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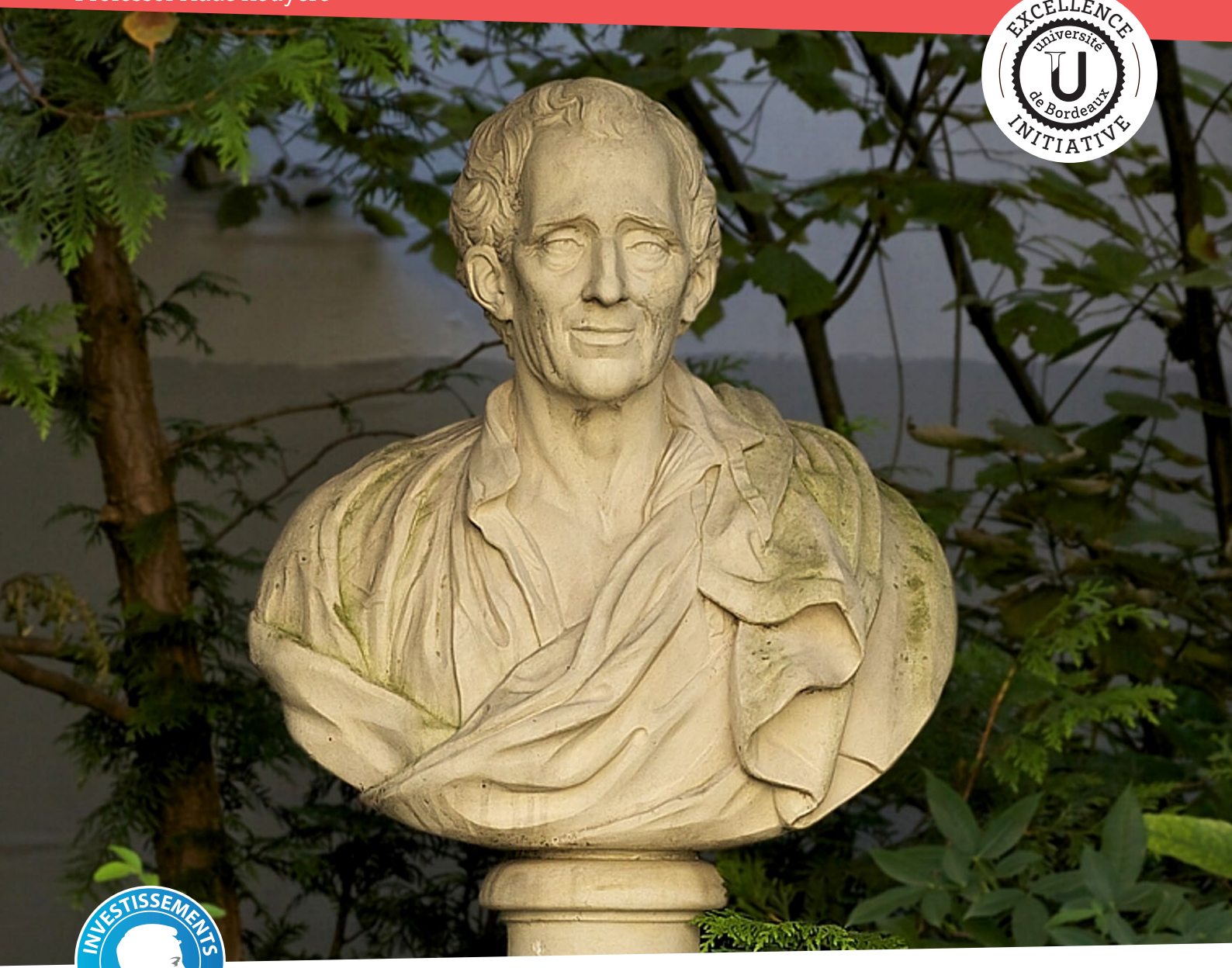

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Administrative law:

The Dieudonné case: freedom of expression, freedom of assembly and public order requirements

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The three temporary orders handed down by the *Conseil d'Etat* on 9, 10 and 11 January 2014 (1) concerning the live stage show performed by Dieudonné M'Bala M'Bala (known simply as Dieudonné) have had extraordinary repercussions, on a par with the legal and political issues that they raise.

At the heart of the litigation was a stage show, titled "*Le Mur*" ("The Wall"), which was first performed in 2013 in Paris and scheduled to tour various other French cities. The live show contains openly anti-Semitic views mixed in with more general points, jibes against well-known Jewish personalities and jokes about the Holocaust.

The "artist" is not unknown in France – far from it. For over ten years, be it in stage shows or other media appearances, Dieudonné has broadcast anti-Semitic views in a more or less allusive manner yet still sufficiently clearly for them to become his signature brand of "humour"… and justify a series of criminal convictions. However, the penalties imposed were not enforced and the stage shows allowed Dieudonné to continue to overstep the mark set down by French criminal law.

Faced with a legal and political situation that was problematic to say the least, the Ministry of the Interior issued a circular to all *préfets* on 6 January 2014 (2), the purpose of which is expressed in terms that leave the reader in no doubt as to the concerns behind it: "*Lutte contre le racisme et l'antisémitisme-manifestations et réunions publiques-spectacles de M. Dieudonné M'BALA M'BALA*" (the fight against racism and anti-Semitism – public meetings and demonstrations – shows performed by Dieudonné M'BALA M'BALA).

The text merits examination as it forms the very basis of the intervention on the part of the authorities which led to the three orders handed down by the *Conseil d'Etat*. Firstly, the Minister recalls therein that the response to such views must above all be criminal proceedings, in accordance with the provisions of the Freedom of the Press Act of 29 July 1881. The Minister then states that the administrative authority also has powers to quell public unrest and that, while freedom of expression must be guaranteed, it must also be reconciled with other constitutional principles or objectives (including the preservation of public order). Mention is also made of Article 10 of the European Convention on Human Rights and Fundamental Freedoms.

From this starting point, it is established that "respect for freedom of expression does not prevent the authority vested with power to enforce legislation from forbidding an activity, on an exceptional basis, where only a measure of that nature can prevent public unrest". Finally, the Minister recalls the conditions, as established in case law, under which the relevant administrative authority may prevent a meeting or show from going ahead, i.e. on the one hand "the risk of serious public unrest resulting from this performance" and, on the other hand, "the impossibility

of preventing such unrest by means of the appropriate enforcement measures which are less intrusive than a ban" (3). The Minister goes on to stipulate the components of the risk of public unrest in the event of a performance in cases such as that of Dieudonné, namely inclusion in a series of performances having already given rise to criminal offences; the recurrent and therefore foreseeable nature of the facts in question; and, finally, the possible affront to human dignity, a component of public order (4).

The message sent by the Minister was clearly received: the performances scheduled in three towns were banned in quick succession on 9, 10 and 11 January 2014 by the administrative authorities. In each instance, an interim application was made to the court on the basis of Article L.512-2 of the *Code de justice administrative* (Administrative Justice Code). The suspension of the order banning the performance in the first case and the dismissal of the application for suspension in the two remaining cases were the subject of an appeal brought before the *Conseil d'Etat*, which overturned the first decision and confirmed the other two. This is tantamount to rescuing (if we may call it that) the orders banning performances given by Dieudonné.

We will comment on these decisions in light of the legal argument put forward by the *Conseil d'Etat*, emphasising those elements that have contributed to markedly different doctrinal points of view. Although the political stakes of the stance adopted by the *Conseil* are far from insignificant, it is indeed in the legal arena that the sparring began between those who defend the decision and those who view it as an unjustifiable break with established case law. In such a context, our commentary will not limit itself to reiterating the grounds of the *Conseil d'Etat*'s decision, but will also give an assessment of the same.

A few words beforehand on the application made under Article L.512-2 of the CJA, created by Law n°2000-597 of 30 June 2000, which provides:

"*Where such an application for interim measures is brought before it on grounds of urgency, the court hearing the application may order any and all measures necessary to safeguard a fundamental freedom with which, it is alleged, a public law body, or a private law body responsible for the management of a public service, has gravely and unlawfully interfered in the exercise of one of its powers. The court will give its ruling within a period of forty-eight hours*".

This is a major procedural advance which provides administrative courts with an essential tool in cases concerning the protection of fundamental rights and freedoms. The Dieudonné cases – just as in other recent decisions (5) – also show that a *référé liberté* (an urgent application for the protection of fundamental rights) may impose a duty on the courts, in highly complex situations heightened by controversy, to take steps that are tantamount to taking the place of the Administration.

What are the elements in the three orders issued by the *Conseil d'Etat* that, quite beyond the political dimension, are evidence of a noteworthy trend in case law? In amongst all the aspects that can be drawn from these decisions, there are two essential points: one concerning the public order perspective, the other on how to reconcile the latter with rights and freedoms.

On the one hand, there is the confirmation of the place occupied by the principle of human dignity amongst the various components of the concept of public order. On the other, there is the

assertion made in the first order that the high degree of probability that a criminal offence will be committed constitutes a threat of public unrest.

1. The legal principle of human dignity as a central component of public order

Public order is a situation that can only be grasped through its opposite, i.e. public disorder or unrest. The latter may manifest itself in the form of various breaches, which may be classed as tangible or intangible breaches.

According to Maurice Hauriou, in his *Précis de droit administratif et de droit public* (12th edition, 1933), "[p]*ublic order [...] is material, external order, a state of affairs considered the opposite to disorder, peace as the opposite to disturbance [...]*". It may be thus understood by means of the classic components of general public order, being public peace, public security and public health.

Intangible public order or disorder has been established in French case law for some time, on the basis of a conception of public morality, being a synthesis of a group of established values at a given time and within an identified community. The relativity of this concept, which is used in light of local circumstances, serves to prevent a general public morality from being set by means of police measures.

The emergence of respect for human dignity as a component of public order, in the 1995 *Commune de Morsang-sur-Orge* decision in the "dwarf-tossing" case, was a development in case law that sparked much debate, not only regarding the reference itself, but also because the limits pertaining to the relativity of intangible disorder were notably absent. This fact was openly presented as "an absolute concept" (6) independent of specific local circumstances. The danger presented to rights and freedoms by the manipulation of an objectivized conception of dignity was not lost on some commentators, who viewed the decision as a licence for police authorities to intervene in the private, or even the intimate, sphere.

After stressing that "the reality and gravity of the risks of public unrest mentioned in the contested order are established", the Dieudonné orders once again use the reference to human dignity as the basis of the breach of public order. Therein lies one of the interesting elements of the decisions, but the latter also and above all holds in the conception of human dignity held here and which stands in stark contrast with the 1995 case law. First of all, the initial decision invokes the "values and principles, particularly of human dignity, enshrined by the Declaration of the Right of Man and the Citizen, and by the republican tradition" (7), while the latter two mention the "values and principles, such as human dignity".

It may be deduced that human dignity could be supplemented by other values and principles. We can see above all – and this is central to the case – that in order to ban Dieudonné's live stage show, the arguments put forward by the *Conseil d'Etat* state that the show contains "anti-Semitic views, which incite to racial hatred and, in breach of the principle of human dignity, condone the discrimination, persecution and extermination perpetrated over the course of the Second World War". Here lays a remarkable difference as compared with the "dwarf-tossing" case, in which the court did not offer up an "objectivized" conception of human dignity, but rather one that in reality fell within the scope of its own discretion. This is a breach of the concept of dignity that does not lend itself to much debate in light of the values that are now protected in our

society and punishable under criminal law. The difference is crucial as such a breach of the concept of dignity is based on a simple finding by the court.

2. Criminal offences and administrative police

While the existence of a criminal offence (Article 24 of the Law of 29 July 1881 on the freedom of the press) consisting in condoning crimes against humanity and in the incitement "to discrimination, hatred or violence towards a person or a group of persons because of their origins or their membership or non-membership of a specific ethnicity, nation, race or religion" provides a legal basis for breaches of the principle of human dignity, the link established between the intervention of an administrative police measure as radical as a ban and the risk of that criminal offence being contested is legally dubious. Moreover, it is this aspect that has fuelled the liveliest criticism of the *Conseil*'s orders.

The *Conseil d'Etat* argued in the first order – having identified the reality and gravity of the risks of public unrest and the serious risk of repeated and grave violations of the respect for values and principles, particularly of human dignity – "that it falls moreover to the administrative authority to take such measures as to prevent the commission of criminal offences". It is therefore a matter of including, within the scope of public unrest, the fact that it falls to administrative police authorities to prevent the commission of a criminal offence.

The arguments against that line of reasoning are not, it must be said, lacking in relevance. The rights and freedoms in question are part of a "repressive", i.e. liberal, system of freedoms, by virtue of which those rights and freedoms would not be subject of an *a priori* review by the administrative authority; the persons benefiting from such rights or freedoms are only exposed on the intervention of a criminal court where a right is exercised in a way that is against the law, i.e. the commission of a criminal offence. In the present case, the ban on Dieudonné's show to prevent the line drawn by the law from being crossed obviously poses problems, by instituting a preventive system. The opposing argument was that it was a matter of simply punishing such offences systematically once, and only once, these had indeed been committed.

It is clear that the role of the administrative police should not include anticipating all possible, potential or probably breaches of the law, at the risk of switching all rights and freedoms into a highly restrictive system.

However, it would appear that the facts of the Dieudonné case are part of an exceptional scenario in which, as emphasised by the court, the public unrest constituted by the commission of criminal offences – and by no means insignificant ones – is in this case sufficiently likely, even certain (being in some ways the sinister "hallmark" of the show itself), for the administrative police authorities to be able and even have a duty to intervene. Indeed, the only possible measure would be to ban such an assembly. The case is extreme but not entirely unprecedented, the administrative authorities having previously been entrusted with a similar task by the law.

In terms of their legal basis, the orders are fully justified. If we want such scenarios (i.e. criminal offences "performed" on stage and radical response on the part of public authorities) to remain the exception, we cannot, for all that, invalidate the exceptional solutions that they demand. There is, in these decisions of the *Conseil d'Etat*, a courageous firmness in the apparently (but only apparently) paradoxical defence of fundamental rights and freedoms.

Notes

(1) CE ord 9 January 2014 req n°374508, CE ord 10 January 2014 req n°374528, CE ord 11 January 2014 req n°374552
(2) NOR: INTK1400238C, available in French on the Légifrance website
(3) Cf. The Conseil d'Etat's landmark decision in *Benjamin* of 19 May 1933 req n° 17413 17520
(4) Cf. CE 27 October 1995 *Commune de Morsang sur Orge* req n° 136727
(5) Cf. CE 14 February 2014 *Mme Lambert* req n° 375081, 375090, 375091
(6) Cf. the conclusions of Patrick Frydman
(7) Cf. *Mme Hoffman-Glemane*, 16 February 2009 N° 315499, featured in the order's endorsements and using that same phrasing

Conseil d'Etat, ORD., 11 January 2014, SARL LES PRODUCTION DE LA PLUME and MD, application number 374552

Given the application, filed on 11 January 2014 with the Judicial Section of the *Conseil d'Etat* by the limited company (SARL) "Les Productions de la Plume" whose registered office is 1, rue des Volaillers, Saint-Lubin-de-la-Haye (28410) by MD, resident at ... Paris; the applicants ask the interim relief judge of the *Conseil d'Etat* to:

1) set aside Order No. 1400080 of 11 January 2014 by which the interim relief judge of the Administrative Court at Orléans, acting on the basis of Article L. 521-2 of the *Code de justice administrative*, dismissed their request for the suspension of the execution of the decree of 9 January 2014 the mayor of Orléans prohibiting the performance of the show "The Wall" by MD, scheduled for Saturday 11 January 2014 at Orléans;

2) grant the application made at first instance;

3) order the Minister of the Interior and the Prefect of Le Loiret to put the appropriate police measures in place;

4) order the town of Orléans to pay them the sum of 4,500 euros;

It is argued that:

- The urgency condition is met, as the show is scheduled for tonight;
- The same applies to the serious infringement of a fundamental freedom;
- That indeed the order issued by the mayor of Orleans was not preceded by an adversarial procedure with the applicants and is not sufficiently justified, failing to note the inability to prevent possible disturbances to public order by the establishment of police measures;
- It is a misuse of power, the mayor having followed the instructions of the Minister of the Interior ignoring the legal regime of freedom of assembly; and the risk of disturbing public order has been brought about by people hostile to the performance of the show;
- The order itself is not sufficiently substantiated;

Given the contested order;

Given the separate memorandum of law filed on 11 January 2014 with the Judicial Section of the *Conseil d'Etat* by "Les Productions de la Plume" and MD, pursuant to Article 23-5 of Ordinance No. 58 -1067 of 7 November 1958; the company "Les Productions de la Plume" and MD ask the interim relief judge of the *Conseil d'Etat* to refer the issue of the compliance of the *Conseil d'Etat*'s Decision No. 136727 of 27 October 1995, *Commune de Morsang-sur-Orge*, with the rights and freedoms guaranteed by the Constitution to the Constitutional Council;
They argue that this decision is applicable to the dispute and is contrary to Articles 6, 10 and 11 of the Declaration of the Rights of Man and of the Citizen of 27 August 1789;
Given the statement, filed on 11 January 2014, in which the Minister of the Interior requests that the *Conseil d'Etat* dismiss the application on the grounds relied upon at first instance by the Prefect of Le Loiret;

Given the other materials on the case file;
Given the Constitution, including its Preamble and Article 61-1;
Given the European Convention for the Protection of Human Rights and Fundamental Freedoms;
Given the Penal Code;
Given the *Code général des collectivités territoriales*;
Given Ordinance 58-1067 of 7 November 1958;
Given the Law of 30 June 1881 on freedom of assembly;
Given the Law of 29 July 1881 on the freedom of the press;
Given the *Code de justice administrative*;

After summoning, on the one hand, the company "Les Productions de la Plume" and MD and, on the other hand, the municipality of Orleans and the Minister of the Interior, to a public hearing;

Given the record of the public hearing on January 11, 2014 at 4:00pm, during which were heard:

- Maître Ricard, lawyer to the *Conseil d'Etat* and the Court of Cassation, counsel for the company "Les Productions de la Plume" and MD;
- Representatives of the company "Les Productions de la Plume" and MD;
- Maître Hazan, lawyer to the *Conseil d'Etat* and the Court of Cassation, counsel for the town of Orléans;
- The representative of the Minister of the Interior;

at the end of which the interim relief judge closed the inquiry;

1. Whereas under Article L. 521-2 of the *Code de justice administrative*: "*Where such an application for interim measures is brought before it on grounds of urgency, the court hearing the application may order any and all measures necessary to safeguard a fundamental freedom with which, it is alleged, a public law body, or a private law body responsible for the management of a public service, has gravely and unlawfully interfered in the exercise of one of its powers. The court will give its ruling within a period of forty-eight hours*" and that under Article L. 522-1 of the Code: "*The court shall rule at the conclusion of written or oral arguments in adversarial proceedings. When asked to order, modify or halt the measures to which Articles L.521-1 and*

L.521-2 refer, the court will immediately inform the parties of the date and time of the public hearing (...) ";

2. Whereas, by the contested Order, the judge of the Administrative Court at Orléans dismissed the application of SARL "Les Productions de la Plume" and MD for the suspension of the execution of the Order of 9 January 2014 issued by the mayor of Orléans prohibiting the show "The Wall", scheduled to be performed there on Saturday 11 January 2014;

On the defence statement made by the Minister of the Interior:

3. Whereas the Minister has a sufficient interest in maintaining the contested order; his statement is therefore admissible;
On the appeal brought by the company "Les Productions de la Plume" and Mr. M'Bala M'Bala:

Regarding the preliminary ruling on constitutionality:

4. Whereas under the first paragraph of Article 23-5 of the Ordinance of 7 November 1958 on the organic law on the Constitutional Council: "*The grounds alleging that a legislative provision infringes the rights and freedoms guaranteed by the Constitution can be raised (...) in the course of proceedings before the Conseil d'Etat* (...) ";

It follows from the wording of these provisions that a preliminary ruling on the issue of constitutionality can only be directed against a legislative provision; that the issue of constitutionality raised by the company "Les Productions de la Plume" and Dieudonne M'Bala M'B is directed not against any legislative provision, but against a decision of the *Conseil d'Etat*; it is, therefore, inadmissible;

As regards the other grounds:

5. Whereas, as recalled by the interim relief judge of the Administrative Court, the exercise of freedom of expression is a prerequisite for democracy and one of the guarantees of respect for other rights and freedoms; it is for the authorities in charge of administrative police to take the measures necessary for the exercise of the freedom of assembly;
that any interference in the exercise of these fundamental freedoms must be necessary, appropriate and proportionate for the purposes of maintaining public order;

6. Whereas, to prohibit the performance of the show "The Wall" in Orléans, previously performed at the Théâtre de la Main d'Or in Paris, the mayor of Orléans noted in particular that this show, as designed, contains anti-Semitic views that shame members of the Jewish community and makes disgraceful references to the Holocaust; that the contested order recalls that MD was the subject of nine criminal convictions, seven of which are final, for views of that nature, and he has made clear his desire to continue in that same vein; that the order notes, furthermore, that the holding of this show is likely to incite racial hatred and racial discrimination, in a context of exacerbated controversy between supporters and opponents of Mr. M'Bala M'Bala and, beyond that, between supporters and opponents of the messages he conveys;

7. Whereas, under the very terms of Article L. 521-2 of the *Code de justice administrative*, the exercise by the interim relief judge of his powers under said article is subject to the serious and manifest nature of the unlawfulness of an infringement of or interference in a fundamental freedom; in this regard, the fact, contradicted by the evidence, that the disputed order was not preceded by an adversarial procedure and would not be sufficiently substantiated is, in any event, not likely to characterize unlawfulness of that kind;

8. Whereas in light the evidence before it, the interim relief judge ruling at first instance referred considered, correctly, that in view of the planned show, as it was announced and scheduled, the allegations that the views constituting criminal offences, likely to cause serious harm to the respect of values and principles such as human dignity and provoke hatred and racial discrimination, raised at meetings held in Paris, would not be repeated in Orléans do not suffice to prevent a serious risk that the planned show itself constitutes a threat of such a nature to public order; that the evidence adduced on appeal, particularly the exchanges during the public hearing, are not such as to cast doubt on that assessment; that the allegation, which cannot, moreover, be regarded as established by the investigation, that Mr. M'Bala M'Bala could perform a different show in Orléans does not affect the legality of the decision prohibiting the performance of the show "The Wall", the suspension of which is requested;

9. Whereas, when the reality of such a risk is sufficiently established, on the evidence put before the interim relief judge, and where the deployment of police forces is not sufficient to breaches of public order of such a nature as those in question here, which consist in inciting racial hatred and racial discrimination, the mayor cannot be considered as having issued a manifestly unlawful act in the exercise of his administrative police powers by issuing the disputed ban; that, in these circumstances, the submission that the mayor would thereby have obeyed the instructions of the Minister of Interior and thus vitiated his decision by a misuse of power must be rejected;

10. It follows from the above that the SARL "Les Productions de la Plume" and MD have no grounds to argue that, by the contested order, which is sufficiently substantiated, the interim relief judge of the Administrative Court at Orléans was wrong to dismiss their request; that their submissions arguing for an injunction and compensation can therefore only be dismissed;

Orders:

Article 1: The defence statement submitted by the Minister of the Interior is accepted.
Article 2: The application made by SARL "Les Productions de la Plume" and MD is dismissed.
Article 3: This Order shall be notified to the SARL "Les Productions de la Plume", MD, the town of Orléans, the Prime Minister and the Minister of Interior.