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*To Tweet or Not to Tweet: on How Administration Should Not Use Digital Communication Tools to Explain Law**

Antoine Oumedjkane
(Ph.D. Candidate at Montpellier's Faculty of Law)

French Council of State, ordinance 440179/2020 of 30 April 2020 - Fédération française des usagers de la bicyclette

Ordinance 440179/2020 of 30 April 2020 saw French Council of State overtaking the issue of wrongful interpretation of law by public authorities through virtual communication. During first lockdown related to Covid-19 outbreak, a series French public authorities –starting from Ministers to mayors of small towns– stated that bike riding as individual physical activity was forbidden by Decree n. 2020-293 of March 2020 which was the ground for restrictions. While a quick reading of the decree was unequivocally dismissing such interpretation, French Association of bike riders "Fédération des usagers de la bicyclette" was forced to bring the case in front of French highest Administrative Court by an urgent action, the "référé-liberté". In his ordinance, the Council of State finds that, by spreading a wrongful interpretation of law, French Home Minister has illegally and seriously breached the freedom of movement and the personal liberty of individuals. The ruling comes with a new type of mandatory injunction, as the Minister must reinstate a rightful interpretation of law by a "broad mean of communication".

ABSTRACT ***Administration's digital communication often comes in direct contact with law. At best, it can be used to quickly spread new legal rules. But at worst, it can spread wrong interpretation of law, meaning Administrations could be part of a general confusion about the scope and the meaning of a legal rule.***
This case, involving bike riding and lockdown rules, shows how the judge may be reacting in order to re-establish a lawful interpretation of the law. But moreover, it shows the need for the Administrations to tackle digital communication's matters when they are used to explain the law to the public.

1. *Introduction*

The use of digital communication by public authorities for their own interest, and especially social media, has become common and grew massively in this last decade. From the French President himself to local towns, digital communication is a particularly efficient tool to promote their action or simply inform citizens. The events that took place in the American Capitol has also shown that those virtual tools can have tangible effects on the real world[1]. It then calls public authority to a certain moderation.

This institutional and digital communication is often in direct contact with law. This is a natural interaction as public authorities are able to adopt legal acts but also ensure that these acts are correctly applied. It is therefore important that everybody gets to know what the rule is, especially in the event of a crisis where such rules are subject to monthly, if not weekly, changes.

What can therefore happen when a public authority doesn't communicate properly online about the meaning of a legal rule? Without going to the extreme example of a public authority that would voluntarily spread a fake news, a serious risk of widely spreading wrongful interpretations of a legal rule, intentionally or not, still remains for public authorities. Therefore, how can such mistakes be corrected and by whom? This present case gives an interesting answer.

In the midst of France's first COVID-19 pandemic lockdown, a peculiar case involving bike riders made his appearance at the French Supreme Administrative Court. Travels outside of residence were then highly restricted by the Prime Minister's Decree of 23 March[2]. Article 3 of this decree gave a

* Article submitted to double-blind peer review.

[1] See the ruling that upheld Donald J. Trump's restriction to post on Facebook: Facebook's Oversight Board, 7 January 2021, n. 2021-001-FB-FBR.

[2] Decree n. 2020-293, 23 March 2020 prescribing general and necessary measures to face Covid-19 epidemic within

series of motives for which peoples could go out such as grocery shopping, commute to work but also "individual physical activity"[3]. This last one could be enjoyed around one kilometre of the residence and for only one hour per day.

Even though the text did not specify that any kind of physical activity was forbidden, the official social medias accounts of the French Home Minister ("Ministre de l'Intérieur") and Sports Minister, began to post on social medias stating that riding a bike as a daily physical activity was forbidden by the decree[4]. Even if some other official accounts stated that bike was authorized[5], the initial information soon began to spread on social medias, relayed by local authorities' official accounts. The wide spread of this blatant wrong interpretation of the rule came to the extent that some individuals were fined €135 (roughly £115) for a violation of the lockdown just because they were enjoying their daily physical activity by riding a bike.

French Association of bike riders "Fédération Française des usagers de la bicyclette" (FUB) then introduced a "référé-liberté" in front of France's highest administrative Court, the "Conseil d'État". The aim was to re-establish a clear and lawful interpretation of the rule. Every public authority that had spread the information on the prohibition of the bicycle was therefore taken to court. The Conseil d'État had thus to determine whether the widespread of this blatant misinterpretation of law was bound to a breach of a fundamental liberty and if yes, how public authorities could resettle a genuine interpretation of the rule.

After identifying a breach of a fundamental liberty (1), the Conseil d'État states that, the fact that the interpretation was wrong but also spread massively online, has caused a serious and patently illegal breach of the freedom of movement and of the personal liberty[6] (2). Finally, using his injunction power, he forces the Prime Minister to restore "by a broad mean of communication, the government's interpretation"[7] (3).

2. *The breach of a fundamental liberty*

We must, at first, explain the nature of the action exerted by the FUB. The association chose to introduce a "référé-liberté". This specific action has been created by the law of 30 June 2000 and codified at Article L.521-2 of French's Code of Administrative Justice (CAJ). It allows the administrative judge to: "order any measures needed to protect a fundamental liberty to which a public body […], using his power, would have breach seriously and in a patently illegal way". His main advantage is his hastiness since the judge must hand down his ruling under 48 hours[8]. The other advantage is the fact that this action is much more accessible from a formal point of view. The référé-liberté can be exerted even though there is no clear legal act linked to the fundamental liberty breach.

Allowing to focus only on the behaviour of the Administration or his effects on individuals, the judge is able to undertake more insidious practices than if they were just formal consequences of a legal act. Under the prism of the development of online communication by the Administration, this requirement is particularly useful. In this case, the confusion about bike riding was not related to a poorly written legal act but about the misinterpretation of the legal act by several public bodies, which have led to a series of fines. But these interpretations were not themselves, formalized on a legal act, only on social media posts and in FAQs on institutional websites.

In our case, the inquiry had revealed that, aware of the doubt set by the contradictory communications, the Prime Minister had adopted an "instruction" on the 24 April, which confirmed that the use of the bike was authorized as long as the motive was legitimate. This document was intended to be spread to agents responsible for the decree's enforcement, mainly police forces. Nevertheless, the Conseil d'État states that: "Event thought this interpretation existed […] many State authorities are still spreading the idea that bike riding is

the State health emergency.

[3] Article 3, I, 5° of the Decree n. 2020-293, 23 March 2020 prescribing general and necessary measures to face Covid-19 epidemic within the State of health emergency.

[4] For example: www.facebook.com/ministere.interieur/photos/a.464856017990/10157496682107991/?type=3&theater. For many other examples, see the thread of French journalist Marc Rees: https://twitter.-com/reesmarc/status/1254670202987589633.

[5] For example, the Home Minister sometimes stated that the bike was authorized: www.liberation.fr/checknews/2020/03/18/peut-on-faire-du-velo-pendant-le-confinement_1782044/

[6] The "liberté personnelle" is linked to the right to privacy.

[7] See § 10 of the ruling.

[8] Article L.521-2 of the CAJ.

prohibited as an individual physical activity, on social media or in FAQ's answers"[9]. In a nutshell, it is because, in complete denial, some State authorities did not change their behaviour and kept on spreading a wrong interpretation, which have led to abusive fines, that the référé-liberté is admissible.

The judge still needs to link those Administrations behaviour and their effects on individuals with a breach of a fundamental liberty within the meaning of Article L.521-2 of the CAJ. Since the Code does not provide any exhaustive list, the judge can freely decide whether a public liberty falls into this article or not.

In our case, the judge bind: "the ability to move, using authorized means of transport"[10], to the freedom of movement[11] [12] and personal liberty[13], which are both fundamental liberties. He then finds a breach of these liberties by a very specific and concrete consequence of the misinterpretation: the single fact that a bike rider may be "forced to get off his vehicle and carry on his route by foot"[14]. But this breach still needs to be "serious and patently illegal" to hope that specific measures can be ordered by the judge. This is the next step we will be studying.

3. *A serious and patently illegal breach*

In order to identify a serious and patently illegal breach, the Conseil d'État relies on different elements. Let's note firstly that during the hearing, the Prime Minister did not try to challenge the fact that the interpretation gave by several administrations was clearly contrary to the actual decree. We can add that this interpretation was a clear breach of Article 5 of the French's Declaration of Human and Civil rights which states the principle that: "Everything that is not forbidden by law cannot be restricted and no one can be forced to do something that the law does not order"[15].

Several elements are taken into account by the judge in order to conclude that: "Because of the uncertainty that has been established by contradictions in several public bodies' communication […] and the consequences of this uncertainty for individuals using their bike for their authorized travels, the absence of public disclosure of the Government's interpretation must […] be considered as a serious and patently illegal breach of a fundamental liberty"[16].

The judge first notes that the information was spread online by public authorities. Indeed, the FUB has taken 14 public bodies[17] to court because they communicated the wrong interpretation. Outside of their behaviour, the judge points out the negative effects it had on individuals because of a sort of a snowball effect. The virtual mean of communication has, indeed, made the effects of the wrong interpretation more serious in real life. Going from the Home Minister, the misinterpretation was reused by local "Préfectures"[18] and even by some municipalities. Police forces responsible for the enforcement of the Prime Minister's decree then thought that biking was not considered an individual physical activity and started handing out fines to bike riders[19]. We cannot blame them since the information initially came from a minister who is supposed to know the meaning of legal rules, particularly since, on this matter, the Home Minister took a big part in the design of such rules. Outside of the fines, the FUB showed in Court that some Préfectures and mayors, picking their legal information from Twitter instead of actually reading the texts, had took by-laws[20], to close bicycle lanes in the territory in order to prevent individuals from riding their bike as their daily physical activity. To briefly summarize, the misinterpretation came from the top to the

[9] See §7 of the ruling.
[10] See §8 of the ruling.
[11] Which is a fundamental liberty in the scope of art. L.521-2 of the CAJ: Council of State, ord., 9 January 2001, *Desperthes*, n. 228928.
[12] For a translation closer to the French version: the liberty to come and go (liberté d'aller et venir).
[13] Which is also a fundamental liberty in the scope of art. L.521-2 of the CAJ: Council of State, ord., 2 April 2001, *Ministre de l'Intérieur c/ Consorts Marcel*, n. 231965. Those two fundamental liberties are often invoked together in other cases, see: Council of State, ord., 26 April 2005, *Ministre de l'intérieur c/ M'Lamali,* nº 279842.
[14] See §9 of the ruling.
[15] The Declaration is part of French Constitutional laws.
[16] See §10 of the ruling.
[17] 3 ministers and 13 "Préfectures".
[18] Préfectures are the public bodies representing the central State in local part of the territory. They main role is to ensure that national policies are applied by local authorities.
[19] A map of those fines can be found at: www.fub.fr/fub/actualites/fub-obligee-saisir-conseil-etat-faire-reconnaitre-velo-moyen-transport-legitime.
[20] A small list of such by-laws may be found on at pages 5 and 6 of the FUB's motion: www.fub.fr/sites/fub/files/fub/Communiques/projet_de_requete_en_refere-liberte_-_fub_-_20042020_ok.pdf.

bottom, and generated a number of potential illegal acts which have led to a series of breaches for individual's freedom.

Those circumstances would already be sufficient for the judge to find a serious and patently illegal breach but the Conseil d'État chose an additional element: the fact that the interpretation of the Prime Minister was not publicly disclosed. As it had already been said, the Prime Minister took an "instruction" in order to re-establish a proper interpretation of the decree. Such legal act – which aims to explain the meaning and the consequences of a legal act – is, however, only directed at the agents responsible for the act's enforcement and, therefore, remains inside the Administration. That's why this document was only revealed during the inquiry.

We can already see that the Conseil d'État has identified several malfunctions in the public communication that should have been corrected by the public communication itself. This finding is already innovatory because no breach of a fundamental liberty has been so clearly linked to a poor use of communication's tools. This new acknowledgment is extended at the mandatory injunction.

4. *A new kind of mandatory injunction: the broad communication of the lawful interpretation*

The judge drew the consequences of his previous assertion by ordering the Prime Minister to "publicly disclose the interpretation, under 24 hours and by a broad mean of communication". The Prime Minister must thus clearly state that the bicycle is a lawful mean of transport as long as the motive for using it is lawful.

This mandatory injunction is unique because the solution uses the same tool that causes the initial breach. This shows that the judge is aware of the power of communication tools. He requires the malfunction in the communication to be corrected by an even wider communication which is the only way to reinstate the lawful interpretation and avoid any other breach. A French author notes that this remedy is a way to protect the principle of legal certainty[21] which, if it has not been cited by the judge in this case, could have been pleaded by the plaintiff[22]. This is the main value of the "broad mean of communication" required by the judge: making sure that everyone gets to know what is the real rule.

We also need to comment the choice to restrict the court order to the Prime Minister only. This may be surprising considering the fact that 14 public authorities were taken to court by the FUB. Firstly, the Prime Minister was the author of the decree. Secondly, as the Chief of the Government, he was obviously the most appropriated authority to re-establish an official interpretation that can be followed by all the other public authorities, especially since Préfectures were the main public bodies to spread the wrong interpretation and that they are under his authority.

In our case, the Prime Minister's reaction can be considered as very underwhelming. By being too literal, he used one and only one mean of communication. A single press release was published on the Home Minister's website, stating in three quick lines[23] that the bicycle was allowed but not recommended. The fact that it was released on the Home Minister's website can be noted since the wrong information initially came from this Minister. The press release is now only accessible through the archives of the website[24].

We could have legitimately expected that the mean of communication used would be social media since they played the biggest part in the spread of the wrong interpretation. It is even fair to say that the press release did not get any attention from the public. The lawful interpretation only gained popularity through online newspaper referring to the ruling. This must then question the fact that the judge refused to add penalty to the mandatory injunction.

[21] This principle is broadly inspired by European law and has been recognized by the Conseil d'État as a "*principe général du droit*" (General principle of law): Council of State, in Assembly, 24 March 2006, *Société KPMG*, n. 288460.

[22] M. Cottereau, *Personal liberty and legal certainty. When the use of bicycle summons major principles*, in *Actualité juridique droit administratif*, 2020, 2438.

[23] "The decree only regulates the motive of travels but not the means of transports which remains free. The bicycle is therefore authorized as any other mean of transport, whatever the motive. As a result, one cannot be fined because he is only using his bike on an authorized travel".

[24] The press release can still be found at: www.interieur.gouv.fr/fr/Archives/Archives-des-actualites/2020-Actualites/Situation-relative-aux-autorisations-de-deplacement-a-velo-dans-le-cadre-du-confinement.

4.1. *Conclusion: Good use of online communication tools by public bodies imply to be clear about what is law or not*

The initial confusion about the decree's interpretation comes from a hazardous communication of a part of the Government. The Home Minister, alongside with the Deputy-Minister of Transport tried to encourage individuals not to use their bike for their daily physical activity. The main reason was the fact that it was easier to go over the one kilometre limit that was set by the decree. But instead of a clear recommendation, their communication has maintained – with sheer talent – a blurry image of the actual law[25].

Even though the incentive is pretty understandable and maybe useful in a way, the fact that it was labelled an actual law is immediately a lot more problematic. Primarily because the rule of law means that the State must respect the law itself which implies that it can't pretend something is law and enforce it when it is not.

The Ministers have not only been clumsy, they went in total contradiction with their initial goal since the incentive have been presented as mandatory and not optional, which is an oxymoron. In their Nudge theory, Richard H. Thaler and Cass Sustein clearly state that nudge cannot be a source of constraint[26], choice architecture must only be modified in order to encourage a chosen behaviour[27]. Therefore, no nudge can remove choice options. By incriminating a behaviour, the minister has indeed remove a choice. Following Thaler and Sustein we might even say that Minister did the exact opposite of a nudge, by creating a sludge. A nudge is supposed to be respectful of choice liberty and select a behaviour that is in a person's best interest whereas a sludge makes the best choice excessively difficult if not, impossible: "It can discourage behavior that is in a person's best interest […], and it can encourage self-defeating behavior […]"[28].

By applying those simple principles, we understand that the fact that the minister has presented the bike as forbidden is a way of discouraging individuals from this activity in order to avoid them to commit an offense. But we cannot fail to underline the clear disproportion between this goal – even thought it might be legitimate – and the mean used: a prohibition. This restriction looks unjustified but can also goes against a simple criminal law principle: the fact that criminal law should not punish actions that could only hypothetically, lead to an offence[29].

Finally, by intentionally mixing law and incentive, public bodies may lose the citizens trust in a time of general mistrust, mostly conveyed by online content and social media uses. Even though the subject of the ruling seems a bit insignificant, in other cases, the result of such mistakes made by Government can have serious consequences in term of trust in democracy.

A seemingly small communication mistake can therefore have multiple serious consequences by law. This points out the need for a clear separation between law and incentive in public bodies' communication. For this to be achieved, it is essential that communication services of those public bodies are helped by lawyers. It is the only way to ensure that communication doesn't blur the line between law and institutional communication policy. It would also help to improve the explanation of law on social media which would then increase accessibility of law while enhancing citizen's trust.

4.2. *Conclusion: On the role of the administrative judge: The judicial review of soft-law*

Even with such changes, it is still important for individuals to have access to legal actions that ensure that similar situations can be resolved. The "référé-liberté" is particularly

[25] In a video posted on 26 March on Facebook, the deputy minister of Transport stated that "Going to work […] grocery shopping […]. For those kinds of travels, the bike is authorized. But if you want to work out, you might want to go for a run instead". This video came out as the minister had posted several messages stating that the bike was forbidden. See at: www.facebook.com/ministere.interieur/photos/a.464856017990/10157496682107991/?type=3&theater.

[26] C. Sustein and R.H. Thaler, *Nudge: Improving decisions about Health, Wealth and Happiness*, New Haven, CT, Yale University Press, 2008, 14.

[27] C. Sustein and R.H. Thaler, *Nudge: Improving decisions about Health, Wealth and Happiness*, 5, 81.

[28] R.H. Thaler, *Nudge, not sludge*, in *Science*, 2018, vol. 361, issue 6401, 431.

[29] The prohibition of *ante-delictum* incriminations has some exceptions in criminal law, especially in matter of terrorism: A. Ponseille, *Les infractions de prévention, Argonautes de la lutte contre le terrorisme*, in *Revue des droits et libertés fondamentaux*, 2017, chronique n. 26. In administrative criminal law, this principle is much less applied since it is supposed to prevent individuals from committing offences.

useful because it does not need a legal act to be introduced. The "recours de pleine juridicition" could also be useful since it only requires the Administration to have breach the subjective right of an individual to be introduced. But unlike the "référé-liberté", it cannot be used in emergency situations.

Therefore, is it possible for the judge to intervene before any fundamental liberty or subjective right is breached? The question is significant since online communication is still growing but also because we saw that the Prime Minister's response to the injunction was questioning his ability to wisely correct a communication mistake. To be more precise, can a tweet or a post made by the Administration be subject to a judicial review? Can it be voided before it may breach a right or a liberty? Some answers can be found in recent administrative case law since the "Conseil d'État" opened the judicial review against soft law.

French's "recours pour excès de pouvoir" is the main legal action used by individuals. It allows the judge to review the lawfulness of an act or a decision issued by the Administration. But it can only be introduced against legal acts, which means that they must produce legal effects30. Unlike these legal acts, most recommendations, tweets or posts made online by the Administration cannot be considered as legal acts since they cannot: "create rights or obligations by themselves"[31]. They are therefore labelled as soft-law acts, which were then impossible to bring to court.

Acknowledging this fact, public authorities started to use these acts more and more often. Without trespassing the border of creating legal obligations, they issued soft-law acts to ensure that their recommendations were respected de facto even though the recipients were not legally obliged to do so. This practice was mostly used by independent administrative authorities against regulated companies and was particularly efficient[32].

The "Conseil d'État" reacted by two en banc ruling handed down on 21 March 2016. In those two cases, the Supreme Court stated that the "recours pour excès de pouvoir" was admissible against acts: "that produce notable effects, especially of economics nature, or that are designed to significantly influence the behaviour of the recipients"[33]. But this new rule was only applied to "regulatory authorities" which were, and still are, undefined in French Law. It quickly appeared that this limitation was too narrow, which has led to another row of evolutions.

In 2019, by another en banc ruling, the rule was expanded to any "administrative authority"[34]. A new notable effect was also given, the effect "in terms of reputation" on the applicant[35]. But the ruling laid a doubt because the administrative authority in this case law was independent from the Government. It was then not clear whether the rule could apply to administrative authority directly attached to national or local Governments.

The doubt did not last long since on June 2020, the "Conseil d'État" did admit a soft-law act issued by border police department which is directly attached to the Home Minister. In this case, the Supreme Court choose to harmonize his vision by stating that: "Any general documents issued by public authorities, materialized or not such as […] recommendations, […] interpretations of law, can be brought in front of the Administrative judge if they may cause notable effects on the right or the situation of recipients"[36].

This case law, handed down just two months after our case has crucial consequences since it allows the judge to reach the institutional communication phenomenon. But his role should be to intervene to sanction deviations as in our case. An exact interpretation of the law cannot be voided which is why the judge had clearly defined his role in the soft-law judicial review proceedings: "The recours [pour excès de pouvoir] must be admitted if [the soft-law act] issues a new rule voided by incompetence [of the public authority] or if the interpretation misunderstood the meaning and the scope of the rule"[37].

[30] See, C. Broyelle, *Contentieux administratif*, IX ed., Paris, Lexis Nexis, 2021, 86

[31] Conseil d'État, Annual study: Soft-law, *Études et documents du Conseil d'État,* 2013, 61.

[32] P. Idoux, *The new judicial review of regulatory authoritie's soft-law*, in *Revue Lamy de la concurrence*, 2016, n. 50.

[33] Council of State, in Assembly, 21 March 2016, *Société Fairvesta GmbH*, n. 368082 and Conseil d'Etat, in Assembly, 21 March 2016, *Société Numéricable NC*, n. 390023.

[34] Council of State, in Assembly, 19 July 2019, Mme. Le Pen, n. 426389.

[35] *Ibidem*.

[36] Council of State, in full litigation section, 12 June 2020, *Association GISTI*, n. 418142.

[37] *Ibidem*.

This last piece is showing that the judge is fully aware of the risks if his intervention would become systematic: he could be criticized for debating Government's communication methods instead of focusing on legal issues. This also shows that the soft-law judicial review would not be the next massive legal action used by individuals as long as public authorities behave correctly on and offline.

But even though those legal actions exists, it is pretty sure that they are not satisfactory for the applicant. The "recours pour excès de pouvoir" is also not an emergency legal action. On average, the administrative judge will hand down his ruling from 1 year to 1 year and 9 months[38] after the action is introduced by the applicant. This is way too slow in a digital world where everything is fast.

In our case, a "recours pour excès de pouvoir" was introduced by an applicant against an FAQ answer published in March 2020 on the Home Minister's website, where he stated that the bike was forbidden as the individual physical activity. The ruling was handed down in 29 July 2021[39]. But the answer was deleted just several weeks after his publication. Even though the answer was voided by the judge, in the meantime, France had the time to end his first lockdown, start a second, end this second lockdown, get his population vaccinated, and to implement his own COVID pass.

A "recours pour excès de de pouvoir" can still be introduced alongside a proceedings for interim relief, ("référé-suspension"[40]). But the action must be urgent, meaning the legal decision have to seriously affect a public interest or the applicant's interest, in order to be admitted by the judge[41]. This emergency condition will oblige the judge to only suspend the soft-law acts which are already producing a high degree of negative effects. Thus, this is another dead end.

To put in a nutshell, no matter what legal action is taken, the administrative judge is doomed to act against negative effects of bad public communication but not directly on his origins. Which, at least, has the benefit of dispelling a legitimate fear about the state of separation of powers.

Fortunately for the French, they are now able to ride their bicycle where they like, just like the popular Queen's song says.

[38] Data collected by the Council of State on his annual report of 2020, p. 35. This data gathers all type of legal actions introduced in front of Administrative judges and therefore, cannot be considered as fully representative.
[39] Council of State, 29 July 2021, *M. B. A.*, n. 440159.
[40] Art. L.521-1 of the CAJ.
[41] Council of State, 19 January 2001, *Confédération nationale des radios libres*, n. 228815.