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Evolution of the role of the Commissaire du Gouvernement

Commissaire du Gouvernement: A member of the administrative or civil courts responsible for presenting, in the form of a brief, what he considers to be the legal issue of the litigation. Said member is an impartial participant whose role is to interpret the law. As such, he does not represent or argue on behalf of any of the parties to the litigation.

Not long ago, before an Administrative Court, the *Commissaire du Gouvernement* could leave the decision to the judges' wisdom or blow the entire case out of the water if, on his own motion, he chose to submit a brief stating that the case should be dismissed or to present an original argument to which the parties were not permitted to respond.

Moreover, the *Commissaire* attended and participated in the deliberations of the court judges.

At that time, the Administrative Court of Appeals did not exist and, before the *Conseil d'Etat* (the Highest Administrative Court), although having a similar function of an appellate court, the briefs submitted by the *Commissaire* were considered as masterpieces of administrative law, destined to orient case law and no one would even dream of protesting against their contents.

An uninterrupted series of reforms completely changed this landscape.

Everything began in 1957 with a decision of the *Conseil d'Etat* which prohibited the *Commissaire* from excusing himself from submitting briefs. This concerned a case pleaded before an administrative court of the French overseas departments and territories (C.E. July 10, 1957, Gervaise, Rec. p. 466).

Then, the *Conseil d'Etat* held that the *Commissaire* was required to submit reasoned briefs (C.E. June 13, 1975, Andrassé Rec. p. 357). Article 18 of the Law dated January 6, 1986 clarified said holding by specifying that the *Commissaire* must, in complete independence, state his opinion on the facts, circumstances and applicable rules of law.

As such, the *Commissaire* was required to justify the contents of his brief. This rule is codified by Article L.7 of

the Code of Administrative Justice.

Moreover, by virtue of other reforms, prior to any judgments, the Administrative Court was required to warn the parties of any arguments and/or claims which were likely to be raised on the *Commissaire's* own motion.

Article 54 of the Decree dated July 30, 1963 introduced said requirement and, as such, in his brief, the *Commissaire* was prohibited from raising the argument of inadmissibility or any other legal argument unless the legal issue had been debated beforehand between the parties.

Finally, 2001 marked a decisive turning point. The High Court of Strasbourg condemned the French Republic and held that the non-adversarial nature of the role of the *Commissaire* was inequitable because it did not allow all parties to fully participate and be equally heard before the administrative courts (C.E.D.H. June 7, 2001 – Kress v. La France).

As from this case, there were discussions to determine which reforms needed to be made in order to comply with this decision.

Some argued the tradition of the institution of the *Commissaire du Gouvernement* dating from Napoleon I, in which said *Commissaire* was neither a party to the litigation, as he did not represent the administration, nor a magistrate somewhat akin to a Public Prosecutor. His role was to bring clarity to the trial by bringing forth the law, general public policy principles and case law, but he never decided upon or imposed any decision whatsoever. Only the judges, after deliberations, were empowered to do so.

The aforementioned discussions focused on this last point. The participation of the *Commissaire* in the judges' deliberations appeared as a reprehensible irregularity under the "theory of appearance" because, according to said theory, the parties being tried could believe, in error, that the *Commissaire* was influencing the court during the deliberations.

A stopgap solution – for lack of a better word – was introduced in 2005-2006 in the regulatory section of the Code of Administrative Justice to attempt to reconcile tradition with the "adversarial" character of the procedure, as desired by the High Court of Strasbourg.

These reforms, qualified as disorganized, insufficient and in vain for some, must be explained in further detail.

A distinction must be made between two complementary, yet distinct and sometimes confused, aspects of said reforms. On the one hand, there is the prior communication of the *Commissaire's* briefs (which does not derive from any text), and on the other hand, the presence of the *Commissaire* during the judges' deliberations (which was codified in recent texts).

1 Prior communication of the briefs:

The contents of the *Commissaire's* briefs, which are binding only to him and are his own property, remain unknown to any of the parties until they are presented at the hearing.

As said contents are presented orally, there is no requirement that the briefs be communicated in writing or included in the file.

As such, there is no opportunity for the parties to fully participate in the debate. The procedure is not adversarial.

The Code of Administrative Justice is silent on the issue.

In a response letter dated July 7, 2005 from the Minister of Justice to Mr. Charasse, a Senator, the Minister stated that, to comply with the Kress holding, an attorney was permitted, before the hearing, to request the *Commissaire* to indicate the "general sense of his brief" and, if necessary, the opportunity to reply with his own brief (which is set forth in Article R.731-3 of the Code of Administrative Justice) (J.O. Sénat Q, p. 1836).

This response letter from the Minister of Justice may not be considered as a binding rule; it only confirms an existing practice: the communication of a written copy of the contents of the brief results in the payment of a fee to the Treasury Department (Decree dated November 14, 1994, as amended on November 10, 2005).

Nevertheless, the *Conseil d'Etat* recently implicitly validated said response letter in a decision which contains more questions than answers (C.E. May 5, 2006, Société Mullerhof case).

In fact, said decision, by referring to (i) the aforementioned existing practice, and (ii) the right for all parties to fully participate through an adversarial procedure only required the *Commissaire* to inform the attorneys of any contemplated last minute changes to the contents of the brief.

The following questions arise from this informal procedure and said decision:

- How to know what is exactly said in the request and in the response?
- Can the *Commissaire* refuse to reveal the general sense of his brief?
- If the *Commissaire* is contacted by one of the parties the night before the hearing and communicates the general sense of his brief, will he do the same vis-à-vis the other party who had requested no information?
- If the *Commissaire* changes his mind during a hearing, must he request a postponement in order to inform the parties of the change in direction of his brief?

Undoubtedly, there are several other questions associated with the possibility for the parties to respond with the supplemental brief which may not be filed until after the *Commissaire's* oral arguments are heard.

2 The *Commissaire's* presence during the court judges'

deliberations:

This was the sensitive issue as this question was “hammered” in by the High Court of Strasbourg, according to the minority holding in a decision rendered April 12, 2006.

Even though the French government put forth a Decree dated December 19, 2005 to state that the *Commissaire* is to attend the judges’ deliberations but shall not otherwise participate (which would preserve the traditional principle), the Grand Chamber of the European Court of Human Rights formally condemned France on April 12, 2006 (the Martinié case – AJDA 2006) specifying that the mere presence of the *Commissaire du Gouvernement*, whether active or only passive or silent, during the judges’ deliberations leads one to assume that the *Commissaire* influenced the holding in said case (application of the theory of appearance).

As such, the French government yielded to the European Court’s holding and enacted the Decree dated August 1, 2006 which modified the system established a few months before by downgrading Articles R.731-1 et seq. of the Code of Administrative Justice, as amended in June 2005.

According to what is currently codified, one must distinguish between whether the *Commissaire* is appearing before the *Conseil d’Etat* or before any lower administrative court:

- Before the Administrative Court and the Administrative Court of Appeals, the *Commissaire* may no longer attend the judges’ deliberations (Article L.732-2).
- Before the *Conseil d’Etat*, the *Commissaire* attends in principle the judges’ deliberations but does not participate therein. Nothing has changed from what had been enacted in the past (Article R.733-3).

But, if one of the parties objects in writing to his presence prior to the judge’s deliberations taking place, the *Commissaire* must abstain from attending. The *Commissaire* has no choice in the matter (Article R.733-3).

The reason for the difference is that this objection procedure is made for *Avocats aux Conseils* (i.e. lawyers specifically trained to plead before the *Conseil d’Etat* and the Supreme Court of France). However, in some cases for which representation through *Avocats aux Conseils* in not mandatory before the Conseil d’Etat, the plaintiffs themselves or their attorney may have recourse to said objection procedure, in which case there is clearly the risk of abuse.

Moreover, it seems useful to the development of case law issued by the *Conseil d’Eta*t thanks to the remarkable legal science of the *Commissaires au Gouvernement* that said *Commissaires* may be informed of the possible evolutions by virtue of the exchanges made during the judges’ deliberations.

In fact, we know that oftentimes, the *Commissaires* of the *Conseil d’Etat* orient administrative case law.

However, it is probable that this will not satisfy those who unconditionally wish to see the *Commissaire* absent from the judges’ deliberation. It must be said that the “*Commissaire du Gouvernement*” are not the best

words to describe the role and that this old title, confused with those of the real representatives of power within the Parliament as well as, for example, the Military Tribunals and the Expropriation Commissions, must be changed if we hope to preserve a role which is indispensable to administrative justice.

Because the *Commissaire's* role is to refer to the law and general principles, why shouldn't we call him the *Conseiller-Référendaire* (Public Advisor)?

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