BRUNO LATOUR

The Making of Law

AN ETHNOGRAPHY OF THE CONSEIL D'ETAT

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Revised by the author

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Preface to the English edition

It's not my fault if this book is a little hard to read: it's about *law*; it's about *French* law; it's about French *administrative* law! English-speaking readers will forgive an ethnographer for telling them about the rituals of New Guinea or the folklore of the Scottish Highlands; they will absorb without difficulty the many concepts often retained in native languages, but certainly not if they are asked to make the same effort with regard to the legal niceties of the French State. Exoticism has its limits. You might be willing to cross the Channel to hear charming stories about Provence or Burgundy wine, but not to sit, for 300 pages, inside the Palais-Royal in Paris to hear exceedingly boring people discuss exceedingly subtle points of law. But the same readers will accept, with a certain degree of open-mindedness, an ethnography of a scientific laboratory or of a technical project that might be just as difficult. Ah, yes, but science and technology are supposed to be universal and the arguments might ring a bell in Cambridge as well as in Toulouse or Houston. But law? Law is so provincial, so stubbornly local. How could anyone pretend to interest them in French administrative law?

The reasons I insisted on writing this study, and then on having it translated, is, first, that this branch of legal reasoning is not a Code-based law but a precedent-based legal corpus entirely fabricated, over two centuries, by the judges themselves (who are not judges, by the way, but members of the executive, a queer feature about which we will learn more in due course). So, my meek retort is that, of all the

branches of Continental law, it is the one that most resembles Common Law in the way it is elaborated and arrayed in reasoning.

Okay, but not a good enough reason.

The second reason is that administrative law, and especially what happens in the Council of State which plays the role of Supreme Court for this branch of law (yes, this is complicated: in France, administrative law is a completely autonomous and separate system from the judiciary, which has its own Supreme Court, called the Cassation), is almost totally unknown by the French people themselves. In other words, in the book that follows, everything is just as exotic to most French-speaking readers as it is to English-speaking readers. If it is strange to the latter, it is just as strange to the eyes of the former.

This is why, instead of bombarding the reader with technical terms in the local tongue – which can be done without any qualms when reconstructing the cosmology of the Iroquois or the assembly of gods in a Brazilian *candomblé* – I have chosen, for each function, words that have no common meaning in English. But they have no meaning in French either, except for the lawyers who work directly in contact with the Council of State. '*Commissaires du gouvernement*' in italics and quotation marks would have meant nothing to the English reader, nor does 'commissioner of the law' (the term I have chosen); but in French, 'commissaires du gouvernement' means so little that every single time a decision of the Council of State is mentioned in the press, you need a long paraphrase to explain what it means. Especially because, in the same palace, there are other people, also named 'commissaires du gouvernement', who are really sent and commissioned by the government, whose function is utterly different from that of commissioners of the law (who are sent and commissioned by Law only, as it is interpreted by their own conscience – and that of their colleagues). Too complicated? Who has said that the central institutions on which contemporary civilization are based should be simple and fully opened to the gaze of the ordinary citizen? Anthropology of modern cultures is just as hard in Paris as it is in Beijing or Tierra del Fuego.

But here is the real reason why I think it is worth taking the trouble to read such an ethnography about French administrative law: forget that it's in France, forget that it is only about administrative law (in contrast to the judiciary that deals with private and criminal law), and just consider the chance I had: for about four years – not continuously – I had privileged access (it took a long time to sneak in) to the private conversations of about six or seven counsellors who had to come to a conclusion about the cases that

were coming to them. I was sitting not only in the tribunal room where the public audiences were given (not much happened there anyway since the lawyers for the plaintiffs say nothing and only the commissioner of the law stands up and reads his 'conclusions' and then sits down and that's all . . . no drama whatsoever), but also behind the closed door where the cases were discussed, or, as they say, 'reviewed'. A unique site for a unique access to the collective interlocution where I could observe in great detail (okay, too many details, I agree, but isn't that what ethnography is about?) the close knitting of legal reasoning.

At which point you might object that I observed not 'legal reasoning' but the ways French administrative law judges (and they are not even judges but political appointees, former ministers, heads of public companies, journalists, etc.) think legally. That's where I somewhat disagree. Anthropology of law has this interesting feature in that – contrary to, let's say, anthropology of science, my original field – there was never any question that all cultures *have* law. It might differ in content; the conclusion might horrify the ethnographer – or the plaintiff; the circuitous route of reasoning might look incredibly farfetched; there might be blood all along; but it is always recognizable as tracing the path of something – quite elusive I agree – that we all call 'legal'. So, yes, a case study will always be just a case study, and it should not be generalized too much, but the whole book that you, hopefully, are going to accept to read is based on the assumption that the English-speaker does not need to learn about 'French administrative law' (unless they wish to) but about the *passage* or the *transit* of law, a question that, naturally, can be highlighted only thanks to a detailed case study but that may become, in the end, rather independent from it.

The true reason why I invested so much energy in this field work (I found, on the whole, law much more technical and difficult to follow than science or technology) is that it was precisely to compare the passage of law with the other types of enunciation regimes I had studied up till then (or have studied since). I belong to a small group of social theorists who believe that we have been pretty wrong in providing a 'social' explanation of anything – science, religion, politics, technology, economics, law and so on. Far from being what should provide the *source* of explanation of those phenomena, what we loosely call 'the social' is rather the *result* of what has been produced by types of connection ('associations' in my terminology) that are established by scientific, religious, political, technological, economical or legal connectors. If this theory (now called 'Actor Network Theory' or 'ANT') is even vaguely right, there is a paramount interest

in defining, as precisely as possible, what it means to connect some association, let's say, religiously, or scientifically, or politically, etc. The use of the adverbial form is crucial to the argument, since there may be a great gap between speaking *about* politics or religion and speaking politic*ally* or religious*ly*. It's much easier to understand, and it will become even clearer in what follows, that there is similarly an immense difference, very easy to grasp, between speaking *about* law and speaking *legally*.

In the last thirty years, I have done much field work to define the scientific way of establishing connections: what I called 'reference'. The book you are about to read is the *Laboratory Life*, not for the construction of facts, but for the construction of legal arguments ('moyens de droit'). In the same way that I had been able to extract, from one admittedly limited set of case studies, a plausible definition of what it was to speak scientifically of some state of affairs, I have tried here, through another carefully devised set of ethnographic devices, to extract, to educe, to highlight a plausible definition of what it is to speak legally of a tort. My overall point, my general contention, is that we can't possibly provide a positive anthropology of the Moderns (who, I remind you, have never been modern, but that is only a negative definition: what have they been, then?) as long as we don't have a clear comparative study of the various ways in which the central institutions of our cultures produce truth. And clearly there are several types of felicity conditions for the various kinds of truth production (scientific, legal, religious, etc.) that define the former Moderns. There exists an inner pluralism in the way truth production is defined among the Moderns – which does not mean that they are indifferent to truth, quite the opposite. It is actually what makes law so interesting.

I have to confess that, until I had carried out this field work, I was not too convinced that my overall project had any chance of succeeding. Having tried to compare scientific felicity conditions to, for instance, those of religion or politics, I knew it was feasible, but there was always the nagging feeling that it was a lost cause, so powerfully had the ideology of science squashed those other contrasts beyond recognition. Whatever I tried to do, religious and political enunciations seemed always to lament and repent for *not* being scientific enough. The immense advantage of law – talk to a lawyer or a legist for five minutes and you will understand what I mean – is that they never have any doubt (a) that their way of arguing is entirely specific; (b) that there is a clear distinction, inside this way of arguing, between what is true and what is false (the felicity and infelicity conditions are clearly recognized even though they might be agonizingly difficult

to put on paper); and (c) that this difference between true and false is totally different from what might be taken to be scientifically true or false. In other words, only law has maintained, throughout the modernist parenthesis, a sturdy confidence in the validity of its own felicity conditions quite independently of what has happened to science (even though there have been many attempts, and just as many failures, at founding a 'science of law'). It is this unique feature that allowed me to have confidence in the project of systematically comparing the felicity and infelicity conditions of the different regimes of truth production that define the hard core of our cultures. And there cannot be much doubt that the rule of law is one of the ways in which Western societies have defined themselves. And yet it is extremely difficult for outsiders to characterize what is legal in a legal reasoning . . .

Although there is no clear description for what I am doing, the closest is that of an empirical (not an empiricist) philosopher. This book tries, through the device of ethnography, to capture a philosophical question (and in addition a social theory puzzle) that would be inaccessible philosophically (provided the adverb had a real meaning, which I doubt very much): *the essence of law*. Knowing that an essence does not lie in a definition but in a practice, a situated, material practice that ties a whole range of heterogeneous phenomena in a certain specific *way*. And it is on the search for this specific way that this book is entirely focused. Now, once again, what is marvellous in law is that, to designate this apparently abstract question, it has a very explicit term, at least in French: the word 'moyen', for which the translators and I had a lot of trouble trying to find an equivalent. It is uttered ten times a minute by lawyers and judges, and yet this key term has no definition in law dictionaries. That's what this book tries to redress: to provide a description, understandable from the outside, for the word '*moyen*' – legal argument, legal ground, legal reason, this little vehicle on which is transported the rule of law, this value that we cherish so much – and with good reason.

To assuage the difficulties of the chase, the book is constructed in such a way that the reader learns about the site, the precedent, the cases, the functions, morsel by morsel, just when it is needed. So don't expect a presentation of the French legal system, a description of the overall institution, a summary of the cases. This is a completely zoom-free, context-free ethnographic description, which means it is, or it should be, a good ANT's view of law. Context is doled out when necessary to give you just enough to move to the next step.

A word to finish, on anonymity: the counsellors I had the patience to study were at the outset very wary about my publishing a book about the practice they had let me observe for so long. First, because the discussions about the cases should not be available to the plaintiffs, and, second, because they did not want their decision to appear as the result of a complex and humble situation of interlocution. The first problem was easily solved by a complex montage of cases where the names of the judges and the number of the cases were reshuffled enough to erase all the traces without losing the argument (impossible naturally to record on tapes – I had to scribble fast and inevitably I lost a lot). To the second objection, I could not submit: it would have meant abandoning the project entirely. For the few who read my manuscript in detail before publication, Law, at least in France, seemed to have no possible individual or personalized site: it had to speak from nowhere as the Voice of the Law. 'Since Napoleon's foundation of the Council', one of the counsellors wrote to me, 'never has the Voice of Law been downgraded to the level of a mere interlocution among individual judges'.

For a moment I thought that I was going to enter into the same dispute with judges I had been forced to enter with some scientists in the past: a realistic description of their practice was seen by them as mere debunking. Fortunately, judges seemed to be more open-minded than scientists to the ethnographic gaze (or, in the case of the *Council of State*, more thoroughly indifferent to what the social sciences can say of the type of truth they generate). To my great surprise, the book was a small success in French, to the point of getting me a few reviews, and I am told it is a required reading for every apprentice in administrative law. If I was accused of something, it was this time by the social critics of law who found my portrait of the Council too favourable – not to say complacent. And it's quite true, not only is this book context-free, it is also critique-free. To stand any chance of grasping the elusive passage of law required, it seemed to me, this breach in the usual methods of inquiry. Each study demands a different writing strategy in order to reach that most elusive of all the goals I have pursued in my career, following Harold Garfinkel's dictate: the 'unique adequacy' of the text to the matter at hand.

I would have lost courage in bringing this book from French to English if Alain Pottage had not constantly pushed for it, translating a chapter, revising others and convincing the publisher that a book on French administrative law was of no less interest than any other more exotic and sexy topic . . . I have since revised the translation quite extensively. I was encouraged in translating the result of this

field work by the warm welcome of several jurists, especially Noah Feldmann in the United States, and Frédéric Audren in France. In Belgium, Serge Gutwirth and Laurent de Sutter were kind enough to comment at length on the French version of the book and to make this enterprise part of their own research project on 'Les loyautés du savoir'.

I

In the shadow of Bonaparte

In which we introduce the readers into the bicentennial celebrations, in order to get them warmed up – In which larcenous pigeons allow us to meet the commissioner of the law, who is a main character in this story – In which we discover the importance of a missing signature to a decree, and in which we familiarize ourselves with the 'review meetings' of a 'sub-section', which are the main empirical sources of this work – In which an editorial in the newspaper *Le Monde* allows us to introduce the distinction between civil or criminal law and administrative law – In which the readers begin to experience the particular force of the law, thanks to two contrasting cases discussed in the 'Counsel Section' – In which we show the readers the workshops of the 'General Assembly' where legal texts are written – All of which does not leave the author completely unperturbed as he ascends the main staircase of the Council

Two rather unfortunately chosen symbols

To mark its second centenary, which was celebrated on 13 December 1999 in the main amphitheatre of the Sorbonne against the backdrop of Puvis de Chavanne's wonderfully kitsch frescos, the Conseil d'Etat (from now on, 'Council of State') chose to represent itself by means of a very peculiar symbol. An impressive Doric column emerged from

nowhere to support a piece of architrave upon which rested the detached fragment of a majestic cornice, which jutted forward like the prow of a ship about to part the seas.

This stylized blue sketch appeared very peculiar to the ethnographer: by depicting this beautiful and moving Greek ruin from below, it suggested that the Council was somehow suspended in mid-air with no support or foundation, as though the column drew from within itself the power to support a monument which might have been a temple, but whose purpose could not be discerned without a view either of the whole edifice or of the landscape which it would have surveyed. Sitting in the public gallery, on the fringe of this illustrious gathering, the ignorant ethnographer could not help but ask himself why such an image had been chosen to celebrate the anniversary of the institution. What was the point of designating the foundations of the State by means of this kind of unidentified flying object? What was signified by this pillar with no roots and no support, which held up a ruin? Why return to the ancient Dorians to locate the emblem of an institution that wished to project itself forwards into the twenty-first century?

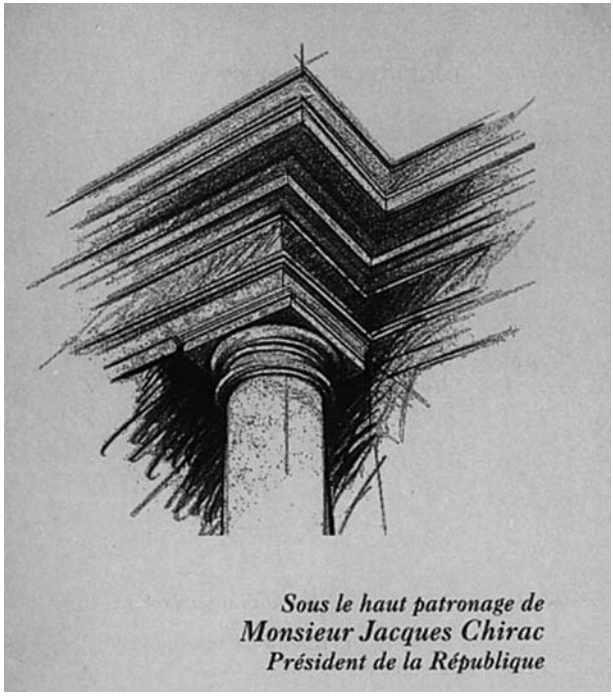

Figure 1.1

The ethnographer's astonishment did not diminish when he found out from his neighbour that this was not a ruin but a rendering by the painter Ernest Pignon-Ernest of a corner of the monument which enclosed the courtyard of the Palais-Royal, which is the seat of the 'Haute Assemblée', as it is often called somewhat pompously in the press. And, if anything, his surprise increased when he found that none of the counsellors, auditors[1] or civil servants with whom he raised the question during the interval shared his surprise: 'But really, why does that surprise you?' Apparently, this fragment of power suspended in mid-air and seen from below needed no particular explanation. Had the ethnographer conducted his research over the past four years so badly that he was still unable to predict what should surprise the members of the institution he had been studying?

The uncomfortable feeling that he had so completely misunderstood his field intensified when he received New Year's greetings from some of those who had put up with him so patiently and for so long. In order to celebrate both the beginning of the year 2000 and the beginning of its third centenary, the representatives of the Council had had the even more peculiar idea of illustrating their greetings card with a painting which depicted Bonaparte standing on a rostrum in the shiny uniform of the Premier Consul. Standing ahead of Cambacérès and Lebrun, who remain discreetly in the background, the author of the coup d'état receives the enthusiastic tributes of the newly appointed counsellors, who are themselves opulently dressed in uniforms designed by the revolutionary painter David, while behind, barely visible against the sunlight, arms raised in a collective solemn gesture, the whole of the Council pledges its loyalty to the new Constitution in a single voice.

Our observer asked himself whether this was not a rather clumsy choice of painting. At the very moment when Europe and European law were acquiring increasingly greater importance, the somewhat embarrassing founder of the Council of State is moved centre-stage. As far as we know, Napoleon is not seen overseas as the model of a democrat, but rather as a bloodthirsty tyrant! And whereas the very

[1] Because administrative law speaks its own language, the reader will find in the glossary a reference in French and in English to the pages where most of the technical terms are defined. The complete bibliographic references can be found at the end of the book. By convention, we will use the French term the first time we encounter it and then the English equivalent, whenever it is possible, for the remainder of the book. If some of these words seem odd, the English reader should be reminded that they are just as strange for French speakers, most of whom have never heard of the Conseil d'Etat and are totally unfamiliar with the jargon of administrative law.

Figure 1.2

notion of a specific body of administrative law as something distinct and separate from civil and criminal jurisdiction still provokes unease, irony or indignation in the press, among elected politicians and among jurists, what was set before the eyes of the public here was a gesture of submission to the personal power of a man who claimed to incarnate a State which brooked no opposition. Even more remarkable is the fact that the very Council whose bicentennial was being celebrated had, throughout France's troubled history, unwaveringly pledged its complete and absolute fidelity to a succession of regimes which each in their turn sought to suppress it, but which it had always outlived – as had France itself – but only at the price of quite a few palinodes.[2] Is it really so clever to put the finger on a gesture

[2] See the long chapter in Collectif, *Deuxième centenaire du Conseil d'Etat* (2001), entitled 'Le Conseil d'Etat et les changements de régime politique', pp. 77–144, for a useful synthesis. As Pierre Legendre says: 'The Council of State is not admirable, it just is. Its development, the demultiplication of its function and especially the paradox of its permanence are the effect of a mechanism which has nothing heroic nor even thought out about it.' Legendre, 'Prestance du Conseil d'Etat' (1975), p. 633

of fidelity that could be pledged at one moment and will be abjured the next?

It need hardly be said that the ethnographer was again alone in his surprise. Those members of the Council who were kind enough to send him this card were not being in the least bit malicious, and that is exactly what he should have understood.

In order to create a portrait of the Council of State, we will have to redraw Pignon-Ernest's pencil sketch a little. Although it is true that the Council is a pillar of the State, it is still improbable, for reasons that have to do with simple mechanics and the resistance of materials, that it could anchor itself in the void in this way! So, unlike the painter, we will seek to multiply the ties which, despite their fragility and insignificance, form entanglements and multiply weak links in such a way as to explain the solidity of the edifice. As for this monument itself, rather than treating it as a fragment of neoclassical temple mysteriously hovering above an astounded citizenry, our objective is to restore to it its materiality, its colours, its textures and its opulence, but also its fragility and perhaps its relevance, and – why not? – its utility. The picture will lose some of its solemn splendour and majestic isolation, but it will gain the vascularization and numerous connections that allow an institution to breathe.

In distancing ourselves from this architrave and ruined pile of Doric columns, we are also distancing ourselves from Bonaparte and from the occasionally sensational history that, from the Restoration through to de Gaulle by way of Vichy, allowed the Council to believe itself to be unchanging, as immune to the passage of time as the Platonic Idea of the Republic. We are interested neither in the version of this history that is tirelessly reworked by members of the Council, nor in its scholarly revision by (the somewhat rare) historians of the institution.[3] We are not going to follow the path of the archives, but

[3] There is no equal balance between the number of works dedicated to the glory of the Council of State and works about the Council. Even after the publications relating to the second centenary, voluminous but purely celebratory (Collectif, *Deuxième centenaire du Conseil d'Etat* (2001)), we still find only one sociological work more than thirty years old (Kessler, *Le Conseil d'Etat* (1968)); another book, more recent (Costa, *Le Conseil d'Etat dans la société contemporaine* (1993)) only barely touches on sociology; some stimulating articles by Monnier (Collectif, *Deuxième centenaire du Conseil d'Etat*, vol. I, pp. 643–7); then some research on the evolution of the 'corps', for example Roquemaurel, *Les membres du Conseil d'Etat et les entreprises* (1997), and Bui-Xuan, *Les femmes au Conseil d'Etat* (2000). That is all where external views on the institution are concerned. We find, on the other hand, some works of administrative science – Chevalier, *Science administrative*, vol. I (1994) and Burdeau, *Histoire du droit administratif* (1995) – excellent presentations of the legal and administrative role of the Council, from the most efficient – Stirn,

rather that of patient observation by someone who was initially entirely ignorant of legal method and who had not even the most minor responsibility in the State. It so happens that the person whom we shall call the ethnographer – for reasons that will be made clear further on – was able for a period of fifteen months spread over four years to enjoy privileged access to the work of the Council, like a sort of internship carried out under the supervision of eminent members of the establishment, as a result of which he found himself in the position that newer methods in anthropology sometimes describe as impossible, not to say indecent, that of being 'a fly on the wall', an observer reduced to silence and invisibility, but equipped with a notebook and a laminated card giving him access to the Council library . . .

A small matter concerning pigeons

The voice resonates across the room whose wooden furnishings have been polished by years of use:

> Although pigeons can be enchanting for the users of public squares, they are a plague on the cultivators of sunflowers. This is the case of Mr Delavallade, who has tried unsuccessfully to obtain compensation of 100,800 francs from the commune of La Rochefoucauld for the damage done to his crops by the town's pigeons.
>
> Today, he asks you to overrule the decision of 3 December 1991 in which the commune was held not liable on the basis that it had committed no serious wrong.

As in a children's story, these 'cases' always begin by evoking some more or less picturesque place, place-names that recall a history or geography lesson, or the more or less painful or comical incidents of a daily life that is far removed from the plush atmosphere of the place du Palais-Royal, which is situated between the Louvre and the famous theatre called La Comédie Française. We are now in the 'Section du

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Le Conseil d'Etat (1991) – to the most luxurious – Massot, *Le Conseil d'Etat. De l'An VIII à nos jours* (1999). All other works are, more than anything, about administrative law and where they do discuss the history of one concept or another (for example Berre, *Les revirements de jurisprudence en droit administratif* (1999)) or one function or another (Deguergue, 'Les commissaires du gouvernement et la doctrine' (1994)), a historian would have some difficulty in finding points of reference in them. But of course there is no lack of moving, amused or ironic accounts – there is even an atrocious novel about the minor failures of the Council: Lebon, *Meurtre au Conseil d'Etat* (1990). One typical trait is amusing: the work concerning the second centenary includes photographs of armchairs, platforms, wood-panelling, but not a single image of a human being – only plenty of portraits of famous dead white men . . .

Contentieux' (from now on, 'Litigation Section'), one of the two roles of the Council, the other being composed of what are called 'les Sections administratives' (from now on, 'Counsel Sections'),[4] though nothing in the complicated layout of corridors, hidden doorways and formal or obscure staircases, or in the arrangement of contrasting carpets, really allows one to separate the building into these two functional sides, which are entangled in a hundred different ways, and whose subtle ecology we will describe further on.

The speaker is standing on a rostrum, reading aloud from a carefully drafted document that is called his 'conclusions' because it always ends with the following formula:

> And for these reasons, we conclude:
> – that the decision of the appellate administrative court of Bordeaux be annulled;
> – that the appeal of Mr Delavallade, and the remainder of his conclusions of appeal, be rejected.

The speaker is called 'le commissaire du gouvernement', but we should not be misled by the term: the main characteristic of this character, with whom we are going to spend quite some time, is precisely that he is not the official representative of a government; rather, he is one of the twenty members of the Council to whom are entrusted the task of advising the judicial body as to the proper grounds for decision, according to his particular view of administrative law.[5] Because everything happens as if he was commissioned by the Law itself to speak to his colleagues, we will call him from now on 'the commissioner of the law' thus retaining the origin of the word and taking out some of the ambiguous connotation of the French.

Although he is the only person standing, his role is not that of a public prosecutor because he does not bring proceedings in the name of the State, nor does he control the procedure of review in any way. And although he stands to the left of the adjudicating body, his role is not that of a defence counsel either. In this assembly, lawyers never

[4] To avoid a misunderstanding that the word 'administration' could entail, we have chosen the word 'Counsel' to designate 'les Sections administratives' since their main role is not at all to 'administer' anything but to advise and counsel the various ministries about all the bills and decrees they wish to pass.

[5] See, on the history of this function, Rainaud, *Le commissaire du gouvernement près le Conseil d'Etat* (1996). The term can give rise to even more confusion since, on the other side of the corridor, the 'commissaires du gouvernement' are persons who fulfill a totally different function: they are members of the Cabinet or senior civil servants charged with the task of defending their bills or decrees before the Counsel Sections of the Council of State. We will call them 'government envoys'.

speak, or they do so only in the rarest of cases, and although a bench facing the judges is reserved for them, they sit in silence, giving only a terse nod when their file is announced, at which time they mumble something like 'I refer to my written conclusions on this matter'. The function of the commissioner of the law is more like that of an independent academic. Some weeks ago, his colleagues of the 'sous-section' (from now on, 'sub-section')[6] to which he belongs handed file no. 133-880 to him, on which he is presenting his conclusions today, 25 October 1995.[7]

Figure 1.3

However, nothing compels his judicial colleagues, who listen to him more or less attentively, depending on the importance of the case and the prestige of the commissioner, to follow his conclusions. He himself is free to publish them, as would a researcher, because they remain valuable even if the deciding judges end up preferring a very different solution. Case reporters, law professors, amateurs of litigation, and litigants themselves learn to scrutinize these conclusions for the first signs of a 'reversal of precedent', rather like weekend sailors

[6] One of the divisions of the 'Litigation Section', to which we will return and which allows for the work on files to be distributed. There are ten 'sub-sections'.

[7] The sources of this research are of two kinds: ones that are public and which everyone can consult – these are the sources of administrative law; and the ones which are completely confidential – these are the 'review meetings' which were observed by the researcher.

searching for a breeze on a becalmed sea. But let us not rush to present the reader with terms that are better introduced slowly. For now, what is essential is the point that, in this preserve of administrative law, no one but the commissioner of the law ever speaks publicly.[8] The rest of the procedure is conducted entirely in writing. Let us try to understand the content of the text that he is reading in his neutral voice, which is occasionally enlivened by a touch of humour that might bring a shadow of a smile to the faces of his interlocutors:

The battle against the nuisance caused by birds unquestionably falls within the powers of the municipal police, which, according to article L 131-2 of the Code of communes, are exercised so as 'to ensure order, safety, security, and public health', and, more especially, within heading 8 which refers to 'the task of preventing or remedying the mishaps caused by the straying of harmful and wild animals'. In these terms, although pigeons are not wild animals, they are certainly harmful ones.[9]

Between the paragraph on p. 16 and this one an important operation has been performed. The pigeons which so delighted people in public squares with their displays of aerial ballet have now become 'harmful animals' 'according to article L 131-2 of the Code of communes', which makes them the responsibility of the Mayor and which 'unquestionably' authorizes Mr Delavallade to bring a complaint in the form of an appeal. The 'requérant' (from now on, 'litigant') – a name which is given to plaintiffs in administrative law – could have taken his gun to the pigeons in the sunflower fields of La Rochefoucauld and served them up as roasts; he could have hated the Mayor in his heart of hearts, or insulted him in public, but as soon as he assumed

[8] We will come back to this often, but the reader who is not a jurist must always remember that administrative law, in France at least, is an entirely separate branch of law, which must therefore never be confused with what we curiously call, by contrast, the 'droit judiciaire' or 'le judiciaire' (criminal and civil, public and private).

[9] The importance of the act of writing in the procedures that we are going to study is so great that we will try hard to always respect the layout, the typography, the tables, the space between the lines, the paragraphs – in short, all that we call 'the paratext'. This allows us to make the materiality of the text perceivable to the eyes of the reader. Since we will need to attract attention to the passages that we wish to comment on, we will use bold type. All the underlined or italic terms in citations are the same in the original. Conventionally, in the transcripts, we put between brackets all that is implied in the situation and that we can add in the certainty that we are not mistaken. We put between square brackets the connecting link that we are obliged to make in order to understand the document, but on which we might be mistaken.

the dignity of the 'litigant' by posting the piece of stamped paper in which he made his complaint to the administrative tribunal of Bordeaux, we find ourselves on this cold autumn afternoon linked by a thread which allows his pigeons, his sunflowers, his resentments and his Mayor to 'produce law'. It will take us the whole of this book to grasp the nature of this very particular operation, which we must for now be careful not to consider as a simple and homogeneous operation.[10]

The commissioner of the law continues:

> The municipality did not do nothing. It preferred to use the 'gentler' method of sterilizing the pigeons, which did not have particularly convincing results.
>
> Curiously, the litigant does not attack the decision on the basis that it incorrectly interpreted the law, which led it not to find fault, but only for the legal error that led it to look only for the presence of a gross negligence.

Let us listen attentively to the commissioner of the law, because things are about to become very complicated very quickly. If the case had been trivial, a filter introduced at the stage of submission of appeals in order to avoid the proliferation of appeals to the highest tribunal would have summarily dismissed this litigious claimant on the basis that no serious 'moyen' existed.[11] Later on, we will study in detail what is meant by this strange ambiguous and ubiquitous word 'moyen', that has been translated by the words 'argument', 'reason', 'ground' or '*mean*'.[12] Although both at first instance and on appeal

[10] We then follow roughly the rules of method as defined in the magazine *Enquête*, dedicated to the 'objectives of the law'. To capture the law 'in action', see in particular Hermitte, 'Le droit est un autre monde' (1998).

[11] It is the Commission of admission of appeals in the final instance which allows appeals to be dismissed when they are deemed to be without ground. The reader who is used to civil jurisdictions should note that it is important to remember that the Council of State can judge cases in first instance (for example for law relating to elections or appeals against decrees), but also on appeal and, more and more, on final appeal. The same panels of judges can therefore see their jurisdictions vary according to the cases brought. In 1997, the Council judged 21 per cent of cases in first instance, 11 per cent on appeal, 30 per cent on final appeal, and more than 30 per cent on referrals of tribunals and courts on issues of jurisdiction (*Rapport public* of the Council of State, 1998, Paris, La Documentation française,). Since this date, to the regret of certain members, more and more time is spent just on cases in final appeal.

[12] Since the whole book is a commentary on this word '*moyen*', it would have been awkward to leave it in French, so we chose to call it *mean* to keep the metaphor of the *middle* (in both English and French) rather than that of a foundation (as in 'legal ground') or that of discussion (as in 'legal argument'). Since the word 'mean' has no use in legal English, we have added an asterisk to remind the readers of its technical use, and when we have used the English synonyms (ground, reason, argument), we have also added an asterisk to underline that there is in French only one word for all those usages.

the claim should be rejected, we have to assume that there is nevertheless some 'serious legal mean*' because we are sitting here listening to the commissioner of the law. Technical terms are going to proliferate rapidly, and the readings will soon become opaque to both the observer and the litigant, who for this stage of the final appeal is obliged to employ the services of a lawyer qualified to appear before the Council of State.[13]

Although the allusion to the Code of communes, which authorized the elevation of pigeons to the rank of a harmful-animal-for-which-the-Mayor-is reponsible, did not pose any problem, the same is not true of the references to 'legal qualification', 'legal error' and 'gross negligence'.[14] An abyss suddenly opens up before the eyes of the researcher. Codes, with their clarity and elegant certainty, are no more: the commissioner of the law, whose voice acquires greater subtlety, enters into the infinitely more intricate fabric of the interpretation of administrative law, which rests only on *precedents*. Despite the difficulty of what follows, let us continue to follow the thread of his reasoning:

> Where police measures are concerned, the distinction has long been based on the distinction between 'legal' acts and 'conceptual' acts, which is found in the law relating to fault (*Assembly, 13 février 1942, Ville de Dole, p 48*), and 'substantial' or 'executory' acts, which are reviewable only in terms of gross negligence ['faute lourde'] (*Section, 3 avril 1936, Syndicat d'initiative de Nevers et Benjamin, p. 453, aux conclusions Detton*).
>
> But although this distinction is seductive, it is, as President Odent observes in his lessons (p. 1401), 'only apparently easy'. As a result, it has gradually given way to a more substantial distinction that is based on the intrinsic difficulty of the measure to be taken.
>
> You have therefore admitted that there might be 'legal' police measures that are so delicate to conceive that the liability can only be based on gross negligence (*Assembly, 20 octobre 1972, Ville de Paris c/Marabout p.664*, for traffic regulations in Paris). And symmetrically, that fault ['faute simple'] might be sufficient where an executory measure, even when taken in the 'heat of the action', presented no particular difficulties (*Section, 28 avril 1967, Lafont, p.182* on the monitoring of ski runs). And we could find many examples on both sides of this distinction so that one might almost be tempted to say that the criterion based on the nature of the police act no longer holds and that we should restrict ourselves to a criterion based on the content of this act (see the commentary of the authors of the 'Grands Arrêts' under the decision of *10 février 1905, Tomaso Grecco, p 139*).

[13] This particular order, which a *numerus clausus* limits to ninety members and whose history goes back to the 'Ancien Régime', also deals with all the appeals before the Cassation Court: Massot, 'Le Conseil d'Etat. De l'an VIII à nos jours' (1999), p. 148. We did not have time to continue our research into the offices of these lawyers, which is a great pity.

[14] A gross negligence is a fault which shows gross recklessness or gross carelessness.

We will try hard to avoid extended citations in what follows so as not to discourage the reader too quickly. However, they are indispensable at this stage in order to penetrate the *textual matter* that is so characteristic of the world that we have to describe. To prepare himself for this task, the reader might imagine himself as a young product of the ENA (the Ecole nationale d'administration, from now on, 'National School of Administration') who, having just graduated from the School at the top of his class, has been allowed to choose an assignment to the prestigious body of the Council of State. Or he might imagine himself as one of those members coming 'from the outside'[15] – a journalist, Member of Parliament, Minister, General or Doctor – who is called by favour of the sovereign to hold a seat at the Council. These persons represent one-third of its members. Whether young or old, an ENA graduate appointed to a position within the Council or a person coming in from the outside, all new arrivals at the Council with no previous knowledge of administrative law will inevitably, sooner or later, be confronted with such jargon. They will gradually learn to recognize the turns of phrase and will quite soon learn to speak the language by writing 'notes' and 'drafts' for themselves.

Let us begin with the particular play of references that we will later (in chapter 5) compare to the play of references in science. The long phrases of administrative law are punctuated by citations of judgments showing the date in italics, the name of the case, as well as the page of the indispensable *Lebon* volumes in which everyone is able to find the complete text of the judgment to which the commissioner of the law refers.[16] All legal arguments move from the proper noun of the case to the date and from the date to the proper noun, much as an underground train moves from one station to the next; so much so, that the '*Benjamin*' or '*Blanco decisions*', always in italics, seem as familiar to those who use them daily as the 'Waterloo' or 'Covent Garden' stations in the Tube.

At the beginning of the reference between brackets, we also find the expression 'd'Assemblée' (from now on, 'Assembly') or 'de Section' ('Section') which indicates the level of the judgment. A judgment of

[15] The counsellors arriving through the 'tour extérieur' ('the outside way'), generally older, by opposition to those who are recruited by competitive exams from the National School of Administration – see chapter 3.

[16] The volumes of 'Le *Lebon*', the local equivalent of the Bible, of an *Encyclopaedia Britannica* and of a Code (which is nonexistent in administrative law anyway), are displayed in each of the rooms of the Council, even though, nowadays, information technology could very usefully replace it with computer searches. For its composition, see chapter 2.

the Assembly carries more weight than a judgment of the Section, and the latter more than a judgment of the 'sous-sections réunies' ('united sub-sections'), which in turn weighs more than a 'sous-section jugeant seule' ('sub-section judging by itself'). We will gradually learn the reasons for these terms, as well as the composition of all the panels of judges through which the same file can travel from month to month and even from year to year if it is a somewhat thorny case.

Occasionally, we also find in the references a brief note saying 'in the Detton conclusions', which allows the commissioner to cite not the judgment but the conclusions of another commissioner of the law – a great and prestigious forebear such as Léon Blum, whose conclusion will have been published on the basis that it was particularly enlightening.[17] And then, standing out like a lighthouse to the lost, there are 'the lessons of President Odent', which are to this day the only interpretation that allows one to ground reasoning on a more or less solid body of doctrine.[18] Finally, there is the collection of the *Grands arrêts* (from now on, *Major Precedents*). This is a volume that is incessantly being re-published and expanded, and to which the counsellors[19] always try to refer when the reasoning gets complicated. The names of '*Benjamin*', '*Blanco*', '*Tomaso Grecco*' and '*Canal*' usually elicit the support of the deciding judges as if they were indisputable theorems of some kind. While the legal productions of the civil and criminal system are fashioned by stringing texts and Codes together, the administrative law relies on the resonance of the often charming, outdated, provincial and antiquated names of these poor people who have argued with the State and whose complicated cases allow this Assembly to move the law forward.[20]

[17] Since judgments are preferably short – we will learn later to describe them – the litigants obviously find them obscure. It is therefore important that the conclusions are sometimes published, whether they are followed or not. Reports and commentaries are added to these conclusions and together they constitute the Doctrine (but counsellors rarely cite academics or Professors of administrative law, whose presence, from the point of view of the Council, seems purely explicative and even parasitical).

[18] We should note the humour in the citation 'only apparently easy' in a reasoning which will very quickly attain a totally Byzantine complexity . . . On the controversial usage of Doctrine by the commissioners of the law, see Deguergue, 'Les commissaires du gouvernement et la doctrine' (1994).

[19] We will use throughout the word 'counsellors' to designate any member of the Counsel of State, whatever their age and status, even though, in French, the word 'conseiller d'Etat' refers only to the last and most prestigious grade of the 'corps' (see chapter 3 for more niceties).

[20] In the book of major precedents you will find nice stories of this sort: 'A raging bull had escaped in Souk el Arbas (Tunisia), the crowd set out to pursue it; a shot

Very curiously, it is the same Bonaparte, the flamboyant Premier Consul that we encountered in figure 1.2 who had the perverse ingenuity to invent both the Civil Code that bears his name and the exact opposite of what is known as 'Napoleonic' law. He attributed to his Council of State the task of conjuring up, from start to finish and through the mere interplay of its previous decisions and in the absence of any written text, in the Anglo-Saxon manner, a *sui generis* form of law whose specific objective is to protect the citizen from the excesses of the administration. Since the Assemblée Constituante, during the French revolution, had prohibited the civil and criminal judge from considering acts of State (*actes de gouvernement*) under the penalty of abuse of authority,[21] the administrative law has had – slowly and painfully – to invent a body of doctrine to prevent the 'coldest of all cold monsters' from crushing its citizens under the yoke of its tyrannical power. That is the source of the expression 'contrôle' (from now on, 'review'), which defines the essence of the mission of the Council. The problem is that this power of review is bitterly contested – as we shall see – because it must not completely obstruct State action and because it is exercised by particular civil servants who seem to be both judges and parties. Now, one of the most delicate forms of this review concerns police powers, which are exercised in thousands of dangerous situations in 'the heat of the action'. Hence the distinction between the review of 'gross negligence' – the Council of State only intervenes when the authority exercised has been truly excessive – and of 'fault' – the Council of State can sternly reprimand acts, even if they appear to be excusable. The question raised by the commissioner of the law regarding this matter of the pigeons therefore concerns the following problem: with regard to the municipality of

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was fired, injuring Mr Tomaso Grecco inside his home. The victim asks for reparation from the State alleging that the shot had been fired by a policeman and that, in any case, the police service had committed a mistake by not securing order in such a manner as to avoid such incidents.' The 'Observations' in *Major Precedents* begin like this, p. 80: Conseil d'Etat. 10 févr. 1905, TOMASO GRECCO Rec. 139, concl. Romieu (D 1906.301, concl. Romieu; S. 1905.3.113 note Hauriou). It is not an insignificant detail that the author of the note is Hauriou, who is respectfully described as a 'great commentator'.

[21] By law of 16–24 August 1790 and the decree of 16 fructidor year III. Its article 13 provides: 'The civil and criminal functions are distinct and will always remain separated from the administrative functions. The judges will not be able, under the penalty of abuse of authority, to interfere in any way with the operations of administrative bodies, nor summon administrators before them because of the latter's functions', cited in Stirn, *Le Conseil d'Etat* (1991), p. 14. The Constitutional Court has repeated these arrangements in its decisions of 22 and 23 January 1987, giving them constitutional value.

La Rochefoucauld, should the Council assume the role of a severe judge who reprimands even minor offences, or, having consideration for the difficulties of police action, that of a judge who only censures 'gross negligence'?

We shall see how the commissioner of the law, with his legendary subtlety, deals with the issue. But let us pause to notice one of the most fascinating figures of speech in the extract (p. 11), which is so characteristic of the administrative law: '*You* have therefore admitted', he says, 'that there might be "legal" police measures, etc . . .'. At first sight, this is a very strange formula, because it would have been physically impossible for members then present in 1995 to have also been making decisions in 1942, 1936, 1972, 1967 and, a fortiori, in 1905 at the time of the famous *Tomaso Grecco*. Nevertheless, the commissioner of the law stands on his rostrum as though he were addressing an immense, ever-present body composed of a large number of members who have long since disappeared, leaving only a few hallowed names, a body that is said to have 'thought', 'considered', 'wanted', 'decided' and 'judged' something. It would take us a great deal of time to measure the anthropological weight of this corporate body to whom the commissioners of the law so solemnly address themselves. Even more so since this 'you' has neither the unquestionable and eternal character of a Code, nor the quick pace of progressive accumulation that characterizes scientific progress (see chapter 5). Rather, it resembles more the opacity, variability, confusion and weightlessness of a feeble human brain in need of enlightenment. Isn't that precisely the point of President Odent's observation that 'this criterion, which is intellectually attractive, is only apparently easy, and it has progressively given way to another'? The sovereign body to whom commissioners address themselves is therefore composed of 200 years of phantom counsellors, aggregated by the sheer power of the address in one unique and majestic body of thought that is *ne varietur*, but which nevertheless is endowed with an obscure and stuttering voice which, like that of Pythia, has to be ceaselessly interpreted, assessed, clarified and even rectified. This crucial role of educating this collective body while pretending to do nothing but merely interpreting what it has always said, belongs to the commissioner of the law, who continues his presentation – which should not be confused with pleadings – by using terms that are less technical than those he used a short while ago, but which are nonetheless surprising:

> Without entering into this doctrinal debate, it nevertheless seems to us that the old distinction [between conception and execution] retains some justification, or at

least a practical value, in situations in which it is possible to distinguish two successive police operations: the first having the character of conception and the second of execution. It seems opportune to us to introduce a distinguo, a gradation in the requirements applying to each of these two stages. Policing is an art of execution. It is then fair to say that, where possible, the government is not exposed to the same rigorous scrutiny in the phase of conception as it is in the phase of execution.

The commissioner of the law goes back to the old solution, despite the fact that it was abandoned for reasons of 'practicality', 'opportunity' and 'fairness' – weighty terms whose traces we will need to pursue – but he does so while clearly refusing to enter into questions of 'doctrine' and 'justification'.[22] This is somewhat curious, given the intellectual subtlety of his invention of a 'distinguo' and 'gradation' between the conception of an act and its execution! And yet we shall often encounter this contrast between, on the one hand, fundamental questions in which the counsellors refuse to become embroiled so as not to 'lapse into philosophy', and, on the other hand, the often stupefying multiplication of distinctions which seem to the observer to be utterly baroque. There are many ways of splitting a hair and the philosophical way – what is an action? what is a conception? – would simply be a waste of time at this point, whereas 'practical reasons' mean that one should introduce other distinctions that are no less subtle but which are controlled by quite different dictates. We might say that the commissioner of the law is practising a form of subtlety *divorced from conceptual foundations* – even doctrinal foundations – that is characteristic of the law even though it never ceases to surprise the philosophically minded.[23]

To confine ourselves to the matter which concerns us, that is to say straying animals, you have already distinguished between the liability of a commune for

[22] 'Doctrine' does not play a very clear role in the elaboration of law. It often designates the law professors, academics and jurists whose job is to comment on administrative law but who do not produce this law themselves because they are not judges. They might add foundations to this body of law but their glosses are sometimes considered as more ornamental than technical – the members of the Council usually consider 'la doctrine' to be superfetatory.

[23] A typical phrase in the administrative law course excellently taught at Sciences Po by Bernard Stirn: 'One must guard oneself against an abstract view of things and not ask oneself which are the abstract systems of independence and partiality in all countries and at all times; we at the Council of State', the Professor adds proudly, 'we have done it without text, empirically, progressively, efficiently' . . . Nothing is less philosophical than this requirement to 'not wreck one's brain'. This distrust towards the great problems of foundations is not unique to the Council of State: 'A witty remark', writes Atias, 'provides an illustration; one must, it seems to him, leave doctrinal anxieties aside which are too fundamental to be discussed seriously': Atias, *Science des légistes, savoir des juristes* (1993), p. 333.