THE RULE OF LAW
THE FRENCH PERSPECTIVE*

*Jean-Bernard Auby***

Abstract

The article sheds lights on the historical and current position adopted by French law with regard to the concept of rule of law. In particular, the primacy attributed to parliamentary law, the submission of the State to a special body of law, the declining role played in practice by the principle of separation of powers are all elements which characterize the French perspective on rule of law in a very peculiar way.

TABLE OF CONTENTS

* 10th Anniversary of the Italian Journal of Public Law, Milan, 30-31 May 2019.

** Emeritus Public Law Professor, Sciences Po Paris

If one wants to summarize very simply the main position historically adopted by French law with regard to the concept of rule of law, one can say: that it drew its inspiration from the German doctrine of the *Rechtsstaat* while separating itself significantly from it and that it constantly remained far from the English conception of the rule of law.

While the German doctrine of the *Rechstaat* developed in the second half of the XIXth century, it is only at the beginning of the XXth one that French authors started to refer to it and to try and position French law in comparison with that concept.

Not that French law did not have any idea of a submission of statal authorities to the Law: on the contrary, it had for long adopted a rather hierarchical vision of Law, whose respect was imposed on all public authorities except the King – with nuances –, and since the Revolution it had made a pillar principle that all public authorities had to respect fundamental rights – the "*droits de l'homme et du citoyen*" enshrined in the 1789 Declaration –[1].

Nevertheless, the French vision distinguished oneself on some aspects, well described in the very famous book by Raymond Carré de Malberg, *Contribution à la théorie générale de l'Etat*[2]. Carré de Malberg fundamentally demonstrated that the Constitution' supremacy in the French system was purely theoretical, the real primacy being attributed to parliamentary law – "*la loi*", in French –. Thus, he claimed that the concept of "*Etat légal*" better characterized the French perspective than the one of "*Etat de droit*", direct translation of "*Rechsstaat*". Correlatedly, he argued that the French system of the "Legal State" only concerned the limitation by law of administration and justice, not that of the legislator.

The French system, by its basic characteristics, well highlighted by R. Carré de Malberg, constitutes an original context for the development of the rule of law. To explain more precisely in what sense, it is necessary to go from more theoretical considerations to more practical ones, and to evoke what the French legal tradition has to offer in terms of general apprehension of the relations between the State and Law (1), of institutional guarantees of the rule of law (2) and of principles

[1] J. Chevallier, *L'Etat de droit, Paris, Montchrestien* (2017).

[2] 2° vol. (1920-1922).

relating to the normative production – in line with the rule of law concept – (3).

1. General apprehension of the relations between the State and the Law

In order to locate more precisely the traditional French vision of the rule of law, it is necessary to highlight the two fundamental convictions to which it strongly adheres: the equivalence of the State and Law, and the principle of the State's submission to a special body of law.

1.1 The equivalence of State and Law

Being based upon the credo of parliamentary law sovereignty – legislation being in principle topped by the Constitution, but in a purely theoretical manner –, the traditional French approach also conveys the conviction of an equivalence of State and the Law: not only is there no source of law above parliamentary legislation – at least no source of law whose superiority would be made effective –, but there is no fountain of law external to the state, whether international, local or private.

Curiously, this position was not accepted by two authors who are often considered as the two founding fathers of the modern French administrative law: Léon Duguit[3] and Maurice Hauriou[4]. Both, in the first part of the XXth century, claimed that equating Law and the State was not acceptable since it was the best way of vesting statal authorities with purely arbitrary powers.

Both pleaded, with different arguments, that something existed above the legislative might. Duguit contested the idea of sovereignty in itself, he thought that the basis of the legal edifice was the "objective" law deriving from the needs of social solidarity, and that all public authorities were submitted to that "objective" law. Hauriou viewed the legal systems as an arrangement of diverse institutions – Santi Romano picked up and systematized that idea – and considered that the statal institutions

[3] Eg.: L. Duguit, *Traité de droit constitutionnel*, 5 vol. (1927-1930).
[4] Eg.: M. Hauriou, *Précis de droit constitutionnel* (1929).

were just part of them: by way of consequence, part of the Law was produced out of the State.

The truth is that these two famous authors were not too much followed on this particular issue of the equivalence of State and the Law. The mainstream French public law doctrine has remained notably positivist, in the sense that it has always predominantly considered that the Law was and only was the one produced by legislators. Produced by legislators and applied and interpreted by judges: importantly so, it must be underlined, in the field of administrative law, the French administrative law having also been mainly created by the *Conseil d'Etat*. But, like the Parliament, judges are part of the State.

In the recent past, though, there has been a renewed debate on the subject. Some authors have again strived to demonstrate that the assimilation of Law and the State was not realistic: a large amount of the Law being generated out of the State, in some international and European entities, and in the deep fabric of the society through contracts. That assimilation, some of them added, was just a symptom of the excessive place conceded to the State in the French vision, and the modernization of the latter required a more open reading of how the Law is produced. This analysis was proposed, in particular, in a most debated book written by a barrister partly trained in the United States and mainly based on a comparison between the French and the American vision: "*Le droit sans l'Etat*", by Laurent Cohen-Tanugi[5].

1.2 The State's submission to a special body of law

With its commitment to parliamentary supremacy and the important role played by judges in the field of administrative law, the traditional French vision of the rule of law, finally, had characteristics fairly symmetrical to the ones presented by the British vision of parliamentary sovereignty and of a prominent judicial power. By contrast, the two visions have always been opposed as to the submission of public authorities to special rules[6].

---

[5] L. Cohen-Tanugi, *Le droit sans l'Etat* (2007).

[6] M. Freedland, J. Auby (eds.), *The Public Law/Private Law Divide*; *Une entente assez cordiale?* (2006) ; B. Plessix, *Droit administratif général*, 2° ed. (2018).

a) Borrowing to the continental legal traditions, the French one fully adheres to the conviction that the Law is divided into public and private law; and that, if things go this way, it is because the activity of public institutions needs by nature, at least to a certain degree, to be submitted to special rules. And it adds to this a correlated judicial organization, in which special jurisdictions – administrative courts – are entrusted with the application of the special rules applicable to public entities.

All this, which places the French system in sheer opposition with the diceyan vision, has been clearly accepted, at least since the end of the XIXth century: the unchallenged reference being the case of "Blanco" (1873) in which the "*Tribunal des Conflits*"[7] admitted that administrative institutions liability was not submitted to the Civil Code rules, but to special rules, taking into account the special needs of public service activities ("*le service public*")[8].

Things are nevertheless a bit more complex, since French administrative law has never gone so far as to admit that any and every situation related to administrative activities would be submitted to special rules: on the contrary, courts and the doctrine have always accepted as a principle that some administrative activities fell under ordinary law, because their social, economic, or political nature made their similar to private ones, those of citizens and businesses.

In particular, a very important judgment of 1921, in the case of "*Société commerciale de l'ouest africain*"[9] ruled that, among the public services, some – the "*services publics industriels et commerciaux*" – were principally subject to ordinary law because of their similarities with market activities.

[7] This jurisdiction, composed of half members of the *Conseil d'Etat*, the supreme administrative court, and halt members of the *Cour de Cassation*, the supreme ordinary court, is in charge with determining which part of the judicial organization – the administrative one or the ordinary one – has jurisdiction on a particular issue where this has been disputed.

[8] *Tribunal des Conflits*, 8 February 1873, Blanco.

[9] *Tribunal des Conflits*, 22 January 1921, *Société commerciale de l'ouest africain* (also known as the «Bac d'Eloka» judgment, under the name of the ferryboat the litigation originated from.

b) Then, it is no less true that, in fact, public institutions are "normally" submitted to the special rules: normally meaning, here, most of the times.

Two points must be underlined accordingly.

The first one is that the French administrative law does not welcome the idea that, when the Administration would use legal tools similar to the ones which are the common instruments of legal relations between private people – typically, the contract –, it would necessarily place itself under the rules of private law. Where, for example, the common law tradition, but also the German administrative law one, will consider that a contract belongs by nature to private law, French administrative law will deem that contracts made by public authorities may be either public law contracts or private law ones, depending on their content.

The second one, related, is that, in fact, French administrative law considers that there is a share of private law and a share of public law in all areas of public administration. Just as much as contracts made by public authorities may be public law ones or private ones, assets possessed by public entities may be subject to public law – they then belong to the "*domaine public*" – or to private law – they then belong to the "*domaine privé*", people working with the administration may be "agents publics" – therefore employed under public law – or "*salariés de droit privé de l'administration*" – placed under common labour law –.

It must nevertheless be immediately added that, in fact, nowadays at least, administrative public law is clearly dominant. Things went this way by the conjunction of various factors. Legislation was one: for example, a 2000 statute decided that all procurement contracts made by the administration – and they are by far the majority of administrative contracts – had a public law nature. Case-law was another one: for example, with time, the criteria used in order to determine if an administrative staff would be an "*agent public*" or a "*salarié de droit privé de l'administration*" evolved in favour of the first option. Some economic and political evolutions played their part: for example, because of various waves of privatizations, the perimeter of the "*services publics industriels et commerciaux*" has significantly shrunk.

2. Institutional guarantees of the rule of law

In order to be effective, the submission of public authorities to the law has to be guaranteed by institutional mechanisms. Very important in this respect are those related to separation of powers: one excellent way for having the law respected within the public apparatus is to separate the institutions which serve different functions in relation with it – creation, implementation, interpretation…–. Then, of course, it is essentially on jurisdictional supervisions that our systems mainly trust in order to recall public authorities to the respect of Law.

Both series of mechanisms are affected by some specific orientations in the French system.

2.1 Separation of powers

a) It is in 1748 that "*L'Esprit des Lois*", Montesquieu's main book on constitutional issues, proposed – drawing some inspiration from previous authors like John Locke – the separation of powers theory: based upon the idea that the main powers in the State must be attributed to different institutions, the theory also includes the requirement of a certain balance of powers – this concern, for example, led Montesquieu to propose that the King be endowed with a right of veto on legislation.

The leaders of the 1789 Revolution fully adhered to the theory, to the point that they made the 1789 Declaration of human rights say that any society in which the separation of powers is not ensured has no Constitution at all[10].

b) In fact, all the – numerous: the whole XIXth century is a period of strong constitutional instability – French political regimes after the 1789 Revolution, except the Empires, were to be parliamentary ones, that is to say constitutional arrangements in which collaboration of powers is as important as separation[11].

Moreover, in the current regime of the Fifth Republic – born in 1958 –, the powers of the executive have been so significantly increased, including in legislative matters, that the current constitutional relationship between the main powers certainly favors the executive rather than it rests on a balance of powers.

---

[10] Article 16 of the Déclaration : "*Toute Société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée n'a point de Constitution*".

[11] See M. Morabito, *Histoire constitutionnelle de la France de 1789 à nos jours*, 15th ed. (2018).

That said, a true picture of the distribution of powers can only be drawn if consideration is taken of the importance of the statal administration and of the Council of State. Both are main inspirators of the normative production, the administration because of its strong tradition of cohesion, expertise, familiarity with high public policies issues, the Council of State simultaneously because it is – apart from being the main administrative judge: we will come back to this – the main legal advisor of the Government – and on various issues of the Parliament as well – and because most of the highest positions in ministries as well as in independent agencies are held by some of its members.

In sum, behind the separation of powers between political organs, there is a rather strong degree of concentration, of which the executive and the Council of State are indisputably beneficiaries.

c) Then, the French system shelters another specific orientation in separation of powers which is about the relationship between the executive and the judicial.

Neither in the relation between the executive and the administrative courts nor in the relation between the executive and the ordinary judiciary – the "private law courts" – is there a strict independence.

We have already referred to the strong links which still exist between the supreme administrative court, the *Conseil d'Etat*, and the government, of which it is the main legal advisor and with which an organizational linkage exist through the frequent occupation by members of the *Conseil d'Etat* of the highest positions in ministries.

On the judiciary side, the most important fact is that one part of the judicial machinery is not independent from the government, but on the contrary subject to its hierarchical authority. It is the branch of the judiciary which is in charge of prosecutions, and is called in French "*Ministère Public*" or "*Parquet*".

It is true that this situation of dependency has been alleviated by recent reforms – the constitutional one which has been made in 2008, notably[12] – that has endowed "*Ministère*

[12] B. Stirn, *Les libertés en questions*, 11th ed., 95 (2019).

Public" magistrates with better independence in terms of career. But their functional subordination remains strong enough.

Regular proposals are made as to the adoption of independent prosecutors, but the tradition still resists.

2.2 The jurisdictional guarantee

a) All that has just been explained has obviously consequences on the jurisdictional guarantee of the rule of law.

Even if increased in the recent past, the still limited independence of the criminal prosecutors naturally makes less probable that they trigger criminal actions against public authorities, whether members of Parliament, ministers, or civil servants.

As to the Conseil d'Etat, even if it has acquired a very high level of independence – in fact, the institution is independent because powerful –, its proximity with the government leads it sometimes to take into account the interests of the latter more profoundly that an ordinary judge would probably do.

b) To this, must be added some weaknesses in the constitutionality review system.

Such a system was indeed provided for in the 1958 Constitution, funding the current Fifth Republic, but it took a long time to take off and it retains some limitations.

It is only in 1971 that the "*Conseil Constitutionnel*" agreed to include among the bases of its review the preamble of the Constitution, from which flows the essential part of fundamental rights protection. Until then, statutes submitted to it could only be contested on the basis of what could be found in the body of the Constitution itself, thence essentially rules concerning law making processes and the distribution of powers between the Parliament and the Government.

The scope of constitutionality review nevertheless remained limited for procedural reasons. Until 2008, statutes could only be submitted to the "*Conseil Constitutionnel*" before they came into force and only by certain public authorities, not by the citizens themselves. The 2008 Constitutional reform introduced a new mechanism, called "*question prioritaire de constitutionnalité*", which allows any citizen being party to a judicial procedure to raise the issue of constitutionality of a legislative act the judges are about to apply in the case. Subject to a filtration by the supreme

administrative court – "*Conseil d'Etat*" – or the supreme judiciary one – the "*Cour de Cassation*" –, the "*question prioritaire de constitutionnalité*" will then be transferred to the "*Conseil Constitutionnel*" for constitutionality review[13].

Weaknesses remain, concerning in particular membership to the "*Conseil Constitutionnel*", that is not subject to the possession of any legal expertise, to which is added the de jure membership of all former Presidents of the Republic. One of its last presidents – Jean-Louis Debré – used to claim that the "*Conseil Constitutionnel*" was not really a court, rather a political organ. The creation of the "*question prioritaire de constitutionnalité*" has certainly pushed it forward towards a real jurisdictional entity, but the evolution in that direction is not complete.

3. Principles relating to the normative production

The position a legal system can claim to have in relation with the rule of law does not just result from the institutional arrangements associated with the distribution of powers and judicial supervision of public authorities. It has also something to draw from the very content of normative production.

In this respect, being in accordance with the rule of law means abide with some requirements in terms of quality of the norms and in terms of protection of the citizens against brutal normative changes.

3.1 Quality of the norms

One can only say that one finds oneself in a real rule of law system if the norms which are emitted by law – creators are sufficiently clear to make sure that any lay citizen can understand what they mean and what kind of behavior they forbid or require.

In the French system, there is a constitutional rule which heads for that direction. It is a principle of intelligibility and accessibility of the law, which was acknowledged by the "*Conseil Constitutionnel*" in a 16 December 1999 judgment[14].

---

[13] M. Morabito, *Histoire constitutionnelle de la France de 1789 à nos jours*, cit. at 11, 509.

[14] J. Auby, *Observations théoriques, historiques et comparatives sur l'incertitude du droi*t, 4 Revue tunisienne des sciences juridiques et politiques (2018-2).

3.2 Protection of citizens against brutal normative changes

Another important condition for accepting that one particular legal system is a rule of law one is that it contains principles that protect citizens against brutal changes in legislation which could cause to them excessive harms.

At the top of these principles, are the general one of legal certainty, and the more specific one of legitimate expectation, which implies that legal changes affecting people who could reasonably expect the maintenance of the rules they deferred to previously, should be applied in a progressive way and with transitions.

In the French system, the general principle of legal certainty has been adopted by the administrative law jurisprudence[15]. By contrast, French courts have not accepted that national law would entail the principle of legitimate expectation: thus, they apply it in the field of EU law implementation – they have no choice, here – but not when EU law is not concerned[16].

*

Submitting the State to the Law seems to be a rather simple program. And though, even if some general implications of it are universal, the national legal systems have found and find their way through it at the expense of significant variations. The French one followed its own path, accorded to its traditionally centralist character, which can be said to have rendered things easier at times, more difficult at others. Among other features, it knows rather well how to organize the internal discipline of the public apparatus, while it is less comfortable when it comes to make accountable the very center of the State which is the national executive power.

[15] *Conseil d'Etat*, 24 March 2006

[16] S. Calmes, *Du principe de la protection de la confiance légitime en droits allemand, communautaire et français* (2000).