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THE DOCTRINE OF ADMINISTRATIVE TRESPASS IN FRENCH LAW: AN ANALOGUE OF DUE PROCESS*

Armin Uhler †

THE French *droit administratif*, since Dicey's critical and unsympathetic comments in his lectures and works on the English constitution,¹ has continued to attract a great deal of interest in the English-speaking world. In this country the more recent references² to the system known by that name are prompted by something more than academic curiosity. Unprecedented expansion of administrative activity, particularly on the part of the federal government, has focussed attention on many problems³ which have become acute because of that fact. Unquestionably, one of the most vexing among them is the question of review of administrative action upon the application of interested private parties. It is natural that the solutions found elsewhere should be inquired into, and that the French system of adjudication by special administrative courts should receive particular consideration. However, if French administrative law is identified with this one characteristic, while other important features of the system are left unnoticed, the view obtained is necessarily incomplete and distorted.

The French administrative courts⁴ are indeed the outgrowth of

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¹ DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, 3d ed., 303 ff. (1889). The first and second editions of Dicey's lectures appeared in 1885, and 1886.

The abbreviations which will be used herein for citing cases are as follows:

D.—Dalloz, *Recueil Périodique et Critique*

S.—Sirey, *Recueil Général des Lois et des Arrêts*

D.H.—Dalloz, *Recueil Hebdomadaire de Jurisprudence*

Recueil—*Recueil des Arrêts du Conseil* (Macaret & Lebon, edited by Panhard)

² See, for instance, "Report of the Special Committee on Administrative Law," A. B. A. ADVANCE PROGRAM 134 at 144 (1938).

³ See the interesting symposium in 47 *YALE L. J.* 515-674 (1938), and the numerous articles in the current volume (24) of the *American Bar Association Journal*.

⁴ Duguit, "The French Administrative Courts," 29 *POL. SCI. Q.* 385 at 389 (1914); WALINE, *MANUEL ÉLÉMENTAIRE DE DROIT ADMINISTRATIF* 59 ff. (1936) [hereinafter cited as "*Droit administratif*"]; BERTHÉLEMY, *TRAITÉ ÉLÉMENTAIRE DE DROIT ADMINISTRATIF*, 13th ed., 1107 ff. (1923) [hereinafter cited as "*Droit administratif*"]; BONNARD, *PRÉCIS DE DROIT ADMINISTRATIF* 114 ff. (1935) [hereinafter cited as "*Droit administratif*"].

certain principles embodied in the enactments of revolutionary origin. Both constitutional and statutory provisions of the revolutionary period sanctioned the separation of powers⁵ and especially the separation of the administrative and judicial authorities.⁶ Strictly interpreted, the prohibition addressed to the latter precluded their adjudicating any of the acts of the administration. Whatever review or relief might be available, therefore, had to be accorded by the administrative authorities themselves. Almost of necessity the disposition of administrative appeals in time came to be assigned to special judicial bodies within the administration. But even the organization of independent machinery for the judicial determination of controversies arising from administrative action did not make absolute the separation of the two authorities. Not all acts emanating from administrative authorities are "administrative" in the sense which renders them immune from scrutiny by the ordinary courts. The latter, in principle, are competent to take cognizance of all matters in which the administration's acts have no substantial relation to governmental functions.⁷ Furthermore, even where administrative authorities profess to act with respect to governmental functions, their acts may be tainted with certain illegalities. It is precisely in regard to this class of administrative acts, in so far as they affect persons or property, that a closer examination of French law reveals an extremely interesting phase of jurisdiction of the ordinary courts. The principle involved is embodied in the doctrine of *voie de fait*, which is the object of the following discussion.

⁵ See Law of Dec. 22, 1789, § 3, art. 7; Law of 16-24 Aug., 1790, tit. 2, art. 13; Constitution of 1791, tit. 3, c. 4, § 2, art. 3, and c. 5, art. 3; Constitution of the year III (1794), art. 189, 203.

⁶ Law of 16-24 Aug., 1790, tit. 2, art. 13, provides: "The judicial functions are distinct and shall forever remain separate from the administrative functions. The judges may not, under penalty of forfeiture, interfere, in any manner whatsoever, with the operations of the administrative authorities; nor shall they summon before them administrative functionaries on account of their official acts."

The law of the 16th Fructidor, year III (1794), provides: "The courts are again prohibited from taking cognizance of any acts of the administration of whatever nature."

These prohibitions were enacted to meet the specific conditions which had existed prior to the revolution, when the powerful judicial bodies of France (particularly the *parlements*) frequently obstructed the policies and acts of the administration. See ESMEIN, *COURS ÉLÉMENTAIRE D'HISTOIRE DU DROIT FRANÇAIS*, 11th ed., 582 ff. (1912); BRISSAUD, *A HISTORY OF FRENCH PUBLIC LAW* 445 ff. (1915) [translation by Garner in the Continental Legal History Series].

⁷ BERTHÉLEMY, *DROIT ADMINISTRATIF*, 13th ed., 1100 et seq. (1933); BONNARD, *DROIT ADMINISTRATIF* 154 et seq. (1935); WALINE, *DROIT ADMINISTRATIF* 45 ff. (1936).

GENERAL THEORETICAL CONSIDERATIONS

An administrative official or authority may perform an act devoid of legality *to a degree* which reduces its administrative quality to the naked fact of its origin within the administration. If such is the case, according to accepted doctrine of French administrative law, the administration disclaims the act as non-administrative, provided it is not of a general regulatory nature.⁸ Jurisdiction may then be exercised by the ordinary courts without contravening the statutory prohibitions against their taking cognizance of, and interfering with, administrative operations. But illegality is also at the foundation of certain broader and other closely related concepts with which *voie de fait*⁹ is easily confused, and from which it is sometimes inadequately distinguished.

According to the time-honored formula devised by Laferrière,¹⁰ which continues to hold sway, illegality¹¹ does not as a rule deprive an act of its administrative quality¹² so as to bring it automatically within the jurisdiction of the ordinary courts. To this extent the

⁸ As a general rule, the ordinary courts may interpret administrative regulations though they may not inquire into their legality. *Septfonds v. Chemins de fer du Midi*, D. 1924.3.41; HAURIU, *PRÉCIS DE DROIT ADMINISTRATIF*, 12th ed., 568 (1933) [hereinafter cited as "Droit administratif"]; APPLETON, *TRAITÉ ÉLÉMENTAIRE DU CONTENTIEUX ADMINISTRATIF* 111 (1927), Supp. 16 (1936) [hereinafter cited as "Contentieux administratif"]; BERTHÉLEMY, *DROIT ADMINISTRATIF*, 13th ed., 124, note (1933); BONNARD, *DROIT ADMINISTRATIF* 162 (1935); WALINE, *DROIT ADMINISTRATIF* 51 (1936).

There is, however, a much discussed statutory exception, Code penal, art. 471, § 15, which permits the judicial courts to verify the legality of certain ordinances. I LAFERRIÈRE, *TRAITÉ DE LA JURIDICTION ADMINISTRATIVE ET DES RECOURS CONTENTIEUX*, 2d ed., 480 (1896) [hereinafter cited as "Juridiction administrative"]; BERTHÉLEMY, *supra*, 1104; Réglade, "L'exception d'illégalité en France," 40 *REVUE DU DROIT PUBLIC* 393 (1923); MOREAU, *LE RÈGLEMENT ADMINISTRATIF* 260 (1902); BONNARD, *DROIT ADMINISTRATIF* 162 (1935); Garner, "Judicial Control of Administrative and Legislative Acts in France," 9 *AM. POL. SCI. REV.* 637 (1915); Garner, "French Administrative Law," 33 *YALE L. J.* 597 (1924).

⁹ "Administrative trespass" or "trespass" will be used interchangeably with the French term throughout the discussion.

¹⁰ I LAFERRIÈRE, *JURIDICTION ADMINISTRATIVE*, 2d ed., 478-480 (1896). Cf. DARESTE, *LES VOIES DE RECOURS CONTRE LES ACTES DE LA PUISSANCE PUBLIQUE* 168 (1914) [hereinafter cited as "Les voies de recours"]; APPLETON, *CONTENTIEUX ADMINISTRATIF* 103 (1927).

¹¹ See 3 DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* 681 et seq. (1923) [hereinafter cited as "Droit constitutionnel"]; HAURIU, *DROIT ADMINISTRATIF*, 10th ed., 52 et seq. (1921), 12th ed., 577 ff. (1933). Cf. WALINE, *DROIT ADMINISTRATIF* 97 et seq., 300, 323 (1926).

¹² "Just as illegality or vice of form attending the decision of a judicial decision does not destroy its judicial character." I LAFERRIÈRE, *JURIDICTION ADMINISTRATIVE*, 2d ed., 478 (1896).

analogy between general regulations and individual administrative acts is complete; both must be respected by the judicial authorities and any infirmity in one or the other only "affects its validity, not its nature."¹³ However, differential treatment has been accorded individual administrative acts and, as to them, theory and practice have continued to recognize *degrees* of illegality, with the result that illegality is deemed capable of assuming proportions which will destroy the administrative quality of the act. Such a high degree of illegality is, according to Laferrière,¹⁴ present whenever an administrative agency steps not only outside the sphere of its own competency but beyond the domain constitutionally occupied by the aggregate of administrative authority.¹⁵ Any act coming within this definition constitutes a "usurpation of power."¹⁶ In turn, the resultant lack of administrative quality produces consequences the nature of which depends upon whether the act bears the semblance of a decision or order,¹⁷ or of an act performed in the execution of an administrative order.¹⁸ In the former case the purported decision is simply nonexistent, while in the latter the effects produced by the act of execution call for active redress.

A "nonexistent act"¹⁹ by its very term implies that it is without any effect whatever, so that it may be disregarded as a complete nullity.²⁰ Neither being administrative nor having any legal effect, obviously it gives rise to no jurisdictional problem.²¹

¹³ Ibid., 478.

¹⁴ Ibid., 479.

¹⁵ Cf. 3 DUGUIT, DROIT CONSTITUTIONNEL 714-715 (1923); DARESTE, LES VOIES DE RECOURS 263, 265 (1914), citing Corbon v. Vallet, D. 1877.1.9 (Cour de Cassation, Dec. 11, 1876). Cf. the language used by the commissioner of the government in Société immobilière de Saint-Just v. Préfet, S. 1904.3.17 at 20 (col. 2): "Employing the customary legal terminology, it is not merely contended that [the administrative authority] exceeded 'the limits of its powers,' but that it did not act in 'the exercise' of its powers, and that it left 'the domain legally assigned to it.'"

¹⁶ 2 LAFERRIÈRE, JURIDICTION ADMINISTRATIVE, 2d ed., 497-499 (1896); 3 DUGUIT, DROIT CONSTITUTIONNEL 709, 713 et seq. (1923), 2 ibid. 294-295; APPLETON, CONTENTIEUX ADMINISTRATIF 105, 593 et seq. (1927); BONNARD, DROIT ADMINISTRATIF 217 (1935).

¹⁷ "Décision exécutoire."

¹⁸ "Opération matérielle d'exécution."

¹⁹ 2 LAFERRIÈRE, JURIDICTION ADMINISTRATIVE, 2d ed., 498 (1896); 1 ibid. 480; DARESTE, LES VOIES DE RECOURS 153-155 (1914), and cases there cited; 3 DUGUIT, DROIT CONSTITUTIONNEL 714 (1923); HAURIU, DROIT ADMINISTRATIF, 10th ed., 39 (1921); BONNARD, DROIT ADMINISTRATIF 195 (1935); WALINE, DROIT ADMINISTRATIF 442-444 (1936), and cases there cited.

²⁰ 2 LAFERRIÈRE, JURIDICTION ADMINISTRATIVE, 2d ed., 498 (1896); JÈZE, LES PRINCIPES GÉNÉRAUX DU DROIT ADMINISTRATIF 76 et seq. (1925); BONNARD, DROIT ADMINISTRATIF 195 (1935); HAURIU, DROIT ADMINISTRATIF, 10th ed., 39 (1921).

²¹ Because of the *usurpation* of power the act distinguishes itself from the act which is illegal because of an *excess of power*. See 3 DUGUIT, DROIT CONSTITUTIONNEL 714-

On the other hand, when usurped power is transformed not only into an executory determination but manifests itself through immediate and tangible results in relation to the rights of the individual, then the situation necessitates action to offset the illegal effects.²² In such cases it is no longer possible to speak of a "nonexisting act,"²³ and under a system which sanctions the separation of the administrative and judicial authorities, the question of jurisdiction over the fact situation caused by the act must be dealt with.²⁴ As intimated at the outset, due to its flagrant illegality, the act is deemed not to be administrative, so that the administration is not concerned with either the act itself or with its consequences. This construction automatically leaves the ordinary courts competent to adjudicate any private rights alleged to have been thus invaded, and to grant relief, without violating the principle of the separation of authorities.

ADMINISTRATIVE TRESPASS DEFINED

Illegality in the form of a usurpation of power on the one hand, and a direct violation of private rights on the other, are the basic criteria which constitute an act performed by an administrative authority a trespass.²⁵

717 (1923); HAURIU, *DRIT ADMINISTRATIF*, 10th ed., 39 (1921). Cf. the note under *Labadié v. Gaillardon*, D. 1876.1.289, col. 2. The latter persists until annulled by the administrative jurisdiction. The nonexistent act need not—2 LAFERRIÈRE, *JURIDICTION ADMINISTRATIVE*, 2d ed., 498 (1896); APPLETON, *CONTENTIEUX ADMINISTRATIF* 594 (1927)—nor, in fact, can it be annulled.—BONNARD, *DRIT ADMINISTRATIF* 195 (1935). However, more recently the Conseil d'État has shown a tendency to allow a recourse for excess of power if not for the purpose of annulling, then in order to censure the *administration active* for acting illegally. See APPLETON, *supra*, 596; BONNARD, *supra*, 195, and the cases cited by these authors. Cf. *Matter of Frécon*, D. H. 1935.183 (Conseil d'État).

²² Cf. Hauriou's note under conflict *Abbé Piment*, S. 1910.3.129; 1 HAURIU, *LA JURISPRUDENCE ADMINISTRATIVE DE 1892 À 1929*, pp. 604, 609 (1929) [hereinafter cited as "Jurisprudence"].

²³ 3 DUGUIT, *DRIT CONSTITUTIONNEL* 709 (1923). Cf. also WALINE, *DRIT ADMINISTRATIF* 443-444 (1936), as to indications of a tendency in the Conseil d'État away from the doctrine of *actes inexistantes*. *Matter of Mahieu*, D. H. 1932.154; S. 1932.3.60.

²⁴ The distinction between the nonexistent executory decision and the wholly unauthorized act of execution has not always been made. It seems to have been stated clearly only recently by Professor Waline in his note accompanying *L'Action française v. Bonnefoy-Sibour*, D. 1935.3.25 at 26, col. 2. Cf. for instance, APPLETON, *CONTENTIEUX ADMINISTRATIF* 103-105, 593-596 (1927); HAURIU, *DRIT ADMINISTRATIF*, 12th ed., 578 (1933). See 3 DUGUIT, *DRIT CONSTITUTIONNEL* 710-715 (1923). Cf. DARESTE, *LES VOIES DE RECOURS* 155, note 3 (1914).

²⁵ 1 LAFERRIÈRE, *JURIDICTION ADMINISTRATIVE*, 2d ed., 530 (1896). Cf. 3 DUGUIT, *DRIT CONSTITUTIONNEL* 709 (1923); HAURIU, *DRIT ADMINISTRATIF*, 12th ed., 578 (1933); APPLETON, *CONTENTIEUX ADMINISTRATIF* 104-105 (1927);

It does not appear that the courts themselves have ever clearly defined the concept, although it has served as the ground of decision in numerous cases, and it is well to point out first this aspect of the problem.

Viewing the relevant decisions as a whole, one may go so far as to assume a reluctance on the part of the courts to fix the limits of its application. This obviously permits them to avoid the trespass doctrine at times when they may prefer to attribute the jurisdiction of the ordinary courts over an act of an administrative authority to some reason other than that it is "non-administrative"; and this, of course, is equally true whether jurisdiction is conceded by an administrative court, asserted by a judicial tribunal, or determined by the Tribunal des Conflits.²⁸

On the positive side of the problem, we have frequent applications

BONNARD, *DROIT ADMINISTRATIF* 195 (1935); WALINE, *DROIT ADMINISTRATIF* 57 (1936); Waline, note in *D.* 1935.3.25 at 26 et seq., and see the conclusions of the Commissaire du Gouvernement, *ibid.* Cf. also DARESTE, *LES VOIES DE RECOURS*, §§ 69, 70, 72, 73 (1914); TEISSIER, *LA RESPONSABILITÉ DE LA PUISSANCE PUBLIQUE* 55-58 (1906).

²⁸ In the case of *Favre v. Mas*, *D.* 1904.2.321, referred to by DARESTE, *LES VOIES DE RECOURS* 274, note 3 (1914), the Cour d'Appel de Lyon held that the arrest by three police officers (*agents des mœurs*), without warrant or express authority of law, of a woman suspected of prostitution because of her alleged conduct constituted a judicial and not an administrative act, even though performed by administrative functionaries. Consequently the judicial authority was competent in the matter of damages which the woman sought to recover for the illegal arrest; for the judicial courts are "the natural guardians of individual liberty" and, in principle, their jurisdiction extends to all questions affecting that right. Dareste, *ibid.*, points out that this formula was used to circumvent the necessity of having the legality of an administrative act determined by the administrative jurisdiction. However, instead of reaching the same result by way of the simple and unquestionably applicable doctrine of trespass, cf. 1 DUGUIT, *DROIT CONSTITUTIONNEL* 30 (1923), the court rested its authority upon the broader and more impressive grounds of the judicial nature of the act and on its guardianship in all matters of personal liberty. But see the law of February 7, 1933, *D.* 1933.4.65 at 66, 67, vesting jurisdiction over all matters of individual liberty in the ordinary courts and precluding the administration from claiming jurisdiction in the Tribunal des Conflits.

In several cases of seizures, *infra* at note 78, performed by police agents, the Conseil d'État refused to take jurisdiction, and the Tribunal des Conflits under similar circumstances confirmed the ordinary jurisdiction on the ground that the acts of seizure were judicial in nature. The acts in those cases were indeed authorized under statutes appointing the particular administrative agents officers of the *police judiciaire*. See BERTHÉLEMY, *DROIT ADMINISTRATIF*, 13th ed., 267 (1933). Nevertheless it would seem to have presented little difficulty to term administrative an act as plainly so in its effects as the seizure of property. By way of analogy, if acts performed by administrative functionaries are not necessarily administrative, acts emanating from judicial officers need not indiscriminately be deemed judicial.

by the courts of the doctrine of *voie de fait*. In justifying the jurisdiction of the civil courts on this ground, the emphasis is commonly placed upon the "non-administrative" character of the act,²⁷ so that on the surface the separation of powers is left unimpaired. However, it should be emphasized again that every trespass presupposes the violation of a personal right, and it seems natural to seek an explanation of the power of the ordinary courts in that other doctrine which, broadly stated, embodies the very marked insistence that the judicial courts are at all times the natural guardians of civil liberties and of property rights against invasions, even by the administrative branch of the government.²⁸ It seems pertinent, therefore, to inquire whether the jurisdiction of the ordinary courts in cases of administrative trespass is not but a manifestation of the desire to remit the protection of all personal rights and liberties to the judicial authorities.

An examination of the decisions holding at various times in favor of the ordinary jurisdiction by applying the *voie de fait* doctrine discloses the following types of cases:

1. *Illegal arrest.* The Cour de Cassation, in 1876, decided a case in which an arrest had been made illegally and detention had been prolonged in an unlawful manner.²⁹ It held that the illegal arrest

²⁷ HAURIU, DROIT ADMINISTRATIF, 10th ed., 35 (1921), 12th ed., 27 (1933); BONNARD, DROIT ADMINISTRATIF 157 (1935); WALINE, DROIT ADMINISTRATIF 56 (1936).

²⁸ 2 DUCROCQ, COURS DE DROIT ADMINISTRATIF, 7th ed., 13 (1897); 1 AUCOC, CONFÉRENCES SUR L'ADMINISTRATION ET LE DROIT ADMINISTRATIF, 3d ed., 482 (1885); 1 LAFERRIÈRE, JURIDICTION ADMINISTRATIVE, 2d ed., 514, 529 (1896); DARESTE, LES VOIES DE RECOURS 247, 272 (1914); APPLETON, CONTENTIEUX ADMINISTRATIF 141, 152 (1927). See also MOREAU, LE RÈGLEMENT ADMINISTRATIF 260 (1902); 3 DUGUIT, DROIT CONSTITUTIONNEL 30 (1923); BONNARD, DROIT ADMINISTRATIF 158 (1935); WALINE, DROIT ADMINISTRATIF 52 (1936). Cf. the cases in 10 DALLOZ, REPERTOIRE MÉTHODIQUE ET ALPHABÉTIQUE, DE LÉGISLATION, DE DOCTRINE ET DE JURISPRUDENCE, "Compétence administrative," p. 472 ff., § 138 et seq. (1848); 3 *ibid.* (Supp. 1888), p. 266 ff., § 209 et seq.; also the cases in the digest to DALLOZ, RECUEIL PÉRIODIQUE, under "Compétence administrative." For contrary views, cf. JACQUELIN, LES PRINCIPES DOMINANTS DU CONTENTIEUX ADMINISTRATIF 82 ff., 97 ff., 106 ff. (1899); 12 REPERTOIRE GÉNÉRAL ALPHABÉTIQUE DU DROIT FRANÇAIS 638, §§ 752-759 (1894). See also HAURIU, DROIT ADMINISTRATIF, 10th ed., 38, note 1, 876-877 (1921), 12th ed., 30, note 10, 347 (1933); note by Alibert under the decision of the Tribunal des Conflits in the Matter of Mélinette, S. 1933.3.97, noted 51 REVUE DU DROIT PUBLIC 140 (1934).

²⁹ Labadié v. Gaillardon, D. 1876.1.289 at 296, col. 2. Gaillardon was arrested upon the order of Labadié shortly before the latter received a telegram containing his nomination as prefect. Thereafter the prefect permitted Gaillardon to be detained during seven days without a hearing. Gaillardon committed suicide, and his widow sued the prefect personally in the civil courts for indemnity and recovered the judgment which the defendant below asked the Cour de Cassation to set aside.

made was not an administrative act and that therefore the lower court was competent to take cognizance. Although there is no express reference, the decision is a manifest application of the doctrine of trespass, revealed in this language: "In passing upon the character [illegality] and the consequences [invasion of personal liberty] the court below did not interfere with any *administrative act*, and consequently did not violate the principle of the separation of powers."³⁰

2. *Illegal interference with religious freedom.* The Tribunal des Conflits recently³¹ upheld the jurisdiction of the civil court which had been invoked by a church community to secure relief from administrative interference with property devoted to religious purposes. The action taken by the mayor was deemed not to be a proper execution of a resolution of the town council concerning a public works, and because of the resultant violation of religious freedom the act was characterized as a trespass.³²

There is also a series of interesting decisions of the Tribunal des Conflits concerning religious freedom in which the trespass doctrine was applied and the judicial competency affirmed.³³ The question involved was the authority of a mayor to order the ringing of church bells on the occasion of civil interments. Under certain statutory provisions³⁴ and regulations,³⁵ church bells are recognized as belonging to the religious cult, except in case of public danger and except in so far as local laws and regulations or local custom do not authorize their use for other purposes. The mayor's order to ring the bells at a civil

³⁰ The case is noteworthy also because it is in sharp contrast with the later case of Favre v. Mas, D. 1904.2.321, discussed supra, note 26, in that it expressly holds that the act of arrest was *not a judicial function* subject to inquiry only in the ordinary courts. The point is discussed with elaboration in the note accompanying the report of the decision.

Cf. Matter of Ginière, Recueil, 1904.88, where the Conseil d'État, without qualifying its grounds for the *rejet*, declined to take jurisdiction over a case of alleged arbitrary arrest of a woman.

³¹ July 4, 1934, Curé de Réalmont v. Maire de Réalmont, S. 1935.3.97.

³² The council had authorized the construction of a public comfort station at a designated location behind a church building. The mayor had part of an iron fence upon the church property removed and had the station placed up against the church. In order to occupy premises devoted to religious cults, it would have been necessary to follow a specific statutory procedure.

³³ Abbé Piment v. Mayor of Grancey, Recueil, 1910.324, S. 1910.3.129; Abbé Mignon v. Godet, Recueil, 1910.442; D. 1911.3.41; Abbé Thiney v. Dompnier, Recueil, 1916.52. See also 3 DUGUIT, DROIT CONSTITUTIONNEL 716 (1923); JÈZE, LES PRINCIPES GÉNÉRAUX DU DROIT ADMINISTRATIF 78 (1925).

³⁴ Law of Dec. 9, 1905, art. 27; Law of Jan. 2, 1907, art. 5.

³⁵ Ordinance of Mar. 16, 1906, art. 51, 106 DUVERGIER, COLLECTION DES LOIS 114 (1906).

burial, having been found in each case to be contrary to existing laws and regulations and to be without the sanction of a local custom, was held not an administrative act, but a *voie de fait* and therefore subject to redress in the civil courts.⁸⁶

3. *Illegal damage to land.* In an 1892 case⁸⁷ a conflict was decided in favor of the judicial authority in an action to recover possession of land, to enjoin the taking of material from the land, to have the land restored to its previous condition, and to recover damages for material already removed and used for maintenance work on a public road. The court found that the taking of the material was illegal and a trespass because of non-observance of statutory formalities.⁸⁸

The Cour de Cassation in 1905 held⁸⁹ that the Cour d'Appel de Nîmes did not violate the principle of the separation of powers by ordering the restoration, at the cost of the city, of a private water supply which had been destroyed by the city's agents, without observing the required procedure.⁴⁰ The action taken was termed a trespass.

4. *Illegal military requisition.* On December 22, 1930, the Tribunal des Conflits resolved a "negative conflict"⁴¹ arising from the refusal of both the civil courts and the Conseil d'État to exercise jurisdiction in an action for damages by a corporation whose canning plant had been taken over by the military authorities.⁴² The Tribunal ordered the judicial court to take cognizance because the requisition, not having been preceded by compliance with the statutory formalities, constituted a trespass.

⁸⁶ Cf., however, the recourse for excess of power to the Conseil d'État in the case of Abbé Bruant v. Mayor of Breurey-les-Faverney, D. 1911.3.41 at 42. Under identical facts, with the exception that the mayor alleged a local custom, the Conseil d'État (July 8, 1910) apparently treated the act as administrative, though it denied the existence of a custom, and annulled it.

In a note concerning this and the above decisions (also reported in S. 1910.-3.129), Hauriou reconciles the holding of the Conseil d'État with those of the Tribunal des Conflits through an interesting analysis: The order of the mayor to ring the bells was considered by the Council as a *décision exécutoire* while the Tribunal deemed it to be an act of execution. This dual aspect of an order, or the coincidence of a decision with the order causing its execution, is only possible in case of verbal orders in which the two elements, though present, cannot be readily discerned. 1 HAURIOU, JURISPRUDENCE 604, 609 et seq. (1929).

⁸⁷ Lebel v. Bault, D. 1892.3.110.

⁸⁸ Authorization by prefect. Law of May 21, 1836, art. 17. See "procedural trespass," *infra*, p. 221.

⁸⁹ City of Mende v. Roussel, D. 1910.1.266 at 269.

⁴⁰ See "procedural trespass," *infra*, p. 221.

⁴¹ BERTHÉLEMY, DROIT ADMINISTRATIF, 13th ed., 1096 (1933); BONNARD, DROIT ADMINISTRATIF 165 (1935); WALINE, DROIT ADMINISTRATIF 40 (1936).

⁴² Matter of Union Villeneuve de Conserves, D. H. 1931.135.

5. *Illegal encroachments on private property.* A typical situation that finds its way into the courts with some frequency arises in connection with encroachments on private property in the course of installing electric line equipment. In 1884⁴³ the Tribunal des Conflits affirmed the competency of the civil court in which an action was pending against the administration on account of telephone line equipment and apparatus installed on top of plaintiff's buildings. Finding that the prefect, in ordering the construction upon private property, had acted without statutory or regulatory authority, the Tribunal held that the act was not administrative.⁴⁴ In a recent case⁴⁵ the Conseil d'État termed a *voie de fait* the placing of telephone line supports into the façades of private buildings without observing the statutory procedure provided by the law of 1885.⁴⁶

6. *Illegal abridgment of the freedom of the press.* The safeguarding of the press has given the ordinary courts further occasion to assert their jurisdiction where the administration appeared to have committed a flagrant violation. In the widely discussed case of *L'Action française*,⁴⁷ the Tribunal des Conflits held "the general seizure of a newspaper, wherever the same may be offered for sale" on a certain day, to be a trespass and subject to redress in the civil courts. The Tribunal gave as the reason that the measure taken by the prefect of Paris in that form was not indispensable for the restoration and maintenance of the public order.

If unequal weight is, for any reason, to be given to one or the other

⁴³ *Neveux v. Administration des Postes et Télégraphes*, Recueil, 1884.909.

⁴⁴ In consequence of this litigation, the competent minister submitted a draft of a statute regulating the procedure to be followed by the prefect under similar circumstances. It became law on July 28, 1885. 85 DUVERGIER, COLLECTION DES LOIS 444 (1885).

⁴⁵ *Matter of Frécon*, D. H. 1935.183, summarized 52 REVUE DU DROIT PUBLIC 340 (1935), and cases there cited. Cf. the cases in D. 1937.1.17 (Cour de Cassation); 54 REVUE DU DROIT PUBLIC 517 (1937).

⁴⁶ *Supra*, note 44. It should be noted, however, that the Conseil d'État annulled the act of the administration and referred the plaintiff to the civil courts "which alone are competent to adjudicate the consequences of a *voie de fait*." The annulment of an executed decision, of course, amounts to no more than a censure, and the holding of the Conseil d'État does not imply that such an annulment was necessary before the judicial authorities could take jurisdiction. Had the case been brought before the civil court at the outset, and had the administration asserted a conflict, the latter would unquestionably have been resolved in favor of immediate action in the ordinary court without the previous intervention of the Conseil d'État. It may well be supposed that the particular procedure was employed for the very purpose of bringing the matter before the administrative jurisdiction in order to provoke an expression of its attitude toward the issue involved.

⁴⁷ *L'Action française v. Bonnefoy-Sibour*, D. 1935.3.25; 52 REVUE DU DROIT PUBLIC 322 (1935).

of the two basic factors of (1) illegality of the act as such, and (2) illegality in its consequences, the foregoing cases⁴⁸ strongly tempt the conclusion that the greater weight should attach to the fact of invasion of private rights. But if this were correct, it would in fact follow that every act which directly or indirectly results in injury to private rights is "non-administrative." Quite obviously, this does not correspond to the actual state of French legal doctrine. In the first place, the judicial competency at times has been predicated upon the formal aspect of the act where the court avoided the concept of *voie de fait* by holding the act to be judicial.⁴⁹ Furthermore, not all illegal administrative invasions of the particular rights are trespasses, as will develop further. The utility of the trespass concept⁵⁰ and the consequent necessity of appraising separately and individually the act as distinguished from its consequences must be looked for in certain specific considerations which go to the very essence of the French system of administrative jurisdiction. While the courts of the judicial hierarchy alone are competent to determine the scope of private rights and to give relief in the event of their violation, the theory of French law is that the legality and propriety of acts by administrative officials as a rule can be determined only by the administrative tribunals. In regard to such acts, under protection of the fundamental statutes sanctioning administrative independence, the administrative courts will be the sole judges of their formal validity, their "administrative legality." The administrative department will not tolerate its own acts to be condemned, except by its own tribunals. Its interest is concerned with the act and its administrative purpose, while the judicial authorities may deal with its collateral and secondary effects. But it may be that those effects are so drastic as to be wholly out of proportion to the original purpose. At such a juncture the administration may be assumed to be no longer interested in being identified with the act. Submission of the question

⁴⁸ The situations exemplified by these cases are practically identical with those envisaged by Laferrière as involving the jurisdiction of judicial tribunals. 1 LAFERRIÈRE, JURISDICTION ADMINISTRATIVE, 2d ed., 479-480, 530 (1896).

⁴⁹ Favre v. Mas, D. 1904.2.321.

⁵⁰ There are some attempts to deny completely the validity of the *voie de fait* concept. Laroque, in a note accompanying the report of the Curé de Réalmont v. Maire de Réalmont decision, S. 1935.3.97, discussed at note 31 supra, questions the grounds for the decision on that account. He finds justification for the jurisdiction of the civil court not in the violation of the freedom of religion but in the illegal entry upon the church property. Generally, he recognizes the principle of judicial competency only in the case of invasion of privately owned real property. See also the note by Blaevot under the decisions reported in D. 1937.1.17 at 18, col. 2. Cf. HAU-RIOU, DROIT ADMINISTRATIF, 12th ed., 26, note 5 (1933).

of legality to it for inquiry is no longer insisted upon. It may be more convenient and less injurious to the administrative prestige to abandon the *enfant terrible* and to let it be disciplined at the hands of the judicial court—to let it be branded a *voie de fait*.

The trespass concept is elastic. The civil courts may readily apply it, while the administration remains unwilling. The degree of illegality may vary according to the dissimilar views which must be harmonized through the office of the Tribunal des Conflits. The doctrine of "administrative trespass" seems to have a definite place in the French *régime administratif*. It will yet appear more clearly that it does not coincide with the notion of *faute personnelle*, i.e., delictual or quasi-delictual abuse of power by administrative functionaries which may result in personal liability. Considering it from the standpoint of the judicial tribunals, it offers the advantage of eliminating reference to the administrative jurisdiction to determine the validity of the act attacked. The doctrine of *voie de fait*, then, seems to serve the administrative as well as the judicial authorities. And paradoxical as it may seem, the principle makes for flexibility.

THE ELEMENTS OF TRESPASS ANALYZED

The very fact that the doctrine of *voie de fait* has received close attention and analysis only in the comparatively recent legal literature is significant. It points undoubtedly to the cause which, during the past two decades, has engendered a great deal of new and penetrating interest in the relation of the administrative and judicial authorities. That cause, in France the same as in this country, is the rapid expansion of administrative activity since the Great War. During this period it would indeed have been strange if the notion of administrative trespass had escaped the searching thought of modern legal writers.⁵¹

According to Hauriou, who was the first to undertake careful analysis and definition, the illegality tainting the act of an administrative authority may assume two distinct forms. Trespasses may arise not only from a usurpation of power,⁵² reflected in the ends towards which the act is directed, but also from the unlawfulness of the means employed, i.e., from disregard of procedural requirements. So trespass, classified on the basis of intrinsic defects, has been subdivided⁵³ into

⁵¹ See HAURIOU, *DROIT ADMINISTRATIF*, 10th ed., 35 (1921); 12th ed., 26 (1933); BONNARD, *DROIT ADMINISTRATIF* 157 (1935); Waline, note in D. 1935.3.25 at 26.

⁵² *Supra*, at note 16.

⁵³ HAURIOU, *DROIT ADMINISTRATIF*, 10th ed., 35 (1921); 12th ed., 26 (1933).

trespass due to lack of lawful authority⁵⁴ and trespass due to procedural irregularity.⁵⁵ Trespass of the first type presupposes an act performed outside the exercise of a *right* previously regulated by formal legislative act or administrative regulation.⁵⁶ The absence of a right to act results, then, in an excess of power attended by a *total* lack of authority. On the other hand, in the case of "procedural trespass," there is an excess of power because of a *total* disregard for required formalities.⁵⁷

A second classification of trespass on the basis of intrinsic illegality, suggested by Bonnard,⁵⁸ seems to differ from the foregoing rather in the detail than in the essence of the distinction made. This analysis arrives at (a) trespass because of irregularity in the executed decision, and (b) trespass because of irregularity in the act of execution itself. The first type is attributable to the virtual non-existence of the purported decision,⁵⁹ i.e., a decision which is ineffectual because it tends to operate upon a subject-matter wholly beyond the powers of the administration⁶⁰ or because made without any express statutory authority. The second type of irregularity is subclassified according to four different situations in which it may occur: (1) intrinsic illegality in the means of execution, (2) abuse of an intrinsically legal means, (3) employment of a legal means of execution but with complete disregard of the procedure prescribed, (4) employment of a legally permissible method of enforcement but without the authorization by a *judicial*

⁵⁴ *Voie de fait par manque de droit* ("for want of right").

⁵⁵ *Voie de fait par manque de procédure* ("for want of procedure").

⁵⁶ Hauriou's qualifying phrase "for want of right" envisages both the constitutional powers and authority derived from legislative enactments. Hauriou emphasizes that there is an autonomous regulatory power which the administration may exercise to determine its own *rights* within a domain that not even the legislature may arbitrarily limit. HAURIU, *DRIT ADMINISTRATIF*, 10th ed., 25, 34, 52 (1921). If on the one hand the administration has only such rights as have been specifically regulated by legislative enactment or by its own rules, administrative regulations on the other hand, although they must not be contrary to the laws, "may go as far as they are not checked by the laws." *Ibid.*, p. 35, note 1. Cf. *conflit Piment, Recueil*, 1910.324, S. 1910-3.129.

⁵⁷ See Hauriou's note under *Société immobilière de Saint-Just v. Préfet*, S. 1904.3.17; 1 HAURIU, *JURISPRUDENCE* 84 and quotation at 100 (1929): "It is very important to confine the administration to its habitual procedure, otherwise, whenever the ordinary methods (*mesures de haute police*) proved inconvenient, there would be added *extraordinary procedures*. . . . There should no more be extraordinary methods in administration than in the courts of justice."

⁵⁸ BONNARD, *DRIT ADMINISTRATIF* 157 (1935).

⁵⁹ *Supra*, at note 19.

⁶⁰ *Supra*, p. 212. 1 DUGUIT, *ÉTUDES DE DROIT PUBLIC* 11 et seq. (1901); 1 ESMEIN, *ÉLÉMENTS DE DROIT CONSTITUTIONNEL*, 7th ed., 33-35, 548 (1921).

authority which (subject to certain exceptions) is required in all cases of forced execution against persons or property.⁶¹ The situations contemplated under (a) clearly, and those under (b) (1) and (2) if only slightly re-formulated, correspond to Hauriou's *manque de droit*, while (b) (3) and (4) are typical instances of "want of procedure." Perhaps the broader definition is preferable in that it does not attempt to anticipate all possible situations.

The analysis which leads to the finding of two distinct classes of formal infirmities in the act—(1) absence of authority derived from a positive general rule, and (2) non-observance of procedural forms in the execution—has not always been recognized⁶² notwithstanding the judicial decisions which clearly support it. Examples of procedural trespass will be found in the cases already referred to. In the *Réalmont* case⁶³ the court held that "in the absence of a disappropriation pronounced in accordance with the statutory^[64] provisions, the removal of the fence and the installation of the public comfort station . . . constituted a trespass."⁶⁵ Instances of purely procedural trespass will occur most frequently in connection with the taking of private property for public use. So in the *Lebel* case⁶⁶ the failure to obtain the required statutory authorization of the prefect⁶⁷ caused the removal of materials

⁶¹ It is interesting to note that in this one instance Bonnard associates the trespass doctrine with the oft-asserted principle of the jurisdiction of the ordinary courts over all questions affecting individual liberty and private property. However, there seems to be no adequate reason for differentiating between invasions of the private domain through *direct enforcement* of general police measures against persons and property as in case of arrests or seizures, and incidental encroachments arising in connection with administrative operations such as unauthorized destruction or taking of private property for the public benefit.

⁶² 3 DUGUIT, *DROIT CONSTITUTIONNEL* 709-710, 716-717 (1923); APPLETON, *CONTENTIEUX ADMINISTRATIF* 104-105, 593-594 (1927).

⁶³ *Curé de Réalmont v. Maire de Réalmont*, S. 1935.3.97, discussed *supra* at note 31.

⁶⁴ Art. 13 of the law of Dec. 9, 1905, concerning the separation of the church from the state provides that church property can be taken only upon a decree of the *Conseil d'État*, or under a special act of the legislature.

⁶⁵ S. 1935.3.97 at 99. The court's language in this case in fact indicates that a double trespass was found. The administrative authority had not only taken church property without observing certain statutory formalities, but it had at the same time violated the religious freedom. Combinations of illegality in the form of usurpation of power with taking of private property may occur in other situations as well. Compare the instances of seizures of newspapers or printing machinery: encroachments upon the freedom of the press. Obviously coincidences of this type, together with the comparative frequency of trespass in regard to property, have militated against the general recognition of the utility of the concept of administrative *voie de fait*.

⁶⁶ *Lebel v. Bault*, D. 1892.3.110, discussed *supra* at note 37.

⁶⁷ Art. 16 of the law of May 21, 1836, concerning rural highways.

from private land for road purposes to be qualified as a trespass. Similar conclusions were reached because of the disregard of statutory procedure in the *Union Villeneuvevoise*⁶⁸ and the *Frécon*⁶⁹ cases.⁷⁰

Until very recently, analytical treatment has been confined to the forms of illegality which convert the act of an administrative authority into a trespass; and the attendant violations of specific rights and liberties have received only incidental attention.⁷¹ However, the aftermath of an uncommonly important decision rendered by the Tribunal des Conflits on April 8, 1935, brought with it a particularly penetrating examination of the elements of *voie de fait* by Professor Waline,⁷² and for once an equal amount of attention was given the criterion of "invasion of private property or of public liberties."⁷³ The result has been to distinguish a third characteristic, namely, that a violation of a civil right or liberty is not sufficient to constitute a trespass unless the injury is especially severe. That the degree, or severity, of the unlawful invasion of rights and liberties is relevant is exemplified by cases in which the jurisdiction of the ordinary courts was not conceded although the first and second prerequisites of *voie de fait* were satisfied.

In order to understand the modern meaning and significance of the doctrine of *voie de fait* in French law, it becomes necessary to analyze in detail the resolution of the conflict in the case of *L'Action française v. Bonnefoy-Sibour*.⁷⁴ The *Action française* case involved the powers

⁶⁸ Matter of Union Villeneuvevoise de Conserves, D. H. 1931.135, discussed supra at note 42. There the formalities prescribed by the law of July 3, 1877 (as amended) relative to military requisitions had been completely omitted.

⁶⁹ D. H. 1935.183, supra at note 45. Telephone line equipment had been attached to the walls of a privately owned building with complete disregard of the requirements of notice and hearing provided by art. 6 et seq. of the law of July 28, 1885, pertaining to the construction, maintenance, and operation of telegraph and telephone lines. 85 DUVERGIER, COLLECTION DES LOIS 446 (1885).

⁷⁰ See also 3 DALLOZ, RÉPERTOIRE PRATIQUE, "Compétence Administrative," 257-258, § 136 et seq. (1912).

⁷¹ HAURIU, DROIT ADMINISTRATIF, 10th ed., 34 ff. (1921); BONNARD, DROIT ADMINISTRATIF 157 (1935).

⁷² See Waline's note in D. 1935.3.25. Waline is otherwise in agreement with Hauriou and Bonnard and distinguishes trespass arising from complete want of authority from trespass due to non-observance of formalities prescribed by statute and intended for the protection of private persons.

⁷³ Deemed "public liberties" are the constitutionally guaranteed liberties. 1 WALINE, DROIT ADMINISTRATIF 52 (1936).

⁷⁴ D. 1935.3.25; 53 REVUE DU DROIT PUBLIC 296 (1936). The decision is in the customarily concise form: "In view of the laws of August 16-24, 1790, Fructidor 16, year III, Pluviose 28, year VIII, July 29, 1881, and April 5, 1884.

"Considering that the action instituted by the publishing company L'Action française against Bonnefoy-Sibour before the justice of the peace of the northern canton

of the administrative authorities in regard to the freedom of the press. Upon order of the prefect of police of Paris, plaintiff's newspaper had been seized on the morning of February 7, 1934, at all places where it was held for sale and distribution, within the city of Paris and the Département de la Seine. The Tribunal des Conflits confirmed the jurisdiction of the civil court, which the prefect of police of Paris had questioned upon the commencement of an action for damages against him. The seizure had been ordered under the very grave political situation existing in Paris during the night of February 6, and even the commissioner of the government pointed out that⁷⁵ "if ever a police prefect could make use of exceptional powers it was during that night, and the seizure of newspapers containing appeals to riot could well constitute a legitimate use of police powers *to the extent that the seizure was indispensable for the prevention of renewed and more serious disorders.*"⁷⁶ Underlying the conclusions of Commissioner Josse, which the court adopted, is a minute analysis of the jurisdictional issue, and through them considerable light is thrown upon the broader implications of the trespass doctrine which follow from its application in the case.

The Tribunal des Conflits had to determine whether or not it was

of Versailles has for its object the reparation of the damage caused by the seizure of the newspaper *L'Action française* on the morning of February 7, 1934, ordered by the prefect of police to be made at the depositories of that newspaper in Paris and in the Department of the Seine;—considering that the seizure of newspapers is regulated by the law of July 29, 1881; that, although it is the duty of the mayors, and in Paris of the prefect of police, to take the measures necessary for the preservation of public order and safety, these duties do not carry with them the power to cause, as a preventive measure, the seizure of a newspaper, without a showing that the seizure ordered in such a general manner as appears from the record, viz., wherever the newspaper shall be offered for sale, in Paris as well as in the suburbs, was indispensable for the maintenance or restoration of the public order; that, therefore, the measure attacked in the circumstances constituted but a trespass so that the judicial authorities have jurisdiction over the case actually pending before the court of Versailles;—considering nevertheless that the court could not, without exceeding its powers, condemn the prefect to the costs on account of the rejection of his challenge [concerning the jurisdiction], because the prefect [in asserting a conflict] did not act as a party to the proceeding but as representative of the sovereign power:

"Art. 1. The *arrêté de conflit* made by the Prefect of the Seine-and-Oise on December 20, 1934 is annulled.

"Art. 2. The disposition in the judgment of the civil court of Versailles, dated December 14, 1934, condemning the Prefect of the Seine-and-Oise to the costs is deemed not to have been made."

⁷⁵ D. 1935.3.25 at 30, col. 2.

⁷⁶ The prefect of police, under art. 8, of an order of March 13, 1924, concerning concessions of newsstands by the city of Paris, had power to prohibit the sale at those stands of newspapers which in his opinion endangered the public order; but he had no such special power as to the sale in other places, as for instance in the streets.

proper for the Civil Court of Versailles to allow the action against the prefect. This necessitated individual consideration of the possible factors which could subject the act of an administrative functionary to the scrutiny of a civil court. In the first place, the question arose whether the prefect had committed a "personal mistake," i.e., a delictual or quasi-delictual act which would involve only his personal liability. The question was answered in the negative by the commissioner, and implicitly by the court, on the ground that the prefect had not acted for personal motives⁷⁷ but undeniably for the purpose of maintaining and restoring public order in the city of Paris on that critical day. He "exercised police powers which he had or believed he had; whether wrongly or rightly, legally or illegally, mattered little as far as jurisdiction is concerned."

Secondly, there was an apparent analogy in the facts of the case to those of three earlier cases⁷⁸ decided by the Tribunal des Conflits in 1889. At that time it had held the ordinary courts competent to entertain the suits which had been instituted against several prefects as the sequel of certain seizures ordered by them, and which were found to constitute invasions of the freedom of the press. It was necessary therefore to determine whether the problem of jurisdiction was to be disposed of accordingly. The commissioner demonstrated at length that the earlier decisions could no longer stand as precedents in the solution of the present case. True, the freedom of the press was still regulated by the same statute,⁷⁹ which prohibits preventive confiscations by the administration and permits seizures only in connection

⁷⁷ The exact formula referred to again is one originally devised by Laferrière who defined *faute personnelle* as an act "which reveals the man with his human weaknesses, his passions, his indiscretions," instead of "the official, the representative of the State, more or less subject to errors." I LAFERRIÈRE, JURIDICTION ADMINISTRATIVE, 2d ed., 648 (1896).

⁷⁸ Dufeulle v. Prefect of Police, Usannaz-Joris v. Lefebvre, and Michau et Lefreney v. Boegner, D. 1890.3.65.

All of these cases involved political agitations directed against the republican government by the former nobility of France, in particular by Philippe, Comte de Paris. In the first case the prefect of police of Paris had ordered the seizure of a manifesto addressed by the Count of Paris to mayors and towns of France, as well as of plates and signature stamps used in the printing. In the second case the Préfet de la Savoie had seized at a post office letters similarly addressed and containing copies of the same manifesto. In the third case the Préfet du Loiret ordered the seizure of likenesses of the Count of Paris to be distributed with a newspaper. The courts in which the respective complaints were received were held to have power to give relief by way of ordering the restitution of the confiscated property or by assessing damages against the prefects, not, however, to hold the postmaster liable in damages for having surrendered the letters, as in the second case.

⁷⁹ Law of July 29, 1881, concerning the freedom of the press, D. 1881.4.65, as amended December 12, 1893, D. 1894.4.9.

with specific cases of criminal prosecutions for designated offenses.⁸⁰ However, in the former adjudications the Tribunal upheld the jurisdiction of the civil courts, not because the action taken by the prefects violated the statute which safeguarded the freedom of the press, but because they had acted in the exercise of powers conferred upon them by Article 10 of the Code d'Instruction Criminelle, as "officers of the judicial police,"⁸¹ rather than in their administrative capacity. In the *Action française* case the prefect did not act in such capacity nor in aid of a criminal prosecution,⁸² but strictly in the exercise of police powers. Justification for the ordinary jurisdiction then had to be found elsewhere.

Consequently, the action of the prefect of police had to be examined in the light of an act of an administrative official performed in the exercise of his functions and not involving a *faute personnelle*. The conclusions point out that under normal circumstances the seizure of newspapers would indeed amount to such a flagrant violation of the freedom of the press that it would no longer be an exercise of police powers, but that it would constitute a trespass.⁸³ Nevertheless, the fact that a liberty, such as the freedom of the press, is protected and that violations are subject to judicial redress according to statute, does not nullify the police powers which the administration derives from other laws.⁸⁴ It is of particular interest to note that the commissioner in this

⁸⁰ Provocation to crimes such as murder, arson, crimes against the security of the state. See Law of December 12, 1893, *supra*, note 79.

⁸¹ Cf. the instances of illegal arrest (*supra*, at notes 26 and 29) where the jurisdiction also was motivated with the judicial nature of the function. Cf. also the cases cited by the commissioner (Matter of Spitz, Recueil, 1920.1006; Matter of Dubois, Recueil, 1921.231; Matter of Huignard, Recueil, 1923.727; Matter of Marquié Recueil, 1926.383) in which the Conseil d'État declined to assume jurisdiction because the seizures had been made by commissaires de police "acting in their capacity as officers of the judicial police."

⁸² At the particular time, art. 10, Code d'Instruction Criminelle, was not in force, having been abrogated by the law of February 7, 1933. It was, however, re-enacted in a limited sense by art. 6 of the law of March 25, 1935, amending the Code d'Instruction Criminelle. S. 1935.1481. See WALINE, *DRIT ADMINISTRATIF* 450 (1936).

⁸³ Citing two cases decided by the Cour de Cassation involving violations of the press law of July 29, 1881: *De Lajudie v. Pomarède*, and *Vaugeois-Héron v. Rieunier*, D. 1919.1.32.

⁸⁴ This point is illustrated by a number of cases in which the Conseil d'État indicated the extent of the general police power. So it was held that the "freedom of advertising" (art. 17, law of July 29, 1881, *supra*, note 79) was not violated by a police order prohibiting the use of special vehicles for advertising purposes in the streets of Paris, in the interest of the safety and convenience of traffic. *Hostein & Co.*, D. 1901-3.53; *Compagnie nouvelle des Chalets*, Recueil, 1902.42. Cf. *Matter of Cotte*, Recueil, 1924.839, concerning the destruction of "suspicious" billboards under the order of a

case denied that a collision of the exercise of those powers with a protected liberty is of itself sufficient to exclude the administrative jurisdiction from passing upon the action taken and its consequences.

The final conclusions for the solution of the principal case were drawn from the precedents reviewed. If the administrative authorities through the use of general police powers may curtail constitutional liberties without committing a trespass⁸⁵—the ordinary jurisdiction being

prefect duly authorized by the Minister of the Interior in 1914; held not in violation of the above law of July 29, 1881.

Respecting the scope of the general police power in regard to "public liberties" (peddling, art. 18, law of July 29, 1881), the decision of the Conseil d'État of Nov. 30, 1928, in *Matter of Pénicaud*, D. H. 1929.39, referred to by the commissioner, appears especially pertinent. It was held that the statute did not preclude the mayors' and prefects' exercising their general police powers in the interest of peace and order, and consequently they could prohibit the distribution of "writings" apt to endanger the public order in the vicinity of schools, churches, barracks, or factories; but that it would be an excess of power and contrary to the statute to prohibit the distribution of all writings whatsoever in all cases where there is a certain congestion of traffic.

Enlarging further the background of the extent of the police power, there is repeated emphasis in the conclusions on a decision of the Conseil d'État (May 19, 1933) annulling a prefect's decree prohibiting a public address by a named speaker for the purpose of preventing anticipated disturbances of the public order. The language employed by the court is of interest in connection with the principal case: The right of free assembly being involved, "the alleged probability of disturbances did not present such a degree of graveness that the public order could not have been maintained without prohibiting the meeting." This implies that under different circumstances the same order might have been a proper police measure. *Recours Benjamin*, D. 1933.3.54 at 57.

Completing the sketch, two cases of confiscation are considered in order to demonstrate the right of the administrative authorities under the general police powers to interfere directly with property rights. In *Monpillié v. Gruet*, Mayor of Bordeaux, D. 1921.1.41, the Cour de Cassation affirmed the incompetency of the ordinary courts in an action against the mayor on account of the seizure of meat brought into the city without having been submitted for inspection and stamping in accordance with a city ordinance. The reason was that both in issuing the order and in causing the seizure pursuant to it, the mayor had remained within his police powers and his administrative functions (art. 97, law of April 5, 1884, Municipal Organization). And the Conseil d'État, in principle, decided that a mayor under his police powers may proceed to confiscate deteriorated foods where such action is urgent in view of the existence of serious danger to the public health.

⁸⁵ Additional precedents sanctioning the administrative jurisdiction (i.e. denying the trespass character of the act) in case of illegal invasions of those rights, are cited in Professor Waline's note, D. 1935.3.25. The Conseil d'État held itself competent to adjudicate a matter of illegal detention and utilization of a foreign neutral vessel. *Matter of Chan Pek Chun*, *Recueil*, 1931.1125. (The case is relied on by Laroque, in a note in S. 1935.3.97, *supra*, note 50, in his endeavor to discredit the *voie de fait* doctrine.) In this particular instance the question seems pertinent whether the diplomatic aspects of the case contributed to the retention of jurisdiction by the Conseil d'État. Furthermore, one may well ask if and upon what grounds the administrative jurisdiction

justified neither by the presence of a malfeasance nor by the judicial nature of the function performed—then the action impeached in the case before the court can be withheld from the administrative jurisdiction only because there was something in the attending circumstances which deprived the seizure of the newspaper of its otherwise administrative character and reduced it to a mere violation of the law protecting the freedom of the press.⁸⁶ This raises two further questions: (1) Did the police powers of the prefect extend to the seizure made in the circumstances? (2) If so, was the seizure ordered, and made, as a means to an end, or as an end in itself?

The first question presents two aspects, one concerning the existence of the power as such, and the other regarding the mode of exercising it. That in the case of the prefect of police the power did exist offered little difficulty. On the one hand, under the terms of the concessions of the city-owned newsstands, the display and sale of publications deemed by the administration to endanger the public order could be prohibited. On the other hand, since the authority of the police extended to whatever might affect the order on the public streets,⁸⁷ the sale of a newspaper inciting to violence in the streets of an already inflamed city could also be *prohibited* by the prefect. However, whether

might have been vindicated before the Tribunal des Conflits had the action of the owner of the ship been instituted in the civil court.

In the case of *Bailly v. Carques*, D. 1918.3.1 at 4, irregularities in effecting military requisitions of beef cattle and grain, in the opinion of the Tribunal des Conflits, did not deprive the respective acts of their administrative character so as to justify the jurisdiction of the civil court. This case should be compared with the *Union Villeneuve* case, D. H. 1931.135, discussed *supra* at note 42. There is a difference both in the degree of procedural irregularity, and in the consequences. The former case involves the taking of some personal property while the latter was concerned with taking possession of an entire factory. It should be noted, however, that in the *Bailly* case the court did not refer to the trespass doctrine as an alternative solution but rather reached its decision on the basis of the distinction between *faute de service* and *faute personnelle*, i.e. by denying the quasi-delictual character of the acts in question. If in the third case cited, *De Gasté v. Hospices*, D. 1895.3.45 at 46, the Tribunal des Conflits decided in favor of the administrative jurisdiction "because there was no trespass, even though construction on a public works had been begun prior to any administrative formalities and a water course to which plaintiffs claimed a right had been diverted" (*Waline*, D. 1935.3.25 at 27), it should nevertheless also be noted that the court expressly held that there had been no dispossession and that the right claimed was not a property right.

⁸⁶ Although the 1889 cases, discussed at note 78, denied all right of preventive seizure of newspapers, the commissioner insisted that "not every seizure of a newspaper is, nor can it be, a trespass" *per se*. D. 1935.3.25 at 30.

⁸⁷ *Baldy v. Préfet*, D. 1920.3.25 (Conseil d'État, Aug. 10, 1917); see art. 97, law of April 5, 1884, Organization of Municipalities. Cf. *Hostein & Co.*, D. 1901.3.53; *Compagnie nouvelle des Chalets*, Recueil, 1902.42.

it could be *seized* raised a different, more delicate issue. As to the newstands, the action taken was appropriate under the special terms of the concessions. On the other hand, in regard to the street sales, the seizure was construed as a direct sanction of an implied prohibition to sell.

Administrative trespasses often stage their appearance under the cloak of such acts of direct execution, and, therefore, the jurisdiction of the ordinary courts depends frequently upon whether or not an administrative authority was entitled to proceed immediately against a person or property.⁸⁸ The commissioner in the *Action française* case found that under the prevailing doctrine⁸⁹ the action of the prefect was generally justifiable because of the exceptional circumstances. The seizure of the newspaper was not illegal per se: there had been a legal duty to maintain order, and there existed an emergency and immediate danger to the public safety arising from the sale of printed matter inciting to violence. This called for prompter action than could be obtained through the intervention of the judicial authorities. How-

⁸⁸ On the highly controversial aspects of the problem of direct administrative execution, see Berthélemy, "De l'exercice de la souveraineté par l'autorité administrative," 21 *REVUE DU DROIT PUBLIC* 209 (1904); DARESTE, *LES VOIES DE RECOURS* 71-89 (1914); HAURIOU, *DROIT ADMINISTRATIF*, 10th ed., 77-80 (1921); 12th ed., 578-582 (1933), and his note accompanying the Saint-Just decision, S. 1904.3.17; 1 HAURIOU, *JURISPRUDENCE* 84, 99, et seq. (1929); BONNARD, *DROIT ADMINISTRATIF* 186-187 (1937); WALINE, *DROIT ADMINISTRATIF* 451-454 (1936): "This is one of the most delicate problems of our public law, because it brings into conflict two fundamental principles: the personal liberty and the respect due the laws."

⁸⁹ The Commissioner relied on the authority of the decision of the Conseil d'État in *Matter of Anduran*, D. 1925.3.43. Upon the recourse of the owner of a flour mill whose plant had been "sealed" because of numerous known and suspected violations of certain statutes, it was held that the administration exceeded its powers in resorting to a sanction not provided for in the respective statutes which provided other adequate means, since this was "not a case of emergency and immediate danger." The principle was established in the famous case of *Société immobilière de Saint-Just v. Préfet du Rhône*, S. 1904.3.17; D. 1903.3.41.

See also *Monpillié v. Gruet*, D. 1921.1.41; *recours Gilibert*, Recueil, 1933.930; *recours Suremain*, Recueil, 1907.345; *Matter of Société française d'industrie chimique* S. 1916.3.1; 1 HAURIOU, *JURISPRUDENCE* 120 (1929); *Matter of Cotte*, Recueil, 1924.839; *Matter of Société Laitière Maggi*, D. H. 1924, p. 170.

It is particularly noteworthy that the jurisdiction of the ordinary courts here must, at least in part, be attributed to the fact that those courts can give injunctive relief, while no similar remedy is available in the administrative courts. Attempts have not been lacking to equip the latter with corresponding powers of injunction. BONNARD, *DROIT ADMINISTRATIF* 159 (1935); Jacquelin, "L'évolution de la procédure administrative," 19 *REVUE DU DROIT PUBLIC* 373 (1903), 20 *REVUE DU DROIT PUBLIC* 5 at 17-19 (1903); 1 HAURIOU, *JURISPRUDENCE* 108 (1929); see the conclusions of the commissioner in the Saint-Just case, D. 1935.3.25.

ever, the commissioner concluded that the act was nevertheless a trespass on account of certain motives imputable to the prefect and because of the apparent objective. Due to the general scope of the order "to seize the newspaper *Action française* at all places where held for sale in Paris and suburbs," the seizure was not limited to designated places within an area where the sale of that newspaper would actually have been a menace to the public order and safety. The real intent of the prefect therefore was not to forestall the potential effect of such sales, but to prevent the distribution of a specific commodity as such. On the basis of this construction, the commissioner suggested,⁹⁰ and the court held, that the act of seizure constituted a trespass and that the civil court had jurisdiction in the matter.

The *Action française* decision quite obviously injects new and important considerations into the analysis of administrative trespass. Though sanctioning in principle an extension of the police powers as against the freedom of the press—and by implication against all civil liberties—it indicates the function of the doctrine as a check upon administrative discretion.⁹¹

In evaluating the implications of the decision, the final conclusions of the commissioner have not been generally accepted.⁹² The construction adopted by the commissioner is rather ingenious; proceeding from the general scope of the impeached order,⁹³ he finds in the implied motive of the prefect⁹⁴ the illegality which deprives the act of its administrative character. Thus the act appears no longer as a proper police measure but solely as a trespass upon the freedom of the press, subjecting it to the jurisdiction of the civil court. This construction is not necessarily reflected in the language of the decision,⁹⁵ upon which

⁹⁰ D. 1935.3.25 at 31, col. 1; 53 REVUE DU DROIT PUBLIC 296 (1936): "What we ask you [the court] . . . is that you confirm the existence of a police power to restrict, or paralyze temporarily, civil liberties which are guaranteed and regulated by law, be it the freedom of the press or the freedom of assembly, whenever exceptional circumstances justify it. You should not disarm the authority of the police by a decision to the contrary. If upon confirming this principle you find that the circumstances in the present case were not such as to render legal a measure as general as the one taken, it is unimportant from the doctrinal point of view. . . ."

⁹¹ In this respect the decision vindicates Hauriou, who defends the doctrine of *voie de fait* as necessary to confining administrative activity within its constitutional domain. HAURIOU, DROIT ADMINISTRATIF, 12th ed., 26 (1933).

⁹² See Professor Waline's note in D. 1935.3.25.

⁹³ "To seize the newspaper in all places where held for sale in Paris and suburbs."

⁹⁴ To seize certain property regardless of the immediate concern of maintaining public order.

⁹⁵ D. 1935.3.25; 53 REVUE DU DROIT PUBLIC 296 (1936).

Professor Waline placed a somewhat different interpretation.⁹⁶ A trespass could indeed result from the sole fact that the seizure, "ordered in such a general manner," was not necessary for the maintenance of order and security. In other words, the direct sanction, i.e., the seizure resorted to under the circumstances, was not justified in the sense of the limitations established in the *Saint-Just* case.⁹⁷ Consequently, the decision of the court must be taken to hold⁹⁸ (1) that under the circumstances, though not per se, the act of the prefect was illegal; (2) that the act tended to violate a civil liberty; and (3) that the resulting invasion of the freedom of the press in the form of the seizure of a newspaper was so severe that it constituted a trespass.

It is this third element, first emphasized by Waline, that must receive further attention. There is nothing either in the underlying conclusions or in the tenor of the decision which immediately suggests this last qualification. The only outstanding fact, on the surface, is that in the *Action française* case an encroachment upon the freedom of the press was treated as a trespass for the first time. But the encroachment had to be of a particular quality before a trespass could be found; and if the earlier cases are viewed in the light of this limitation, it is now possible to discern a trend to apply the trespass doctrine only where the imputed violation has been particularly severe.⁹⁹ So, where property rights are concerned, a dispossession¹⁰⁰ seems to be requisite, and this rather as to real property than merely as to personalty.¹⁰¹ With dispossession as the standard to be applied in case of

⁹⁶ See note in D. 1935.3.25.

⁹⁷ S. 1904.3.17.

⁹⁸ Cf. Waline's note, D. 1935.3.25.

⁹⁹ Waline, D. 1935.3.25, thinks that the presence of a trespass may equally depend upon the seriousness of the formal illegality of the act instead of that of its consequences, citing for a drastic illustration, *Lacombe v. Perrier*, D. 1876.3.51. In that case the Tribunal des Conflits found a trespass because the mayor had violated a criminal statute by causing graves and corpses to be disturbed in locating the foundations for a church building.

¹⁰⁰ Cf. the introductory notes preceding the report of the decision of the Tribunal des Conflits in *Montlaur v. Balmigère*, Mayor of Tournissan, Recueil, 1904.888 at 889: "So long as the administration stays on its own ground, does not invade private property, but reaches it from without only and does not put its hand upon it, the impairment of the owner's enjoyment, no matter how severe, is not for the judicial cognizance; on the other hand, the judicial courts have exclusive jurisdiction if there is a trespass, i.e., if there is on the part of the state [*personne publique*] an encroachment, taking, seizure, or usurpation in respect to private real property whose protection is specially entrusted to those authorities."

¹⁰¹ See the cases discussed above, page 2155 ff. Note in particular *Monpillié v. Gruet*, D. 1921.1.41 (emphasized in Waline's note, D. 1935.3.25), where even the Cour de Cassation denied the jurisdiction of the ordinary courts in a case involving the

violations of property rights, what sort of invasions of civil liberties will correspond in point of severity? Very probably¹⁰² unlawful detention in the matter of personal liberty,¹⁰³ illegal deprivation of the use of property devoted to a cult resulting in the violation of religious freedom¹⁰⁴ and, in the case of the freedom of the press, the illegal seizure of a newspaper.¹⁰⁵

While the foregoing analysis reveals a trend which permits a more accurate definition of administrative trespass, there is yet another deduction to be made from the decision in the *Action française* case which is of importance. Apparently the decision must be understood to confirm that a trespass does not necessarily imply a malfeasance, i.e., a quasi-delict. In other words, it need not invariably coincide with a *faute personnelle*.¹⁰⁶ Consequently, there may be a bona fide trespass

removal from stores of non-inspected meat over the objection of the owners. There was procedural irregularity which in this country would have provoked at least an allegation of want of due process. However, the act was held to be administrative, very probably on the ground that the disregard for procedure was comparatively slight. But again, it may be, as Waline seems to suggest, that the holding was influenced by the fact that only personal property was involved. Evidently the case of *Bailly v. Carques*, D. 1918.3.1 at 4, concerning a procedurally irregular military requisition of cattle and grain, is susceptible of analogous interpretation, and both cases can on the same ground be contrasted with the contrary holding in the *Union Villeneuve* case, D. H. 1931-135, where the Tribunal des Conflits was concerned with the occupation of an entire factory by the military. Cf. also *City of Mende v. Roussel*, D. 1910.1.266, where the Cour de Cassation found in favor of the jurisdiction of the civil court because of a trespass resulting from the destruction of a private water conduit; and *De Gasté v. Hospices*, D. 1895.3.45, where, on the contrary, the Tribunal des Conflits declared the administrative courts competent in a somewhat similar situation. There was neither a dispossession nor a trespass upon plaintiff's property; furthermore, no property right in the bed of the water course but only a right to the water being at stake, compensation for any permanent damage sustained had to be sought in the Conseil de Préfecture because it resulted from the construction of a public works. Law of 28 Pluviose, year VIII (1800), art. 4.

However, it should be observed that Waline himself seems to take a different view in his *DROIT ADMINISTRATIF* (1936). There he says (p. 56): "The jurisdiction belongs to the civil courts in all cases of trespass, even though there is no dispossession." It would follow that in the foregoing cases where there was no dispossession, the jurisdiction of the administrative courts must be attributed to the absence of a sufficient degree of illegality. Cf. *Matter of Frémy*, Recueil, 1933.1159 (Conseil d'État), upholding a Conseil de Préfecture which had declined to take jurisdiction in a matter of "taking irregularly possession of private property" in connection with the construction of an electric power line.

¹⁰² Waline's note in D. 1935.3.25.

¹⁰³ Cf. *Labadié v. Gaillardon*, D. 1876.1.289.

¹⁰⁴ Cf. *Curé de Réalmont v. Maire de Réalmont*, S. 1935.3.97.

¹⁰⁵ *Action française v. Bonnefoy-Sibour*, D. 1935.3.25.

¹⁰⁶ JÈZE, *LES PRINCIPES GÉNÉRAUX DU DROIT ADMINISTRATIF* 79, note 2 (1925), takes the view that trespass and the quasi-delictual quality of the act are inseparable.

with no personal liability on the part of the administrative agent. If, therefore, *voie de fait* is primarily a *notion objective* while *faute personnelle* is a *notion subjective*, the coincidence of both elements in some cases is nevertheless possible.¹⁰⁷ But it is especially the "impersonal" element of the concept that must be borne in mind when appraising its value and its function. In the light of the foregoing analysis, the concept of administrative trespass appears by no means simple, but rather multi-faceted. Granting illegality, the violation of one or the other of certain rights does not seem to be sufficient of itself to consummate the trespass; the injury inflicted must show a certain intensity to which the courts will look. As for the degree of illegality which is deemed destructive of the administrative qualities of the act, the problem is even more intricate. It may be well enough to hold the act to be non-administrative in a case where the culpable authority clearly stepped over the borders of the domain belonging constitutionally to the administrative department of government. But where there is merely procedural irregularity the administrative agency obviously has remained within those borders, and, in fact, has acted under express statutory authority, though it has failed to exercise its powers according to specified methods.¹⁰⁸ And again, there may be trespass although there is not only color of authority but a legitimate administrative objective and good faith in the attempted realization. In such cases, can it be justly said that the act is not administrative? Does not the phrase "a trespass can never be an administrative act," once again employed by the commissioner in the *Action française* case, appear to be no more than a formula?¹⁰⁹ Is not the real function of the trespass doctrine concealed in this very formula, that is, to serve as a device for avoiding the unwieldiness of the principle of the separation of the administrative and judicial authorities? No sweeping modification of that doctrine is wanted, but a means of giving greater play to individual exigencies without sacrifice of the principle. In certain cases of invasions of personal liberties and property rights, particularly in the form of direct administrative sanctions, it may be eminently a question of policy where jurisdiction is to fall. The administration is undoubt-

See also 3 DUGUIT, *DROIT CONSTITUTIONNEL* 715 (1923); cf. APPLETON, *CONTENTIEUX ADMINISTRATIF* 253 (1927). But see HAURIOU, *DROIT ADMINISTRATIF*, 10th ed., 36 (note 3 beginning p. 35) (1921), who recognizes that "in the case of trespass there is frequently malfeasance on the part of the functionary," engaging his personal liability.

¹⁰⁷ Waline's note, D. 1935.3.25 at 27.

¹⁰⁸ Ibid. at 27, col. 2.

¹⁰⁹ Ibid. at 31, col. 1.

edly interested in protecting its own actions, as well as its functionaries, from any other than its own censure. It will not readily admit that it has stepped beyond its lawful domain, for that might tend to impair its authority and arouse popular antagonism. But also, politically it may be to its advantage to respect, as far as possible, the traditional protectorate of the ordinary courts over "life, liberty and property." Furthermore, there will be cases where its prestige will be best served if only its subordinate agent, and not the administration, is identified with a given act. Where redress of an alleged trespass is sought in the ordinary courts, the administration may signify its insistence upon the administrative character of the act by claiming jurisdiction and by defending its position before the Tribunal des Conflits. Or, it may tacitly concede the error of its agent. Similarly, where relief is applied for in the administration's own courts, these courts may retain jurisdiction or they may denounce the act of the agent and refer it to the judicial authorities.

The manifold implications surrounding the trespass doctrine indicate that out of a seemingly simple rule of jurisdiction it has grown into a complex device, a device permitting sporadic modifications of the principle of the separation of authorities and implementing the reconciliation of that principle with the "unwritten" rule of the guardianship of the ordinary courts over the rights and liberties of the people in specific situations.

It has been pointed out that the separation of powers in France was originally intended to bring about a stricter independence of the administrative department of government from judicial control or interference.¹¹⁰ Viewed from this angle, the concept of administrative trespass might indeed be taken to have at first envisaged only those acts of administrative functionaries which constituted pure usurpations; that is, acts which were conspicuously "non-administrative." The jurisdiction of the ordinary courts would then appear to be nothing more than a necessary consequence, and the doctrine as nothing more than a form of stating that consequence. However such an interpretation could not possibly be reconciled with other contemporary rules,¹¹¹ and

¹¹⁰ *Supra*, note 6.

¹¹¹ Prior to the law of September 19, 1870, 70 DUVERGIER, *COLLECTION DES LOIS* 335 (1870), administrative officials could be prosecuted in the ordinary courts on account of delictual acts, committed in the exercise of official functions, only with the consent of the administration. 1 LAFERRIÈRE, *JURIDICTION ADMINISTRATIVE*, 2d ed., 637 ff. (1896).

furthermore it is not at all tenable if examined in connection with the more recent judicial applications.

The substance of this phase of French public law has thus an uncommonly familiar tone. Perhaps the *droit administratif* is too often thought of solely in terms of administrative independence from judicial scrutiny. True, the separation of powers in France has been made to preclude the judicial authorities from interfering with administrative action, and special administrative courts have sprung into existence to afford review of *all* administrative action. But notwithstanding the basic principle and the resulting combination of the administrative and judicial processes within the administrative organism, unconstitutional and illegal encroachments upon civil liberties and property rights will not escape inquiry in the judicial tribunals at the instance of any injured party. In other words, "judicial review" as understood in this country, that is, as a guarantee of the supremacy of the law and of due process of law, is by no means foreign to the French conception of justice.