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Editorial

They Order Things Differently ...

From time to time the compilation of the Materials on Legislation section of the *Review* is a source of great editorial temptation. It is to inflate the summary of a particular item to such an extent that it would become a lengthy paraphrase rather than a relatively brief precis. Apart from breaching the principle of proportionality in its application to the Materials on Legislation section, such a step might well trespass on the territory of the contributors. But the editorial pages are an appropriate place for the treatment of an article which deserves more than a summary in a later section. To adopt and adapt a saying first uttered a century ago, the only thing to do when faced by such a temptation is to succumb to it.

The article which prompted the generalisations in the previous paragraph, and consequently this editorial, is fascinating in its title and distinguished in its authorship. It appeared in the October 1981, issue of the *International and Comparative Law Quarterly*, it is entitled "The Role of the *Conseil d'Etat* in Drafting Legislation," its author is M. Bernard Ducamin and it was translated by Sir William Dale. Add to these bibliographical details that the learned author is a *Conseiller d'Etat* who was for eight years Secretary General of the *Conseil d'Etat*, and that his article was delivered as a lecture in Colombia in 1980, and the editorial temptation becomes irresistible.

The Constitutional Background

In a couple of succinct pages M. Ducamin traces the origins of the *Conseil d'Etat* from the thirteenth-century royal counsellors on juristic matters (robustly termed "law-men") to the end of the *ancien régime*, pointing out that since the king was the source of all justice there was only a distinction in form between a regulatory *ordonnance* prepared by the *Conseil d'Etat* for the royal signature and a decision, similarly prepared, for the king's decision of a litigated dispute. Then, in its Napoleonic reincarnation in 1799 the *Conseil d'Etat* played an important part in the drafting of those great Codes which are such large landmarks in the civil law. But consultation on Parliamentary Bills (though not on decrees) fell into desuetude over a century ago. Then in 1941, under the de Gaulle Provisional Government, the foundation of a *Comité juridique* to prepare laws for liberated territories led eventually to the present consultative role of the *Conseil d'Etat* in the preparation of laws.

This is a brief summary of what is in itself a brief summary, but M. Ducamin's constitutional scene-setting is useful not only for the logic of his article but also for readers from other jurisdictions. For example, the functions of royal counsellors in the mediaeval period invites a comparison with the origins of the institutions of government under the common law system, sometimes summed up (though perhaps too succinctly) in the phrase "The king has his court in his council in his parliament." But, spanning the centuries, St. Stephen's and Westminster Hall were very distinct sources of power at the end of the eighteenth century—events at the end of the seventeenth century

had seen to that. So it is important, if axiomatic, to bear in mind that different constitutional developments can produce widely divergent results.

The general relevance of the constitutional background is that it is just such a background which becomes the foreground in matters of legislation. Comparative legislation, and comparative legislative processes and procedures, have to be handled in this light.

Consultation on Laws

The omission of a reference to decrees in this cross-heading may seem somewhat arbitrary but is necessarily selective for the present purpose. Described as "the act of the Executive *par excellence*," they are made by the Prime Minister or the President but, save in one instance, are not constitutionally required to be submitted to the *Conseil d'Etat*. What is particularly interesting is that some 90 per cent. of laws passed contain a provision that some or all of the details implementing it are to be contained in a decree made after receiving the advice of the *Conseil d'Etat*. This development is a "firmly established tradition—having, one might say, the validity of an institution" and it has the effect that the *Conseil* "finds itself involved in the greater part of the Government's law-making measures of a general nature."

But, at least in this editorial, the special interest of M. Ducamin's article lies in the *loi*—passed by the National Assembly and the Senate and promulgated by the President—and in the requirement (a legal one since 1945 and now a constitutional one under Article 39 of the 1958 constitution) that *projets des lois* be considered by the Council of Ministers "after advice by the *Conseil d'Etat*" and then deposited in the offices of the National Assembly or the Senate. *Projets des lois* are distinguished from *propositions des lois*, coming not from the government but from senators and deputies, and therefore outside the *Conseil's* remit, so that "When reading the text of a law one can quickly tell whether its provisions have undergone this preliminary screening."

This summarised outline compresses M. Ducamin's description but indicates the main features of the *Conseil d'Etat's* function in the legislative process. Its duty is set in a constitutional context and its status is that of an arm of the Executive branch, "a consultative organ for the Government," dealing with all draft laws, whatever their size or content. One point underlines the special situation of the *Conseil*—its competence does not extend to the Parliamentary stage of the legislative process, since it is concerned only with draft Bills, and since urgent questions of textual alterations must be left to the Government. But another point emphasises the problem common to so many legislatures and legislators—the tyranny of time. Speaking of governmental attempts to agree provisional timetables both with the *Conseil d'Etat* and Parliament M. Ducamin says "yet every year both of these bodies, while welcoming these efforts, regret that the results have not been better." This description of organisational difficulties will surely be echoed in fields far away from France.

The Procedure of Consultation

After the constitutional background and the duty to consult comes the method of consultation, but M. Ducamin prefaces his examination of the internal

procedure of the *Conseil d'Etat's* function with a general comment on the *Conseil's* place in a more complex process, for the examination of a draft is only "one stage along the—sometimes long—road ending in publication in the *Journal Officiel*." Vital to this process is continual contact, informal as well as formal, with the Secretary General of the Government. It is also important that the *Conseil* neither initiates drafts nor follows up its advice for, though close to the Government, it "is neither a political organ, nor is it, however relevant to administration in a broad sense, an administrative body that actually administers." Rather its importance at the start of the drafting process lies in its being the last body to be consulted before the draft goes to the Council of Ministers.

With the *Conseil* at the heart of the drafting process, the core of the *Conseil's* legislative work lies in its four Sections exercising the consultative function in relation to Ministries as assigned by the Prime Minister. Each Section consists of a score or more of persons of varying ranks, under a president who organises and allocates the work and is "the soul of his Section."

Given this internal organisation, the first person to deal with a *projet* is the rapporteur, who is in general charge, meets the *Commissaires du Gouvernement* (the relevant Ministerial officials) and prepares a new draft. Next, at a full meeting of the Section (with the civil servants present to speak but not to vote) the rapporteur comments, there is a general discussion, the draft is read article by article and a vote is taken on each article or, if necessary, each paragraph. The rapporteur then prepares a new draft to correspond with the decisions taken at the meeting. It is this text which (except in urgent cases) goes to the General Assembly of the *Conseil d'Etat*, where over 90 *Conseillers d'Etat* may sit in plenary session, or a third of that number, the *Conseillers* of all the Sections, may sit in ordinary session. Here the rapporteur defends the Section's draft and there is a general discussion, rather like an appeal to a larger court. The Assembly's debates and decisions form part of the *Conseil's* legislative jurisprudence.

Pausing here, it is clear that first, the *Conseil d'Etat's* place in the legislative process, next, its internal organisation and, thirdly, the operation of that organisation all combine to give a detailed and carefully worked out system for the discharge of the *Conseil's* consultative function. The submitted draft, the rapporteur's consultations and revision, the Section discussions (with officials) and decisions (without their vote), and the deliberations of the General Assembly constitute a logical sequence leading to the tendering of advice to the Government, consisting of the *Conseil's* revised draft and a note of any points of substance or drafting where agreement with official representatives was not reached.

As M. Ducamin puts it, the examination of the text and related problems results in a new, self-sufficient text giving the Government the *Conseil d'Etat's* solution and "those who know from experience the margin there may be between a concept, and the text that expresses it as a law, know what that means."

The Influence of Consultation

While the analysis in the first part of M. Ducamin's article is both informative and important, his assessment in the second part of the *Conseil d'Etat's* con-

sultative work has equal interest and value, especially since he touches on matters of general concern to all those involved in any way with legislation.

Thus in describing the *Conseil's* general approach the author quotes Rousseau's dictum that "It would take gods to give men laws" and categorises law making as "a formidable mission," complicated by the laws and decrees in each issue of the *Journal Officiel*. In default of gods there are administrators, professionally qualified people and judges, and it is the first task of the *Conseil* to remedy drafting imperfections, but it goes on to deal with matters both of form and of substance.

On matters of form (linked as they are with substantive matters), the juridical method of the *Conseil d'Etat* subjects drafts to certain tests. Thus the unwritten rules relating to presentation of material constitute a general regime "limiting remarkably the fancies of the draftsmen." Then on style and language there is the need to maintain a balance between the classical French of the juridical style and current language. (Of a Presidentally requested experiment in drafting in "contemporary French" it is remarked "It cannot be said that that effort carries the promise of long tomorrows.") A third test is that of conciseness, aimed at the internal structure of a draft as well as at the elimination of repetitions and redundancies. And, fourthly, there is clarity and precision, the quest for intelligibility by means of examination and explanation leading to the production of a comprehensible and definite text.

But if these processes do not eliminate obscurities there is still the second matter, the *Conseil's* concern for matters of substance. In France this necessarily involves consideration of the hierarchy of legal norms, ranging from the general principles of law and the Constitution through various international provisions to the *lois* themselves. But this examination is not merely mechanistic, conducted as it is by people who often have both judicial and administrative experience, and who are concerned with the possible practical consequences of a draft, as well as with the need for prudence in taking decisions which, though emanating from a non-political body, may have political effects.

Direct and Indirect Effects

In an admittedly informal estimate of the influence of the *Conseil d'Etat*, carried out by contrasting drafts as submitted to the *Conseil* and as adopted by the Government, the distinction between form and substance is again essential. Drawing on his lengthy and varied experience, M. Ducamin concludes that on questions of style, terminology and internal structure of texts "on the whole, the *Conseil's* suggestions are very largely followed." The two reasons given for this are that the *Conseil* is not regarded as a hostile body but as one assisting the Government; and, secondly, that the *Conseil* has an accumulated—and continuously increasing—experience and expertise in drafting which does not exist elsewhere and cannot be ignored.

On matters of substance, there is a distinction between draft decrees, where the *Conseil's* legal objections are usually accepted (in case the decree might be annulled), and draft laws, where legal objections are rarer (because the *loi* is higher in the hierarchy of norms and the legislator is its source) and less compelling (because laws are not controlled by the courts).