derogation complies with the Environmental Charter and with beekeepers' property rights. **In addition, European law provides for temporary derogations when there are serious agricultural risks, and no other solution is available.** In this case, the derogation is indeed an exceptional measure - it can only be extended until 2023, while awaiting alternative solutions to be found.

... but not for corn

Despite this, the exception must not become the rule. In July 2021, the Conseil d'État notably confirmed that the Government cannot extend this measure to corn producers. And that said producers cannot invoke the derogation granted specifically to protect sugar beets. ●

“

Neonicotinoids have harmful effects on bees' health.

Decision no. 424617



FIND OUT MORE

DECISION no. 450194 of 15 March 2021, "Neonicotinoids for sugar beets"

DECISION no. 424617 of 12 July 2021, "Ban on neonicotinoids"

DECISION no. 427387 of 12 July 2021, "No exception for corn crops"



Ensuring compliance with European hunting law

Should a hunting method be authorised simply because of tradition? Referring to European law, which prevails over national law in the hierarchy of norms, the Conseil d'État handed down several decisions on bird hunting in 2021.

of preserving a tradition is not sufficient to justify an exception to the rule. Species protection must prevail.

... as is hunting with nets, traps and cages

Hunting with birdlime is illegal...

In 2019, following an appeal submitted by two animal protection organisations against an authorisation to hunt using birdlime, the Conseil d'État asked the Court of Justice of the European Union (CJEU) to clarify the scope of the European Birds Directive of 30 November 2009. More notably, it asked it to specify the reasons permitting an exception from the ban on certain traditional hunting techniques, including hunting with birdlime as practiced in the southeast of France. **Relying on the CJEU's response, the judge handed down a decision in June 2021: hunting with birdlime must be banned.** There is no evidence that this method - which consists of coating a branch with an adhesive substance to capture certain birds alive so they may serve as callers - only traps the desired bird species. Nor is there any evidence that any birds caught by accident do not suffer serious harm once released, particularly to their plumage. To the CJEU and the Conseil d'État, the argument of tradition has no weight: the mere aim

In August, the argument of tradition was once again put forward to defend ministerial authorisations to hunt the Northern lapwing, European golden plover, thrush, common blackbird and Eurasian skylark in recent years.

Supported by the decision rendered in June, the judge reiterated that the hunting methods in question—nets, traps and cages—could not be exempted for the sole reason of perpetuating a tradition. These authorisations had also been granted based on a French regulation dating back to 1989, which has since been recognised as non-compliant with

“
The various means, devices or methods of large-scale or non-selective capture or killing [...] must be banned because of the excessive pressure they exert or may exert on the numbers of the species concerned.

Directive 2009/147/EC

European law. To authorise these three traditional techniques, it would need to be proven that they alone enabled the capture of the listed species, which is not the case. Siding with animal welfare organisations, the Conseil d'État cancelled said hunting authorisations. However, two months later, the Government once again authorised these traditional methods for the 2021-2022 season, based once again on the 1989 regulation. Authorisations the Conseil d'État ended as a matter of urgency in late October 2021. ●

FIND OUT MORE

DIRECTIVE 2009/147/EC of 30 November 2009 on the conservation of wild birds

DECISIONS nos. 443849, 434365 and 425519 of 28 June 2021, "Hunting with birdlime"

DECISIONS nos. 425435, 425540 and 426515; 425464, 425473, 425495 and 425503; 425549; 434375, 434400, 434459 and 434460; 434456; 434461; 443736, 443745, 443746, 443748, 444588, 444589, 444590 and 444591; 443742 of 6 August 2021, "Traditional bird hunting techniques"

DECISION no. 457535 of 25 October 2021, "Traditional bird hunting"



.....
1 in 5 French citizens

is pro-hunting

Source: IPSOS/OneVoice survey, 2021.



↑ The northern lapwing is one of the bird species benefiting from European protection, with hunting of the species banned by the Conseil d'État in 2021. Referred to as a matter of urgency when the Government had just issued hunting authorisations, the administrative judge reminded the Government that European regulations on species protection must prevail.

IN BRIEF

Protecting the **brown bear in the Pyrenees**

To avoid brown bears attacking livestock, two types of scare tactics were trialled in the Pyrenees. A simple scare tactic, involving sound, light and smell signals, and a more forceful scare tactic, involving non-lethal shots. In February 2021, environmental and wildlife protection organisations asked the Conseil d'État to put an end to these measures. The judge found that, based on current knowledge,

simple scare tactics do not necessarily harm the species' preservation and the improvement of its conservation. However, it considered that the use of shots fired is not sufficiently regulated. This more forceful scare tactic could have effects on keeping bear populations in their natural territory and on the improvement of their condition. **Since protecting the species is the priority, this measure was cancelled.** ●



FIND OUT MORE

DECISION no. 434058 of 4 February 2021, "Scare shots fired at brown bears"

IN BRIEF

Laying hens: the State must take measures to enable laws to be implemented

This was a major step forward for animal welfare: the Food act of 30 October 2018 bans the rearing of laying hens in cages in all new builds and in "renovated buildings". In light of the uncertainty surrounding this notion, the Government was meant to set out the specific terms for the implementation of this act in a decree. Yet, two and a half years after the entry into force of this text, this decree had still not been drafted. An animal welfare organisation asked the Government to issue the implementing

decree for this act, to no avail. On an appeal lodged by the organisation, the Conseil d'État ordered the Prime Minister to comply: as it stands, the phrase "renovated buildings" is far too vague and prevents the proper implementation of the act itself. The Government must publish the decree within a period of six months, under penalty of 200 euros per day of delay. When monitoring proper compliance with its decision in March 2022, the Conseil d'État found that the Government had indeed issued said decree a few weeks earlier. ●



FIND OUT MORE

DECISION no. 441660 of 27 May 2021, "Rearing of battery hens"

Adjusting public administration

Taking account of territorial specificities, clarifying the scope of local authorities' powers, simplifying the law... The Conseil d'État ensures that public administration is handled in a fair, effective and useful way for citizens.

↑ **December 2012, Marseille.** Demonstrations before the creation of the Aix-Marseille metropolis. In May 2021, the Conseil d'État examined the "3DS" bill on decentralisation.

Towards public action adapted to territorial specificities

Goals pertaining to social housing construction, water and sanitation management norms, rent control experiments,... How can public action be tailored to territorial specificities?

The Government tackled this topic. In 2021, it submitted its "3DS" bill on differentiation, decentralisation and deconcentration, containing several measures to simplify local public action, to the Conseil d'État. This act was ultimately enacted in February 2022.

The first steps in a long process

Comprised of a multitude of measures, this bill aimed to grant local authorities the ability to adjust their actions to their territorial specificities without infringing the principle of equality (see insert page 41).

The Conseil d'État highlighted the importance of consulting and dialoguing with representatives of local elected officials in the drafting of this text. This approach provides useful and practical measures.



IN BRIEF

Uniformising the administration's investigative powers

Tax inspectors, customs officers, labour inspectors, Urssaf officers,.... In France, these officers have the power to investigate and ensure companies' and citizens' compliance with regulations. But how effective are these powers entrusted with safeguarding our social model? In 2021, the Conseil d'État published a study on the topic.

These inspections are an integral part of our social model and meet a great need for citizens since they aim to ensure the rules are the same for everyone and that offences are indeed punished. Yet, in this relationship managed by the Prime Minister, the Conseil d'État finds that the powers of investigation granted to administrative authorities have become far too numerous, often redundant and rarely coordinated. The absence of a comprehensive view prevents them from being effective. The Conseil d'État made recommendations to uniformise and simplify these powers, and to make them more transparent, notably by creating rules shared by all administrative inspections. **As a result, it aims to improve trust between administrative authorities and citizens and to ensure compliance with the rights and duties of each.** ●



FIND OUT MORE

STUDY "The administration's investigative powers", adopted on 15 April 2021

It directly addresses the need for proximity and effectiveness as expressed by elected representatives and citizens.

However, the Conseil d'État invited the Government to launch more general discussions to achieve its ambitions, notably in terms of territorial differentiation - a principle that implies allowing local representatives some leeway when exercising their powers. **Such a monumental change to how public action is organised cannot be made with a single legal text.** It is a long-term process and initiative. The Conseil d'État considered that the bill only offered local authorities means of action with a very limited scope.

Clear goals rather than a rigid legal framework

The Conseil d'État also suggested setting out clear objectives for public action in this text, rather than establishing new normative frameworks which could hinder local initiatives. In particular, it considered that the measures distributing powers between regions, départements and municipalities in matters of ecological transition should be cancelled. In their place, it recommended including the overriding public interest goals of an ecological transition and circular economy in the General Local Authorities Code. Thus, such objectives could provide clear direction to local authorities, without the need for force. For the Conseil d'État, this would ensure both the consistency, legibility and actual effectiveness of the act on a daily basis. ●

68%
of French nationals would like national laws to be adjusted to territorial specificities.

Source: Sénat.



FIND OUT MORE

OPINION of 6 May 2021, "Bill on differentiation, decentralisation, deconcentration, and containing various measures to simplify local public action"

OPINION of 21 June 2021, "Letter of amendment to the bill on differentiation, decentralisation, deconcentration, and various measures"



↑ **September 2021, Paris.** A technician looks around the reservoir that supplies the capital's drinking water. A few months prior, the Conseil d'État specified municipalities' obligations as regards providing homes with a connection to the water network, in the context of a dispute between a private individual and their municipality.

Combating conflicts of interest in **public procurement**

In 2018, the Corsica local authority entered into a contract with a company to design, install and manage a regional very high-speed broadband network for educational and research establishments. A competing company asked the administrative court of Bastia to cancel the contract, calling into question the authority's impartiality during the tender award process. One of the employees in charge of the matter within the authority had been an employee of the selected company a few months prior. Was there a conflict of interest?

The administrative court deemed that there had not been, but the administrative court of appeal of Marseille acknowledged there had. It cancelled the contract. The Corsica local authority lodged an appeal with the Conseil d'État.

The principle of impartiality cannot be disregarded

The judges underlined the importance of the principle of impartiality when an administrative authority selects a service provider. They confirmed that this principle had indeed been disregarded by the Corsica authority. **For the Conseil d'État, this disregard in itself is a serious enough failing to justify the contract's cancellation, despite there having been no intention to favour a tenderer.** Moreover, the obligation to compensate any companies not selected depends on the chances they had of being awarded the contract. If, given the scores obtained when their bids were studied, they had a good chance, they must be compensated for their loss of revenue. In this case, the Corsica authority was sentenced to pay the losing company 3,000 euros. ●

FIND OUT MORE

DECISION no. 454466 of 25 November 2021,

"Principle of impartiality in public procurement matters"

IN BRIEF

Supplying drinking water: clarifying municipalities' obligations

The mayor of a rural municipality in the Drôme département refused to connect a home located outside the village to a public drinking water network. The owners challenged the refusal before the administrative court of Grenoble, which sided with them. Yet, according to the administrative court of appeal of Lyon, no law or regulation requires the municipality to connect homes to the network. Upon further appeal, the Conseil d'État considered that the court had made an error of law. Pursuant to the General Local Authority Code, in some cases,

municipalities can be required to ensure connection to the drinking water network.

Using the principle of equality before a public service as a guide (*see insert page 41*), every municipality must establish a map of the zones served by said network. **In such zones, they are required to grant all connection requests.** In this case, the administrative court of appeal did not check whether a supply zone had been defined. As a result, its ruling was quashed, and it must re-examine the case. ●



FIND OUT MORE

DECISION no. 431494 of 26 January 2021, "Local public drinking water supply service"

IN BRIEF

Repealing **obsolete legislation** to simplify the law

To make our laws clearer and improve legibility, the Sénat proposed a law to repeal old now-obsolete laws. Having already examined laws enacted between 1880 and 1940 as part of the "BALAI" (sweep) act, it scoured those enacted between 1941 and 1980 and suggested repealing 163. Most have become obsolete as only a few articles remain, detailing, for example, the implementing terms of provisions that have already disappeared from our law. By examining this bill, the Conseil d'État helped to create a clear legal framework for the repeal of obsolete laws. It ensured the proposed repeal would have no impact on current law in force, that it could be operated by way of ordinary law and

that it would meet the aim of clarifying the law. It also checked that any legislation in question was, in fact, no longer useful. Because, in its view, some establish legal frameworks that could still be used and must not be repealed. This is the case, for example, of a 1970 law which enabled a married person to recognise a natural child born prior to his/her marriage from a union with a person other than their spouse. This act was ultimately enacted on 14 February 2022, confirming the repeal of a total of 115 laws. ●



FIND OUT MORE

OPINION of 11 February 2021, "Bill to repeal obsolete legislation to ensure better legibility of the law"

A few obsolete law that have been repealed

NO LONGER CURRENT



Act of 1st October 1946 setting the **minimum age for election** by universal suffrage, notably as a deputy, to 23 years old.

NO LONGER CURRENT



Act of 18 March 1950 detailing **enrolment in the armed forces** in 1950.

REPLACED

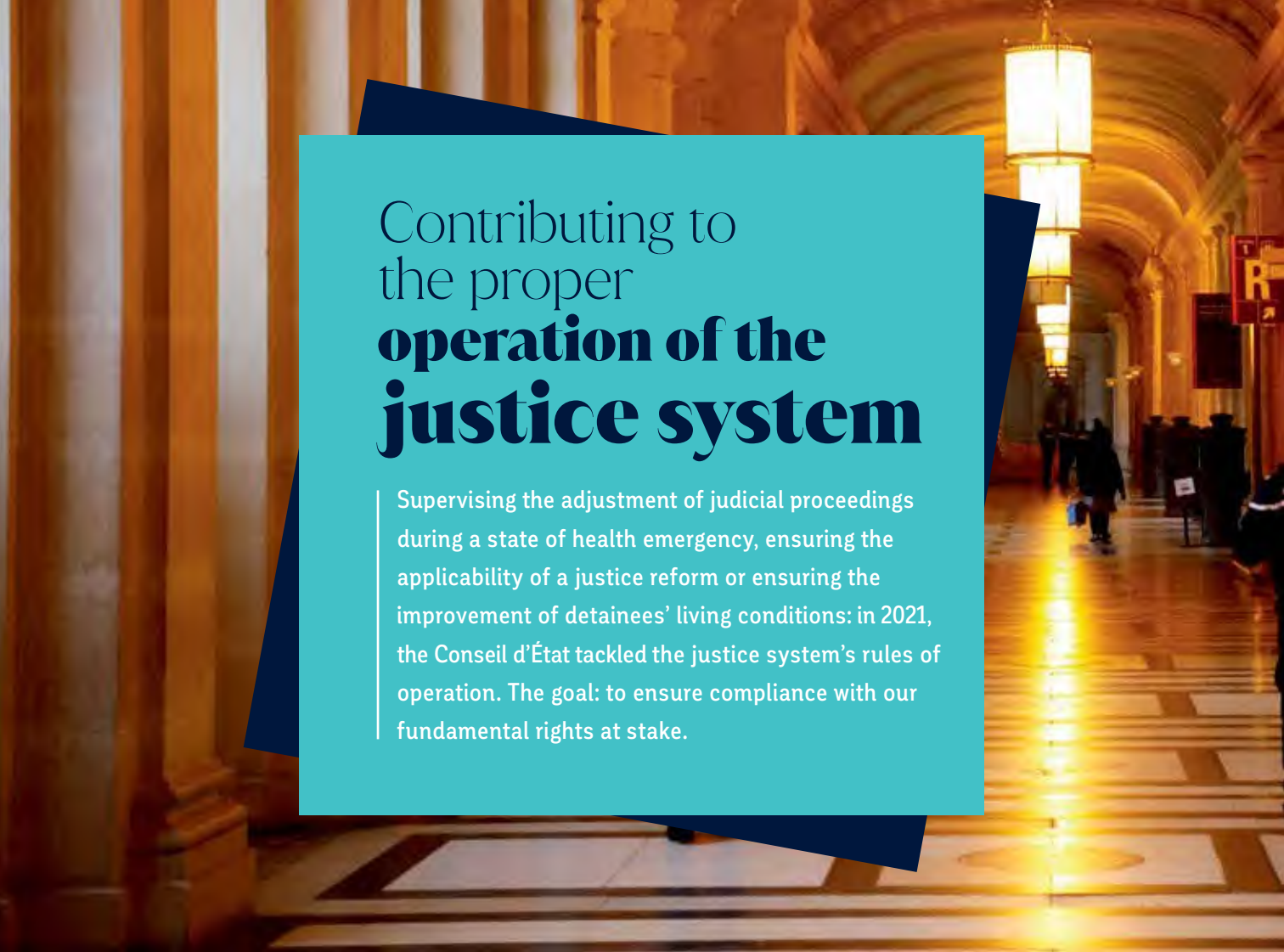


Act of 16 June 1966 extending the **offence of swindling** to fuel and lubricants.

REPLACED



Act of 6 May 1976 creating and **organising the Île-de-France region**.



Contributing to the proper **operation of the justice system**

Supervising the adjustment of judicial proceedings during a state of health emergency, ensuring the applicability of a justice reform or ensuring the improvement of detainees' living conditions: in 2021, the Conseil d'État tackled the justice system's rules of operation. The goal: to ensure compliance with our fundamental rights at stake.

Health crisis: adjusting procedures

In 2021, the Government adjusted judicial procedures to enable the judiciary system to continue to operate despite the health crisis. The Conseil d'État ensured that these measures complied with our fundamental freedoms and did not infringe on the right to a defence, while ensuring and ensure access to fair justice.

Requiring the use of videoconferencing is illegal

The Government chose to first take action regarding criminal procedures, offering judges the option of requiring the use of videoconferencing without asking for the parties' consent. [Referred to as a matter of urgency in 2021 by professional lawyers' organisations, the](#)

[judge hearing urgent applications within the Conseil d'État suspended this measure.](#) Due to the fact that it does not provide for any supervision, it infringes on the right to defence which each individual must benefit from.

Rendering a decision on the merits of this measure the following month, the Conseil d'État further considered that it infringed on the right to a fair trial as protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Maintaining maximum temporary custody periods

To take account of the slowdown in tribunals' activity during the pandemic, another measure provided for the

IN BRIEF

Reigniting **confidence in justice**

In 2019, only 53% of French nationals stated that they had confidence in our country's justice system.

The Government sought to respond to this mistrust: in 2021, it submitted a bill to the Conseil d'État for its opinion. Among the measures it put forward, it proposed to film trials for educational purposes, to better monitor preliminary investigations, and to review the assizes system.

The Conseil d'État studied each of the proposals separately: are they applicable, useful and effective in achieving their objectives? To improve them and ensure better coordination with existing law, it recommended several redactional changes. For example, it suggested clarifying the terms for accessing procedural documents during preliminary investigations to prevent coercion of the individuals in question. More generally, the Conseil d'État applauded the reform's experimental approach. However, it regretted that the method used to conduct such experiments sometimes lacked rigour. For example, it lamented the fact that no assessment was conducted prior to generalising—with this reform—the experiment conducted in départemental criminal courts. This act was ultimately enacted on 22 December 2021. ●

**FIND OUT MORE**

OPINION of 8 April 2021, "Bill for confidence in the judicial system"



January 2021, Paris. The courthouse is empty during the curfew implemented on 14 January. The Conseil d'État handed down several decisions to enable the judiciary system to continue to operate during the health crisis.

extension of temporary custody periods and of deadlines to appear before court for those awaiting trial. In line with the Constitutional Council's solution, the Conseil d'État held that the right to security set out by the ECHR does not in itself prevent this. **However, even in exceptional circumstances, European law requires that each extension be approved by a judge as part of adversarial proceedings within a short period of time.** As this is not explicitly guaranteed, the measure was revoked.

Authorising law office appointments despite the curfew

Between January and March 2021, any personal travel outside of the home between the hours of 6 pm and

6 am was prohibited. No exceptions were provided for meeting with legal counsel. What solutions were available when appointments could not be made during the day? How can the confidentiality of discussions

held via teleconsultation be ensured? Referred to by the Montpellier Bar Association, the Conseil d'État deemed that this measure made it difficult, if not impossible, to access counsel under conditions in compliance with the right to a defence.

To ensure the fundamental freedom of

effective remedy before the judge, an exception to the curfew must be made for appointments with legal counsel. ●



Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

*European Convention on Human Rights,
Article 6*

**FIND OUT MORE**

DECISIONS nos. 448972-448975 and n°448981 of 12 February 2021, "Criminal procedures during a state of health emergency"

DECISION no. 449764 of 3 March 2021, "Appointments with counsel despite curfew"

DECISION no. 440037 of 5 March 2021, "Criminal procedures during the COVID-19 epidemic"

Better protecting detainees' health



April 2021, Gradignan. Detainees exercising. On several occasions in 2021, the Conseil d'État reminded the administration of its responsibility to protect the health of detainees, who are completely dependent on it.

Whether in custody or in prison, individuals deprived of their liberty are under the administration's authority. The Conseil d'État ensures that their rights are complied with and their health is protected. To do so, it does not hesitate to use its power of enforcement.

Hygiene kits for Fresnes detainees

In December 2021, the Conseil d'État thus sentenced the State to pay a penalty of 1,000 euros per day of delay should it fail to apply a decision rendered by the administrative court of Melun in 2017 within one month. This decision forced the State to distribute hygiene kits to Fresnes prison (Val-de-Marne) detainees with insufficient resources on a more regular basis. **The administration argued that it distributed these kits at the detainees' request, yet the judge found that this was insufficient:** to fully comply with the administrative court's decision, it must increase the frequency of such distribution.

However, the Conseil d'État did note progress in other key aspects of detention conditions, for which improvement

had been ordered by the administrative court of Melun. In this 19th century establishment regularly singled out for its uncleanliness, improvements were made in terms of pest extermination, lighting and the supply of hot meals and hot water.

Improving sanitary conditions for those in custody

One month prior, the judge hearing urgent applications for the Conseil d'État had already ordered the Ministry of the Interior to automatically offer hygiene kits to individuals taken into custody. Widely available in police stations, these kits contain refreshing wipes, toothpaste tablets and sanitary towels.

When referred to on the topic by lawyers' associations, the Conseil d'État underlined that persons taken into custody are entirely dependent on the administration: the latter is therefore responsible for taking all necessary measures to protect their life and health, and to avoid any inhumane or degrading treatment. In the context of the COVID-19 epidemic, they must also be informed of their ability to change their protective mask every 4 hours and to have access to hand sanitizer on mere request. ●



FIND OUT MORE

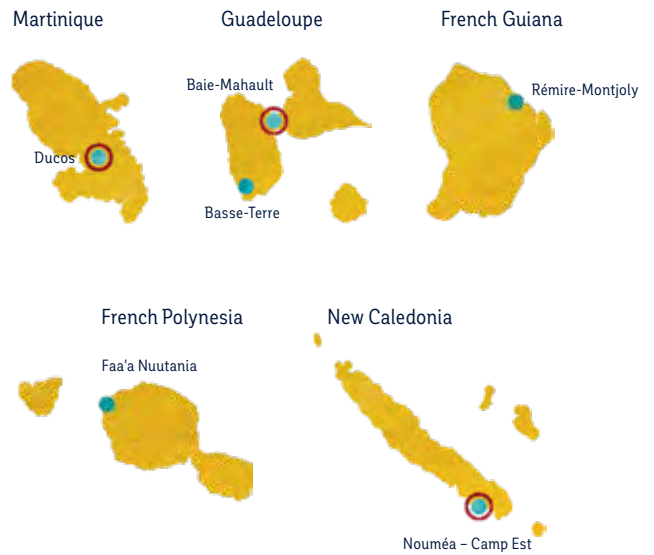
DECISION no. 435622 of 24 December 2021, "Hygiene kits in Fresnes prison"

DECISION no. 456924 of 22 November 2021, "Better protecting the health of persons in custody"



44 French prisons were sentenced for undignified detention conditions since 2009

Source: International prison observatory.



Overseeing legal protection for youths

In October 2021, the Prime Minister asked for the Conseil d'État's opinion on establishments and departments in charge of executing judicial measures issued against minors and young adults. On a daily basis, the legal protection of youths is ensured by public organisations as well as an authorised charitable sector. This sector is comprised of nearly 1,000 structures of varying sizes and types: day structures, homes, reinforced educational centres, etc. What law applies to these associations as regards the prevention of radicalisation? What obligations in terms of neutrality and secularism are enforced on their staff? And on the minors they accommodate?

Private organisations, providing a public service

The Conseil d'État explored the issue. It underlined that the requirement for religious neutrality in public

services also applied to private organisations entrusted with a public service mission and, as a result, to charitable structures. **Their employees must therefore comply with the obligation of neutrality and the principle of secularism.** In particular, they must abstain from expressing their religious or political opinions during the performance of their duties. As for the youths accommodated, as users, they are not subject to the obligation of religious neutrality. Any restrictions to the free expression of their religious beliefs must be strictly necessary; it is the heads of establishments and departments that must ensure this. The Conseil d'État also specified that current law does not permit authorities to conduct administrative security investigations into the employees of such charitable organisations. ●

FIND OUT MORE

OPINION of 14 October 2021 on a question asked by the Government relating to the "Principle of neutrality in establishments and departments in the charitable sector responsible for the legal protection of youths"



Overseeing public health

Overseeing the management of a lasting health crisis, compensating for any losses caused by care, ensuring our public health system can withstand the future: these were the challenges shouldered by the Conseil d'État in 2021 in its opinions and rulings.

↑ **July 2021, Créteil.** Hospital staff look after a patient suffering from COVID-19 on life-support. Between January and December 2021, the Conseil d'État issued six opinions on bills aiming to organise health crisis management.

Adjusting how we manage the health crisis

In 2021, the Conseil d'État examined six bills on the Government's management of the health crisis. With each of its opinions, it ensured a balance between the need to protect citizens' health and respect for their fundamental freedoms. It also invited the Government to set out a sustainable framework for action able to outlive the crisis.

Extending the state of emergency when required

In January 2021, the health context was full of uncertainty. The virus' incidence rate was high, and the health system was under pressure. To preserve its means of acting against the developing pandemic, the Conseil d'État approved the Government's intention to extend

the state of health emergency until 1st June. The same rationale was applied overseas, where the situation continued to change at its own pace and under its own unique conditions, thereby requiring a different calendar: the Conseil d'État approved the renewal of the state of emergency in Martinique and Guadeloupe starting on 28 December 2021, as well as in French Guiana, Mayotte, Saint Martin and Saint Barthélemy as from January 2022 and in New Caledonia starting in February 2022.

However, each time, it stressed that any measure taken in the context of a state of emergency may be verified by a judge. Said judge is responsible for ensuring that the measure is necessary, appropriate and proportionate in light of the health objectives pursued. Where circumstances no longer justify recourse to a



FIND OUT MORE

OPINION of 11 January 2021 "Bill authorising the extension of the state of health emergency and postponing the sunset clause date applicable to the schemes introduced"

OPINION of 21 April 2021, "Bill on managing the end of the health crisis"



IN BRIEF

Ensuring equality among health students

Health studies will never be the same. To counter the lack of doctors across the territory, a 2019 reform revoked the *numerus clausus*, which had until then regulated the number of students able to continue on to the second year of studies. Now, each university is free to decide how many spots are available based on its capacity. This reform also replaces the former first year with new course pathways, including a health access licence (LAS) and a specific health access pathway (PASS). How can we manage the transition from the old system to the new one? For the 2021-2022 period, a ministerial order set out a fixed number of second-year spots assigned specifically to students from the old system. Following an appeal by student organisations, the Conseil d'État ruled that this order was illegal. While accepting any admissions already notified, it found that the text favoured students of the old system, to the detriment of other students. 48% of second-year spots were assigned to them when they only represented 30% of first-year students. It also asked 15 universities that had not sufficiently increased the number of second-year spots to take immediate action, to the benefit of LAS and PASS students. ●

**FIND OUT MORE**

DECISION no. 452731 of 8 July 2021, "Number of spots in the 2nd year of health studies"

state of emergency before the date initially decided, it must be immediately put to an end.

Managing the return to normalcy

However, coming out of a state of emergency does not mean an immediate return to normalcy. To be able to quickly adapt to any developments or outbreaks during the epidemic, some legal derogation tools are kept in place. The health pass is one of such tools. Believing this measure to be particularly restrictive, the Conseil d'État asked the Government to set out clear and explicit terms.

Its goal was to ensure that the application of this measure does not disproportionately infringe on

freedoms, notably freedom of movement, as well as the right to privacy. Access to all basic necessities must also be ensured under all circumstances.

Developing a sustainable legal framework



The announcement of each of these measures is subject, as ensured by the judge, to the condition that it is [...] strictly necessary, appropriate and proportionate to health risks.

OPINION of 14 January 2021

The Conseil d'État simultaneously called for the Government to set out a sustainable legal framework. In an opinion issued on 7 October 2021, and in line with the recommendations made in its 2021 annual study (see page 20), **it asked the Government to present the Parliament with an in-depth assessment of**

the legal framework governing exceptions when the crisis is over. The aim: to draw valuable lessons, in order to set out a sustainable framework to react to future threats, crises or health disasters. ●

**FIND OUT MORE**

OPINION of 19 July 2021, "Bill on adjusting our health crisis management tools"

OPINION of 30 August 2021, "Bill authorising the extension of the state of health emergency in overseas territories"

OPINION of 7 October 2021, "Bill on various health vigilance provisions"

OPINION of 26 December 2021 "Bill reinforcing health crisis management tools and amending the public health code"

Mandatory vaccines: determining the State's liability

Vaccines constitute a significant step forward in the field of modern medicine and a precious tool to protect public health. In some cases, the State can make vaccines mandatory, notably for professions that are especially exposed or in contact with vulnerable individuals. But, like any medical procedure, vaccinations are not without risk. What happens when a citizen suffers losses at an individual scale that he/she believes to be caused by mandatory vaccination? This was a topic addressed by one of the Conseil d'État's decisions in September 2021.

Establishing a causal link is not always an easy feat

Having been vaccinated against Hepatitis B as part of their military service in 1994 and 1995, an individual since suffered from various disorders that they attribute to said mandatory vaccination. Their medical situation is such that they receive an armed services invalidity pension. Despite this, the Ministry of Defence rejected their request for compensation for their losses, denying the State's liability for their health problems.

In 2017, the same individual asked the administrative court of Orléans to sentence the State to pay them compensation. The judge denied this request. In 2019, this decision was confirmed by the administrative court

of appeal of Nantes. The reason: no causal link between a vaccine and subsequent health issues had been established.

Checking the probability of a link between a vaccine and a prejudice

To render their decisions, both courts relied on the work carried out by scientific institutions such as the National Academy of Medicine, the World Health Organisation and the High Council of Public Health. They considered that the State was not responsible for the losses suffered by the applicant because no causal link between these issues and the administration of a vaccine could be scientifically established. Upon further appeal, the Conseil d'État did not agree: it considered that, according to that reasoning, both courts made an error of law.

The fact that no causal link has been established between vaccination and the losses, based on the latest scientific knowledge available, does not rule out any liability on the public authority's part. To do so, it must rather check that there is no way the losses could have been caused by a vaccination: the burden of proof is on the State. The Conseil d'État therefore referred the case before the administrative court of appeal of Nantes, charged with re-examining the applicant's request for compensation with this in mind. ●

FIND OUT MORE

DECISION no. 435323 of 29 September 2021, "The public authority's liability"

Vaccination in dates



1796: Experiments on the 1st vaccine, against smallpox.

1902: This vaccine becomes mandatory in France.

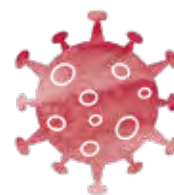
1980: Smallpox is eradicated.



1885: Louis Pasteur creates the vaccine against rabies.



2018: The number of mandatory vaccines increases from 3 to 11 in France.



2020: The European Union authorises the first vaccine against COVID-19.

2021: The WHO estimates that the COVID-19 vaccine saved 500,000 lives.



↑ **January 2021, Lyon.** Croix-Rousse hospital staff gets vaccinated. A few months later, the Conseil d'État clarified the State's liability for health issues occurring after mandatory vaccination - in this case against Hepatitis B.

Repairing losses caused by **medical negligence and accidents**

How can individuals who are victims of medical negligence or accidents receive compensation when the liability of several administrative authorities can be incurred?

In October 2021, the Conseil d'État was referred to following an appeal in cassation by a person having developed an illness further to hospital admission, and by the Biomedicine Agency partially also accused in part.

Who should compensate what? Establishing liabilities

In the middle of a liver transplant, the patient was forced to wait several hours due to the hospital belatedly detecting an issue with the graft. The delay in operating and poor coordination between the various medical teams involved constituted negligence. After the transplant, the patient developed a serious neurological disorder that

he had a 25% chance of avoiding had such negligence not occurred. For this reason, he brought a joint action against the hospital that carried out the operation, the hospital the graft came from and the Biomedicine agency in charge of identifying grafts. If able to prove that these medical errors had not directly caused the illness but that the latter had resulted from an accident, the patient could also receive compensation on national solidarity grounds from the National Office for Compensation for Medical Accidents, Iatrogenic Disorders and Nosocomial Infections (ONIAM).

On 2 April 2019, the administrative court of appeal of Bordeaux denied the option of compensation from Oniam. **But, for the Conseil d'État, an in-depth review of the obligations and shortcomings of all parties must be conducted by the court:** it referred the case to it for a second time to be ruled on again. ●



FIND OUT MORE

DECISION no. 431291 of 15 October 2021, "Compensation in cases of medical hazard"

IN BRIEF Improving **preventive healthcare at work**

Streamlining health at work and public health, and transforming companies into true places for prevention: such was the aim of the bill submitted to the Conseil d'État for an opinion in February 2021. **This was the first time a national interprofessional agreement was being transposed into law by members of Parliament and was the result of cooperation between social partners, the Parliament and the Government.** Noting this unprecedented

configuration, the Conseil d'État ensured that a clear distinction was made between what falls under regulations and what falls under law. It recommended adjusting the redaction to clarify the text's scope of application and afford it the means of achieving its objectives. By wholeheartedly fulfilling its role as a legal advisor, it ensures that this new collaboration between players is consistent and effective. Enacted in August 2021, the law entered into force on 31 March 2022. ●



FIND OUT MORE

OPINION of 9 February 2021, "Bill to improve preventive healthcare at work"



Reconciling **security** and freedoms

How can public authorities effectively ensure the safety of French nationals without infringing on our rights and freedoms? In 2021, the Conseil d'État strove to protect this fragile balance. In its opinions and decisions, it considered the challenges of an evolving world in which security risks are taking on new forms.



August 2020, Argelès-sur-Mer. Gendarmes carry out checks in a bar. Since February 2020, the national gendarmerie can use the GendNotes app to collect personal data during checks. In 2021, the Conseil d'État handed down a decision on this tool.

Our security... and that of **our data**

In the name of peacekeeping, can the national gendarmerie use an app that collects our personal data? In February 2020, a decree authorised the GendNotes app, which gendarmes can use to take notes and enter information during their operations. Once entered in the app, this information can be used in other files and forwarded to judicial authorities.

Does this really comply with the right to privacy? Following an appeal lodged by several organisations fearing the creation of lists of certain minorities, the Conseil d'État specified which law was applicable.

Collecting sensitive data is legal

The organisations feared, among other things, that the app would enable the recording of so-called "sensitive" data. Such data includes data on racial or ethnic origins, political, philosophical or religious opinions, trade union membership or the data subjects' health, sex life or sexual orientation.

Yet, according to the Conseil d'État, the guarantees offered by the text are sufficiently protective of citizens. It specified that such sensitive data may only be collected where absolutely necessary, and within the limits of what is necessary, so that gendarmes may fulfil their duties. The Conseil d'État also stressed that a person cannot be searched for using data relating to their sexual orientation, ethnic origin or political opinions.

Transferring such data to other files is illegal

However, the article of the decree cannot be left in its current condition as it allows GendNotes data to be transferred to other files. The Conseil d'État noted that the Governmental text does not specify the nature nor the purpose of such transfers. The conditions under which such data might then be used in other files are not defined either.

However, since 1978, the "Data Protection" Act is clear: personal data may only be collected for specified, explicit and legitimate purposes. **The text's lack of accuracy regarding transfers and the subsequent use of the data makes this specific provision illegal.** Without prejudice to the rest of the text, the Conseil d'État revoked the article in question. ●

“

Personal data shall be [...] collected for specified, explicit and legitimate purposes.

Article 4 of the Data Protection Act of 6 January 1978



FIND OUT MORE

DECISION no. 49360 of 13 April 2021, "Ability to transfer data from the GendNotes app to other files"

A safe 5G connection

FIND OUT MORE

DECISION no. 442120 of 8 April 2021, "Mechanism of prior authorisation for 5G operators to use relay antenna equipment"

A 2019 act allows the French State to refuse access to facilities that could adversely affect the interests of national defence and security. In practice, the Prime Minister is free to authorise operators to roll out 5G antennas or not. The purpose of this is to prevent the espionage, piracy and sabotage risks arising from new 5G functionalities.

Public interest prevails over operators' rights

This prior authorisation mechanism forces operators to carefully select their partner equipment manufacturers. And because the equipment provided by different suppliers is not compatible with one another, changing partners for 5G equipment means also replacing the 2G, 3G and 4G equipment provided by the former partner already in place. In 2021, Bouygues Télécom and SFR challenged this measure before the Conseil d'État. For these companies, the act disregards the "legitimate trust" they should receive from authorities to continue using 2G and 4G equipment already in place. Yet the Conseil d'État considered that these operators could not have hoped for the rules to remain the same for 5G networks when the technological developments involved pose unprecedented security challenges.

Bouygues Télécom and SFR further argued that the law infringed their right to respect for their property. However, the Conseil d'État considered this limit was in proportion with the public interest objective at stake. Nonetheless, it stressed that the operator is entitled to request compensation where refusal of an authorisation results, for example, in excessive costs to renew its equipment. ●

5G in 2021: rapid growth



Between 30 September and 31 December 2021,

5,883

new 5G antennas were rolled out in France, i.e., **+26%** in 3 months.

Source: ARCEP.

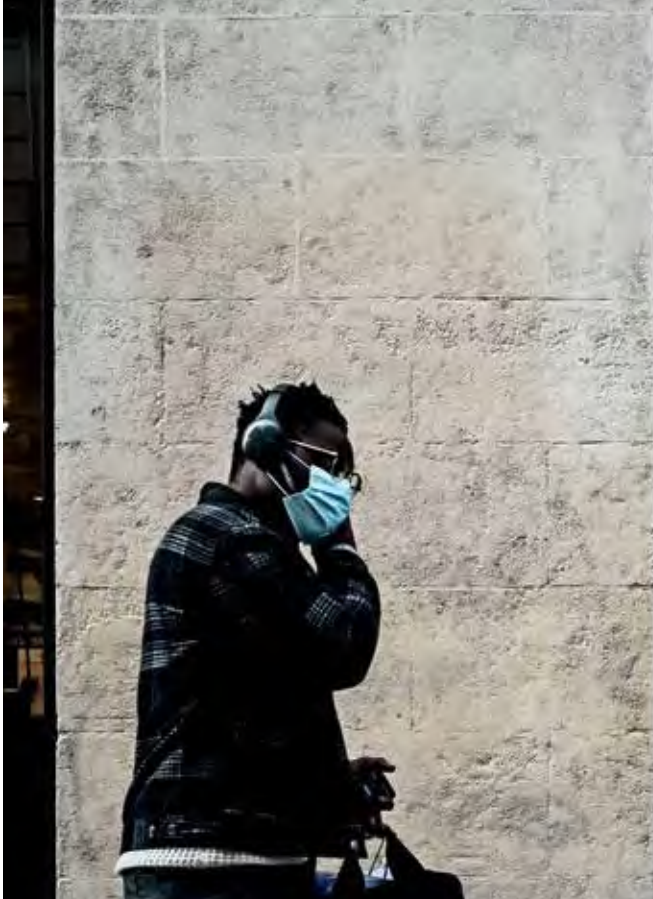
IN BRIEF Combatting foreign interference

How can we fight cyberattacks and the dissemination of *fake news* on the Internet by foreign States or organisations? In 2021, the Conseil d'État issued a favourable opinion on a draft Government decree authorising the processing of personal data by a specific algorithm with the aim of identifying foreign digital interference. The Conseil d'État considered first and foremost that said bill complied with the 1978 Data Protection Act on the protection of privacy because the data processed were data that had been made public

by the data subjects themselves. In addition, the algorithm would be programmed so as to only serve the purposes set out in the decree over a limited period of time. **Above all, this measure pursues a general interest purpose: that of protecting State security and the Nation's fundamental interests.** It also aims to ensure freedom of communication—currently threatened by the manipulation of information—and protects our democratic system by combatting foreign interference attempts during elections. ●

FIND OUT MORE

OPINION of 2 December 2021, on a bill "authorising the automated processing of personal data with a view to identifying foreign digital interference"



↑ **February 2021, Bordeaux.** Telephone operators roll out 5G in Bordeaux. In 2021, the Conseil d'État issued a ruling on the prior authorisation mechanism which required the Prime Minister to approve the roll-out of antennas. The aim: to safeguard national security.

Connection data: storage must be justified

Our connection data includes information on our identity, our online browsing history and our location data. But this data is also a key tool in fighting criminal activity and terrorism. How can we ensure respect for privacy while allowing the use of such data for security purposes? In France, the law requires that telecommunication operators store such data for one year.

Regularly reviewing the threat

Following an appeal by one such operator and by organisations, the Conseil d'État studied whether this French rule complied with European law, and notably the General Data Protection Regulation (GDPR). The challenge: to find a balance between respect for privacy and national security.

The Conseil d'État started by asking the Court of Justice of the European Union to specify the scope of European rules. **Its answer: a general obligation to retain connection data may only be imposed on operators for national security purposes and in case of a serious threat.** The Conseil d'État considered that the country's security was still under serious threat, notably from terrorism. Thus, the general retention of data is justified in order to ensure the effectiveness of the work carried out by the judicial, police and intelligence departments in charge of our security. However, the Conseil d'État set out limits to avoid excessive infringements on our rights and freedoms: the use of the data retained for intelligence purposes must, for example, first be authorised by the National Commission for the supervision of intelligence techniques, and the Government must regularly review the threat to the territory, under the administrative judge's supervision. ●



FIND OUT MORE

DECISION no. 393099 of 21 April 2021, "Connection data"

Regulating the prevention of **terrorist acts**

April and May 2021: a bill relating to intelligence on and prevention of terrorist acts was submitted to the Conseil d'État for its opinion. This bill aimed to entrench and adjust certain anti-terrorist measures under experiment since 2017. In its opinion, the Conseil d'État verified that the legal text was both effective in preventing serious threats to law and order and that it complied with our rights and freedoms.

No extension of administrative surveillance measures

In particular, the bill proposed extending the duration of administrative surveillance measures (MICAS) for individuals having been released from prison after serving a long sentence for terrorism. These measures may include a ban from exiting a certain

perimeter, or the requirement to report to a police station or gendarmerie. The act intended to extend these measures from a maximum of 12 months to 24 cumulative months. However, the Conseil d'État considered that the adjustments made to criminal law over the last few years to bring individuals likely to commit acts of terrorism before the courts already meet the objective pursued by this measure.

“
The need for each of these measures, their proportionality with the infringement on freedoms they imply, and the degree of rigour they require are assessed on a case-by-case basis.

OPINION of 21 April 2021

It further deemed that extending MICAS raises constitutional challenges, notably because their actual effectiveness is not sufficiently established. **The Constitutional Council confirmed this view just a few weeks later: such a measure goes against our Constitution.** As such, it was not included in the law enacted in July.



↑ **November 2021, Paris.** 13 November 2015 attack commemorations in front of the Bataclan: a plaque was installed in memory of the 130 people killed that day. A few months earlier, the Conseil d'État had studied a bill aiming to better prevent terrorist attacks.

The algorithm technique placed under surveillance

Another provision in the bill drew the Conseil d'État's attention. This provision aimed to entrench the "algorithm" intelligence technique experimented with since 2015. This technique allows for the automated processing of connection and browsing data online by using an algorithm to detect connections that could signal a terrorist threat. This technique is implemented with cooperation from access providers.

In this case, the Conseil d'État considered that the safeguards surrounding recourse to the algorithm must be strengthened. To this end, it suggested including in the law the fact that the data processed must immediately be destroyed, save for any data signalling the existence of a terrorist threat. It also asked the Government to review the application of this technique in a report to be submitted to the Parliament within a period of three years so as to check its practical relevance. ●



FIND OUT MORE

OPINION of 21 April 2021, "Bill on prevention of terrorist acts and intelligence"

OPINION of 12 May 2021, "Letter of amendment to the bill on prevention of terrorist acts and intelligence"

IN BRIEF Combatting incitement to hatred and violence

In late 2020, France was rocked by the assassination of history and geography teacher Samuel Paty by an Islamist terrorist. On the back of this, the Government decided to dismantle two organisations: Barakacity and the Collective against Islamophobia in France (CCIF). It argued that they posed a risk to national security by disseminating Islamist propaganda and inciting hatred and violence. In September 2021, the Conseil d'État approved the dissolution of these organisations. As grounds for its decisions,

it notably recalled that both organisations had allowed internet users to publish many openly antisemitic or religiously hostile messages on their social networks without any moderation. It reviewed the many public statements made by the president of Barakacity, which constituted hate speech and incitement to hate or violence. As for the CCIF, it highlighted its ties with proponents of radical Islamism, inviting it to go against certain laws of the Republic. ●



↑ **October 2021, Conflans-Sainte-Honorine.** A sculpture celebrating freedom of expression is erected in memory of Samuel Paty, the teacher assassinated one year earlier by an Islamist terrorist. In April and May 2021, the Conseil d'État had studied a bill aiming to better prevent acts of terrorism.



FIND OUT MORE

DECISION n^{os}. 449215-449287-449335 of 24 September 2021, "Dissolution of the Collective against islamophobia in France"

DECISION no. 445979 of 24 September 2021, "Dissolution of Barakacity"

Defining **criminal irresponsibility**



↑ **April 2021, Paris.** Demonstrators demand justice for Sarah Halimi. A few months earlier, the Conseil d'État examined a bill on internal security drafted in response to the affair.

April 2017: a Jewish woman is assassinated in her home by her neighbour, a heavy cannabis user. Is the perpetrator guilty of antisemitic murder or criminally irresponsible? The justice system opted for the second solution in March 2021. Four months later, the Government submitted a bill on criminal responsibility and internal security to the Conseil d'État.

Can a person be responsible for their lack of responsibility?

This was a key and widely-anticipated measure of the bill: the Government intended to restrict criminal irresponsibility in cases of mental illness caused by the use of psychoactive substances. Without bringing into question the general principle of criminal irresponsibility due

to mental illness preventing discernment, the bill aimed to insert nuances. For example, any person having voluntarily taken a substance with the intent of committing a crime would be considered criminally responsible. Moreover, voluntary intoxication with knowledge of the possible consequences of such an act on one's own mental health and one's behaviour towards another could be considered an aggravating circumstance. The Conseil d'État considered this measure to be compliant with international and national law. However, aware that the Government created this measure in response to the emotion roused by the Sarah Halimi affair, it emphasised that it would be difficult to implement in practice when it comes to excluding irresponsibility and, especially, proving that the person did indeed take the substance with the intent of committing a crime. ●

FIND OUT MORE

OPINION of 8 July 2021, "Bill on criminal responsibility and internal security"

IN BRIEF Ensuring access to **top-secret defence archives**

How can we reconcile top-secret defence and historians' need to access archives? The law provides for periods after which all archives become publicly accessible: 50 years for documents, the communication of which could adversely affect national defence secrets, and up to 100 years for those for which disclosure could place the security of named or easily-identified individuals at risk. Decrees issued in 2011 and 2020 by the Prime Minister further

required that, after expiry of legal periods, classified archives be subject to a prior declassification process before being communicated to any individuals requesting access. In 2021, archivists and historians challenged this procedure before the Conseil d'État, believing it to delay or prevent effective access to archives. For the judges, enforcing additional conditions to access archives after expiry of legal periods is in breach of the law: the order establishing this procedure was revoked. ●

FIND OUT MORE

DECISION nos. 444865-448763, "Access to top-secret defence archives"


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