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## POLICYMAKING AND PUBLIC LAW IN FRANCE: PUBLIC PARTICIPATION, AGENCY INDEPENDENCE, AND IMPACT ASSESSMENT

Susan Rose-Ackerman<sup>\*</sup>  
Thomas Perroud<sup>\*\*</sup>

*Policymaking in government ministries and agencies is the inevitable result of the complex and technical nature of modern policy issues. This reality creates a puzzle: How can policymaking inside the executive remain true to democratic values? We confront this question through an analysis of modern pressures on French public law. We ask if the U.S. approach, which we call "rulemaking accountability," has any lessons for French reformers. The primary aim of this type of accountability is facilitating public input to assure that democratic values extend into administrative policymaking.*

*In France, the public administration traditionally has been understood, not as a threat to democracy, but as an instrument for achieving republican ideals. Statutes set out broad frameworks, but their concrete implementation should be left to impartial, expert bureaucrats. A specialized judiciary, also composed of civil servants, oversees the administration. Developments are putting pressure on French public law. These call for enhanced public participation, the creation of independent agencies, and the use of new forms of technocratic policy analysis. Can these new trends produce a stronger, more democratically legitimate state, or are they in such deep tension that France will either return to old practices or experience a drastic realignment of public power and public law? The French system has begun to respond to these new pressures, but they are still frequently resisted, and reforms have not coalesced around a consensus view. However, recent decisions of the French high courts suggest a move toward more oversight of the democratic legitimacy of administrative processes. Furthermore, efforts occurring inside and outside the government are encouraging more open policymaking and the more systematic study of government programs. Future developments are by no means clear, but the elements are in place for reforms that enhance public accountability and support systematic analysis of policy impacts.*

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## INTRODUCTION

In all democracies policy is made, not just in the legislature, but also in the executive. Yet, despite its prevalence, executive policymaking raises concerns of popular legitimacy that have led some to question its justification. To examine this controversy, we focus on the French case both because of its distinctive public law traditions and because these traditions are facing a new and challenging set of pressures. Because of the high quality of its civil service, France is a particularly valuable lens through which to examine the impact of new developments. One cannot simply dismiss the bureaucracy as corrupt, captured, or incompetent.<sup>1</sup> The French model of administrative law stands in sharp contrast to the American case. Hence, it can help illuminate features of American public law that might otherwise seem unproblematic. Conversely, assessing the French case through the lens of American law highlights the tensions facing French policymaking institutions as new developments confront entrenched legal doctrines and practices.

In both France and the United States, constitutional law acknowledges the policymaking role of the executive branch. The administration is not simply a way to implement detailed and clearly articulated statutory mandates; rather it plays a creative role in designing and determining policy.<sup>2</sup> Policymaking in government ministries and agencies is the inevitable result of the complex and technical nature of modern policy issues. Policymakers must also respond promptly to dynamic changes in conditions.<sup>3</sup> As a result, rules with legal force cannot be the sole responsibility of the legislature. Either the legislature explicitly delegates policymaking power to the executive, or the executive assumes this role by default or by constitutional design.<sup>4</sup>

This reality creates a puzzle: How can policymaking inside the executive remain true to democratic values? The goal is not to assure that the executive follows the “preferences” of the legislature, which often do not exist in any clear-cut way. Rather, the administration should exercise its discretion in the broader public interest, conditioned by statutory language and constitutional principles. France and the U.S. differ sharply in their responses to this policymaking dilemma.

We ask if the U.S. approach, which we call “rulemaking accountability,” could be adapted to French conditions. Under that concept, if the executive or an independent agency makes policy, it has an obligation to use procedures that are

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<sup>1</sup> Timothée Paris, *Is (French) Continental Law Efficient to Fight Conflicts of Interests?*, paper presented at a symposium on “*Corruption and Conflicts of Interest*”, Sciences Po, Paris September 2011. (discussing the socialization of civil servants into the culture of integrity and impartiality).

<sup>2</sup> PETER LINDSETH, *POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION STATE* 37 (2010) [hereinafter *POWER AND LEGITIMACY*], distinguishes between the “executive” at the political summit of the government and the “administration.” We consider policymaking at both levels and include mixed cases where the background work is performed by civil servants and lower-level political actors, but where the final decision is made by politically accountable individuals.

<sup>3</sup> On the difficulty of distinguishing policymaking from administration, see generally James H. Svara, *The Myth of the Dichotomy: Complementarity of Politics and Administration in the Past and Future of Public Administration*, 61 *PUB. ADMIN. REV.* 176 (2001).

<sup>4</sup> See 1958CONST. arts. 34–38 (Fr.). Article 37 could be given a strong reading to permit a range of autonomous executive regulatory powers; however, the jurisprudence of the Constitutional Council and Council d’État has narrowed its scope. See Conseil Constitutionnel [CC] [Constitutional Court] decision No. 81–132DC, Jan. 16, 1982, Rec. 18.

democratically legitimate, not just technically competent. This does not imply that they should copy the operation of a representative legislature. Rather it implies that the executive must facilitate public input and operate in a transparent and accountable manner so that citizens can understand the reasons for the policy. The primary aim of this type of accountability is neither to protect individual rights nor to assure more technically competent policy. Instead, it requires that those making policy must facilitate public input to assure that democratic values extend into the administrative policymaking process.

The American policymaking framework emphasizes open hearings, public participation, the giving of reasons, and political accountability. The process incorporates the interests of political appointees and of private individuals, businesses and organized groups. Specialized, expert civil servants play an important role in the US, but their characterizations of the public interest are not automatically accorded respect, and the law requires broad opportunities for the public to comment before agencies can make policy.

In France, by contrast, the public administration traditionally has been understood not as a threat to democracy but as an instrument for achieving republican ideals. The French have a very strong concept of the public interest, but its connection to the laws produced by a representative democratic assembly is often awkward. If one is wary of the ability of legislatures to produce laws in the public interest, shifting policymaking power to the administration may seem to assure that public-spirited officials make the key policy decisions. Statutes should set out broad frameworks, but their concrete implementation should be left to impartial, expert bureaucrats committed to republican values. Career public officials are an elite, meritocratic corps that checks narrow, partisan politics and are best-positioned to further the public interest under constitutional and legislative constraints. Policy is produced by the interplay of elected politicians and career civil servants imbued with public interest values.<sup>5</sup> A specialized judiciary, also composed of civil servants, oversees the operation of administrative institutions.

As Pierre Rosanvallon explains, the modern French conception of democracy was built up after a crisis between 1890 and 1920 during which “the idea that a majoritarian electoral system could somehow express the interests of the whole society lost all credibility.”<sup>6</sup> Critics argued that Parliamentary processes were not always clear reflections of popular will, but were influenced by lobbyists and other well-organized interests.<sup>7</sup> At the same time, all western democracies, including

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<sup>5</sup> The literature on this notion is vast. For a discussion in English, see Léon Duguit, *The Concept of Public Service*, 32 YALE L.J. 425 (1922–1923). For more contemporary analyses, see JACQUES CHEVALLIER, *LE SERVICE PUBLIC* (9th ed. 2012); N. Foulquier, *Service public*, in 2 TRAITÉ DE DROIT ADMINISTRATIF 45 (Pascale Gonod et al. eds., 2011).

<sup>6</sup> PIERRE ROSANVALLON, *DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY, PROXIMITY* 3 (A. Goldhammer trans., 2011). See also Peter Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Citizenship in Germany and France, 1920s–1950s*, 113 YALE L.J. 1341, 1376–77 (2004) [hereinafter *Paradox*].

<sup>7</sup> For a similar argument in the context of the United States, see generally Jerry Mashaw, *Pro Delegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985). To take just one example, the Center for Media and Democracy has recently exposed the role of the American Legislative Exchange Council in supplying templates to states’ legislators to implement pro-gun “stand your ground” laws. In France, the work of lobbies has only recently been investigated in legal

France, saw the emergence of an administrative power that profoundly changed the machinery of government.<sup>8</sup> These two developments led to a reformulation of democratic principles. In France the bureaucracy was “a force of realization of the general interest.”<sup>9</sup> The public service ethos of officials was described as “interested in disinterestedness.”<sup>10</sup> As a consequence, “the “Jacobin mandarins” of the high civil service claimed to embody the Republic as fully as the people’s elected representatives.”<sup>11</sup> Delegation seemed more responsive to republican virtues than detailed statutes passed by the legislative majority. Parliament delegated policymaking power to officials who legitimately embodied the general interest.

The role of the courts in France also reflects this confidence in the bureaucracy. Public officials may fail to perform well in individual cases, and a system must be in place to discipline those who fall short. However, in line with the fundamental confidence in officialdom, the main check on the bureaucracy is a system of specialized administrative tribunals that culminates in the Conseil d’État, an elite body that plays both an advisory and a judicial role. Its members are career civil servants who frequently spend part of their careers as high government officials. Even though the separation of the *jurisdiction administrative* and the *administration active* is a long-established feature of French governance, in practice, civil servants judge other civil servants to assure that they further public interest values and obey the law.<sup>12</sup>

Contrast this situation with the United States. Generalist courts engaging in administrative review are staffed by judges who are rarely drawn from the career civil service. At most, some have experience as elected politicians or as high-level political appointees. Just as in the case of policymaking inside the bureaucracy, the contrast is between an elite career body, and one that is more linked to partisan politics, at least at the time of appointment. Some say that French public law tribunals are too inclined to side with public officials.<sup>13</sup> However, American judges’ rulings may track their political history.

scholarship. See, e.g., JEAN LAPOUSTERLE, *L’INFLUENCE DES GROUPES DE PRESSION SUR L’ÉLABORATION DES NORMES* (2009); GRÉGORIE HOUILLO, *LE LOBBYING EN DROIT PUBLIC* (2012).

<sup>8</sup> The United States is a partial exception. On the late development of its bureaucratic capacity, see generally STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* (1982). However, the Interstate Commerce Commission, the first U.S. national independent regulatory agency, was established during this period in 1885. JERRY MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012), traces the origins of U.S. administrative law to the early nineteenth century.

<sup>9</sup> ROSANVALLON, *supra* note 6, at 54, argues that elections and *concours* (i.e., exams to enter the public service) were both seen as serving the goal of furthering republican government.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> JACQUES CHEVALLIER, *L’ÉLABORATION HISTORIQUE DU PRINCIPE DE SÉPARATION DE LA JURIDICTION ADMINISTRATIVE ET DE L’ADMINISTRATION ACTIVE* (1970) [hereinafter *PRINCIPE DE SÉPARATION*]. See also Peter Lindseth, “Always Embedded” *Administration: The Historical Evolution of Administrative Justice as an Aspect of Modern Governance*, in *ECONOMY AS A POLITY: THE POLITICAL CONSTITUTION OF CONTEMPORARY CAPITALISM* 117 (Christian Joerges et al. eds., 2005) [hereinafter *Always Embedded*].

<sup>13</sup> ACHILLE MESTRE, *LE CONSEIL D’ÉTAT, PROTECTEURS DES PREROGATIVES DE L’ADMINISTRATION* (1974), gives two arguments in favor of viewing the Council d’État as a protector of

Before proceeding it is important to stress some similarities between France and the US. First, neither democracy espouses a simple version of the separation of powers in which the legislature, executive, and judiciary each stays securely in its own realm and strictly limits its overlap with other branches. Under that simple model, powers really are separated and elections are the primary source of public input. Citizens vote for political parties or parliamentary representatives and perhaps for a president, but between elections they sit on the sidelines. If the state violates an individual's rights, he or she has access to the courts to gain redress, but the courts are not a route to challenge government policies or procedures.<sup>14</sup> Statutes resolve all the important policy issues so that officials in the public administration do not need additional public input when putting laws into effect. If they do look outside their offices, it is only to consult experts with scientific and technical knowledge. Under this view, democratic legitimacy rests in the legislature alone.<sup>15</sup> The legislature, because it represents the citizens, is the only legitimate venue for policymaking.<sup>16</sup>

Second, neither polity whole-heartedly endorses the neo-corporatist model.<sup>17</sup> Under neo-corporatism, the executive promulgates general rules to carry out statutory mandates, but before doing so, it must consult predetermined bodies. These bodies make or recommend policies on the basis of negotiations between a fixed group of organized interests, such as business associations, labor unions, and civil society organizations. The government does not engage in open-ended public consultations.<sup>18</sup> The democratic legitimacy of these bodies is questionable if their membership is not a good reflection of the range of policy positions in the electorate or if they reflect a balance of opinion that is tilted toward certain stakeholders. In

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the administration's privileges: (1) its own self-restraint in limiting the intensity of review and (2) its defense of some administrative privileges. His analysis has, of course, been criticized. See, e.g., M. Barbet, *Bibliographie*, 28 REVUE INTERNATIONALE DE DROIT COMPARÉ 192 (1976).

<sup>14</sup> In France, the Constitutional Council has elaborated a theory of "negative incompetence." Under this theory, Parliament is the only body responsible for the protection of fundamental rights. It cannot delegate that power to the executive. In the abstract review of draft statutes, the Council can raise this problem *ex officio*. See DOMINIQUE ROUSSEAU, DROIT DU CONTENTIEUX CONSTITUTIONNEL 139 (2006). The theory of negative incompetence is akin to the German *Wesentlichkeitstheorie* and the *Vorbehalt des Gesetzes*. Lindseth, *Paradox*, *supra* note 6, at 1385–1411.

<sup>15</sup> This view of the relationship between statutory drafting and executive implementation is a familiar feature of some German scholarship on democracy. See SUSAN ROSE-ACKERMAN, CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES 7–13 (1995) [hereinafter CONTROLLING]; SUSAN ROSE-ACKERMAN, FROM ELECTIONS TO DEMOCRACY: BUILDING ACCOUNTABLE GOVERNMENT IN HUNGARY AND POLAND 15–16 (2005) [hereinafter FROM ELECTIONS TO DEMOCRACY]; Werner Jann, *State, Administration and Governance in Germany: Competing Traditions and Dominant Narratives*, 81 PUB. ADMIN. 95, 101 (2003).

<sup>16</sup> The strongest statements of this view come from German defenders of the post-war German "democratic political party state." See, e.g., Michaela W. Richter, *The German Party State: An Assessment*, in TRANSFORMATION OF THE GERMAN POLITICAL PARTY SYSTEM: INSTITUTIONAL CRISIS OR DEMOCRATIC RENEWAL 62, 62 (Christopher S. Allen ed., 1999). In the French context, some commentators worry about the consequences of weakening representative government with too much direct input from citizens. See, e.g., DOMINIQUE SCHNAPPER, PROVIDENTIAL DEMOCRACY: AN ESSAY ON CONTEMPORARY EQUALITY 189–96 (2006).

<sup>17</sup> For a discussion comparing the French case with Germany in the post-war period, see Lindseth, *Paradox*, *supra* note 6, at 1412–15.

<sup>18</sup> Neo-corporatist bodies exist even in political systems that otherwise espouse strict separation; for example, in Germany. ROSE-ACKERMAN, CONTROLLING, *supra* note 15, at 65.

both countries, but especially in France, such neo-corporatist consultative bodies exist, but they are concentrated in particular regulatory pockets, such as labor/management relations or have purely advisory roles. Of course, one can imagine corporatist bodies that are sufficiently representative, but the selection of members and the mode of reaching consensus can easily diverge from democratic ideals. The most fundamental problem in many corporatist bodies is the discretion given to government officials and particular interest groups to select the participants.<sup>19</sup>

France has a constitutionally mandated third chamber, the Economic, Social, and Environmental Council (“CESE”) organized on neo-corporatist lines, but it is only advisory. It submits reports to the National Assembly and the Government on draft bills, ordinances, decrees, and financial plans in its areas of concern.<sup>20</sup>

In the United States many advisory committees also exist, and administrative agencies can voluntarily engage in regulatory negotiation under statutory guidelines, but the groups represented around the table are reconstituted each time the process takes place. The model of stakeholder negotiation does not have a strong hold on American public law and is in any case a complement to, instead of a substitute for, open-ended consultation.<sup>21</sup>

Given the importance of policymaking inside the government and the inadequacy of neo-corporatism as a model of consultation, three distinct but overlapping developments are putting pressure on the basic premises of French public law: they involve process, institutions, and substance. More precisely, these developments call for enhanced public participation, the creation of independent agencies, and the use of new forms of technocratic policy analysis. Legal imperatives arise at the European level, mostly in European Union (“EU”) directives and policy initiatives. However, each development also has a vocal domestic constituency both inside and outside the public sector that looks to European and American models for inspiration.

A fourth pressure arises from the protection of individual rights, originating primarily in the European Court of Human Rights. Others have noticed the impact of the new rights jurisprudence on French law, and we recognize its importance.<sup>22</sup>

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<sup>19</sup> For examples of these problems in post-socialist countries see ROSE-ACKERMAN, FROM ELECTIONS TO DEMOCRACY, *supra* note 15, at 42.

<sup>20</sup> The CESE includes representatives from different social groups, such as unions, business associations, and experts. The CESE is mandated in articles 69–71 of the French Constitution. Articles 32 to 36 of the Constitutional law no. 2008–724, 23 July 2008 added the environment to this mandate, and environmental representatives were added to the CESE social groups already represented. Article 71 states that the CESE shall have no more than 233 members. Some recommend an expanded role for the CESE. See, Interviews with Pierre Lascoumes, Senior Researcher, CNRS, CEE, Sciences, Po, in Paris, France (November 7, 2011) [hereinafter Lascoumes Interview], and L  ic Blondiaux, Professor of Political Science, University of Paris I Panth  on-Sorbonne in Paris, France (DEC. 6, 2011) [hereinafter, Blondiaux Interview]

<sup>21</sup> Regulatory negotiation is purely voluntary but must be carried out under the provisions of the Negotiated Rulemaking Act of 1996, 5 U.S.C. §§ 561–570. See generally Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206 (1994); Cary Coglianese & Laurie K. Allen, *Does Consensus Make Common Sense?* 46 ENV’T 10 (2004).

<sup>22</sup> See MITCHELL DE S.-O.-L’E. LASSER, JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE (2009).



However, our focus is on new developments that appear, at first, not to raise as direct a challenge to French notions of the public interest and the proper role of the administration. Yet each one forces French public law to face a new set of dilemmas that occur at the intersection of substantive notions of the public interest and the institutions of the modern democratic, regulatory state.

The debate over the legitimacy of government policymaking is especially heated in France, because the country has traditionally relied on the administration not just for technical competence but also as an expression of republican values. Yet, the public does not view French bureaucrats as inherently benevolent.<sup>23</sup> In recent years, public choice theories and new public management doctrines have contributed to a view of administrative action that leaves room for questioning the legitimacy of administrative policymaking.<sup>24</sup> French public law is confronting the contested roles of civil servants, outside experts, interest groups, civil society advocacy organizations, and politicians. It faces challenges to the very nature of the public interest coming from advocates of analytical techniques such as Impact Assessment (IA) and Cost-Benefit Analysis (CBA).

We will first discuss the push for more public participation and enhanced transparency and accountability. Policymaking delegation is widespread in complex and contested areas, such as the environment or the health and safety of products and workplaces. However, citizens no longer routinely defer to official judgments of what constitutes the public interest. Individuals and organized groups are pressing for a greater role in executive policymaking. Yet, unlike the United States, France does not have established, generic legal requirements for open-ended participation in the promulgation of secondary legislation.<sup>25</sup> Nevertheless, the French state is beginning to face up to the need to combine administrative expertise with public accountability when it promulgates secondary legislation.<sup>26</sup> This requires not just transparency and ex post justification, but also procedures that are open to public input at an early stage in the policymaking process in ministries, in independent agencies, and in lower-level governments. Nevertheless, as we will discuss below, French government proposals have so far been rather modest.

French citizens and civil society groups are supported by European institutions and treaties—the EU, the Aarhus Convention and the European Court of Human Rights.<sup>27</sup> European Union bodies advocate for greater public participation in Member

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<sup>23</sup> For an early scholarly critique, see MICHEL CROZIER, *LE PHÉNOMÈNE BUREAUCRATIQUE* (1964).

<sup>24</sup> The public choice or positive political economy literature often takes an overly simple view of delegation in which the ideal is policy that reflects the preferences of the legislature that enacted the statute, or perhaps the current legislative majority. This perspective sees the administrative process mainly as a way to facilitate legislative oversight. See, e.g., Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984). We take a broader view of the democratic project, which leaves space for policy that balances legislative will and input from the public.

<sup>25</sup> See Administrative Procedure Act, 5 U. S. C. §§551–559, 701–706 (1946). The basic requirements for informal rulemaking are contained in Section 553 of the Act.

<sup>26</sup> With a few exceptions, so far the requirements are sector-specific, not comprehensive.

<sup>27</sup> In France international law has precedence over parliamentary law. See CE Ass., Oct. 20, 1989, Rec. Lebon 190 [hereafter *Nicolo*].

State policymaking as part of the “Better” (or “Smarter”) Regulation agenda.<sup>28</sup> The European Union’s Charter of Fundamental Rights includes a right to good administration.<sup>29</sup> In the environmental area, France added an Environmental Charter to its constitution after ratifying the Aarhus Convention, an international treaty with a European focus that deals with public participation in environmental matters.<sup>30</sup> Finally, the European Court of Human Rights (“ECtHR”), which interprets the European Convention on Human Rights (“ECHR”), has considered claims of procedural injustice, but only insofar as they may violate individual rights.<sup>31</sup> They seldom consider the procedures used to promulgate either statutes or secondary legislation as a basis for violation. The right to good administration in the Convention appears directed toward individual adjudications, but the Court’s focus could broaden over time if it extends its view of rights to include public rights to participate in executive policymaking. In concert with domestic supporters, this web of European norms has begun to increase the rights of French citizens to participate in policy-making over and above the protection they already have against state overreaching in individual cases.<sup>32</sup>

Although rulemaking may require scientific and economic sophistication, that fact does not negate the responsibility to consult. Policymakers are not simply making purely expert judgments that citizens ought to respect.<sup>33</sup> Rather, the

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<sup>28</sup> The initiative was launched in 2001 after the Göteborg and Laeken European Councils. This led to the publication of a Commission Communication entitled *Action Plan: “Simplifying and Improving the Regulatory Environment”*, COM (2002) 278 final (May 6, 2002). It was the first step of what would become a comprehensive policy to simplify and enhance the quality of European legislation. See Robert Baldwin, *Is Better Regulation Smarter Regulation?*, PUB. L. 485 (2005).

<sup>29</sup> Charter of Fundamental Rights of the European Union, art. 41, Dec. 12, 2007, 2007 (C 303) 1.

<sup>30</sup> See Convention on Access to Information, Public Participation, Decision-making and Access to Justice in Environmental Matters, June 25, 1998, available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> [hereinafter Aarhus Convention]. The Charter for the Environment was added to the Constitution in 2005. See Loi 2005–205 du 1 mars 2005 relative à la Charte de l’environnement [Law 2005–205 of March 1, 2005 on the Environmental Charter], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], Mar. 2, 2005, p. 3697; Jean-Marc Février, *Les principes constitutionnels d’information et de participation*, 35 ENVIRONNEMENT 31(2005).

<sup>31</sup> The cases mainly deal with the failure of States to give sufficient information to their inhabitants on the risks of pollution to their lives. See, e.g., Öneriyıldız v. Turkey, App. No. 48939/99 (Eur. Ct. H.R. Nov. 30, 2004), <http://hudoc.echr.coe.int/webservices/content/pdf/003-1204313-1251361?TID=hhufznhdy> (concerning industrial pollution).

<sup>32</sup> In theory, the European Convention on Human Right and the EU treaties are separate legal orders with separate courts—i.e., the European Court of Human Rights [hereafter ECtHR] and the Court of Justice of the European Union [hereafter ECJ]. However, the ECJ has increasingly relied on precedents set by the ECtHR, and under Treaty of Lisbon, the EU has adhered to the European Convention on Human Rights. See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, art. 6, § 2, Dec. 13, 2007, 2007 O.J. (C 306) 1.

<sup>33</sup> Both regulation and policy are difficult to translate into French for different reasons. Regulation in English can either be translated as *règlementation* or *régulation*, the former meaning rules or rule-making. *Régulation* is a term that comes from physics and means “maintaining an equilibrium in a complex” system. We use the English word “regulation” in its first sense. However, there is a debate in French public law over the applicability of the second meaning. See generally, e.g., Gérard Marcou, *La Notion Juridique de Régulation*, 62 L’ACTUALITÉ JURIDIQUE, DROIT ADMINISTRATIF 347 (2006). In legal theory, some scholars use the term regulation to capture the “new normative approach” that we are witnessing today because of clashing models of normativity—i.e., the State and the market. Regulation in this sense is a “normative approach based on dialogue.” See generally Gerard Timsit, *Braibant Lecture 2007: Reinventing the State*, 74 INT. REV. OF ADMIN. SCI. 165 (2008); Gerard Timsit, *Normativité et*

policymaking process in the executive and in independent agencies is ultimately a political one.<sup>34</sup> Although the participants in policymaking processes in the executive may not represent overall public opinion, that fact does not mean that their contributions are irrelevant. Rather, the participants bring both information and their own intensity of concern to the attention of public authorities. True, the authorities should not let a weighted average of the comments determine their decision.<sup>35</sup> A more open and well-justified process does not imply that officials give up their mandate to further the public interest. Rather, it can produce a more informed choice because decisions are not isolated from public input. Nevertheless, there may be tradeoffs. We assess participation as a way to justify policy delegation in a democracy by opening up space for citizen and group input. However, in practice, it may simply delay and complicate public choices. This tension between more open and democratically legitimate administrative policymaking and efficient, technically competent choices presents real tradeoffs, but we argue that the French policymaking process would gain popular legitimacy from a move in the direction of requiring both more public input and more transparency.

We turn next to the challenges that independent agencies raise to traditional French forms of bureaucratic centralization. The movement toward independent agencies has been fueled by pressures from the EU and by global trends toward the privatization of public utilities. Agency independence is more desirable in France than in the US, not just to insulate the agency from partisan political influence but also to give it the freedom to regulate firms where the government still owns a substantial share. In some cases, such as broadcasting, the government controls a major firm. These independent agencies, although a familiar feature of the regulatory landscape in the United States since the late nineteenth century, are newcomers in France and fit awkwardly into the existing constitutional and regulatory structures. They highlight the tensions between expertise, public accountability, and political control in a particularly clear-cut way. On the one hand, the notion of a cadre of independent, expert officials seems compatible with the French tradition of an elite, meritocratic civil service. On the other hand, constitutional provisions that place ultimate policymaking authority with the Prime Minister and the legislature seem to limit the scope of permissible institutional innovation.

Rather than taking on the entire spectrum of independent agencies in France, we concentrate on the two agencies that regulate telecommunications content and infrastructure. We selected these agencies because telecommunications and media are fields that combine strong public concern with the need to regulate complex and fast-changing technologies. Our study of these two agencies also allows us to

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*Régulation*, 21 LES CAHIERS DU CONSEIL CONSTITUTIONNEL 84 (2006). In contrast, English distinguishes between “policy” and “politics,” but French uses the word *politique* for both. In English, policymaking implies the application of both specialized knowledge and political expediency to the design of public programs, with some commentators criticizing the politicization of policymaking.

<sup>34</sup> For discussion of these issues in the United States, Germany, Hungary, and Poland, see generally ROSE-ACKERMAN, *CONTROLLING*, *supra* note 15; ROSE-ACKERMAN, *FROM ELECTIONS TO DEMOCRACY*, *supra* note 15.

<sup>35</sup> Susan Rose-Ackerman, *Regulation and Public Law in Comparative Perspective*, 60 U. TORONTO L.J. 519, 528 (2010); see also generally Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998).

compare an infrastructure agency ("ARCEP") that was created because of EU requirements and that implements EU law with another agency, the Broadcasting Commission ("CSA"), that is a domestic creation, although it too implements EU law.

Finally, we consider the tensions between French traditions of expertise and new forms of technocratic policy analysis. Both the European Commission and the OECD have encouraged French legislative and regulatory processes to include various forms of impact assessment ("IA"), risk assessment, and cost-benefit analysis. These pressures are especially salient when the government makes policy through general norms with legal force (rulemaking in U.S. parlance) or when it presents draft statutes to the legislature. Arguments for IA also arise in planning large projects at the municipal and regional levels that affect resource allocation, economic development, and environmental or cultural values.<sup>36</sup> Support for IA has been expressed both by French social scientists with economic training and by members of the career civil service who seek to constrain the politicians' enthusiasm for lawmaking. IA is now legally required whenever the Government presents a draft bill to the legislature, with the assessment posted on the website of the National Assembly. Here the challenge is not so much procedural as substantive. Although standard descriptions of IA include procedures to obtain public input, it is fundamentally a substantive criterion for determining if policies are in the public interest. Yet the technique does not necessarily fit with traditional French notions of the public interest, and the expertise required to carry out a competent IA is not necessarily the type that pervades the elite corps of French civil servants. To its proponents it is a way of articulating public welfare criteria in a more systematic and quantitative fashion. To its detractors it is a reductionist formula that ignores essential values. However, because IA has no precise definition, it has been invoked to justify tradeoffs in policymaking, on the one hand, and to require net-benefit maximizing techniques, on the other. IA is ultimately a political tool, in that it implies a commitment to certain values in determining the allocation of scarce social resources. Hence, it needs to be legitimized consistent with principles of democracy and the public interest.

Supporters of traditional French republican values are struggling to cope with these new developments. Can they be resolved to produce a stronger, more democratically legitimate state, or are they in such deep tension that France will either return to old practices or experience a drastic realignment of public power and public law? We identify trends indicating a shift in public policymaking towards the integration of participatory methods and toward the use of new tools to evaluate the merits of policies. We assess these developments in light of both the democratic legitimacy and the technical competence of public policymaking in the French executive and its independent agencies.

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<sup>36</sup> These developments are framed by the growing importance of the European Convention on Human Rights, as interpreted by the European Court of Human Rights and the courts of the European Union. The French courts directly enforce international law so long as the law reciprocally applies, but individuals can utilize the ECtHR to seek damages when they have exhausted their domestic options, and French courts can refer questions to the European Court of Justice. See 1958 CONST. art. 55 (Fr.) [hereinafter Article 55].

Section I provides an overview of the basic institutional and legal building blocks inside France and at the European level. We then move to the three aspects of our study: efforts to engage the public, the role of independent regulatory agencies, and finally, the use of Impact Assessment to evaluate policies. Section II shows how public involvement in executive policymaking is evolving in the direction of broader public consultation. It highlights some recent high court decisions that support enhanced public participation. Section III focuses on the constitutional challenges raised by policymaking in independent regulatory agencies, using CSA and ARCEP as case studies. Section IV considers how Impact Assessment and related techniques of policy analysis are beginning to influence French lawmaking. Finally, in Section V we compare the U.S. and France and argue that a greater sensitivity to the public legitimacy of the regulatory and legislative processes appears to be pushing French public law in new directions.

### I. PUBLIC LAW IN FRANCE AND THE INFLUENCE OF EUROPEAN INSTITUTIONS

This section introduces the institutions and doctrines of French public law to provide background for our analysis of contemporary trends.<sup>37</sup> It begins with constitutional provisions concerning the legislative competence of the parliament and the regulatory power of the government, along with provisions on public accountability. The next subsections introduce the most important institutions: the Conseil d'État with its accompanying structure of administrative courts and the Conseil Constitutionnel. France has no administrative code, but the doctrines of French public law have built up over time and are most clearly expressed in the case law of the Conseil d'État. The Constitution also contains some explicit provisions dealing with delegation and public accountability that have been interpreted by both high courts.<sup>38</sup>

The three-fold challenges of public participation, independent agencies, and impact assessment all arose from an ongoing dialogue between domestic French reformers and European-level officials and legal texts. Domestic pressures for change are essential to all three developments, but they have been complemented

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<sup>37</sup> For a comprehensive introduction to French administrative law in English, see L. NEVILLE BROWN, JOHN S. BELL & J.-M. GALABERT, *FRENCH ADMINISTRATIVE LAW* (5th ed. 1998); BERNARD SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* (1954). For a good comparative introduction, see generally Lindseth, *Paradox*, *supra*, note 6, and Lindseth, *Always Embedded*, *supra* note 12.

<sup>38</sup> In addition, in some areas, administrative procedures have been codified—the *Livre des procédures fiscales* [Book of Tax Procedures] covers tax law procedures, and the *Code de l'urbanisme* [Planning Code] (for building permits, etc.) covers planning law procedures. In addition, legislation covers some aspects of the administrative process. See *Loi 78-753 du 17 juillet portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal* [Law 78-753 on Various Measures to Improve Relations Between the Administration and the Public and Various Administrative Arrangements, Social and Fiscal], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], 18 July 1978, p. 2851; *Loi 79-587 du juillet 1979 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public* [Law 79-587 on the Motivation of Administrative Acts and to Improve Relations Between the Administration and the Public], *J.O.*, 12 July 1979, p. 1711; *Loi 2000-321 du avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations* [Law 2000-321 on the Rights of Citizens in Their Relations with the Administration], *J.O.*, 13 April 2000, p. 5646.

and channeled by European developments. France, a founding member of the EU, has struggled to implement EU policies and directives in our areas of concern. Sometimes French understandings of a particular challenge are quite different from those of European actors. This is most obvious in the case of Impact Assessment, but it occurs elsewhere as well. Other times, the French public law tradition is at odds with the reform agenda of those inside France and in Europe. This is particularly true for moves toward public participation where respect for the elite, meritocratic civil service may clash with demands for increased openness. But the expanded mandates of independent agencies in response to EU policies also reveal tensions between constitutional principles and EU law. Overall, European law has had a major impact on all areas of French law in the last twenty to thirty years, and particularly in our areas of focus dealing with the interaction between citizens, business firms, and the state.<sup>39</sup>

#### A. *The Constitution and the Separation of Powers*

Under the French Constitution government ministries and the prime minister have the authority to issue secondary legislation.<sup>40</sup> All such regulations are deliberated upon in the Cabinet and must be signed by the President.<sup>41</sup> According to article 37: "Matters other than those coming under the scope of statute law shall be matters for regulation." The Constitution in article 34 lists the subjects that must be governed by statute, but these statutes can be implemented through secondary legislation.<sup>42</sup> Secondary legislation is an essential aspect of the French government structure. However, the ability of independent agencies to issue degrees is ambiguous under article 37, and the courts have interpreted the Constitution to limit the agencies' authority.

The executive can issue ordinances under statutory delegations that are then submitted to the legislature for a vote, which is usually *pro forma*.<sup>43</sup> Article 38 states that the Council of Ministers has the authority to issue ordinances, seemingly preventing independent agencies from doing so on their own. Once approved by the legislature, an ordinance has the status of ordinary law.

Because of the wide constitutional authority given to the Government to issue secondary legislation, public consultation on their content is a particularly salient

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<sup>39</sup> International law, especially EU and ECHR law, has profoundly changed the French legal landscape. France is a monist country, which means that, unlike most common law countries, all international law norms produce a direct effect and can be enforced domestically without Parliament's intervention. The struggle in France concerns the place of international law in the hierarchy of norms. The Constitution clearly says that international law prevails over parliamentary statutes, subject to a reciprocity requirement. See Article 55, *supra* note 36. However, the courts did not immediately acknowledge this provision. The Conseil d'État finally accepted the supremacy of international law in 1989 in the *Nicolo* case. See *supra* note 27.

<sup>40</sup> 1958 CONST. arts. 37, 38.

<sup>41</sup> *Id.* art. 13.

<sup>42</sup> Most statutes cover topics included in article 34. In the few cases where that is not so, the government may "amend" such statutes by decree. However, the Constitutional Council determines whether or not a statute was enacted under one of the clauses in article 34, and it has an expansive view of the article's coverage. See *id.* art. 34.

<sup>43</sup> *Id.* art. 38.

issue. One cannot claim that all the important policy issues have, in principle, been resolved by the legislature.

### B. French Public Law Institutions

France has both a system of ordinary courts and an administrative court system.<sup>44</sup> As A.V. Dicey described the situation in France over one hundred years ago: “[A]ffairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies.”<sup>45</sup> There are three layers: (1) forty-two first instance administrative tribunals; (2) eight administrative courts of appeal; and (3) the Conseil d’État at the apex of the system.<sup>46</sup> Appeal to the Conseil is generally only on matters of law, although appeals from some important authorities—such as those of the Broadcasting Commission—go directly to the Conseil d’État on matters of both fact and law.<sup>47</sup>

#### 1. The Conseil d’État: Tradition and Change

The Conseil d’État is both the highest administrative court and an advisor to the Government.<sup>48</sup> The successor to the Council of the King, it was created as an advisor to the Government with no judicial function in 1799 after the French Revolution. This advisory role gives its members the first rank among the *grands corps de l’État*. In its advisory role it must both review ordinances and decrees, classified as *Décrets en Conseil d’Etat*, before they are issued and assess draft government bills before they are presented to the legislature.<sup>49</sup> This review is routine, and the advice can be

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<sup>44</sup> The public-private split between the ordinary courts and the administrative courts is not always clear-cut. If the administration acts in a “private” capacity, private law prevails. Recently, Parliament extended the jurisdiction of private law courts to cover the individual decisions of certain independent agencies. For example, it hears adjudications involving the oversight of business and financial markets. A separate court, the Tribunal des Conflits, resolves disputes about the assignment of cases. It was created in 1848 and given full powers in 1872.

<sup>45</sup> ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 194 (5th ed. 1897)

<sup>46</sup> The current system arose slowly over time as a response to the growing caseload. For an overview by a retired member of the Conseil d’État, see generally Jean Massot, *The Powers and Duties of the French Administrative Law Judge*, in COMPARATIVE ADMINISTRATIVE LAW 415 (Susan Rose-Ackerman & Peter Lindseth, eds., 2010) [hereinafter *Powers and Duties*].

<sup>47</sup> The Conseil d’État hears direct appeals dealing with ordinances and decrees of the President and rules made by ministers, as well as appeals against the decisions of sixteen independent agencies—including, *inter alia*, the Broadcasting Agency, the Financial Markets Authority, the Competition Authority, the Communications and Postal Authority, the Railways Authority, and the Energy Commission. See CODE ADMINISTRATIF [C. ADM.], art. R311-1.

<sup>48</sup> For English summaries on the Conseil d’État, see generally George Bermann & Etienne Picard, *Administrative Law*, in AN INTRODUCTION TO FRENCH LAW 57 (George Bermann & Etienne Picard eds., 2008); James Charles Sholto Burchett, *Administrative Law—The French Comparison*, 69 AUSTL. L.J. 977 (1995); H. B. JACOBINI, AN INTRODUCTION TO COMPARATIVE ADMINISTRATIVE LAW (1991); Paul-Marie Falcone, *The Conseil d’État*, in AN INTRODUCTION TO FRENCH PUBLIC ADMINISTRATION 97 (T. Ablard, et al. eds., 2d ed. 1993).

<sup>49</sup> In 2010, the Conseil d’État reviewed 156 draft laws and ordinances, 810 regulatory decrees, and 223 other types of government actions, some of which dealt with individual cases, not general policy—for example, denial of nationality. CONSEIL D’ÉTAT, RAPPORT PUBLIC: ACTIVITÉ JURISDICTIONNELLE ET CONSULTATIVE DES JURIDICTIONS ADMINISTRATIVES 263 (2011), available at <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/114000263/0000.pdf> [hereinafter

kept secret at the option of the Government. The Conseil is consulted at the end of the process inside the Government, which allows it to check that all necessary formalities have been respected, and to be fully informed of all the consultations and opinions on the drafts. For rules and bills that require the advice of the Conseil, the Government has three choices: to wholly accept the advice of the Conseil, to reject it and issue its previous text, or to abandon the proposal. This practice gives the Conseil considerable leverage over the Government.<sup>50</sup> In a more informal way, the Conseil also prepares studies and gives policy advice. In the 1870s the Conseil developed into a true administrative court without giving up its advisory role.<sup>51</sup>

*Organization and Personnel:* The Conseil is an elite institution, drawing more than half its membership from top graduates of the *École Nationale d'Administration* or ENA.<sup>52</sup> Writing almost twenty years ago, one member of that select group argued that the Conseil enjoys “considerable prestige” among the general public because it is composed of the ‘la crème de la crème.’<sup>53</sup> However, there do not seem to be any public opinion polls that assess the body’s standing with the public. Even though the Conseil d’État is a “pillar of the State” it has a low profile, and citizens’ knowledge of all legal institutions is low. For example, more than half of the French confuse the functions of prosecutor and judge (*parquet* and *siège*). It is, therefore, doubtful that

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RAPPORT PUBLIC 2011]. Article 37 of the French Constitution provides for the consultation of the Conseil for draft decrees, Article 38 for ordinances, and Article 39 for government bills. Under Article 39, as amended in 2008, bills prepared by members of Parliament [*propositions du loi*] are now reviewable by the Conseil d’État at the request of the president of either house. In 2010, the Parliament submitted two drafts to the Conseil. *Id.* at 113–115. For advice given by the Conseil d’État on the way it and the Assembly should carry out this process, see CONSEIL D’ÉTAT, RAPPORT PUBLIC: ACTIVITÉ JURIDICTIONNELLE ET CONSULTATIVE DES JURIDICTIONS ADMINISTRATIVES 106–09 (2010), available at [http://www.conseil-État.fr/media/document/rapport\\_public\\_2010.pdf](http://www.conseil-État.fr/media/document/rapport_public_2010.pdf) [hereinafter RAPPORT PUBLIC 2010].

<sup>50</sup> The steps in the process are presented in Jean Massot, *Legislative Drafting in France: The Role of the Conseil d’État*, 22 STATUTE L. REV. 96 (2001).

<sup>51</sup> During most of the nineteenth century, the system of *justice retenue* prevailed, meaning that the ultimate say in administrative disputes belonged to the head of State. An 1872 law gave the Conseil d’État final authority to resolve all administrative disputes. See Lindseth, *Always Embedded*, *supra* note 12; CHEVALLIER, PRINCIPE DE SÉPARATION, *supra* note 12, at 109.

<sup>52</sup> The ENA is the primary avenue of entry into the French high civil service. See generally George Vernardakis, *The National School of Administration: Training for the Higher Levels of the French Civil Service*, 12 INT’L J. PUB. ADMIN. 563 (1989). ENA was established after the Second World War to replace the previous elites, thought to be responsible for the defeat and the collapse of the country during the war. A similar effort to replace previous elites occurred after France’s 1870 defeat by Prussia and led to the creation of Sciences Po in an effort to establish new elites faithful to the newly established Republic after the collapse of the Second Empire (1852–1870). See generally Jean-François Kesler, *La ‘première’ école nationale d’administration*, 108 REVUE FRANÇAISE D’ADMINISTRATION PUBLIQUE 543 (2004). To enter the Conseil d’État, two avenues are available: One must be either (1) a top graduate of the ENA or (2) nominated at the *tour extérieur*, which is a political nomination. It brings into the institution people from the civil society or from other administrations. On the whole, 80 percent of the Conseil d’État is made up of ENA graduates. See BRUNO LATOUR, *LA FABRIQUE DU DROIT: UNE ETHNOGRAPHIE DU CONSEIL D’ÉTAT* 124 (2004). Only eighty French candidates are admitted to ENA each year. For the statistics, see *Combien de candidats au concours?*, ÉCOLE NATIONALE D’ADMINISTRATION, <http://www.ena.fr/index.php?/fr/institution/ena-chiffres/candidats-concours> (last visited Apr. 12, 2013).

<sup>53</sup> Falcone, *supra* note 48, at 99.



many know there is a dual court system, and even if they do, few may have an opinion on the quality of administrative justice.<sup>54</sup>

The members of the Conseil d'État have careers distinct from most civil and criminal judges. Of the approximately 300 members of the Conseil d'État, about one-third are seconded outside the Palais Royal, the seat of the Conseil, at any time.<sup>55</sup> Although its members are formally appointed by the Council of Ministers under the Constitution, these are lifetime appointments that transcend political shifts in government.<sup>56</sup> They serve in ministries and other public positions, and many now spend time in the private sector, reflecting the privatization of many formerly public entities. In the course of a career as a Counselor of State, a member will have hands-on government experience where he or she is likely to wield considerable influence, even relative to political appointees. They are trained at ENA and in the Conseil to draft documents in "legal language" (*légistique*) that will withstand future scrutiny by the Conseil and the administrative courts.

There is almost always at least one member serving on the Conseil Constitutionnel, and since its creation, the General Reporter for the Conseil Constitutionnel has been a member of the Conseil d'État with only one exception. Bruno Latour estimates that on average members spend 40 percent of their time outside the Conseil d'État.<sup>57</sup> To the extent that members are associated with points on the political spectrum, a counter-weight seems to be at work. When conservatives come to power, they tend to bring in members of the Conseil from that end of the spectrum into the government and vice versa for a left-of-center government.<sup>58</sup>

*Advice:* Law and policy ought to interact most clearly when the Conseil gives advice to the Government. Unfortunately, details on the nature and quality of Conseil d'État advice are not generally available for public critique. Its advice has traditionally remained secret unless the Government chooses to release it. However, recent Governments have, in practice, permitted more of these documents to be made public. They are published in the annual report of the Conseil d'État, and the most important are selected and commented on in the *Grands Avis du Conseil d'État*.<sup>59</sup> Nevertheless, Government control over their release obviously produces a biased sample of *avis* consistent with the Government's priorities.

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<sup>54</sup> See Katia Weidenfeld, *La perception de la justice administrative par les Français: Le reflet abstrait d'une réalité ignorée*, 31 LETTRE DE LA MISSION DE RECHERCHE DROIT ET JUSTICE 12 (2009), available at <http://www.gip-recherche-justice.fr/IMG/pdf/RDJ31-2.pdf>.

<sup>55</sup> Because of the prestige associated with being a member of the Conseil d'État, those who qualify treat it as a life-long credential, whether or not they are serving in the Palais Royal, seat of the Conseil, or working elsewhere. References to the Conseil d'État in this essay refer to the judicial (*contentieux*) and consultative work of the Conseil. The percent of members of the CE working outside the Court went from 24% in 1986 to 36% in 1996. See LATOUR, *supra* note 52, at 125.

<sup>56</sup> French civil service law provides this job security to members of the Conseil. See Massot, *Powers and Duties*, *supra* note 46, at 416.

<sup>57</sup> See LATOUR, *supra* note 52, at 131.

<sup>58</sup> See *id.* at 123-24.

<sup>59</sup> There are two kinds of "advice" (*avis*). Some concern draft government measures; others are given after a referral by an inferior court—e.g., a first instance administrative court. See generally LES GRANDS AVIS DU CONSEIL D'ÉTAT (Yves Gaudemet et al. eds., 3d ed. 2008) [hereinafter LES GRANDS AVIS].

Examination of some published *avis* reveals some features of Conseil d'État review.<sup>60</sup> The Conseil claims to be neutral on the substance of policy, and the publicly available *avis* seldom represent in-depth policy analyses. Their form is strikingly similar to that of decided cases; they are usually quite short, two or three pages, concentrate on formal legality, and include lists of legal sources and answers to questions posed by the administration. Some of these questions deal with policy, but the Conseil has neither the time nor the expertise to provide in-depth analyses. They do not confront the functional efficacy of the proposed government actions. However, the Conseil d'État does sometimes reach the merits of a proposal in answering the government's questions. The Conseil pays particular attention to the quality of drafting. Rules and statutes must be drafted in a clear and precise manner and must avoid ambiguous terms.<sup>61</sup> The nature of the advice suggests that excesses of both praise and blame are misdirected. It also suggests that making the *avis* public would be unlikely to cause much of a political backlash and could help increase the legitimacy both of the Conseil and of Government policymakers.

*Dual Roles:* The Conseil d'État originated inside the administration and the government; yet it is currently both an advisor to the government and a court that judges the legality of government actions.<sup>62</sup> These dual roles have caused tensions with European institutions, especially the European Court of Human Rights. The ECtHR has criticized conseils d'état in several European countries for their lack of independence from governments.<sup>63</sup> It has interpreted article 6 of the European Code of Human Rights under the common law "theory of appearances" ("Justice must not only be done but be seen to be done") to condemn any appearance of bias.<sup>64</sup> To counter this criticism, two French rules govern cases that challenge the legality of a

<sup>60</sup> See Assemblée Générale (Section des travaux publics), Avis no. 362.908, Sept. 16, 1999, available at <http://www.conseil-État.fr/media/document//avis/362908.pdf> (Fr.); Transfert de Marchés Publics et Délégation du Service Public, Avis no. 364.803, Jun. 8, 2000 (Fr.), available at <http://www.marche-public.fr/Marches-publics/Textes/Jurisprudence/CE-avis-364803--cession-marches-dsp.pdf>; Liberté syndicale Conditions d'exercice du droit syndical, Avis no. 359.702, Sept. 26, 1996 (Fr.), available at <http://www.conseil-etat.fr/media/document//avis/362908.pdf>.

<sup>61</sup> See LES GRANDS AVIS, *supra* note 59, at 39.

<sup>62</sup> We only discuss judicial review here. The Conseil d'État also hears claims in tort (when the government or a public body causes damages), and disputes over public contracts and public property. See BROWN, BELL, & GALABERT, *supra* note 37.

<sup>63</sup> The ECtHR ruled on the issue of the combination of functions inside the Conseil d'État of Luxembourg and its compatibility with the right to a fair trial under ECHR art. 6 in *Procola v. Luxembourg*, 326 Eur. Ct. H.R. (ser. A) (1995). See also *Kleyn v. The Netherlands*, App. Nos. 39343/98, 39651/98, 43147/98 & 46664/99, 2003-VI Eur. Ct. H.R. 185 (2003) (indicating that the ECtHR objects to judges adjudicating a case where they have previously given their opinion on a legal text on the same issue). Since a 1996 reform, spurred by the ECtHR decision, the Luxembourg Conseil d'État has had a purely advisory role. See M. Biever, *Organisation et composition du Conseil d'État luxembourgeois*, (Spécial) 4 LA REVUE ADMINISTRATIVE 22 (1999).

<sup>64</sup> ECHR art. 6 has had further consequences on the Conseil d'État within its *contentieux* or judicial mandate. The most important concerned the *Commissaire du gouvernement* (Government Commissioner), who gave opinions on an independent basis on the legality of the law. The problem was that this person also sat during the judging phase. See LASSER, *supra* note 22, at 90–93. Subsequently, under pressure from Strasbourg, these officials no longer sit on judicial panels of the Conseil d'État, and the name of the office was changed to *Rapporteur public* (Public Reporter) by the decree n° 2009–14 of 7 January 2009 [JORF n°6 OF 8 JANUARY 2009 P. 479]. This strengthened separation of roles only applies to the Conseil d'État as the highest court of appeal; it does not apply at the lower level of the administrative court system. See J.-C. BONICHOT ET AL., LES GRANDS ARRÊTS DU CONTENTIEUX ADMINISTRATIF 23 (3d ed. 2011).

decree or law already reviewed by the Conseil in its advisory capacity. First, judges who have previously studied and given their opinion on a norm must recuse themselves. Second, in the past the prior advice given by the Conseil d'État was confidential and was not available to the parties or the judges. A 2008 change now provides the full opinion and the file to the parties, and they are discussed openly before the judge.<sup>65</sup>

In spite of these efforts, the Conseil d'État's fundamental structural ambiguity has led some critics to claim that it is merely a guardian of executive power. A traditional critique holds that the Conseil is too close to the apparatus of governing to be an impartial judge.<sup>66</sup> But others contest this, claiming that the Conseil is an effective check on the executive by a body that understands how the administration works. A 1963 reform requires all active members to be part of both the advisory and the litigation section.<sup>67</sup>

*Judicial Function:* The administrative court system receives a large number of cases because it imposes few standing requirements beyond germaneness and interest.<sup>68</sup> In 2011 the Conseil d'État rendered 10,827 decisions, and the entire administrative court system made 232,840 decisions.<sup>69</sup> So long as the plaintiff is able to present a case competently, the administrative tribunals are not concerned with the degree of individualized harm. Thus, simply in terms of access, the Conseil d'État could act as a stronger guardian of the democratic legitimacy of the state than could US courts, where standing is tied claims of individual harm.<sup>70</sup> In addition, the Conseil d'État's specialization on administrative and public law matters could also make it a more effective check compared with the U.S. courts with their general jurisdiction. Of course, if it did expand the grounds for review, caseload pressures could persuade it to limit standing and jurisdiction. The solution of the U.S. courts is, however, not a positive model. If one justifies judicial review as a check on the democratic legitimacy and competence of the administration, the limits imposed by

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<sup>65</sup> See LES GRANDS AVIS, *supra* note 59, at 51. As a matter of practice, the Conseil d'État has always sought to prevent a member of the Council from sitting on a case if she or he had been previously involved in giving advice on the impugned rule. This rule is now written in the code of administrative justice. See CODE ADMINISTRATIF [C. ADM.] art. R122-21. However, giving the parties access to the prior advice proved to be more contentious.

<sup>66</sup> See MESTRE, *supra* note 13. For an inside look at the Conseil d'État and the impact of members' ties on the day-to-day work of the Conseil, see the "ethnography of the Conseil d'État" by LATOUR, *supra* note 52, at 38.

<sup>67</sup> See DANIELE LOCHAK, LE RÔLE POLITIQUE DU JUGE ADMINISTRATIF FRANÇAIS 60 (1972).

<sup>68</sup> MASSOT, *Powers and Duties*, *supra* note 46, at 420–21. The law on standing dates back to the early twentieth century and is tailored so as to vindicate legality (*i.e.*, *recours pour excès de pouvoir*). See also Burchett, *supra* note 48, at 981 (noting that the right of review under French administrative law extends beyond the person affected so that an appeal is possible for every administrative decision in order to test its legality).

<sup>69</sup> CONSEIL D'ÉTAT, 1 RAPPORT PUBLIC: ACTIVITÉ JURIDICTIONNELLE ET CONSULTATIVE DES JURIDICTIONS ADMINISTRATIVES 21 (2012), available at <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/124000492/0000.pdf> [hereinafter RAPPORT PUBLIC 2012].

<sup>70</sup> The American law of standing is complex and contested. For an overview, see generally PETER L. STRAUS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES (2d. ed. 2002). See also generally Cass R. Sunstein, *What's Standing after Lujan?*, 91 MICH. L. REV. 163 (1992); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

U.S. standing law do not sort cases in a principled fashion. Furthermore, they are not linked to the nature of review once the courts have taken a case.<sup>71</sup>

In practice, most cases in the administrative courts involve individual claims of state overreaching and local government disputes. Many common French administrative law disputes would never arise in federal courts in the United States absent a constitutional law claim: for example, the taking of private property for public use.<sup>72</sup> The French courts' concern with local planning and infrastructure has created a body of law has no direct parallel in the United States, where most such disputes are the province of state and local judiciaries.

France has no administrative law code, but the case law of the Conseil d'État provides an ongoing framework for public law. In this sense, French administrative law is judge-made law. Some general principles of public law and judicial review surface again and again in the case law.<sup>73</sup> The basis of judicial review is legality: he administrative judge has to decide only whether a decision is legal.<sup>74</sup> The grounds of review are numerous. They are usually classified into two groups: external legality, which concerns the jurisdiction of the decision-maker, the form of the complaint, and procedural violations; and internal legality, which concerns compliance with the law. The administrative judge reviews questions of law and fact using inquisitorial procedures. At first, the administrative judge enjoyed very blunt powers; he could only quash or sustain the impugned decision. Now, administrative courts have the power to issue injunctions that order the administration to implement the correct decision. The judge can review all aspects of the decision and determine the degree of discretion he or she will allow the administration in situations where statutes give the administration broad power to regulate a sector. The Conseil d'État never openly defers to the legal interpretations of the administration; questions of interpretation are always "under the review of the judge" (*sous le contrôle du juge*). However, depending upon the context and the degree of discretion Parliament has afforded the administration, review can be minimal (university examinations for example), normal, or maximal (for example, proportionality review when a freedom or a right is at stake).

Applying these principles in particular cases produces written judicial decisions that are usually quite concise. This economy of words is typical in civil law systems where the reasoning of the judge follows the traditional syllogism: the major premise (the legal rule) is confronted with the minor premise (the facts) in order to reach the conclusion. The court lists the relevant legal authorities, states the legal issues, and resolves them. If the Conseil quashes an administrative decision, it finds that it was illegal but does not usually articulate the options that remain open to officials. Sometimes when a decision is quashed, the legal alternative is clear, but frequently it

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<sup>71</sup> Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1284 (1994).

<sup>72</sup> See Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 VA. L. REV. 1435, 1491–92 (2000).

<sup>73</sup> For a list of the grounds for review, see JACOBINI, *supra* note 48, at 108–12. See also Burchett, *supra* note 48, at 980–82.

<sup>74</sup> In this sense, the French administrative law system is very Kelsenian in its vindication of the hierarchy of norms. Cf. M.D.A. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* 310 (8th ed. 2008); see also HANS KELSEN, *GENERAL THEORY OF NORMS* 257–65 (Michael Hartney trans., 1991).

is not. However, now that administrative judges have the power to issue injunctions, their practice may change. If they wish, they can go further to direct the administration to act in a particular way.

French public law has no decision comparable to the U.S. case *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.<sup>75</sup> In that case the United States Supreme Court stated that it would defer to an agency's interpretation of a statute if Congress had not directly spoken on the issue in question and if the agency's interpretation was "reasonable." The case involved rulemaking that took place under the notice and comment procedures of the Administrative Procedures Act requiring notice, a comment period, and reason-giving. A later case stated a less deferential standard for a policy that was made without notice and comment.<sup>76</sup> Although the exact import of *Chevron* remains contested, it stands for the proposition that agencies have some discretion to interpret the statutes under which they operate.<sup>77</sup> The French courts do not take this view, but one needs to notice a key difference. *Chevron* involved rulemaking. In France the processes used to promulgate secondary legislation are not generally subject to judicially reviewable requirements *ex post*. Presently, the Conseil, in its judicial capacity, may be becoming more willing to review policymaking processes.<sup>78</sup> Other than that, the only constitutional mandate is the requirement that draft decrees and ordinances must be submitted to the Conseil d'État *before* being issued.<sup>79</sup> The Conseil reviews these rules for legality *ex ante* in its advisory capacity, but it does not routinely publish its analyses. Furthermore, compared with the US, procedural violations have not played much of a role in the jurisprudence of the Conseil d'État when it reviews the legality of large projects. . This may, paradoxically, be because there is so much law at the administrative level. Because there are so many technical requirements that large projects must fulfill, mistakes are likely. If some technical requirements are hard to rationalize on functional grounds, they become merely symbolic with little practical effect.<sup>80</sup> The administrative courts take note of such mistakes but do not often halt public projects. Rather the officials correct the mistakes *ex post*, and the project goes ahead. However, the Conseil d'État can intervene if it judges that the procedural lapses could have affected the outcome. This is not merely an empty gesture. According to one member of that body, its review of the process of project approval can be summarized in a few simple principles: the Conseil checks to be sure that the decision maker was impartial, respected the calendar (the process was neither too long nor too short), provided information to the public, publicized the opinions

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<sup>75</sup> 467 U.S. 837 (1984).

<sup>76</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

<sup>77</sup> See generally Peter Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (1990); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998); William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

<sup>78</sup> See the discussion of CE, Ass., 23 décembre 2011, M.D. et autres, no. 335033, Recueil Lebon p. 649, *infra* note 199.

<sup>79</sup> The French Constitution states that the Conseil d'État must be consulted before the issuance of both regulations and ordinances. 1958 CONST. arts. 37, 38.

<sup>80</sup> Interview with Laurent Mermet, Professor of Political Science, École Nationale du Génie Rural, des Eaux et des Forêts, in Paris], France (October 28, 2011) [hereinafter Mermet Interview].

expressed, and managed a “fair” debate that respected the principle of proportionality.<sup>81</sup>

The definition of an “administrative act” subject to review includes secondary legislation.<sup>82</sup> However, when the Conseil reviews decrees and ordinances, the decisions usually provide little guidance on what represents good practice. The Conseil seldom reviews either the procedures used to promulgate decrees and ordinances, or the nature of the underlying evidence.<sup>83</sup> It does consider procedural irregularities (*vice de procédure*), but the cases usually involve individual adjudications and are decided in a highly formalistic manner. In the absence of a general code of administrative procedure, the Conseil d’État has not set forth procedural principles that apply to all secondary legislation.<sup>84</sup> However, certain statutes require particular procedures: for example, urban and regional planning, licenses for medical equipment, environmental policymaking.<sup>85</sup> The benefits for democratic legitimacy of more open and inclusive procedures across the board have not been a concern either in statutory and constitutional texts or in the case law of the Conseil d’État.

An iconic case from 1962 explicitly deals with process, but the case concerns criminal offenses tried in special military courts, not ordinary administrative decisions made in government ministries.<sup>86</sup> The Conseil d’État found an ordinance to be void on abuse of power grounds because the procedures violated the rights of the

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<sup>81</sup> Interview with Jacky Richard, Adjunct Head and General Reporter of the Section on Reports and Studies, Conseil d’État], in Paris, France (December 14, 2011) [hereinafter Richard Interview]. The definition of proportionality is open to debate, but the European Union seems to have settled on three broad principles. A measure must be suitable to obtain the desired objective, and necessary to achieve the objective in that no other measure is less restrictive of individual rights. Sometimes it is applied in the strict sense, meaning that the burden on the individual must not be disproportionate. For a detailed analysis, see PAUL CRAIG, *EU ADMINISTRATIVE LAW 655–715* (2006).

<sup>82</sup> Administrative acts subject to judicial review include all acts of public bodies. It is, therefore, primarily an institutional criterion that determines the Conseil’s jurisdiction. See PIERRE-LAURENT FRIER & JACQUES PETIT, *PRÉCIS DE DROIT ADMINISTRATIF 267* (2012).

<sup>83</sup> The administrative courts have had the power to issue injunctions since 1995. C. Maugué, *Les injonctions pour exécution de la chose jugée*, in *MÉLANGES EN L’HONNEUR DE DANIEL LABETOULLE 593* (2007). A recent development may give the Conseil d’État greater leeway to affect the administrative process. Since 1995, the administrative courts have had the power to issue injunctions to reinforce the *res judicata* effect of their decisions, and they can give clear directions to the administration. In the past, without injunctive power, construction on a disputed project could continue. In one notorious case, the administrative courts ruled negatively in November 1988 on plans to build the bridge to l’Île de Ré after construction was completed, and the bridge opened in May 1988. The project’s promoters obtained a *déclaration d’utilité publique*, which was challenged in court; however, when the trial that nullified the permit was held, the works were so far advanced that the bridge was protected from destruction because of its public utility. The bridge and the controversy are described at *Pont de l’île de Ré*, WIKIPEDIA, [http://fr.wikipedia.org/wiki/Pont\\_de\\_l'île\\_de\\_Ré](http://fr.wikipedia.org/wiki/Pont_de_l'île_de_Ré) (last visited Apr. 12, 2013). Laurent Mermet provided further information on this case.

<sup>84</sup> The Conseil d’État has developed abundant jurisprudence on procedural rules that apply to adjudications and especially to sanctions.

<sup>85</sup> For planning procedures, see, e.g., *CODE DE L’URBANISME*, available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074075>. For environmental policy-making, see, e.g., *CODE DE L’ENVIRONNEMENT*, available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074220>.

<sup>86</sup> CE Ass., N° 58502, 19 octobre 1962, *Canal, Robin et Godot*, *Recueil Lebon p. 552*.

accused. The procedural violations did not relate to the democratic legitimacy of the procedures, which in fact had been approved by a referendum.<sup>87</sup>

Two other cases indicate that the Conseil d'État will sometimes provide in-depth review of government rules on substantive grounds. One case required the state to act under an EU directive; it held that silence or inaction by the minister could be an abuse of power just as much as action. Again, the opinion does not deal with the administrative process.<sup>88</sup> The second case was a quite aggressive review of a substantive rule that set doctors' fees, but the Conseil did not examine the process.<sup>89</sup> The case turned on an interpretation of the principle of equality.<sup>90</sup> The decision takes on the substantive merit of a policy in a fairly functional way even if the ground is the familiar one of abuse of power.

The Conseil, however, does take procedures into account if they have been mandated in a statute. The cases, however, do not deal with public participation or Impact Assessment. In one case from 2003 the Conseil held that a government body that interferes with rights must give reasons based on actual cost calculations.<sup>91</sup> In a second case, from 2006, the Conseil d'État accepts the privatization of highway building companies, in part, because the executive sought and acted on advice from impartial experts.<sup>92</sup> The national Commission on Privatization evaluated the privatization decree. The Conseil accepted its judgment even though the first advice given by the Commission was not made public.<sup>93</sup> These cases, among others, imply that the Conseil will require either fact-based reasoning or reliance on expert bodies before it approves an executive policy choice, especially if rights are at stake.<sup>94</sup>

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<sup>87</sup> This case is conventionally presented as an example of the Conseil d'État's independence. The Evian Treaty put an end to the Algerian war for independence. In the Treaty, ratified by a referendum, the government was empowered to establish a Military Court of Justice to try the authors of offenses during the war, who were mainly French Algerians. The ordinance was quashed because it did not give defendants the right to a review of their cases. After that, General de Gaulle, then President, considered abolishing the Conseil d'État.

<sup>88</sup> CE Ass., Feb. 3 1989, Rec. Lebon 44.

<sup>89</sup> CE Ass., July 16, 2007, No. 293229. See also Marie-Christine de Montecler, *Redéfinition des règles de calcul des redevances pour service rendu*, 27 L'ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF 1439 (2007); Julien Boucher & Béatrice Bourgeois-Machureau, *Redevances pour service rendu : l'assouplissement de la règle du plafonnement par le coût*, 33 L'ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF 1807 (2007); Laurent Richer, *L'hédonisme au Conseil d'Etat*, 38 L'ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF 2057 (2007).

<sup>90</sup> French judges use a number of "general principles of the law" to resolve cases. Besides equality, others principles include, *inter alia*, liberty (freedom of trade), security (right to judicial review; right to administrative appeal; natural justice; bias; non-retroactivity; obligation to revoke an illegal act; right to live a normal life), respect for the dead (for a doctor's ethical obligations), and the continuity of public services. See LASSER *supra* note 22, at 249; see also RENÉ CHAPUS, DROIT ADMINISTRATIF GÉNÉRAL 94 (15th ed. 2001). The administration cannot ignore these binding principles. Parliament, however, is free to override them.

<sup>91</sup> CE, Mar. 21, 2003, No. 189191, Recueil Lebon p. 144 (concerning a 1997 decree of the Prime Minister that set fees for firms laying cables or wires or building antennas and pylons along public rights-of-way near roads and highways).

<sup>92</sup> CE Sect., Sept. 27, 2006, No. 290716, Recueil Lebon p. 404 (dealing with challenges to decrees that led to the privatization of companies that constructed and operated highways).

<sup>93</sup> The Commission is now called the Commission on Participations and Transfers.

<sup>94</sup> For further examples, see cases in the field of competition law dealing with industrial competition. On the intensity of review in the competition field, see Marie Picard, *Contentieux de la concurrence*, in ENCYCLOPÉDIE DALLOZ: RÉPERTOIRE DE CONTENTIEUX ADMINISTRATIF (2012).

Evidently, the Conseil sees no principled bar to considering administrative procedures and could, as we urge, act to encourage more open and participatory processes. At this point, its response to procedural challenges has been rather ad hoc, but it could develop legal doctrine here. However, the most likely response of the Conseil will be to support legislative or constitutional developments, but not reach out on its own to establish procedural rights.<sup>95</sup>

Since the beginning of the twentieth century, the Conseil d'État has seen itself as a guardian of legality and the public interest both at the policymaking stage and ex post when the law is implemented. The landmark cases on judicial review, dating back to the end of the nineteenth century, reviewed administrative actions ex post on purely legal grounds.<sup>96</sup> Judicial and advisory review on public interest grounds was more contested. First of all, the Conseil's competence in this role is difficult to judge because one can review only a subset of its advisory opinions and because it explicitly rejects a policymaking role. Second, the Conseil claims not to defer to the administration's interpretation of the law but rather to control for legality. Thus, its definition of "legality" is an essential element of its decisions. How far will the Conseil go in reviewing the quality of information, the credentials of expert bodies, and the use that the Government makes of that advice? So far, decisions based on procedure have not produced clear jurisprudence that could guide the administration. The Conseil may uphold a decree because experts were consulted, but it has not examined the nature of the expertise. It has also not ruled on the nature and role of impact assessment or other forms of public policy analysis.

Recent developments suggest some change in focus. Outside the realm of case law, the Conseil's 2010 Annual Report reflected the importance of public participation, especially under the Charter of the Environment, a document with constitutional status,<sup>97</sup> and the 2011 Annual Report discusses the value of public participation and how it might be managed.<sup>98</sup> A 2012 decision voided a decree on procedural grounds,<sup>99</sup> and the Conseil d'État is debating the pros and cons of a codified Administrative Procedures Act, although the members apparently disagree on whether their own broad principles should, in fact, be codified into statute.<sup>100</sup>

## 2. The Conseil Constitutionnel: The Beginning of Ex Post Rights Review

The French Conseil Constitutionnel has two distinct competences. In the United States the Supreme Court can only review the constitutionality of a statute after its passage and promulgation. In contrast, the Conseil Constitutionnel can review

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<sup>95</sup> For the Conseil d'État's own discussion of these issues, see generally CONSEIL D'ÉTAT, RAPPORT PUBLIC: CONSULTER AUTREMENT, PARTICIPER EFFECTIVEMENT (2011) [hereinafter CONSULTER AUTREMENT].

<sup>96</sup> Édouard Laferrière, the author of the first treatise on administrative litigation, defined judicial review as the trial against an act, decision, or adjudication. ÉDOUARD LAFERRIÈRE, TRAITÉ DE LA JURIDICTION ADMINISTRATIVE ET DES RECOURS CONTENTIEUX 561 (2d ed. 1896).

<sup>97</sup> CONSEIL D'ÉTAT, RAPPORT PUBLIC 2010, *supra* note 49.

<sup>98</sup> CONSEIL D'ÉTAT, CONSULTER AUTREMENT, *supra* note 95.

<sup>99</sup> See *infra* Part V.

<sup>100</sup> Interviews with Olivier Schrameck, Head of the Section of Reports and Studies, Conseil d'État, Paris, France (October 18, 2011), and Richard, *supra* note 81; Interview with Jean-Bernard Auby, Professor of Public Law, Sciences Po, Paris, France (November 15, 2011).



statutes after passage but before promulgation. This type of review was created at the beginning of the Fifth Republic in 1958. It can only be instigated by a request from a select group of political actors, a group that, after a 1974 amendment, now includes elected opposition politicians.<sup>101</sup>

The Conseil Constitutionnel recently obtained expanded powers. As a result of a 2008 constitutional amendment, both the Cour de Cassation and the Conseil d'État can now refer cases involving constitutional rights to the Conseil Constitutionnel. Under these so-called QPCs [*questions prioritaires de constitutionnalité*],<sup>102</sup> certain constitutional issues that arise in the other high courts can now be passed on to the Conseil Constitutionnel at the discretion of those courts.<sup>103</sup>

In the past, once a law had been promulgated, the Conseil Constitutionnel played no further role, and no one could challenge a law on the books under domestic law. Statutory interpretation was left to the Conseil d'État and the Cour de Cassation. These courts might take the constitution into account in interpreting legal texts, but they could not declare a law void on constitutional grounds.<sup>104</sup> The lack of ex post review contributed to *sécurité juridique*: once a law was passed it was impossible to question its legality. Under this doctrine, Parliament ought not to enact provisions that change the established legal order unless it could articulate a sufficient and legitimate public interest.<sup>105</sup> Courts similarly were not to reach out to overturn or reinterpret statutes.<sup>106</sup> If the Constitution was changed or amended, all existing laws would remain in force unless explicitly repealed by statute or by the unambiguous wording of the constitutional text. Obviously, the downside of *sécurité juridique* is that laws that are arguably incompatible with the current constitutional text remain in force unless they are explicitly repealed. This is true both for old laws and for newer mandates that were not subject to ex ante, abstract review.

The introduction of QPCs addressed the persistence of potentially unconstitutional statutes by permitting both the Conseil d'État and the Cour de Cassation to refer questions dealing with the violation of constitutional rights to the Conseil Constitutionnel if it had not already judged the text constitutional during the

<sup>101</sup> Some acts and rules must be reviewed before promulgation. 1958 CONST. art. 61 (Fr.). The 1974 amendments gave the right to refer a bill to 60 Deputies or 60 Senators thus giving the opposition a route to challenge laws before they went into effect. *Id.*

<sup>102</sup> The phrase is translated as "Priority Preliminary Ruling on the Issue of Constitutionality," but this seems odd given that a ruling by the CC is definitive, not preliminary. It is not clear why the more natural English translation: "A Question of the Priority of the Constitution" (over ordinary law) was not adopted. See generally *La question prioritaire de constitutionnalité (QPC)*, CONSEIL CONSTITUTIONNEL, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-question-prioritaire-de-constitutionnalite/la-question-prioritaire-de-constitutionnalite-qpc.47106.html> (last visited Apr. 13, 2013).

<sup>103</sup> 1958 Constitution, art. 61.

<sup>104</sup> See, e.g., CE [Ass.], Oct. 3, 2008, No. 297931, Recueil Lebon p. 322 (holding that environmental affairs had to be governed by statutory law setting out the regulatory framework). See the "Commentaire aux cahiers" *supra*. See Conseil d'État, 12 janvier 2009, Association France Nature Environnement, n° 289080.

<sup>105</sup> This is a doctrine of good practice, not an enforceable legal obligation.

<sup>106</sup> The problem arose during the French Revolution. In an attempt to curtail the power of judges who were hostile to the Revolution, a mechanism called *référé législatif* was created, where, if a question of statutory interpretation was raised during a trial, the question had to be referred to Parliament. This system did not last, and before long statutory interpretation was left to the two supreme courts.

legislative process.<sup>107</sup> It was, in part, a response to the aggressive review of rights provided by the ECtHR, whose decisions posed challenges to French law.

A framework statute implemented these amendments, and on March 1, 2010 the Conseil Constitutionnel began to accept QPCs. Referrals are discretionary; each high court can have the last word by stating that no constitutional controversy exists.<sup>108</sup> In practice, both courts have made numerous referrals, increasing the caseload of the Conseil and its importance to French law. The Conseil d'État and the lower administrative tribunals received 2077 QPCs from March 2010 to September 2012. Of these, 655 came before the Conseil d'État, by the end of October 2012, and it referred 146 to the Conseil Constitutionnel or 22.3% of the total. The Conseil Constitutionnel had decided 251 QPC cases by the middle of January 2013. Of the cases referred by the Conseil d'État, the Conseil Constitutionnel found about 25 percent at least partially unconstitutional. Other laws were held in conformity with the constitution but with reservations. These figures suggest that the administrative courts have been doing a relatively good job of filtering out trivial cases.<sup>109</sup>

The introduction of the QPC is likely to affect the role of the French courts in reviewing the administrative process, including public participation. The Conseil only reviews legislation under a QPC if the act affects rights and freedoms guaranteed by the Constitution; it does not consider purely procedural violations of the legislative or administrative process.<sup>110</sup> Recent case law suggests that the Council may be willing to give a fairly expansive interpretation to its constitutional mandate.

<sup>107</sup> Before the introduction of QPCs, the Constitutional Council reviewed proposed statutes for violations of rights. In a famous case dealing with the freedom of association (*liberté d'association*), the Council took an expansive view of constitutional rights that went beyond the text of the 1958 Constitution to include the text of the 1789 Declaration of the Rights and the Preamble to the 1946 Constitution. Conseil constitutionnel [CC] [Constitutional Court] decision No. 71-44DC, July 16, 1971, Rec. 29. It read the open-ended language of the Preamble to include a right to freedom of association. *Id.* The case is discussed in Sophie Boyron, *Constitutional Law*, in PRINCIPLES OF FRENCH LAW 145, 162 (J.S. Bell et al. eds., 2008).

<sup>108</sup> Under law 2009-1523 the issue must be important, and the Conseil Constitutionnel must not have already ruled on the issue. Loi 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution [Law 2009-1523 of December 10, 2009 on the application of Article 61-1 of the Constitution], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 10, 2009, p. 21379.

<sup>109</sup> The material cited here is available from the websites of the three courts: *Le Conseil d'Etat et la Juridiction Administrative*, CONSEIL D'ÉTAT (Feb 12, 2013), <http://www.conseil-etat.fr/fr/dossiers-thematiques/question-prioritaire-de-constitutionnalite-un-nouveau-droit-pour-les-kn2.html>; *Le Décisions QPC*, CONSEIL CONSTITUTIONNEL (Feb. 12, 2013), <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-type/les-decisions-qpc.48300.html>; *Questions prioritaires de constitutionnalité*, COUR DE CASSATION (Feb. 12, 2013), [http://www.courdecassation.fr/jurisprudence\\_2/questions\\_prioritaires\\_constitutionnalite\\_3396](http://www.courdecassation.fr/jurisprudence_2/questions_prioritaires_constitutionnalite_3396). See also Jean-Marc Sauve, Vice President, Conseil d'État, *Bilan de la question prioritaire de constitutionnalité* [Review of the issue of constitutionality], Presentation to the Commission des lois de l'Assemblée nationale (Nov. 21, 2012), available at <http://www.conseil-etat.fr/media/document/DISOURS%20ET%20INTERVENTIONS/bilan-de-la-qpc.pdf>.

<sup>110</sup> See 1958 CONST. 61-1; CE, QPC, July 9, 2010, No. 337320, (recommending referral to the CC under a QPC). See also Bertrand du Marais, *Etablissements Publics: La Légalité de la charte de nommage internet remise anen question*, 274-275 GAZETTE DU PALAIS 45-47 (2010); Conseil Constitutionnel [CC] decision No. 2010-5QPC, Jun. 18, 2010, Rec. [114] (Fr.), available at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/en20105qpc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/en20105qpc.pdf) ("La méconnaissance par le législateur de sa propre compétence ne peut être invoquée à l'appui d'une QPC que dans le cas où est affecté un droit ou une liberté que la Constitution garantit.").

Nevertheless, its opportunity to review administrative rulemaking procedures, as opposed to individual decisions, is likely to remain fairly limited.

The final set of institutional pressures on French public law comes from European institutions and legal developments. In practice, it is difficult to know how much of the impetus for change originates from internal as compared to external influences. However, it is clear that the European Union and the European Court of Human Rights are both key actors in the French public law landscape.

### C. *European Law and Institutions: Challenges to French Legal Sovereignty*

European law is of particular importance to developments in French administrative law, not only because it has become very extensive, but also because domestic courts are its primary enforcers.<sup>111</sup> After a period of reluctance, the Conseil d'État has become pro-European.<sup>112</sup> Both the Conseil d'État<sup>113</sup> and the Cour de Cassation<sup>114</sup> have held that EU and ECHR law are superior to French statutory law.<sup>115</sup> They enforce EU law in the French courts. French public law, in spite of its long history and deep involvement with French republican traditions, has been deeply affected by these external influences.<sup>116</sup> What makes modern developments especially interesting is the extent to which public law developments are a response to the activities of French civil society and other interest groups, rather than just a reaction to EU and ECtHR mandates. The jurisprudence of the European bodies, however, provides another layer of protection to the citizen. Those who challenge the legality of an administrative decision, decree, or ordinance can claim that it is contrary to statute, violates the Constitution, or is inconsistent with EU law or the ECHR.

EU law is framed by a paradox. On the one hand, the doctrine of subsidiarity implies that Member States should be responsible for the implementation of EU law, but on the other hand, harmonization of EU law across Europe requires the Commission and the ECJ to curtail Member States' discretion. EU law requires national regulatory agencies to be independent if the State is a player in the market.

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<sup>111</sup> As the ECJ put it: "The EEC Treaty has created its own legal system which . . . became an integral part of the legal systems of the Member-States." Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhrund Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1134; Opinion of Advocate General Reischl, Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 15 COMMON MKT. L. REV. 479, 480-81 (1978). See also PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXT, CASES, AND MATERIALS* 344 (2008).

We use the term European Union (EU) to refer to both the present day EU, established by the Treaty of Lisbon and to its predecessors called first the European Economic Community (EEC) and then the European Community (EC). These institutions are distinct from the European Court of Human Rights that was created by the Council of Europe and has a membership larger than the EU.

<sup>112</sup> LASSER, *supra* note 22, at 64.

<sup>113</sup> See *Analysis of October 20, 1989—Nicolo, Conseil d'Etat decision: Superiorite des traites sur les lois [Superiority of treaties over laws]*, CONSEIL D'ÉTAT, <http://www.conseil-etat.fr/fr/presentation-des-grands-arrets/20-octobre-1989-nicolo.html> (last visited Apr. 13, 2013). As is often the case with the Conseil d'État, departures from previous case law are not easy to spot.

<sup>114</sup> See Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] ch. mixte, May 24, 1975, Bull. civ. 4, p.6, No. 73-13.556.

<sup>115</sup> See also 1958 CONST. art. 88-1 (giving constitutional status to EU law).

<sup>116</sup> See LASSER, *supra* note 22, for a study of the extent of this influence across all areas of French law.

The ECJ has held that a government body that owns and operates a public utility ought not to have the power to make rules that govern the industry where the utility operates. Otherwise it could be guilty of an abuse of its dominant position.<sup>117</sup> As a result, Member States have created many independent agencies to implement EU liberalization directives. This is the case for example, for public utilities, such as energy, electronic communications, mail, and rail. The principle of subsidiarity conflicts with the policy of increasing the competitiveness of markets, and in these cases market competition trumps other values.

These agencies are beginning to establish networks for coherent implementation of EU law in the new European administrative space.<sup>118</sup> In implementing EU directives, agencies refer both to EU law and to the principles of “better regulation” espoused by the OECD and the European Commission.<sup>119</sup> Often, EU directives contain provisions inspired by “better regulation” principles, requiring transparency and the participation of stakeholders, for example.<sup>120</sup> Agencies are at the forefront of better regulation practices in the Member States. They often have more freedom to innovate than do cabinet departments.

The pressures for regulatory reform in environmental policymaking come from a different direction. International law has supported the push towards more participation in environmental regulation: Principle 19 of the Stockholm Declaration (1972), the World Charter for Nature of 1982, and the Rio Declaration on Environment and Development of 1992 all proclaimed a right to education and participation in the field of the environment. But these instruments had no legal force. The Aarhus Convention, however, is a treaty that links the right to environmental quality with procedural rights. Its provisions are designed to enhance public input in environmental policymaking processes at the national level, but the legislative process is not covered by its provisions. Its enforcement body is the Aarhus Convention Compliance Committee, but it only issues recommendations, not binding decisions. France must file reports with the treaty’s secretariat at the UN Commission for Europe. Environmental groups can then file critiques, which may embarrass the government.<sup>121</sup> European Directives are pushing towards more

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<sup>117</sup> See Case 41/83, *Italy v. Comm’n*, 1985 E.C.R. 880. See also Case C-202/88, *France v. Comm’n*, 28 COMMON MKT. L. REV. 964–72 (1991).

<sup>118</sup> On networks agencies in the EU, see generally, e.g., Damien Geradin & Nicolas Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*, 23 Y.B. EUR. L. 137–97 (2004); Giandomenico Majone, *The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union*, 3 EIPASCOPE 9 (1997); Edoardo Chiti, *The Emergence of a Community Administration: The Case of European Agencies*, 37 COMMON MKT. L. REV. 309 (2000).

<sup>119</sup> The European Commission has developed a strong and established practice of consultation and participation. See *Participation and Policy*, in POLICY-MAKING IN THE EUROPEAN UNION 34 (Helen S. Wallace et al. eds., 6th ed. 2010).

<sup>120</sup> In the electronic communications sector, see, e.g., Parliament and Council Directive 2002/21, On a Common Regulatory Framework for Electronic Communications Networks and Services, art. 6, 2002 O.J. (L 108) 33 (EC) (“Consultation and transparency mechanism . . .”) [hereinafter Framework Directive].

<sup>121</sup> In cases against France, the Compliance Committee has been rather reticent. See, e.g., Julien Bétaille, *La contribution du droit aux effets de la participation du public: De la prise en considération des résultats de la participation*, 2 REVUE JURIDIQUE DE L’ENVIRONNEMENT 200 (2010) (discussing the case concerning the construction by the Marseille Provence Métropole Urban Community (CUMPM) of a center for processing waste by incineration at Fos-sur-Mer).

participation in environmental policymaking.<sup>122</sup> In order to implement the Aarhus Convention, the European Union has made participation a priority, and it has been an important source of new administrative practice in the environmental field. The Sixth Community Environment Action Program states that: “Full consideration shall be given to ensuring that the Community’s environmental policy-making is undertaken . . . with an emphasis on . . . extensive dialogue with stakeholders, raising environmental awareness and public participation.”<sup>123</sup>

Outside of the specific areas of regulated industries and environmental protection, both the EU courts and the ECtHR might in the future increase their oversight of Member State regulatory processes. The Charter of Fundamental Rights in the 2009 Lisbon Treaty includes the right to good administration in article 41, but its focus is on the due process rights of individuals.<sup>124</sup> However, some interpret this new right as calling for more transparency in policy-making and more participation by stakeholders.<sup>125</sup> In addition, the EU courts’ case law already supports a broader view of “good administration” that encompasses policymaking processes and that applies to Member States as well as EU institutions.<sup>126</sup>

The ECHR is also relevant. Article 6 of the Convention gives a right to a fair trial to European citizens if their civil rights are affected or if they are subject to a criminal charge. On the surface, this seems to have nothing to do the procedures for promulgating general norms and rules. However, the ECtHR has defined civil rights and criminal charges quite broadly. It may view an administrative penalty as a criminal charge for the purpose of the Convention, and the withdrawal of a license (to drive a cab, for example) can be linked to a civil right. Thus, in such cases, agencies have to give the person the rights of a fair trial. In France, these rulings have fostered a functional separation inside agencies between those who decide and those who review decisions for their legality. The result is a structure similar to the U.S. Administrative Law Judge (ALJ) system that separates adjudication from other agency tasks. However, in the United States the agency head or the governing commission has the last word if it chooses to exercise its authority.<sup>127</sup> In many French agencies the power to adjudicate disputes and to inflict sanctions is separate from the power to regulate, and the head of the agency does not have the power to change the adjudicator’s decision.

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<sup>123</sup> See Parliament and Council Decision 1600/2002/EC, Laying down the Sixth Community Environment Action Programme, at § 3. OJEC, 10.9.2002, L 242/1.

<sup>124</sup> ECHR art. 41.

<sup>125</sup> See GEORGES DUPUIS ET AL., DROIT ADMINISTRATIF 26–27 (2010).

<sup>126</sup> See RITHA BOUSTA, LA NOTION DE BONNE ADMINISTRATION (2010); see also Joana Mendes, *Good Administration in EU Law and the European Code of Good Administrative Behaviour* (Eur. Univ. Inst., Working Paper No. 2009/09, 2009), available at [http://cadmus.eui.eu/bitstream/handle/1814/12101/LAW\\_2009\\_09.pdf?sequence=3](http://cadmus.eui.eu/bitstream/handle/1814/12101/LAW_2009_09.pdf?sequence=3).

<sup>127</sup> However, if the decision is appealed to the courts, they may require the agency to give weight to the ALJ’s decision. The iconic case here is *University Camera Corp. v. NLRB*, 340 U.S. 474 (1951). However, for disputes that arise in mass benefit programs the agency head only sets the parameters for individual decisions—a practice that has been heavily criticized. See *Heckler v. Campbell*, 461 U.S. 458 (1983) (permitting the Secretary of Health and Human Services to issue guidelines to govern eligibility for disability benefits).

With this introduction to the institutional structure and basic concepts of French and European administrative law, we turn to consider current challenges to traditional ways of mediating the state\ society interface in France, including pressures for more public involvement, the operation of independent regulatory agencies, and those urging more systematic policy analysis. These pressures occur, to some extent, outside the formal structures of administrative and constitutional law, but they have implications for the very meaning of public law in a republican democracy.

## II. POLICYMAKING PROCEDURES: PARTICIPATION AND ACCOUNTABILITY

Agitation for enhanced public participation and public accountability in France has come from civil society groups, many with an environmental focus. Mass demonstrations and other forms of direct action have a long history— it is even said to be a “national sport”<sup>128</sup> — and some of them have had a strong influence on policy. However, organized efforts to manage public debate are more recent. Public participation occurs during the process of statutory drafting and when policy is made inside the national executive, in the independent agencies, and at the regional and local levels. As with any procedural innovation, some question the real impact of the process, and others worry that more participation might be counter-productive. Are the processes simply symbolic charades with no real effect, or are they so effective that they slow down policymaking, undermine its coherence, and favor narrow interests? Without settling on a definitive answer to these difficult questions, we consider the tradeoffs through examination of the recent French experience, and we urge a more explicit debate over the value of more open and participatory policymaking in the executive and the agencies.

We begin at the local level with the venerable procedure of the public inquest, and then move up one step to large regional projects where participation is managed by the National Commission on Public Debate. Next we consider national consultations that have provided advice in a number of areas, most notably the environment. We contrast those efforts with grassroots procedures at the local level and finish by showing that consultation for secondary legislation has had limited impact so far although new initiatives may change the outlook.

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<sup>128</sup> See FRANK LEE WILSON, *INTEREST-GROUP POLITICS IN FRANCE* 174 (1987). A recent example of a national policy debate, not involving the CNDP that spurred such protests, is the controversy over a bill amending the civil code to legalize the marriage of same-sex couples. Between October 2012 and January 2013 the streets of Paris were constantly occupied by protests for or against “marriage for all.” On January 13, 2013, 340,000 persons—according to the police, 1 million according to the organizers—marched in Paris to protest against the proposal, arguing, among other things, that they were not heard by the government and that their opinions were not taken into account. After the protest, President Hollande met with the organizers to hear their views but also to reiterate the government’s determination to press for passage of the law. Two weeks later a counter-march, estimated at 125,000 people, supported the law. The bill has been accepted at the National Assembly and is currently being examined by the Senate. See Steven Erlanger, *Thousands Rally in Paris for Same-Sex Marriage*, N.Y. TIMES, Jan. 27, 2013, at A7.

### A. The Public Inquest

Traditional French law limited public input to the public inquest.<sup>129</sup> The *préfet*, who is the representative of the national government in each *département*, organizes the procedures.<sup>130</sup> The inquest's task is to inform the population about local and regional projects, both public and private, and to assist the *préfet* in making the final decision to approve or cancel a project. An inquest is compulsory for projects that will involve the taking of private property by eminent domain,<sup>131</sup> and it was expanded in 2011 to include projects that have an impact on the environment.<sup>132</sup> The process originated 150 to 200 years ago, but recently it has become more open and transparent. The recent changes are partly the result of EU pressure and due to environmental protests against big projects, such as nuclear plants or, more recently, the extraction of shale gas in undeveloped natural areas.<sup>133</sup>

The inquest occurs at the very end of the project planning cycle after a particular plan has been fully developed. The *préfet* appoints a single *Commissaire* or a small committee, selecting evaluators on the basis of recommendations from the President of the Regional Administrative Court. Those nominated are primarily high national civil servants, often with engineering backgrounds. A committee usually has two or three generalists and two or three specialists knowledgeable about the type of project at issue. Even if committee members are high civil servants, the selection process can be politicized because the ultimate selection is in the hands of the *préfet*, a political official.

The inquest evaluates whether or not the project is in the public interest. It is not a forum for balancing and debating multiple alternatives. The developer—whether the government, a local authority, or a private firm—prepares a dossier describing the project in detail and presents it to the *préfet*. Domestic law, reinforced by EU pressure for more transparency, requires environmental and social impact assessments.<sup>134</sup> As a result of recent reforms, the project must be presented in a nontechnical way that includes both an impact assessment (IA) financed by the developer and the opinion of the Ministry for Environment. The Ministry's opinion

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<sup>129</sup> The first law on public inquests dates from March 8, 1810, and simply allowed landowners to comment on proposed projects that involved the taking of land. See Xavier Dupré de Boulois, *Les actes administratifs unilatéraux*, in *TRAITÉ DE DROIT ADMINISTRATIF* 196 (Pascale Gonod et al. eds., 2011).

<sup>130</sup> Cécile Blatrix, *La démocratie participative en représentation*, in *74 SOCIÉTÉS CONTEMPORAINES* 97–119 (2009).

<sup>131</sup> See CODE DE L'EXPROPRIATION [C. EXPROP.] art. R11–4–14.

<sup>132</sup> See CODE DE L'ENVIRONNEMENT [C. ENV'T] art. L123–1. The provision was introduced by Loi 2010–788 du 12 juillet 2010 portant engagement national pour l'environnement [Law 2010–788 of 12 July 2010 on National Commitment to the Environment], J.O., Mar. 24, 2012, p. [12905].

<sup>133</sup> See Yves Jégouzo, *Principe et idéologie de la participation*, in *POR UN DROIT COMMUN DE L'ENVIRONNEMENT: MÉLANGES EN L'HONNEUR DE MICHEL PRIEUR* 577–78 (2007).

<sup>134</sup> Loi 76–629 du 10 juillet 1976 relative à la protection de la nature [Law 76–629 of 10 July 1976 on the Protection of the Environment], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 28, 1976, p. 4203 (providing for environmental impact assessments with a concern for private property rights); Loi 83–630 du 12 juillet 1983 relative à la démocratisation de l'enquête publique [Law 83–630 of 12 July 1983 on the Democratization of Public Inquiries and Environmental Protection], J.O., Jan. 1, 2001, p. 2156 (marking a significant step toward democratizing the process of public participation); Loi 2010–788 du 12 juillet 2010 portant engagement national pour l'environnement [Law 2010–788 of 12 July 2010 on National Commitment to the Environment], J.O., Mar. 24, 2012, p. 12905.

balances the influence of the IA, which may be biased because it is financed by the developer. The dossier is available for a fixed period of time in town halls and other places (and now sometimes on the Internet). Anyone who asks can obtain the whole dossier and can make comments, which must be submitted on paper at agreed locations so they can be “properly” recorded and added to the dossier. The Commissaire can also request the opinion of anyone with relevant information or expertise. The public’s observations are given more weight than before the 2011 reforms. First, the report of the inquest must mention how the public’s comments were taken into account; second, the Commissaire must communicate the public’s observations to the developer.<sup>135</sup> However, the public is only invited to comment on a particular proposal, not to engage in a debate on alternatives.<sup>136</sup> There are no formal provisions for debate and discussion.

Once comments are recorded and opinions heard, the inquest has three choices; to recommend that the project be approved, that it be abandoned, or that approval be conditioned on certain reservations. Its opinion must contain a statement of reasons to inform the préfet and the developer, but it need not respond to the public comments. In cancelling a project, the opinion cannot propose an entirely new project. This document is not automatically made public, but if there is litigation challenging the final decision, the opinion will become part of the public file. The inquest usually recommends approval of the project, and the préfet generally follows its recommendation, but it is not a rubber stamp. Project planners are likely to take account of the objections raised by the civil servants who typically serve on inquests. In recent years a number of projects have been rejected that would have had adverse environmental or social effects.<sup>137</sup> If such negative decisions begin to pose a significant risk to developers, planners can be expected to incorporate these values up-front.

After a favorable decision, a project can go ahead. However, opponents can bring a case before the administrative courts to have it quashed, and, at present, the courts can issue an injunction to put the project on hold while the court deliberates.<sup>138</sup> Such court cases provide another route for public input, but once

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<sup>135</sup> Décret n° 2011-2018 du 29 décembre 2011 portant réforme de l'enquête publique relative aux opérations susceptibles d'affecter l'environnement (JORF n°0302 du 30 décembre 2011 page 22692, texte n° 12); and Décret n° 2011-2021 du 29 décembre 2011 déterminant la liste des projets, plans et programmes devant faire l'objet d'une communication au public par voie électronique dans le cadre de l'expérimentation prévue au II de l'article L. 123-10 du code de l'environnement (JORF n°0302 du 30 décembre 2011 p. 22718, texte n° 15).

<sup>136</sup> Julien Bétaille, *La procédure de l'étude d'impact après la loi portant engagement national pour l'environnement : des insuffisances récurrentes*, (Spécial) REVUE JURIDIQUE DE L'ENVIRONNEMENT 241-51 (2010).

<sup>137</sup> Michel Prieur argues that the introduction in the 1970s of compulsory environmental impact assessments in the law—shortly after introduction of similar measures in the United States—has had a tremendous impact on administrative law and administrative decision-making in France. See MICHEL PRIEUR, *DROIT DE L'ENVIRONNEMENT* 91 (6th ed. 2011); see also Loi 76-629 du 10 juillet 1976 relative à la protection de la nature [Law 76-629 of 10 July 1976 on the Protection of the Environment], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 28, 1976, p. 4203.

<sup>138</sup> See Blatrix *supra* note 130, at § 30. After an inquest has approved a given project, environmental associations frequently appeal to the administrative courts to prevent the commencement of the project. Once domestic procedures are exhausted, a disappointed property owner may be able to bring a case before the ECtHR, but the remedy there is limited to compensation for lost property rights. As a



again the decision will be whether or not a particular project ought to go forward. Judicial processes are not the place for a broad functional analysis of the available alternatives.

In short, the inquest includes a form of public consultation which, since a 1983 reform,<sup>139</sup> has been open to all, but which does not include a public debate. The process is essentially a way for the national government to exert some control over spending priorities and economic development at the local and regional levels.

In recent years, many have criticized the public inquest as being too closed, too ineffective, and for coming too late in the policymaking process.<sup>140</sup> In response, French law and practice have not only expanded the factors considered by the inquest, but also moved toward increasing public participation through initiatives outside of the traditional inquest, which are occurring at all levels of government.

#### *B. Consultations and Concertations: Legal Requirements, New Experiments*<sup>141</sup>

In recent decades, French law has supplemented the inquest with additional routes for public input. However, it does not routinely require broad-based consultation for executive policymaking along the lines of the U.S. Administrative Procedures Act. A few statutes mandate some form of consultation, but there are no consistent legal requirements. "Public" input into the policymaking process includes consultation either with expert bodies established by the State or with labor unions. Only in the 1960s did participation become a major aspect of public administration reform. It was proposed as a way to regenerate the bureaucracy and also to foster social and political links. Thus, participation by those outside the bureaucracy is not a new concern for French policymakers, but its meaning and implementation have dramatically changed over the years toward more transparency and, recently, toward more direct participation.

The French distinguish between *consultation* and *concertation*. The former term refers to consultations with bodies representing various interests; it corresponds to the "consultative administration" (*administration consultative*).<sup>142</sup> The bodies established by the State have a closed membership and usually have no final decision-making power despite the strong impact of their views on public choices. The law frequently requires consultation with one or another body at some point in the policymaking process. In addition, government ministries and agencies create ad hoc commissions to aid their decisionmaking. The Conseil d'État criticized the

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general rule the ECHR cannot quash a legislative or an administrative decision breaching the ECHR; the Court can only award compensation for the breach.

<sup>139</sup> Loi 83-630 du 12 juillet 1983 relative à la démocratisation de l'enquête publique [Law 83-630 of 12 July 1983 on the Democratization of Public Inquiries and Environmental Protection], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 1, 2001, p. 2156.

<sup>140</sup> MICHEL PRIEUR, DROIT DE L'ENVIRONNEMENT 110 (2011) (contending that the provisions for publicity in the law are "disappointing").

<sup>141</sup> Interview with Charlotte Halpern Professor, University of Grenoble, Paris, France, November 14, 2011 and Phillippe Deslandes, Director General, CNDP (December 13, 2011).

<sup>142</sup> See CONSEIL D'ÉTAT, CONSULTER AUTREMENT, *supra* note 95, at 19.

proliferation of these bodies, especially the permanent commissions, in its 2011 report.<sup>143</sup>

An example of an expert group with considerable impact is the National Consultative Ethics Committee for Health and Life Sciences (NCECHLS). The government consults with it on any public issue involving ethics—for example, organ harvesting, donations for transplanting, research on human embryos, euthanasia, the treatment of personal medical records and problems associated with the computerization of health-related data, and the commercialization of human stem cells. The NCECHLS, often called the “wise men committee,” is made up of experts from various scientific and philosophical backgrounds, such as representatives belonging to the “main philosophical and spiritual families” (Catholic, Protestant, Jewish, and Muslim), those chosen for their “qualifications and interest in ethical problems” (prominent philosophers and intellectuals), and experts from the field of research.<sup>144</sup> This elite group is supposed to tell the government what is “moral.” Its opinions on surrogate mothers or assisted suicide, for example, are thought to represent what can be agreed based on present knowledge. The decision is also meant to be socially acceptable, but it is not subject to an electoral or public opinion test.

The government also organizes consultations where it both learns from participants and gives them information to prepare the way for reform. Ministries consult groups with a stake in the outcome such as unions, professional organizations, and councils representing various groups. Even if many of these consultations serve the valuable function of providing expertise and advice to decision-makers, they are not equivalent to processes that involve the broader public. On the contrary, these bodies act as intermediaries between the broader public and the government.

In contrast, the term *concertation* refers to open-ended consultations in which there is give and take that permits a real discussion with concerned citizens and organized groups. Although the concept dates from the times of French economic planning, the 70s and 80s extended the practice as a way of involving the public in environmental policy making.<sup>145</sup> Since passage of the 1995 “Barnier” law, concertation is becoming more frequent, especially for local and regional projects.<sup>146</sup> The Barnier law sets up early-stage concertation procedures for large projects with environmental impacts.<sup>147</sup> The motivation was a fifteen-year controversy over the

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 21.

<sup>145</sup> See CÉCILE BLATRIX ET AL., RESEARCH ON PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING: APPROACHES, CONTEXT, STAKES AND PERSPECTIVES ACROSS BORDER 12 (2011), available at [http://concertation-environnement.fr/documents/seminaires/CDE\\_Oxford\\_2011.pdf](http://concertation-environnement.fr/documents/seminaires/CDE_Oxford_2011.pdf) (comparing French and British perspectives on the issue and the history of the development of concertation).

<sup>146</sup> See *Programme Concertation, Décision, Environnement*, available at <http://concertation-environnement.fr/> (provides overview of current developments); see also [http://www.concertation-environnement.fr/documents/regards\\_croises/seance\\_12.pdf](http://www.concertation-environnement.fr/documents/regards_croises/seance_12.pdf) (study on the results of 30 years of research on concertation).

<sup>147</sup> Loi 95–101 du 2 février 1995 relative au renforcement de la protection de l'environnement [Law 95–101 of 2 Feb. 1995 on Reinforcement of the Protection of the Environment], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 1, 2001, p. 1840.

high speed train (the TGV) from Paris to Marseilles between 1978 and 1992 that involved many public protests that delayed the project for years.<sup>148</sup> The law created an independent National Commission on Public Debate (CNDP), established in 1997, to organize debates on environmental impacts.<sup>149</sup> In 2002 its mandate was broadened to include socio-economic and development impacts as well as environmental effects.<sup>150</sup> Thus, it covers most major infrastructure projects. Requests to the CNDP to organize a debate can be compulsory or discretionary depending on the nature and importance of the project. For compulsory debates, the private developer and the public body responsible for the project have to ask the CNDP to organize a debate. For other projects the request is not compulsory but can come from a local government, ten MPs, environmental associations of “national importance”, the private developer, the public body in charge, or the Minister for Environment. About two-thirds of requests come from a ministry. At the initiative of the national government, the CNDP can also organize public concertations on national issues, but this is uncommon. It has organized only three so far.<sup>151</sup>

The debates occur at an early stage before the developer has prepared a final plan. The CNDP seeks to apply the principles of inclusion, argument, and openness. The aim is a process that permits a broad range of public concerns to be vetted and discussed before the government settles on a particular plan. The ministries request debates for two different reasons:<sup>152</sup> they may hope to get broad public support for a project, or conversely, they may want to highlight opposition to a local plan that national politicians or officials oppose or want modified.<sup>153</sup>

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<sup>148</sup> See Bénédicte Delaunay, *De l'enquête publique au débat public, La consultation des personnes intéressées*, 8 LA SEMAINE JURIDIQUE ADMINISTRATIONS ET COLLECTIVITÉS TERRITORIALES 35 (2011) [hereinafter *De l'enquête publique*].

<sup>149</sup> It began to operate in 1997, headed by a member of the Conseil d'État, and in 2002 it was given the status of an “independent administrative authority.”

<sup>150</sup> Loi 2002–276 du 27 février 2002 relative à la démocratie de proximité [Law 2002–276 of 27 Feb. 2002 on Local Democracy] JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 1, 2010, p. 3808; COMMISSION NATIONALE DU DÉBAT PUBLIC, <http://www.debatpublic.fr/> (providing background information on the CNDP); Blatrix, *supra* note 130, at 106–07; Cécile Blatrix, *Genèse et consolidation d'une institution: Le débat public en France*, in LE DÉBAT PUBLIC: UNE EXPÉRIENCE FRANÇAISE DE DÉMOCRATIE PARTICIPATIVE 43, 56 (Cécile Blatrix et al. eds., 2007).

<sup>151</sup> René Dosièrè & Christian Vanneste, *Comité d'évaluation et de contrôle des politiques publiques*, ASSEMBLÉE NATIONALE (Dec. 1, 2011), Rapport d'information sur les autorités administratives indépendantes, available at <http://www.assemblee-nationale.fr/13/rap-info/i4020.asp>. These involved nanotechnologies, nuclear waste disposal, and a national highway in the Rhone Valley. The nuclear waste debate operated in a satisfactory way. The nanotechnology debate was disrupted by strong opponents of the technology, so it was not really a debate with give and take but rather a series of events that put the issue in the media. According to one observer, the end result was that the organizations who participated have taken refuge in a sort of bunker (“*se réfugier dans une sorte de bunker*”). See also Blatrix, *supra* note 130, at 113; Interview with Blondiaux, *supra* note 20.

<sup>152</sup> Interview with Charlotte Halpern, Professor, University of Grenoble, in Paris, France (November 14, 2011) [hereinafter Halpern Interview].

<sup>153</sup> Interview with Florence Denier-Pasquier, Administrator, French Nature Environment and representative of FNE on the Economic, Social, and Economic Council, in Paris, France (Dec. 7, 2011) [hereinafter Denier-Pasquier Interview].

The CNDP has 25 members drawn from a range of interest groups and political bodies,<sup>154</sup> but the selection of members is largely controlled by government ministers or other official bodies. Even those representing environmental groups, consumers and users, and experts are nominated by various ministries.<sup>155</sup> The consultations that the CNDP organizes are routine for large projects so that the project planners must open their decision-making activities to generalized input from outside. Any document produced by the public debate takes the form of advice to the relevant authorities. Even an excellent concertation may not produce a unified recommendation, and even if it does, the advice has no binding force.<sup>156</sup> However, if a proposal obtains strong support in the debate and is then completely ignored, government unresponsiveness could spur street protests or lead to lawsuits down the line.

The quality of the debates varies. Some provide excellent input to subsequent stages, but others are just talking shops; still others provoke little interest beyond the firms and the government.<sup>157</sup> Most participants in the debates are existing associations and groups, not the broader public. For example, one interviewee mentioned the failure of a debate over a third airport near Paris. According to her, the debate was poorly prepared and managed and was overly rushed.<sup>158</sup> Officials at the CNDP acknowledge the variability in debate quality, pointing especially to the lack of participation in some processes.<sup>159</sup> The CNDP does not try to mobilize the general public, although the process is nominally open to their input.<sup>160</sup> The CNDP

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<sup>154</sup> The “grands corps” are very well represented. The current President is a préfet (which can be explained by the importance of préfets in the process of eminent domain at the local level), and there are two MPs (one from the National Assembly and one from the Senate); six local government representatives; one member of the Conseil d’État; another from the inferior administrative courts; one member of the Cour de Cassation; and one member from the Cour des Comptes. Other members represent civil society—e.g., environmental and consumer groups, etc.

<sup>155</sup> See *Historique de la Commission: Composition 2007–2012*, COMMISSION NATIONALE DU DÉBAT PUBLIC, <http://www.debatpublic.fr/cndp/composition.html> (last visited Apr. 13, 2013) (the size of the CNDP was increased from 21 to 25 under Loi 2010–788 du 12 juillet 2010 portant engagement national pour l’environnement [Law 2010–788 of 12 July 2010 on National Commitment to the Environment], J.O., Mar. 24, 2012, p. 12905[ch. IV, art. 246, III], to add two labor union representatives and two from business (including one from an agricultural enterprise). They are to be nominated by the Prime Minister on the advice of respective labor and business associations. The environmental representatives do not have the same ability to select their representatives).

<sup>156</sup> See Denier-Pasquier Interview, *supra* note 153. Denier-Pasquier criticized this aspect of the process in her interview.

<sup>157</sup> COMMISSION NATIONALE DU DÉBAT PUBLIC, CNDP 2009–2010: RAPPORT D’ACTIVITÉ 5 (2011) (stating that the CNDP is troubled that sometimes the debates attract little interest from the public beyond those who are directly concerned) [hereinafter CNDP 2009–2010].

<sup>158</sup> See Charlotte Halpern, *Les ressorts politiques de la décision publique en matière de planification aéroportuaire: Les mobilisations autour de l’aéroport Paris—Charles de Gaulle* (Centre de Recherches Politiques de Sciences Po (“CEVIPOF”) Working Paper Grp., Paper No. 19, 2006).

<sup>159</sup> Interview with Philippe Deslandes, Director General, CNDP, in Paris, France (December 13, 2011).

<sup>160</sup> Interview with Cécile Blatrix, Professor of Political Science, École Nationale du Génie Rural, des Eaux et des Forêts, in Paris, France (November 29, 2011) [hereinafter Blatrix Interview]; Blatrix, *supra*, note 130, at 106.

organizes relatively few debates (around ten per year), and the process is quite expensive (although not when compared to the cost of the project).<sup>161</sup>

The legal rights created by the existence of the CNDP are limited. The Conseil d'État reviews the CNDP's decision whether or not to require a public debate.<sup>162</sup> However, once the CNDP has decided to go ahead, the Conseil will not evaluate the adequacy of the process.<sup>163</sup> The Conseil has not explained why it is inappropriate for it to review the organization of the debate.

The relationship between consultation and concertation is integral to the Conseil d'État's 2011 report on participation. The report advocates a process where the government frames the issues in general terms, followed by an open-ended concertation, a stage of impact assessment inside the government, and a more formal consultation at the end. The authors of the report argue for the application of this general model to all kinds of government actions, not just "big projects" in the municipalities and regions.<sup>164</sup>

### C. *La Grenelle: Symbolic Politics or Genuine Involvement?*

At the local level, the national government has a clear interest in monitoring the development of large projects that require the expenditure of government funds and need regional coordination. It may want to use participatory processes as a check on local governments that are captured by narrow interests. However, high-level government officials will be less interested in checks on their own policymaking freedom. In France's unitary state, participation was first legally mandated at the regional and local levels under CNDP oversight. Although the CNDP can organize national debates, the government has seldom requested its help.

Despite this, the global push toward more public participation has been felt at the national level. The Government responded with a series of large public consultations, of which the most important was the 2007 Environmental Grenelle. These consultations are advisory processes organized at the Government's initiative outside the constraints of the CNDP. They do not give anyone legal rights either to challenge the invitation list or the policy recommendations, and the Government is under no obligation to organize them. However, these processes differ from traditional French experiences of participation in that they are not binary interactions with the government at the center (*e.g.*, unions-government or associations-

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<sup>161</sup> CNDP 2009–2010, *supra* note 157, at 96 (the cost of the public debate for developers in 2008–2009 totaled 550,000 to 3 million euros); *see also* Delaunay, *De l'enquête publique*, *supra* note 148, at 37 (analysis of shortcomings).

<sup>162</sup> CNDP 2009–2010, *supra* note 157, at 113.

<sup>163</sup> Bénédicte Delaunay, *Les Limites aux recours contre les décisions de la Commission nationale du débat public*, 60 ACTUALITÉ JURIDIQUE, DROIT ADMINISTRATIF 2100, (2004) [hereinafter *Les Limites aux recours*].

<sup>164</sup> *See generally* CONSEIL D'ÉTAT, *CONSULTER AUTREMENT*, *supra* note 95; *see also* Richard Interview, *supra* note 81.

government).<sup>165</sup> In general they have been organized to help develop legislative proposals, not to assist in the promulgation of decrees or the drafting of ordinances.

The history of the Grenelle, named after the Rue de Grenelle, where many government ministries are located, dates to the late 1960s. The government organized the first such gathering in June 1968, bringing labor union leaders and rank and file members together with government and business representatives and produced an agreement that ended massive and disruptive strikes.<sup>166</sup> The term has been appropriated by more recent governments to refer to any large-scale government-organized concertation process with an agenda and a time limit that focuses on a particular issue area. They generally involve stakeholders other than political parties. The recent Grenelle processes have provided advice to the government; they did not make binding decisions. Recent iterations have dealt with: health (2001), the environment (2007),<sup>167</sup> minimum wages for the poor (le Grenelle de l'insertion, 2007), advertising on public television, job training throughout life (le Grenelle de la formation, 2007), access to the high speed internet (2008), the use of the sea (2009), radio waves from mobile phones (le Grenelle des ondes, 2009), and urban security (2010).<sup>168</sup>

The 2007 environmental Grenelle provides an example, although the label has no formal legal definition and is used rather indiscriminately. Soon after Nicolas Sarkozy was elected president, the Grenelle took place over several months in the summer and fall of 2007. The consultations involved almost 2000 people and drew from a wide spectrum of interests. It involved six working groups, each including representatives from five types of participants: local authorities, the French State, environmental organizations, employers, and employees. The working group proposals were then discussed in public meetings throughout the country followed by four round tables that included representatives of the same five groups.<sup>169</sup>

The idea seems to have originated with the environmental advocacy group *Ecologie sans frontière* and was then adopted by Nathalie Kosciusko-Morizet, an influential member of President Sarkozy's cabinet.<sup>170</sup> The government saw the process as a way to enhance its rather shaky environmental credentials.<sup>171</sup> Some also

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<sup>165</sup> See generally Pierre Lascombes, *Des acteurs aux prises avec le "Grenelle Environnement": Ni innovation politique, ni simulation démocratique, une approche pragmatique des travaux du Groupe V*, 1 REVUE PARTICIPATIONS 277 (2011).

<sup>166</sup> Mermet Interview, *supra* note 80.

<sup>167</sup> LE GRENELLE ENVIRONNEMENT, <http://www.legrenelle-environnement.fr> (last visited Apr. 13, 2013) (reporting ongoing activities related to the environmental Grenelle).

<sup>168</sup> See Philippe Durance, *De la décision politique à la décision publique: Participation des citoyens et innovation sociale*, in CONSEIL D'ANALYSE ÉCONOMIQUE, CRÉATIVITÉ ET INNOVATION DANS LES TERRITOIRES 225 (2010); see also Jacques Chevallier, *De l'administration démocratique à la démocratie administrative*, 137–38 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 217 (2011); Jean-Michel Fourniau, *Information, Access to Decision-making and Public Debate in France: The Growing Demand for Deliberative Democracy*, 28 SCI. & PUB. POL'Y 441 (2001).

<sup>169</sup> See Lascombes, *supra* note 165, at 2. See also Kerry Whiteside et al., *France's "Grenelle de l'environnement": Openings and Closures in Ecological Democracy*, 19 ENVTL. POL. 449 (2010); see also LE GRENELLE ENVIRONNEMENT, <http://www.legrenelle-environnement.fr> (last visited Apr. 13, 2013).

<sup>170</sup> She was Secretary of State for Ecology in 2007 and Minister for Ecology, Sustainable Development, Transport, and Housing from November 2010 until February 2012.

<sup>171</sup> Akhlassé Hamdan, *Médias et environnement : le processus et les protagonistes du « Grenelle de l'environnement »* (2011) (unpublished Ph. D. dissertation, Paris X), available at

claim that the process was designed to marginalize *Les Verts* (the Green Party). Whether or not that was an intention, the process was explicitly non-partisan and excluded official political parties.

The process did not involve open-ended public hearings, but there were no explicit quotas on who could participate. The large environmental umbrella groups supplied many of the participants, as did some specialized groups that had a history of working with the state (for example, groups concerned with wild birds). However, some groups were not certified to participate either because they worked on issues that the government organizers excluded from the agenda, such as nuclear power, or because the organizers judged that they were not environmental groups.<sup>172</sup> Some agonized over whether to be part of the process or to stand outside and maintain a critical stance. One group withdrew after initially agreeing to participate because of the government organizers' failure to include nuclear power on the agenda. However, that group remained a member of one of the umbrella organizations that was a key environmental participant.<sup>173</sup> A few groups established a counter-Grenelle, arguing that the environmental participants had sold out and labeling the Grenelle a "Munich of ecology."<sup>174</sup>

Nevertheless, the Grenelle was an apparently serious effort to seek input from a wide range of opinions and interests, although its broad effort to reach consensus assured that the final recommendations would be moderate compromises. The Grenelle helped to launch a dynamic of policy change, although, the process only produced non-binding recommendations. As Jean-Louis Borloo, Minister of the Environment (*Ministère de l'Écologie, du Développement et de l'Aménagement Durable et de l'Énergie*), said "the Grenelle is not an end point, it is a starting point."<sup>175</sup> Thirty-three follow-up committees (of 800 people) were set up in order to implement the program of the Grenelle.<sup>176</sup> Two recent laws dealing with environmental matters, Grenelle I (2009) and Grenelle II (July 2010), built on some of the policies proposed at the original meeting.<sup>177</sup> The government did not always follow the lead of the Grenelle in its legislative proposals, and consequently the new statutes were not greeted with enthusiasm by all of the participants.

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<http://www.theses.fr/2011PA100145>; Interview, Akhlass Hamdan, Doctor of Political Science, Paris X, in Paris, France (Nov. 7, 2011) [hereinafter Hamdan Interview]; Pierre Lascoumes, *supra* note 165, at 2.

<sup>172</sup> See ANIMAL CONCERNS, <http://www.animalconcerns.org> (last visited Apr. 13, 2013). For example, the Brigitte Bardot Foundation's group Animal Concern was not allowed to participate on that ground).

<sup>173</sup> Hamdan Interview, *supra* note 171.

<sup>174</sup> Lascoumes, *supra* note 165, at 285.

<sup>175</sup> The sentence, part of Minister Borloo's remarks in October 2007 as the end of the process, is frequently quoted. See, e.g., Anne-Christine Bécard & Marina Biadi, *Grenelle de l'environnement: Un autre modèle économique*, TOURAINE ECO LE MAG, <http://www.touraine-eco.com/article.php?art=7> (last visited Apr. 13, 2013).

<sup>176</sup> Lascoumes, *supra* note 165, at 2.

<sup>177</sup> Loi 2009-967 du 3 août 2009 de programmation relative à la mise en œuvre du Grenelle de l'environnement [Law 2009-967 of August 3, 2009 on the Implementation of the Grenelle de l'environnement], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], 5 août 2009, p. 13031; Loi 2010-788 du 12 Juillet 2010 portant engagement national pour l'environnement [Law 2010-788 of July 12, 2010 on National Commitment to the Environment], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], 13 Juillet 2010, p. 12905.

The government did not move immediately to draft a bill based on the Grenelle's recommendations. Rather, reverting to standard practice, Minister Borloo appointed a twenty-four-member commission to recommend legal changes. Headed by Corinne Lepage, a former minister of the environment under Prime Minister Alain Juppé and a long-time moderate environmental activist and politician,<sup>178</sup> *Mission Lepage* produced a report with 88 proposed legal changes in the areas of access to information, use of expertise, and legal responsibility (criminal, civil, and administrative). The reporter, Stéphane Hoynck, was a member of the Conseil d'État, and members had a wide range of expertise and political associations.<sup>179</sup> Thus, the familiar pattern of government consultation with an elite commission persisted even after the completion of the more open Grenelle.<sup>180</sup>

One of the most contentious issues involved a carbon tax, a policy recommended by the Grenelle but modified by the government to exclude many large emitters. The original proposal was not contentious and was endorsed by all the presidential candidates as part of an "ecological pact" even before the Grenelle began. After the Grenelle, the government set up an expert group to implement the proposal, headed by former socialist Prime Minister Michel Rocard. In its report, the group recommended the adoption of a tax of € 32 per ton of CO<sub>2</sub>. The government instead chose to reduce the amount of the tax to € 17. The proposed law, unlike the recommendations of the Grenelle, would have entirely exempted large emitters because they were subject to an EU program of tradable quotas. The Conseil Constitutionnel held the resulting bill unconstitutional on the grounds of unequal treatment.<sup>181</sup> But it is not clear whether the Grenelle played an independent role in the legislative drafting process. The proposal for a carbon tax was the consensus view before the process started. President Sarkozy convened an expert commission after the Grenelle, even though experts were part of the Grenelle. The ultimate legislative proposal was quite different from the recommendations of both the Grenelle and the expert body.

Beyond controversies over the Grenelle's impact on concrete pieces of legislation, the process was the first formal effort by the national government to include environmental groups explicitly in the legislative drafting process even if this insider role was sometimes an awkward fit.<sup>182</sup> It put business, labor, and environmental groups together around a single negotiating table. This created some tensions, but led some large firms voluntarily to adopt environment-friendly policies, perhaps to stave off more restrictive laws. Most of these voluntary agreements have now been codified into law.<sup>183</sup> For example, the working group on construction and

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<sup>178</sup> Lepage is a very well-known attorney who specializes in environmental law. She recently defended the parties in the Erika tragedy, a toxic fuel spill that washed ashore following the sinking of the tanker Erika in 1999.

<sup>179</sup> See CORRINE LEPEGE, MINISTÈRE DE L'ÉCOLOGIE, DU DÉVELOPPEMENT ET DE L'AMÉNAGEMENT DURABLES, MISSION LEPEGE RAPPORT FINAL: PREMIÈRE PHASE, available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/084000490/0000.pdf> [hereinafter LEPEGE MISSION FINAL REPORT].

<sup>180</sup> *Id.*, at 108–09.

<sup>181</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009–599 DC, Dec. 29, 2009, Rec. 218 (reviewing the budget law and discussing the decision on the carbon tax in §77).

<sup>182</sup> Hamdan Interview, *supra* note 171; Lascoumes Interview, *supra* note 20.

<sup>183</sup> Law 2010–788 of July 12, 2010, *supra* note 134.



energy efficient buildings produced a negotiated agreement under which the industry promised to take certain voluntary steps with respect to building insulation.<sup>184</sup>

Jacques Chevallier points out shortcomings that arise whether the public debate is called a Grenelle or an *États généraux*.<sup>185</sup> The problems he raises can occur even though the number of participants is very impressive (200,000 for the Health *États Généraux* and more than 1 million for the debate on the future of education). In practice, the participants are mainly professionals from the sector concerned (doctors for health, teachers for education) and users (patients, parents). The main innovation is that the public debate is more inclusive than traditional organized institutions such as professional unions and associations. Chevallier shows, however, that the two principles guiding public debates—the principle of equivalence (each participant should be treated equally) and the existence of an independent organizing third party—are not sufficient. The traditional hierarchy of actors often reappears in the debate because some actors are more experienced than others.<sup>186</sup>

The dynamics of the Grenelle process and its impact on policy will differ across policy areas depending upon the degree of antagonism between the groups and their relative bargaining power. Furthermore, because it is not a legally institutionalized process and because the government bears the organizational costs, such processes will only be initiated if they are useful to those in power. However, as these methods of participation have been increasingly used, they have set a precedent. The initiatives of the government of François Hollande show that this kind of public input is continuing so that, even where public participation is not legally required, any government that wants to make an important policy uses these labels (Grenelle, *États généraux*) and organizes public participation events to ensure a high level of publicity and popularity. The Hollande Government organized a “social conference” to consult the social partners on several issues. Roundtables were organized, dealing with employment, the reform of public services, vocational training, salaries and purchasing power, the recovery of industry, equality between men and women at work, the quality of work life, and pension reform. Each roundtable was chaired by a minister and an expert. The process involved consultations with labor unions, business associations, and other representative organizations. Although most only aim to produce “road maps” that will be a prelude to further dialogue,<sup>187</sup> the effort to reform the labor market produced a consensus policy on January 11, 2013 that balanced more flexible labor rules with more rights for workers. The proposed reforms in the labor law were signed by the three most important labor unions, the

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<sup>184</sup> Halpern Interview, *supra* note 152; Lascoumes Interview, *supra* note 20; see also generally DANIEL BOY ET AL., *LE GRENELLE DE L'ENVIRONNEMENT: ACTEURS, DISCOURS, EFFETS* (2012).

<sup>185</sup> See generally Jacques Chevallier, *Le débat public en question*, in *POR UN DROIT COMMUN DE L'ENVIRONNEMENT: MÉLANGES EN L'HONNEUR DE MICHEL PRIEUR* 489 (2007). Under the ancient tradition of *États généraux*, public participation is linked with the idea of revolution. The *États généraux* met during the Ancien Régime and were appointed by the King. They were the gathering of the three “estates” in France—*i.e.*, the nobility, the clergy and the third estate. Thus, the term refers to a gathering of all the people. Because the last real one led to the Revolution, its connotation is particularly symbolic. It is used politically to show the will of the government to gather everyone together to debate and solve a specific problem.

<sup>186</sup> *Id.* at 503–04.

<sup>187</sup> See *LES ÉCHOS*, 9 July 2012, pp. 2–4.

employer association, and the Government, and the Government is drafting a statute consistent with this agreement.<sup>188</sup>

#### D. *Other Experiments with Public Participation*

In response to criticisms of both local-level processes and national Grenelle meetings and *Etats Généraux*, other participatory procedures are taking place at the national and the local levels. It remains to be seen if they will influence the actions of the Hollande government. These efforts are legal so long as rights are not obviously violated. If they are legally required, as for urban planning, the *Conseil d'État* reviews the ultimate decision but does not take on the more difficult task of assuring procedural adequacy.<sup>189</sup> This leaves a broad opening for experimentation at all levels of government.

Some recent initiatives need more study. For example, at the local level, the Municipal Council for Children and Youth (CMEJ) organizes conversational consultations for young people in order to build participatory capacity.<sup>190</sup> Similarly, the government has organized debates over an education reform that would shorten the individual school day and lengthen the number of days per school year. The debate involved not just parents, teachers, and educational and health experts, but also the tourism industry, which favored long vacations, and employers, who favored long school days.<sup>191</sup>

Failures may be as instructive as successes. The 1995 pension reform is a classic case where pro forma, hastily organized consultations took place, but where the government feared that it had a good deal to lose from an open debate. Opponents sharply criticized the lack of open concertation, and organized massive strikes. Prime Minister Juppé had to resign, and President Jacques Chirac decided to call for new legislative elections, which his center-right coalition lost.<sup>192</sup> This episode showed future ministers the risks of attempting closed-door pension reform. However, in spite of that experience, the 2010 reform of the retirement/pension system was also proposed with little effective consultation.<sup>193</sup>

Local examples come from the Poitou-Charentes region, which has experimented with a range of participatory activities.<sup>194</sup> These experiments were

<sup>188</sup> Liz Alderman, *Unions Back Revisions of Labor Law in France*, N.Y. TIMES, Jan. 12, 2013, at B1.

<sup>189</sup> Delaunay, *Les Limites aux recours*, *supra* note 163, at 2100 (dealing with the review of CNDP decisions). The CE reviews the decision whether or not to organize a public debate but not the procedural form of the debate.

<sup>190</sup> Blatrix, *supra* note 130, at 107–08.

<sup>191</sup> See Luc Chatel, *La réflexion sur les rythmes scolaires*, MINISTÈRE ÉDUCATION NATIONALE (June 7, 2011), <http://www.education.gouv.fr/cid56729/la-reflexion-sur-les-rythmes-scolaires.html>. A steering committee was set up and consulted all the stakeholders. Debates were also organized inside schools all over the country and on the internet.

<sup>192</sup> See Bruno Palier, *Débat public: L'exemple des Retraites*, 284 PROJET 74 (2005).

<sup>193</sup> Initially the reform was set for 2012, but the financial crisis and subsequent economic downturn accelerated the difficulties of the social security system. See BRUNO PALIER, *LA RÉFORME DES RETRAITES* ch. 5 (4th ed. 2012).

<sup>194</sup> For an overview of these efforts, see Alice Mazeaud, *L'instrumentation Participative de L'action Publique: Logiques et Effets. Une Approche Comparée des Dispositifs Participatifs Conduits Par la Région Poitou-Charentes*, 2 REVUE PARTICIPATIONS 53 (2012).

spearheaded by Ségolène Royal, the former socialist candidate for President of the Republic who was President of the region and a strong supporter of citizens' involvement in public decision-making. One activity involved the financing of high schools, an important budgetary item. Royal helped organize a participatory budgeting process involving ten percent of the regional budget for such schools. In addition, she developed citizen forums that discussed important policy issues and recommended solutions to the regional government. The Poitou-Charentes experiences contain important lessons.

According to Sophie Bouchet, who was deeply involved in organizing these experiments, participatory processes will only work if people believe that the time and trouble of participating will make a difference and if the process is organized so that the debate is productive and well-informed. The participatory budgeting process determined how funds would be spent and consequently attracted students, teachers, and other employees. Parents were less involved. The schools also generally made participation easy by setting aside time for the debate. Participants aired and discussed options but were spared the need to reach a consensus, which is always a difficult requirement in the zero-sum game of allocating funds. Rather, those organizing the process distilled options into a finite set of possibilities with costs attached, and the participants then voted for those they preferred using a point voting system.

The citizens' forums, in contrast, included a stratified random sample of 20–30 individuals from the community, representing all major social groups. The group then debated policy options based on written and oral presentations under the guidance of trained mediators who sought to include everyone in the debate. The resulting recommendations were presented to elected officials and civil servants at a press conference with active media coverage.<sup>195</sup>

Some French proponents of deliberative democracy, however, are skeptical. Loïc Blondiaux, for example, is a critic of what he calls the use of “mini-publics” such as the citizen juries in Poitou.<sup>196</sup> He argues that it is problematic to see the process as a reflection of the popular will because most people do not participate. He worries that the person or group that organizes the process will have power to set the agenda and influence the process. In the worst case, the citizens involved can be used by the organizers for their own ends. Hence such processes need a neutral monitor, which is not usually possible. One response to this critique, reflected in the Poitou forums, is that the proposals that come from the citizen forums are just that—

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<sup>195</sup> See Interview with Sophie Bouchet-Peterson, Former Advisor to Ségolène Royale on Public Participation, and Marion Ben-Hammo, Assistant to Bouchet-Peterson, in Paris, France (Jan. 6, 2012). Bouchet-Peterson and Ben-Hammo also supplied English-language documents. See Marion Ben-Hammo, *High School Participatory Budget (Poitou-Charentes, France)*, PARTICIPEDIA BETA (Feb. 5, 2012, 2:11 PM), <http://participedia.net/cases/high-school-participatory-budget-poitou-charentes-france>; MARION BEN-HAMMO, LA DEMOCRATIE PARTICIPATIVE, PARTICIPATORY DEMOCRACY IN REGION POITOU-CHARENTES (2008), available at [www.oecd.org/gov/public-innovation/41095800.pdf](http://www.oecd.org/gov/public-innovation/41095800.pdf).

<sup>196</sup> See Loïc Blondiaux & Yves Sintomer, *L'impératif Délibératif*, 63 RUE DESCARTES 28, 28–38 (2009); Loïc Blondiaux, *Démocratie Délibérative vs. Démocratie Agonistique?*, 30 RAISONS POLITIQUES 131, 131–47 (2008); Loïc Blondiaux, *La Délibération, Norme de L'action Publique Contemporaine?*, 268 PROJET 81, 81–90 (2001).

proposals. The government will not enact them into law if they fly in the face of broad conceptions of popular opinion.

The Poitou region's experience and that of similar efforts in other countries provides lessons about combining direct citizen input with both technical expertise concerning substantive issues and expertise about how to achieve meaningful public involvement that does not demand more from ordinary citizens than they are able and willing to supply. One of the most interesting aspects of these procedures is the way that the participatory budget process combined public debate with a voting process that ultimately set the priorities. It will be important, however, to study the actual results. Because the process began in 2005, one can ask if the spending priorities were actually followed. Apparently, some of the proposed capital improvements in the high schools have been held up by lengthy bureaucratic approval processes. For the citizen forums, one could see if they affected the political priorities of elected politicians.

#### *E. Public Input for Government Secondary Legislation*

Public, open-ended consultations are not a routine or legally necessary part of the process of issuing secondary legislation. The National Commission on Public Debate can organize concertations on national policy issues, but only if requested to by the Government. Interest groups and civil society bodies cannot make such a request, and the Government has only asked for CNDP help three times. However, recently, the high courts have reviewed some policymaking processes for inclusiveness and adequacy. The Government has also made some moves toward more open-ended consultation both in the environmental area, following France's ratification of the Aarhus Convention,<sup>197</sup> and, in general, as it implements a 2011 law that calls for more transparency and public input. This does not imply that France has established notice and comment rulemaking on the U.S. model, but it does represent some movement in that direction. That is not to say that France should copy the U. S. model, but only to urge reformers to focus on the democratic values that inform and justify those procedures.<sup>198</sup>

#### 1. Judicial Responses

Both the Conseil d'État and the Conseil Constitutionnel have examined policymaking procedures and found them insufficiently deliberative and participatory. These are important new developments, but it remains to be seen how far these courts will go.

*The Conseil d'État:* Recently, the Grand Chamber of the Conseil d'État signaled a willingness to review the efficacy of participatory processes that do not involve

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<sup>197</sup> The Aarhus Convention, *supra* note 30, governs environmental policymaking processes. Forty-six countries had ratified it by September 26, 2012. See also Dominique Custos, *Le Statut du Responsable Public et la Réception de la Notion d'Accountability*, in JEAN-BERNARD AUBY, *L'INFLUENCE DU DROIT EUROPÉEN SUR LES CATÉGORIES JURIDIQUES DU DROIT PUBLIC FRANÇAIS* 275, 279 (2010).

<sup>198</sup> For a fuller discussion of these issues in other comparative contexts, see generally ROSE-ACKERMAN, *CONTROLLING*, *supra* note 16; ROSE-ACKERMAN, *FROM ELECTIONS TO DEMOCRACY*, *supra* note 15.

experts or established commissions. In a December 23, 2011, decision it upheld a procedural challenge to a government decree on excess of power grounds. The decree, issued by the Minister of Higher Education and Research, would have merged two high schools in Lyon.<sup>199</sup> The Conseil found that the procedural violations were serious enough to have possibly affected the final decision. The first flaw was a failure to consult the joint committees of employees at each school who were not part of the teaching staff. The second was the inadequacy of a meeting to discuss the proposal. The opinion holds that the meeting was not truly deliberative and suggests that the head of one of the schools dominated the discussion and limited debate. The decree approving the merger was voided, but the holding only took effect in June 2012.

The decision is particularly important because the Conseil d'État acted under the Warsmann Law III of May 17, 2011, article 70, which states that procedural violations should not lead the courts to void an administrative act unless they are serious enough to have possibly affected the outcome.<sup>200</sup> The decision suggests that henceforth the Conseil d'État will evaluate the efficacy of participatory processes when they are challenged by opponents who claim to have been sidelined.<sup>201</sup> It sends a signal to those who issue decrees that they should organize genuine consultations or concertations up-front to avoid being frustrated *ex post*.<sup>202</sup> The case does not touch on substantive criteria. One can see the merger of two schools as an essentially political decision with both cost savings and losses of institutional identity and jobs. It is not an issue that implicates the broader public interest as would be the case for decisions about, for example, the use of genetically modified organisms in French agriculture or the overall levels of power plant pollutants. It remains to be seen if the Conseil will apply the same standards to a challenge to a government decree promulgating a broad policy initiative. How will it resolve disputes between those who see participation as a right that furthers democratic values and those who see it only as instrumental to better substantive decisions? These values need not conflict in every case, but if they do, the Conseil's response will indicate the direction of its members' thinking.

*The Conseil Constitutionnel:* In 2011 and 2012, the Conseil Constitutionnel dealt directly with challenges to the lack of participation in the administrative process in four closely linked QPCs. The decisions suggest that the Conseil is

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<sup>199</sup> CE, Ass., 23 décembre 2011, M.D. et autres, no. 335033, Recueil Lebon p. 649, available at <http://www.conseil-etat.fr/fr/selection-de-decisions-du-conseil-d-etat/ce-23-d-k0k.html>.

<sup>200</sup> Loi 2011-515 du 17 mai 2011 de simplification et d'amélioration de la qualité du droit [Law 2011-515 of May 17, 2011 on Simplifying and Improving the Quality of the Right], available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024021430&categorieLien=id>.

<sup>201</sup> Furthermore, Denier-Pasquier reported that the Conseil d'État now sometimes requests documents from the government's consultation processes, suggesting a greater interest in reviewing participatory procedures. However, the Conseil d'État has not gone further to require public consultation.

<sup>202</sup> This jurisprudence draws on very old case law about "substantive irregularities." If the consultation is compulsory by law, the decree will be quashed. By contrast, if a procedural omission did not breach a right protected by the rule, the decree will not be quashed. See Pierre-Laurent Frier, *Vice de procédure*, in IV RÉPERTOIRE CONTENTIEUX ADMINISTRATIF §168-173 at 17-18 (Erwan Royer eds., 2013). Frier's article dates from 2004 and has been reprinted in the above volume with updates added at the beginning of the volume that do not apply to the relevant sections. The page numbers refer to Frier's article.

willing to consider the constitutionality of policymaking processes, at least in the environmental area. These cases were brought under the Charter for the Environment, which was promulgated in 2005 and incorporated into the Constitution.<sup>203</sup> The Conseil Constitutionnel affirmed its status as enforceable constitutional law in 2008.<sup>204</sup> Article 7 of the Charter states:

Each person has the right, in the conditions and to the extent provided by law, to have access to any information pertaining to the environment in the possession of public bodies and to participate in the public decision-making process likely to affect the environment.

This text has the potential to constitutionalize environmental policymaking processes. In April 2011, the Conseil held that the substantive rights and duties included in articles 1–4 of the Environmental Charter were appropriate for review under a QPC.<sup>205</sup> It was a relatively small step to hold that the procedural requirements in article 7 were also reviewable in a QPC. The Conseil did this in *Association France Nature Environnement (AFNE)*.<sup>206</sup> The case involved the list of facilities that are subject to various licensing criteria under the environmental laws [*régime des installations classées*].<sup>207</sup> The classification of facilities is of great interest both to the owners of the installations and to the public concerned with environmental harms. The Association argued that the process of promulgating the list violated article 7 because there was insufficient consultation, particularly with environmental organizations. The Conseil Constitutionnel confirmed that article 7 created a constitutional right to consultation, the key to exercising its jurisdiction in a QPC. It then held that this right had been violated by the text of the statute passed by Parliament, and it set January 1, 2013 as a deadline for the passage of a new statute.<sup>208</sup>

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<sup>203</sup> The preamble was amended to include a mention of the rights and duties included in the Charter. The Charter itself is published at the end of the constitutional text. Article 34 lists the environment as an area that must be covered by statutes that lay down basic principles. See Dominique Bourg & Kerry H. Whiteside, *France's Charter for the Environment: Of Presidents, Principles and Environmental Protection*, 15 MOD. & CONTEMP. FR. 117, 117–133 (2007).

<sup>204</sup> <sup>204</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 2008–564DC 19, June 19, 2008, Rec. 313, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/case-law.25743.html>.

<sup>205</sup> Conseil constitutionnel [CC][Constitutional Court] decision No. 2011–116QPC, Apr. 8, 2011, J.O. 89.

<sup>206</sup> Conseil constitutionnel [CC][Constitutional Court] decision No. 2011–183/184QPC, Oct. 14, 2011, J.O. 78. The legal and factual background is summarized in the *Commentaire aux cahiers*, available on the CC website along with the decision. See <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality/decisions-of-the-constitutional-council-qpc/2011/decision-no-2011-183-184-qpc-of-14-october-2011.103823.html>. See CONSEIL D'ÉTAT, RAPPORT PUBLIC 2010, *supra* note 49 (dealing with the same substantive issue).

<sup>207</sup> For a German-French comparison on this aspect of environmental law, see generally LE MODÈLE DES AUTORITÉS DE RÉGULATION INDÉPENDANTES EN FRANCE ET EN ALLEMAGNE (Gérard Marcou & Johannes Masing eds., 2011); UNABHÄNGIGE REGULIERUNGSBEHÖRDEN: ORGANISATIONSRÉCHTLICHE HERAUFORDERUNGEN IN FRANKREICH UND DEUTSCHLAND (Johannes Masing & Gérard Marcou eds., 2010).

<sup>208</sup> Under the doctrine of negative ultra vires, or incompetence, Parliament cannot leave constitutional rights and liberties unprotected. See *supra* note 16. In this case, consultations with Conseil d'État and with the Conseil Supérieur des Installations Classées (now the Conseil Supérieur des Risques Technologiques) were not sufficient to protect rights.

The statute was unconstitutional under the doctrine of “negative ultra vires.” Parliament cannot leave constitutional rights and liberties unprotected, it has to give statutory protection to these rights and not leave the executive free to decide the content of a procedural right. Under that broad rubric, the Conseil Constitutionnel decided three more closely related cases in favor of the plaintiffs in June and July 2012.<sup>209</sup> These decisions raise important challenges to administrative procedures that go beyond the treatment of aggrieved individuals and, as in these cases, extend to broad-based policies affecting the rights of many citizens.

In these cases, the relevant minister issued a decree after hearing the advice of the Conseil d'État and of an expert body that must be consulted on changes in the list.<sup>210</sup> The Conseil Constitutionnel held that this was not sufficient; the Charter requires a balance between legal and environmental expertise, on the one hand, and public consultation, on the other. Hence, the decisions imply that whenever Parliament takes measures that affect the environment, it must incorporate public participation into executive regulatory procedures. However, in its opinions, the Conseil contents itself with finding an existing statutory provision unconstitutional and setting a time limit for it to be amended. It provides no guidance on what would satisfy the constitutional provisions. Can the demand for process be satisfied by a more detailed substantive statute? That hardly seems a realistic response given the technical nature of the list. Assuming that the process remains an administrative one, what kind of hearing or consultation regime would satisfy the Conseil? How do process and substance relate to each other? What is the relationship between the other provisions of the Charter and article 7's participatory provision? Given the Conseil's limited experience with such cases, these are open questions.<sup>211</sup>

## 2. Government Actions

In addition to high court cases dealing with policymaking processes, there are some developments inside the executive, some taken in response to the Conseil Constitutionnel's holdings. As a first step, the Grenelle II statute provides for public

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<sup>209</sup> The 2012 case is Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-262QPC, July 13, 2012, J.O. 83. See also Interview with Florence Denier-Pasquier, Bd. Member & Lawyer, French Nature Environment (“FNE”), and Rep. of FNE on the Economic, Social, and Economic Council, in Paris, France (Dec. 7, 2011); Interview with Schrameck, *supra* note 100. This case has since been followed in the following cases: Conseil constitutionnel [CC][Constitutional Court] decision No. 2012-269QPC, July 27, 2012, Journal officiel, 28 juillet 2012, p. 12356; Conseil constitutionnel [CC][Constitutional Court] decision No. 2012-270QPC, July 27, 2012, J.O. 72; Conseil constitutionnel [CC][Constitutional Court] decision No. 2012-283QPC, Nov. 23, 2012, Journal officiel du 24 novembre 2012, p. 18547; Conseil constitutionnel [CC][Constitutional Court] decision No. 2012-282QPC, Nov. 23, 2012, J.O. 90. All of these decisions found CODE CIVIL [C. CIV.] art. L. 120-1 unconstitutional. The provision struck down by the Council required neither a general consultation provision nor a special consultation with stakeholders. Hence, the Constitutional Council quashed the provisions.

<sup>210</sup> The body now called the *Conseil Supérieur de la Prévention des Risques Technologiques* was formerly the *Conseil Supérieur des Installations Classées*.

<sup>211</sup> The Conseil d'État considered some of these questions in its advice to the government in 2010, before the case was decided. See the summary in RAPPORT PUBLIC 2010, *supra* note 49, at 93-97. The decisions also raise the question of whether the procedural protections of article 7 could apply to a statute. A recent ECJ decision distinguishes between legislation and administrative decisions, but refuses to treat everything passed by a Member State legislature as outside the scope of Aarhus. See generally Case C-182/10, Solvay v. Région Wallonne, 2012 ECJ EUR-LEX LEXIS 59 (Feb. 16, 2012).

comment on draft decrees from the environmental ministry or by state autonomous bodies that have a “direct and significant impact on the environment” (but not ordinances or decrees from other ministries).<sup>212</sup> The minimum period for comments is very short — two weeks — and the ministry does not give public prior warning that a draft regulation is about to be opened for comments.<sup>213</sup> The final decree is usually not accompanied by a statement of reasons incorporating responses to the comments. Formal consultation involves clicking a rather obscure box on the ministry website.<sup>214</sup>

This practice now extends to all administrative authorities that have consultation obligations under the Warsmann law of May 17, 2011.<sup>215</sup> The law permits administrative authorities to organize internet-based consultations that echo the practices of the Environmental Ministry. Authorities that otherwise would have had to consult with established commissions can substitute a public consultation over the Internet. The official commissions can still submit comments by that route if they wish, but the burden is on them to monitor the rulemaking activities of the respective authorities. The decree has important weaknesses: comments are not always publicly available and may only be summarized *ex post*; the comment period can be as short as two weeks.<sup>216</sup>

The Grenelle II procedures have now been strengthened in response to the Conseil Constitutionnel decisions discussed above. Soon after coming to office, the Hollande Government proposed amending the Environmental Code, and parliament enacted a law on December 27, 2012. A proposed environmental rule must now be made available to the public along with its context and objectives. The public can give their observations within a minimum of 21 days, up from 15 days in the original draft. During that period, the comments are not available to other members of the public. After the close of the comment period, the government must wait at least four days (up from two days in the original draft) before issuing the final rule. Along with the final rule, it must provide a statement of reasons, a response to the comments, and a synopsis of the comments. The comments must then be put on the ministry

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<sup>212</sup> See CODE DE L'ENVIRONNEMENT [C. ENV'T] art. L. 120–21.

<sup>213</sup> This development was discussed in the Mermet Interview, *supra* note 80; Blatrix Interview, *supra* note 160; and Denier-Pasquier Interview, *supra* note 153. Denier-Pasquier mentioned the lack of notice. The procedure in the 2011 case discussed above occurred before the Grenelle provision went into effect.

<sup>214</sup> MINISTÈRE DE L'ÉCOLOGIE, DU DÉVELOPPEMENT DURABLE ET DE L'ÉNERGIE, <http://www.developpement-durable.gouv.fr/> (last visited Feb. 2012). A check of the website in February 2012 revealed three open dockets and little activity.

<sup>215</sup> Loi n° 2011-525 du 17 mai 2011 de simplification et d'amélioration de la qualité du droit [Law 2011-525 of May 17, 2011 to simplify and improve the quality of the law], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], n°0115 of May 18, 2011 p. 8537, article 16. The Prime Minister issued an implementing decree on December 8, 2011, which took effect January 1, 2012.

<sup>216</sup> See Loi 2011-1832 du 8 décembre 2011 de relatif aux consultations ouvertes sur l'internet [Law 2011-1832 of December 8, 2011 on Open Consultations on the Internet], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 9, 2011 (issued under Law 2011-515 of May 17, 2011, *supra* note 200, art. 16). For a discussion, see Akis Psygkas, [Legislation] *The “Warsmann Law”: A Notice-and-Comment Process à la Française?*, COMP. ADMIN. BLOG (May 17, 2011), <http://blogs.law.yale.edu/blogs/compadlaw/archive/2011/05/17/legislation-the-quot-warsmann-law-quot-a-notice-and-comment-process-224-la-fran-231-aise.aspx>.



website for three months but can then be removed.<sup>217</sup> This formulation represents a bare minimum. The time periods for comments and for government review of the comments are very short, and the government can decide how it wishes to summarize the comments.<sup>218</sup> The law does contain an experimental procedure for appointing a neutral person to summarize the comments.<sup>219</sup> After 18 months the Government must assess this experimental procedure and issue a report.

### 3. United States Practice

The rather grudging moves in France toward more open-ended public participation in rulemaking contrast sharply with American experience. The 1946 U.S. Administrative Procedures Act mandates that when the government or an independent agency carries out a rulemaking it must place a notice in the Federal Register, engage in an open-ended hearing process that accepts comments in written or oral form, and issue a statement of reasons along with the final rule. That rule can be reviewed by the courts on limited procedural and substantive grounds. The courts will check to be sure the proper procedures were followed, will check for the rule's consistency with the underlying substantive statute, and ask if the policy is "arbitrary and capricious" or sometimes if it is based on "substantial evidence." These concise legal provisions have spawned a large body of case law around the basic principles. Rulemaking needs to go through a final stage that is transparent and open to all interested participants. The administration needs publicly to justify the policies it makes under delegated authority, and those decisions can be reviewed by the courts. Although the courts are not always explicit about the goals of judicial review, one strand of jurisprudence emphasizes that judicial review can be a way to verify that rulemaking procedures are consistent with representative democratic values.<sup>220</sup> Other cases review administrative decisions for consistency with individual rights, but the courts frequently rule on the consistency of delegated rulemaking with democratic values. This aspect of U.S. administrative law is much less prominent in France. There has been a movement to supplement review based on rights with scrutiny of legality and abuse of power. However, most of the French efforts to open up the processes for producing secondary legislation and draft statutes have no legal force. The main legal innovations that we canvassed above concern large local and regional projects, not national decrees and ordinances. Until the passage of the December 2012 law, efforts to involve a broad range of organized groups were purely voluntary, motivated by the Government's own political incentives. They did not give any enforceable rights to citizens to demand such procedures. The 2012 statute dealing with environmental policymaking is a new departure, and it will important to

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<sup>217</sup> The draft is available at MINISTÈRE DE L'ÉCOLOGIE, DU DÉVELOPPEMENT DURABLE ET DE L'ÉNERGIE, CONSULTATIONS PUBLIQUES, <http://www.consultations-publiques.developpement-durable.gouv.fr/projet-de-loi-relatif-a-la-mise-en-oeuvre-du-principe-de-participation-du-public> (last visited Feb. 6, 2013).

<sup>218</sup> No referral was made to the Conseil Constitutionnel, so it is unclear whether the statute will meet constitutional standards.

<sup>219</sup> The proposal for a neutral referee or "guardian" is an innovative aspect of the experimental process. Under U.S. administrative law, the federal courts serve some of that function by reviewing the adequacy of the rulemaking process and the reasons expressed by an agency when it promulgates a rule.

<sup>220</sup> For the seminal discussion, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

monitor the role of the Conseil d'État and the Conseil Constitutionnel in reviewing its provisions for legally mandated public participation. The statute itself contains some language that is not completely clear, and it makes no mention of judicial review. Thus, much will depend upon how the French courts interpret their mandate given this new departure.

The recent high court cases suggest that courts are now willing to pressure the administration to provide for more effective participation and consultation, but these developments are most extensive in the area of environmental law because of participation rights embedded in the Environmental Charter. The Conseil d'État cases, although striking in their willingness to consider the extent and quality of participation and deliberation, deal with rather self-contained decisions, not broad-based policy initiatives. Furthermore, if the Conseil Constitutionnel accepts as sufficient the very limited participation processes in the new law amending the Environmental Code, that action could set back efforts to develop more extensive participation rights.

### III. INSTITUTIONAL INNOVATION: SECONDARY LEGISLATION AND INDEPENDENT AGENCIES

A second challenge to traditional French public law, especially constitutional law, is the existence of independent regulatory agencies.<sup>221</sup> Some of these agencies are relatively recent creations that regulate newly privatized industries under the heavy influence of EU law. Others have a longer history. Most implement the law in particular cases and have limited authority to issue secondary legislation. They raise important separation of powers issues for the French courts as they confront claims from private groups and newly privatized firms that demand stronger roles in agency policy-making.

#### A. *Constitutional Issues and Public Welfare*

The fundamental background issue is the problematic legality of delegating policy making outside the conventional structure of government. As discussed above, both the legislature and the Government have lawmaking authority, but, as in the United States, the Constitution does not explicitly mention independent authorities.<sup>222</sup> There are three linked constitutional issues. First, does the Constitution permit the creation of independent regulatory authorities? Second, if such authorities are permitted, how much detail must be included in the statute that establishes the regulatory body? Third, how much independence can the agencies have from the rest of government? In particular, does the Constitution permit them to issue decrees on their own authority without the participation of the President or the Cabinet?

The Conseil Constitutionnel answered the first question in the affirmative. The French Constitution in articles 20 and 21 provides that the government is under the

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<sup>221</sup> The agencies differ in whether or not they have "moral personality," *i.e.*, whether they can, like private firms, enter into contracts, be sued in tort, etc.

<sup>222</sup> The only exception is a 2008 constitutional amendment that created a new independent agency, the Defender of Rights, an Ombudsman. See 1958 CONST. art. 71-1.

control of the Prime Minister. This language, read narrowly, could limit the ability of the legislature to create independent regulatory agencies. Nevertheless, the Conseil Constitutionnel has accepted the constitutionality of independent regulatory agencies subject to some caveats.<sup>223</sup>

The second question was raised in a 2010 QPC involving the assignment of the Internet domain name “.fr”.<sup>224</sup> The plaintiff challenged an individual decision of *l'Association française pour le nommage internet en coopération* (AFNIC), a state-created, nonprofit body that assigns the domain name “.fr” but also argued that the law was an unconstitutional delegation because it was too imprecise.<sup>225</sup> The statute permits the Minister in charge of electronic communications to determine which bodies have the task of assigning and managing domain addresses “corresponding to the national territory.” The assignment must be carried out “in the general interest, under publicized nondiscriminatory rules designed to ensure compliance by the applicant with intellectual property rights.”<sup>226</sup> The Ministry delegated the assignment to ARNIC, whose status as a quasi-private entity with public responsibilities may have influenced the Conseil. In that sense the Conseil’s decision echoes the U.S. Supreme Court’s conclusion in *Panama Refining* and *Schechter Poultry*, old U.S. cases that found a constitutional violation in vague, open-ended delegations to privately controlled bodies during the Great Depression.<sup>227</sup>

The Conseil Constitutionnel faulted the statutory language saying that:

although Parliament has thus protected intellectual property rights, it has entirely delegated the power to supervise the conditions in which domain names are assigned, refused or withdrawn. No other statutory provision offers guarantees ensuring the absence of any infringement of freedom of enterprise and Article 11 of the Declaration of 1789 [free communication of ideas and opinions]. Parliament thus failed fully to exercise its powers.

The Conseil then declared this article of the act unconstitutional and gave the legislature time to amend the law.<sup>228</sup> The Conseil, saying that it did not have the power to strike the appropriate balance, left it up to Parliament to fill in the details. It did not mention public participation or any other features of the administrative

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<sup>223</sup> The Conseil Constitutionnel has not objected to the creation of independent bodies outside the core administration, unlike in Germany, where this is only possible in a few limited areas. However, the Conseil has tried to limit the regulatory power of agencies and award protections to citizens and businesses when Parliament has granted sanctioning powers to these bodies. See Conseil supérieur de l’audiovisuel, 17 janvier 1989, n° 88–248DC, Recueil p. 18; Commission des opérations de bourse, 28 juillet 1989, n° 89–260 DC, Recueil p. 71.

<sup>224</sup> Decision n° 2010–45 QPC of October 6th 2010 (Mr. Mathieu P.) Internet domain names, Recueil, p. 270.

<sup>225</sup> AFNIC appears to be analogous to an independent agency but—perhaps because of its quasi-private status—it not listed in <http://www.vie-publique.fr>. Its own site is at <http://www.afnic.fr/>.

<sup>226</sup> POSTAL & ELECTRONIC COMMUNICATIONS CODE art. L-45 (Fr.).

<sup>227</sup> *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>228</sup> The translation is from the official website of the CC. The new law correcting the unconstitutional provision is Loi no 2011–302 of 22 March 2011, portant diverses dispositions d’adaptation de la législation au droit de l’Union européenne en matière de santé, de travail et de communications électroniques [introducing various provisions to bring French law into line with European Union law in the fields of health, labour and electronic communications], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 23, 2011, p. 5186, art. 19.

process. It just found the delegation to be too vague and broad, and the case itself only involved an individual decision, not a decree or ordinance. The decision implies that France has a non-delegation doctrine that could have more teeth than the U.S. equivalent, but it is concerned with the violation of rights, not government policymaking.<sup>229</sup>

The third question is of most interest to us because it concerns the policymaking role of agencies and the way independence is intimately tied up with the agencies' insulation from the rest of government. Independent regulatory agencies implement broad policy mandates affecting the industries that they oversee. They are not simply engaged in case-by-case adjudication or the licensing of individual firms. Thus, even if independent agencies are constitutionally acceptable and the statute is sufficiently precise, the constitutional text may limit agencies' policymaking activities even though the French Constitution, unlike the American one, does mention secondary legislation, both decrees and ordinances.<sup>230</sup>

The list of the policy areas that must be governed by statute in article 34 includes "the freedom, diversity, and independence of the media."<sup>231</sup> Statutes must govern the establishment of public legal entities and the nationalization and privatization of firms. However, there are no details on the acceptable institutional options to preserve media independence or to regulate privatized firms in network industries. Article 38 clearly states that the Council of Ministers must issue ordinances, a provision that seems to prevent independent agencies from doing so on their own authority. Their ability to issue decrees seems more ambiguous under article 37, but the courts have interpreted articles 20 and 21 to limit independent agencies' authority to issue decrees.

This restriction on rulemaking contrasts with the US, where independent agencies have the same authority to issue legally binding rules as cabinet departments. The policymaking reach of U.S. agencies is often quite broad under open-ended statutory grants of regulatory authority. This was not always the case. At first, the Interstate Commerce Commission established in 1887 had to obtain court orders to take legally binding actions, but this requirement was soon overturned by statute with Supreme Court approval.<sup>232</sup> In the post-World War II period, the independent agencies followed the rest of government in moving toward greater reliance on rulemaking and met with no resistance from the courts.<sup>233</sup>

In France, the perceived limitations imposed by the text of the Constitution and the venerable concept of *service public* clash with concepts of public welfare emanating from the EU. Under EU efforts to promote competition, it is important to

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<sup>229</sup> In the domain of liberties, the Conseil d'État has ruled that the administration cannot restrict liberties through normative acts that would breach them; only Parliament can restrict liberties through statutes. See, e.g., CE, [5 May], 1944, Rec. Lebon [133]. [[Dame veuve Tromprier-Gravier]]. Ass./Sect. distinction did not exist at that time

<sup>230</sup> 1958 CONST. arts. 13, 37, 38.

<sup>231</sup> 1958 CONST. art. 34. The Conseil Constitutionnel had held that although the Constitution reserves an inherent jurisdiction to the executive in article 37, Parliament can always legislate in these matters.

<sup>232</sup> Thomas W. Merrill, *The Origin of American Style Judicial Review*, in *COMPARATIVE ADMINISTRATIVE LAW*, *supra* note 46, at 389.

<sup>233</sup> See generally, e.g., *Nat'l Petroleum Refiners Assoc. v. FTC*, 482 F. 2d 672 (D.C. Cir. 1973).

distinguish the roles of the public operator and the government regulator and to demand independence on the part of the latter to help ensure that regulation furthers the public welfare.<sup>234</sup> The public-welfare argument in favor of independent regulatory bodies has several pragmatic and functional components.<sup>235</sup>

First, familiar arguments support the use of regulations that give specific content to general laws. These arguments stress the legislature's lack of expertise and time to draft fully detailed statutes, combined with the fluidity of the regulatory environment over time. The French Constitution is fully consistent with these reasons for delegation. In fact, it goes further than the U.S. Constitution by permitting the government to regulate in certain areas even without a statutory basis.

Second, delegating power to independent agencies is based on the benefits of depoliticizing the regulatory environment so that decisions can be made by technocratic experts free from partisan pressures. Even if, as in France, appointments to agency governing boards are made by politicians, staggered terms and security of members' tenure give them protection from day-to-day partisan influence. In general, they cannot be removed even for "good cause" as appointees can in the U.S.<sup>236</sup>

Third, if the regulated industry was formerly in state hands, and especially if it maintains a "golden share" or owns some providers, then independence helps avoid conflicts of interest between public officials who wish to exploit any remaining monopoly power and regulation in the interest of the broader public.<sup>237</sup> This has been a major reason why EU law requires Member States to establish independent agencies when they privatize firms in network industries. The ECJ upheld this justification, finding that the same entity cannot be both a market player and a regulator.<sup>238</sup> This last justification is particularly salient in France and in the rest of the EU, as opposed to the U.S. where state ownership of firms in network industries has been uncommon.

However, in political terms, proposals to create independent agencies can produce inter-branch conflicts. Thus, if the Parliament seeks to make existing agencies more independent or to create new agencies, the Government may object. Especially if these agencies have a monitoring function, the Government will insist that they are actually creatures of the Government that cannot be separated from it by a mere statute. The Government may also seek to limit Parliament's role in

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<sup>234</sup> Dominique Custos, *Independent Administrative Authorities in France: Structural and Procedural Change at the Intersection of Americanization, Europeanization and Gallicization*, in *COMPARATIVE ADMINISTRATIVE LAW*, *supra*, note 46, at 278-79 [hereinafter Custos, *Independent Administrative Authorities*].

<sup>235</sup> 1958 CONST. arts. 20, 21.

<sup>236</sup> In France, security of tenure is guaranteed by the agencies' statutes, and the Conseil Constitutionnel has accepted those provisions as constitutionally permissible. However, the Conseil Constitutionnel did permit the substitution of one broadcasting agency for another in *Décision 86-217 DC*, Sept. 18, 1986, Rec. 141.

<sup>237</sup> The ECJ ruled on this issue in *Case 41/83, Italy v. Comm'n*, 1985 E.C.R. 873 (holding it to be an abuse of a dominant position for a company both to operate in a market and to have regulatory powers over the same).

<sup>238</sup> See *Case 41/83, Italy v. Comm'n*, 1985 E.C.R. 873; *Case C-18/88, Régie des télégraphes et des téléphones v. GB-Inno-BM SA*, 1991 E.C.R. I-5941; *Case C-92/91, Neny*, 1991 E.C.R. I-5398.

agency oversight and appointments.<sup>239</sup> Once such agencies exist, they may seek to increase their independent authority at the same time, seeking more control. In France, if these three actors conflict over the role and behavior of an agency, a fourth actor, the Conseil d'État, referees conflicts over the agencies' legal powers. The Conseil has occasionally reviewed the procedures used to make policy in agencies.<sup>240</sup> The Conseil Constitutionnel might also referee these conflicts both at the time of statutory drafting and *ex post* as the agency carries out its mandate. At present, the EU also is a major player whose legal mandates and court decisions constrain French legal institutions.

To further explore the tensions between functional arguments for independence and constitutional strictures, we consider the two French agencies involved in the regulation of the media and telecommunications: the *Conseil Supérieur de l'Audiovisuel* (CSA) and the *Autorité de Régulation des Communications Electroniques et des Postes* (ARCEP). The former grants licenses and regulates content, including political speech. The latter regulates physical infrastructure and economic conditions. The CSA regulates TV and radio, as well as the Internet and mobile phones to the extent that these two platforms carry professional content. Both agencies operate in an industry where public firms compete directly with private entities under the authority of these bodies.<sup>241</sup> We selected this industry for study because it raises important policy issues that cannot effectively be resolved through case-by-case adjudication alone. The regulatory mandates include many issues that combine high levels of technical expertise and strong public concern. They highlight the tensions between independence and political accountability.

### B. *Le Conseil Supérieur de l'Audiovisuel*

For radio and TV, CSA regulates and monitors content, grants licenses, and can revoke them. It must decide how far to extend its reach into on-line content as these fora are becoming professionalized (e.g. the French version of You-Tube called DailyMotion and Smartphones). It has managed the French transfer to digital TV (TNT in French) and overseen the development of cable and satellite channels. At present, CSA and ARCEP share competences in allocating new frequencies, particularly for digital terrestrial television and in broadband development.

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<sup>239</sup> In 2011, a parliamentary committee heard reports from a study of independent agencies. See Comité d'évaluation et de contrôle des politiques publiques, December 1, 2011 at [http://www.assemblee-nationale.fr/13/cr/2010-2011/20110180.asp#P441\\_98358](http://www.assemblee-nationale.fr/13/cr/2010-2011/20110180.asp#P441_98358)

<sup>240</sup> Some agencies' actions are reviewed either by the Conseil d'État or by the Paris Court of Appeal, a civil court, depending upon the nature of the challenge. Most decisions reviewed by the civil courts are not within the scope of our study as they involve adjudications not general norms.

<sup>241</sup> For background consult RAPPORT ANNUAL 2010, CONSEIL SUPÉRIEUR DE L'AUDIOVISUEL ("CSA"), [http://www.csa.fr/var/ezflow\\_site/storage/csa/rapport2010/rapport/conseil.htm](http://www.csa.fr/var/ezflow_site/storage/csa/rapport2010/rapport/conseil.htm) (last visited Apr. 13, 2013) [hereinafter CSA RAPPORT ANNUAL 2010]. An English-language summary is available on the website. Much of the material in this section is derived from the annual report and from an interview with Olivier Japiot, Director General, and Elisabeth Mauboussin, Directrice Juridique, CSA, in Paris, France (December 5, 2011) [hereinafter Japiot and Mauboussin interview]. In addition, the Haute autorité pour le diffusion des oeuvres et la protection des droits sur internet, has responsibility for regulating file-sharing on the internet and protecting copyright. See generally Christophe Geiger, *Honourable Attempt but (Ultimately) Disproportionately Offensive Against Peer-to-Peer on the Internet (HADOPI)—A Critical Analysis of the Recent Anti-File-Sharing Legislation in France*, 42 INT'L REV. INTELL. PROP. & COMP. L. 457 (2011).

Furthermore, both have a claim to regulate technical digital broadcasting between providers.

We make no attempt to sort out these jurisdictional issues, but instead discuss CSA and ARCEP separately.<sup>242</sup> The CSA must make decisions that mix technical and value choices. Many of its decisions are both politically and economically salient and are also of great interest to ordinary citizens. Its activities cannot be cabined in a technocratic box even if some of its decisions demand technical expertise. In that sense the issue area is similar to the environmental problems discussed above. Although the institutional solutions are quite different, policymakers in both areas face pressure for more accountable decision-making that may clash with traditional ways of acting. Both cases raise the question of how an independent agency can be both independent of politics and responsive to public concerns.

The CSA was founded in 1989 as an independent authority to enforce a 1986 statute guaranteeing freedom of expression in audiovisual communications. It replaced a 1982 body with a more limited mandate.<sup>243</sup> The complex interactions between the government, CSA, and the public broadcaster illustrate some of the challenges of maintaining an independent authority in an industry with prominent publicly owned firms.

Currently, the CSA has nine members, of which three are appointed by the president, three by the president of the Assembly, and three by the president of the Senate.<sup>244</sup> Each member serves for one non-renewable term of six years, staggered with one-third (one from each group) appointed every two years. This system means

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<sup>242</sup> In August 2012, the French government set up a working group to consider the merger of CSA and ARCEP. In December 2011, a National Assembly committee heard from two reporters who had prepared an assessment of independent administrative authorities. The report recommended merging the three agencies with primary responsibility for the media—*i.e.*, CSA, ARCEP, and HADOPI. See Christian Vanneste, Reporter, MP, Statement to the Comité d'évaluation et de contrôle des politiques publiques (Dec. 1, 2011), available at <http://www.assemblee-nationale.fr/13/cr-cec/10-1/c1011010.asp>.

<sup>243</sup> The CSA replaced the Commission nationale de la communication et des libertés ("CNCL"). The CNCL itself replaced the Haute autorité de la communication audiovisuelle ("HACA"). The original 1982 body was created mainly so that appointments of the presidents of the public media companies would be independent of the sitting government. In 2009, a constitutional amendment made the appointment process somewhat less independent. See Loi du 5 mars 2009 relative à la communication audiovisuelle et au nouveau service public de la télévision [Law of Mar. 5, 2009 on audiovisual communication and the new public television service], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 7, 2009, p. 4321. The new process has been used three times so far and, according to Director General Japiot, has not generated controversy. See CSA RAPPORT ANNUAL 2010, *supra* note 241; Japiot and Mauboussin Interview, *supra* note 241; E-mail from Olivier Japiot, Director General, Conseil supérieur de l'audiovisuel, to author (Sept. 20, 2012, 10:10 AM) (on file with author).

<sup>244</sup> This is a common method of appointment in France. For example, this is how the Conseil Constitutionnel is appointed. A National Assembly report recommends changing the method of appointment for the chairs of all authorities to assure bi-partisan support for the candidates (or gridlock). They propose that chairs be appointed by a vote of three-fifths of the members of the relevant committees in the two houses. The government set aside this proposal on conflict of interest grounds, stating that the committee might in the future seek the commission's advice on some legislative matter. The proposal was also opposed by an Assembly committee on the law See Vanneste, *supra* note 242. The agencies themselves have "gone to the mat" [*montées au créneau*] to defend their independent existence. René Dosière, Reporter, [MP, Statement to the Comité d'évaluation et de contrôle des politiques publiques (Dec. 1, 2011), available at <http://www.assemblee-nationale.fr/13/cr-cec/10-1/c1011010.asp>.

that in 2011 all the members had been appointed by politicians associated with right wing parties. An amendment to the agency's statute proposed a new method of appointment to assure party balance, as is the practice in the US, but the proposal has not been enacted. During periods of divided government, more diversity can be expected. After the 2012 elections, however, a single party controlled all three institutions. Unlike the US, where the Senate must confirm Presidential nominees and the threat of a filibuster looms large, the majority of each body can appoint its own preferred candidate without worrying about the approval of another body. However, since the 2008 amendments to the Constitution, it is possible for the relevant committees to veto those nominated by the President (or other appointing authority) if they can muster a three-fifths majority. This reverses the practice in the United States where two-fifths of the Senate can veto a presidential appointment if the opponents choose to filibuster the nominee.

As in other independent regulatory agencies, serving on the CSA is a full-time job.<sup>245</sup> Members cannot be employed in the industry for one year after leaving the board.<sup>246</sup> The background of members varies, but journalists have always been well represented. Retired politicians are common. Others are senior civil servants who will return to government ministries after service on the CSA. The chairman in 2011 was Michel Boyon, a graduate of ENA with a long career in government and French public companies as well as in the Conseil d'État.<sup>247</sup>

The board and especially the Chairman of the CSA are supposed to be above politics, but given the sensitive nature of their responsibilities, this mandate is a source of ongoing debate and critique. The problem is not just the result of personalities, but relates to the structure of the agency, its links to the government, and the career paths of its staff and some of its board. Given the strength of France's civil service tradition, some worry that no real independent thinking is possible in regulatory agencies heavily staffed at the top by career civil servants. The CSA has a staff of 293 full-time-equivalents of which seventeen percent are civil servants seconded from the rest of the government. Many of these are in top positions in the agency.

The CSA mostly issues individual decisions (e.g., it awards and renews licenses, sanctions stations for violations). Limited by the jurisprudence of the Conseil d'État and the Conseil Constitutionnel, it lacks open-ended authority to issue secondary legislation. However, it has decree authority in particular areas set by statute.<sup>248</sup> The

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<sup>245</sup> Loi 86-1067 du 30 septembre 1986 relative à la liberté de communication [Law 86-1067 of September 30, 1986 on the Freedom of Communication], J.O., Oct. 1, 1986, p. 11755 [hereinafter CSA Act], art. 5. In contrast, service on some advisory boards and commissions is a part-time responsibility.

<sup>246</sup> *Id.* According to our joint interview with Japiot and Mauboussin, *supra* note 241, the actual practice appears to be somewhat more restrictive.

<sup>247</sup> See Michael Boyon, WIKIPEDIA, [http://fr.wikipedia.org/wiki/Michel\\_Boyon](http://fr.wikipedia.org/wiki/Michel_Boyon) (last visited Apr. 13, 2013). President Hollande appointed Olivier Schrameck, a member of the Conseil d'État and one of our interviewees, to replace Japiot in January 2013. Pascale Paoli-Lebailly, *Olivier Schrameck Appointed Head of CSA*, RAPID TV NEWS (Oct. 1, 2013), <http://www.rapidtvnews.com/index.php/2013011025770/olivier-schrameck-appointed-head-of-csa.html>

<sup>248</sup> The Conseil Constitutionnel, Conseil supérieur de l'audiovisuel, n° 88-248 DC of 17 January 1989, upheld the creation of CSA but restricted the permissible level of delegation. "17 janvier 1989: Conseil supérieur de l'audiovisuel (248 DC)," in Louis Favoreu, Patrick Gaïa, Richard Ghevoitian, Ferdinand Mélin-Soucramanien, André Roux, Loïc Philip, *Les Grandes Décisions du Conseil*



most important are: child and youth protection (both programming and protection from harmful microwave emissions); advertising (a government decree gave CSA authority here), access of parties and candidates to radio and TV during electoral campaigns, on-line gambling,<sup>249</sup> and the ethical and honest use of information.

Statutes set very general requirements for CSA processes, but these requirements do not create legally enforceable procedural rights when the CSA issues rules. The 2010 Annual Report discusses a requirement of “public consultation,”<sup>250</sup> but this involves individual licensing decisions and seems designed to hear would-be applicants for a license and other firms, not the “public” in general. However, the statute refers to a decision’s impact on the market, a criterion that would seem to invite potential competitors and consumers to take part.<sup>251</sup>

The CSA in its own interest carries out “hearings” with the companies and associations interested in its policies, but these are not open-ended consultations.<sup>252</sup> It often also has a formal public consultation. It accepts comments, but these are not made public and are only summarized *ex post* without attribution. This is justified to protect privacy and encourage frankness, but, of course, it limits debate because participants cannot respond to others’ arguments. According to Director Japiot, the CSA is interested in increasing public consultation, and its top officials have met with people from OFCOM (the UK agency in this area) to discuss its experience with citizen panels. However, such an exercise in public outreach is not the same thing as a process that seeks public input on particular policy decisions.

The administrative and constitutional tribunals have not struck down CSA decisions on procedural grounds. In the absence of statutory provisions, the Conseil d’État is reluctant to require consultation, and has been mostly supportive of CSA practices and choices.<sup>253</sup> However, the recent Conseil Constitutionnel case dealing

*Constitutionnel*, n° 21, p. 229 (Daloz, 16<sup>th</sup> ed., 2011). The delegation must cover only measures of limited scope in terms of both application and content. See also Emmanuel Guillaume and Charlotte Beaugonin, “Contentieux de l’audiovisuel” in *Répertoire de contentieux administratif* (2007), ¶¶ 135–139. The case is summarized in English at 570–571).

<sup>249</sup> A *délibération* sets out conditions on broadcasters that permitted such games. This appears not to be a formal decree but a guideline that announces enforcement priorities. See *Délibération 2011–09 du 27 avril 2011 relative aux conditions de diffusion, par les services de télévision et de radio, des communications commerciales en faveur d’un opérateur de jeux d’argent et de hasard légalement autorisé* [Deliberation of Apr. 27, 2011 on the Conditions of Dissemination of Legally Authorized Gambling by a Commercial Operator of Television and Radio Services], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 30, 2011, text n° 77.

<sup>250</sup> CSA act *supra* note 245, art. 31.

<sup>251</sup> See *id.* arts. 29, 30–1, 30–5, 30–6.

<sup>252</sup> These consultations are not legally required and create no legally enforceable rights. The CSA has no legal obligation to take comments into account and has no published guidelines on the way it carries out consultations. The agency uses its website to manage the consultation process subject to precise time limits for comments. It either poses particular questions concerning a future decision or puts a draft decision on the web and awaits comments. Afterwards, the CSA writes a synthesis of the comments and is free to decide whether or not to take them into account before issuing its decision. E-mail from Elisabeth Mauboussin, Legal Director, Conseil supérieur de l’audiovisuel, to authors (Jun. 15, 2012, 07:06) (on file with authors).

<sup>253</sup> Fifty cases went to the Conseil d’État in 2010; there were three proposed referrals to the Constitutional Council, but none was sent on. Of the 50 cases, 18 upheld the CSA decision, four annulled the CSA decision, seven were ruled out of order by the judge or were nonsuits, and 21 were withdrawn. Of the proposed referrals to the Constitutional Council, one involved procedures but only with respect to

with the assignment of Internet domain names raises some questions. The case did not involve the CSA, but the underlying logic would seem to apply.

Recently, the Conseil d'État held against the CSA in a case of non-decision that dealt with substance. The issue revolved around the question of how to count the speeches of the President in determining the air time allotted to different political viewpoints.<sup>254</sup> In France it had not been the practice for Presidents to give speeches in Parliament. President Sarkozy instituted that practice, raising the issue of how to count them. The CSA omitted them, and the Conseil d'État disagreed. In 2005 the Conseil d'État held that the exclusion of his speeches was generally proper but did not apply in extraordinary circumstances: here a referendum on the European constitution. Subsequently, in 2009 the CSA did not include the president's speeches in Parliament in the total allotted to the government. The Conseil d'État held, in contrast, that the CSA needed to include the "political" parts of the president's speeches in the total.<sup>255</sup> This seems like a highly charged mandate, but the CSA apparently managed its task without much controversy during the 2012 electoral season.

However, the allocation of TV time remains a contested issue that intersects with new political institutions over and above presidential speeches. The Socialist Party held its first ever primary in 2011, and the media covered it extensively, though not always in a manner favorable to the Socialists. The other parties objected that the media devoted too much time to the Socialists. The stations were given a formal warning by the CSA, the first stage in sanctioning. If they were to repeat the contested behavior, they could be fined, advertising could be suspended, or in extreme cases licenses might be modified or revoked. This reaction from the CSA suggests a need to rethink the underlying policy in the light of the newly instituted primary process.

Thus, the Conseil d'État acts as a watchdog over the CSA while giving it considerable leeway in its day-to-day operations. But there is another important check on the independence of the CSA: the Government. The CSA is a statutorily independent body; the Government cannot dismiss board members even "for cause" and cannot interfere with individual decisions, for example, granting licenses and sanctioning firms that violate the rules. However, as noted above, the CSA has only limited decree authority. Outside those areas, they issue advice (*avis*) to the relevant government ministry on draft decrees (as well as on draft laws).<sup>256</sup> The CSA

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deliberations over the grant of an individual license. See Conseil d'État, Oct. 4, 2010, 336918 (where the Conseil d'État refused to send the constitutional challenges to art. 29–3 of Law 86–1067); Loi du 5 mars 2009 relative à la communication audiovisuelle et au nouveau service public de la télévision [Law of Mar. 5, 2009 on audiovisual communication and the new public television service], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 7, 2009, p. 4321, art. 77, which required *deliberation* as part of the process of applying for a license, to the Constitutional Council on the ground that the question was neither serious nor new). The Report cites a number of important Conseil d'État decisions upholding CSA decisions. Of these, only one involved the administrative process and that decision was an individual licensing decision. CSA ANNUAL REPORT 2010, *supra* note 241.

<sup>254</sup> Conseil d'État, Ass., Apr. 8, 2009, 311136, Recueil Lebon p. 140.

<sup>255</sup> *Id.*

<sup>256</sup> The CSA has frequently given advice to the government on draft decrees, but this practice has only been formally required by statute since the Law 2009–258 of March 5, 2009 on Audiovisual

submitted nineteen evaluations in 2010. It also submitted seven evaluations to the competition authority and ARCEP.<sup>257</sup> The key point is not the number of evaluations, but the fact that most of the government decrees dealing with the media will be implemented, but not created, by the CSA.

The CSA offers advice at an early stage while the decree is being formulated in order to have an impact on the final result. As a result of the CSA's involvement early in the drafting of ministry decrees, it usually finds the results acceptable. However, the obvious concern is that the agency is not really independent of the government with respect to major policy initiatives.<sup>258</sup> This can be a plus if one worries that the agency is too independent of democratic imperatives, but it can be a minus if one wants an agency able to act independently of political pressures to provide a background for free flowing political debate and a free media. The latter concern is particularly salient because the government owns or partly owns major providers and has an interest in their financial health and in the content of their programs.

Although the CSA usually approves government decrees, the possibility of going public with a negative finding gives it bargaining power. For example, in 2007 it publicly disapproved the Government's draft decree dealing with on-demand TV services. The Government was obviously unhappy with the CSA's public stance, which was a way of signaling the agency's independence. The Government eventually buckled and took account of the CSA's stated objections.<sup>259</sup>

In other words, rulemaking is a shared competence.<sup>260</sup> Such a back and forth between an independent regulatory agency and a government ministry might seem strange to an American observer. If a government ministry can promulgate a rule that is then carried out by an agency, it would seem to violate the agency's independence. It is one thing to include such agencies in Government task forces that consider overlapping policy issues and to ask it for advice with respect to ministry policymaking. It is quite another for a cabinet ministry to be able to issue rules that the independent agency must enforce.

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Communication and New Public Television. The CSA Annual Report 2010 lists 19 instances where the CSA gave advice to the government. CSA RAPPORT ANNUAL 2010, *supra* note 241, at 11.

<sup>257</sup> *Id.* at 11.

<sup>258</sup> Limited decree authority is a general feature of French independent agencies. See Custos, *Independent Administrative Authorities*, *supra* note 234, at 281–82.

<sup>259</sup> CSA RAPPORT ANNUAL 2010, *supra* note 241, at 9.

<sup>260</sup> For a defense of this way of organizing the relationship between agencies and governments, see generally GÉRARD MARCOU & FRANCK MODERNE, *DROIT DE LA RÉGULATION, SERVICE PUBLIC ET INTÉGRATION RÉGIONALE* (2005). See also SOCIÉTÉ DE LÉGISLATION COMPARÉE, *LE MODÈLE DES AUTORITÉS DE RÉGULATION INDÉPENDANTES EN FRANCE ET EN ALLEMAGNE* (Gérard Marcou & Johannes Masing eds., 2011). This shared competence is a common feature of European regulatory agencies.

### C. ARCEP<sup>261</sup>

The *Autorité de Régulation des Communications Electroniques et des Postes* (ARCEP) regulates both the telecommunications market and the postal services.<sup>262</sup> It was created in 2005 to replace the *Autorité de Régulation des Télécommunications* (ART), established in 1996<sup>263</sup> and was established to prepare for the opening of the telecommunications sector to competition following the liberalization efforts of the European Commission. This sector—except for mobile telephony—was previously a legal monopoly of France Télécom. The ART was entrusted with removing barriers to entry, and it was also responsible for guaranteeing the provision and financing of the “public service of telecommunications.”

The agency is an independent administrative authority (*autorité administrative indépendante*) with an Executive Board of seven members who are appointed for six-year terms “on the basis of their economic, legal and technical qualifications in the areas of electronic communications, post and regional economy.” Their terms are irrevocable and nonrenewable. Three members are appointed by the President of the Republic, two by the President of the Senate, and two by the President of the National Assembly.

Although the board members must have some expertise, informal networks between politicians and members of independent regulatory authorities appear to play a role.<sup>264</sup> The majority of the board members of the ARCEP have followed the traditional path leading to the upper echelons of the French administration. Most appointees incorporate into agency operations a prior knowledge of how the administration works in addition to technical competence.<sup>265</sup>

Political oversight can be informal and behind the scenes, but there are also formal mechanisms. Like CSA, the ARCEP submits an annual public report to the government and the Parliament, and agency representatives participate in

<sup>261</sup> This section summarizes the material in Athanasios Efst Psygkas, *From the “Democratic Deficit” to a “Democratic Surplus”: Enhancing Participatory Regulatory Processes in France*, (unpublished draft paper, Yale Law School, 2011). We are grateful to Athanasios Psygkas for sharing with us his draft, which contains additional details on the agency and its work.

<sup>262</sup> Loi 2005–516 du 20 mai 2005 relative à la régulation des activités postales [Law 2005–516 of May 20, 2005 on the Regulation of Postal Activities], JOURNAL OFFICIEL DE LAW REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 21, 2005, p. 8825.

<sup>263</sup> Loi 96–659 du 26 juillet 1996 de réglementation des télécommunications [Law 96–659 of July 26, 1996 of Telecommunications Regulation], JOURNAL OFFICIEL DE LAW REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 27, 1996, p. 11384. For a comparison of ART and the U.S. Federal Communications Commission, see Dominique Custos, *Agences indépendantes de régulation américaines (IRC) et autorités administratives indépendantes françaises (AAI): L'exemple de la “Federal Communications Commission” (FCC) et de l'autorité de régulation des télécommunications (ART)*, 20 POLITIQUES ET MANAGEMENT PUBLIC 67 (2002), available at [http://www.persee.fr/web/revues/home/prescript/article/pomap\\_0758-1726\\_2002\\_num\\_20\\_1\\_2706](http://www.persee.fr/web/revues/home/prescript/article/pomap_0758-1726_2002_num_20_1_2706) (last visited February 11, 2013).

<sup>264</sup> See Mark Thatcher, *Independent Regulatory Agencies and Elected Politicians in Europe*, in REGULATION THROUGH AGENCIES IN THE EU: A NEW PARADIGM OF EUROPEAN GOVERNANCE 47, 59. (Damien Geradin et al., eds., 2005).

<sup>265</sup> See Martin Hirsch, *L'expertise scientifique indépendante dans un établissement public: L'exemple de l'Agence française de sécurité sanitaire des aliments*, in CONSEIL D'ÉTAT, RAPPORT PUBLIC 2001: LES AUTORITÉS ADMINISTRATIVES INDÉPENDANTES 428 (2001) (suggesting, in the context of another authority, the French Food Agency, that it is entrusted with developing independent expertise).

parliamentary hearings. In addition, the *Commission supérieure du service public des postes et des communications électroniques* (CSSPCE) has provided parliamentary oversight since 1990 when France Télécom was transformed from a state service (*service de l'État*) into a distinct public body.<sup>266</sup> The committee has seventeen members: seven from the National Assembly, seven from the Senate and three “qualified personalities.” The aim was to give parliamentarians an oversight mechanism that would “guarantee the public service of telecommunications.” However, CSSPCE’s role is purely advisory. It can issue an opinion before the ARCEP adopts a policy; ARCEP retains its independence vis-à-vis the legislature but must explain its actions.

ARCEP faces some of the same challenges to its independence as CSA. In its day-to-day operations the threats to ARCEP’s independence are rather subtle. We have already pointed to the fact that both boards and agency staffs include high civil servants. In addition, the government tries to manage or influence policymaking in both agencies.

If the government oversteps, ARCEP has a strong advocate in the European Commission, which can go beyond rhetoric to take legal action. However, it has done so only when the challenge to ARCEP’s independence was particularly evident: for example, in 2010–2011 when the government attempted to assign a government commissioner (*Commissaire du gouvernement*) inside the ARCEP.<sup>267</sup> During the first reading of this bill in the National Assembly, the Government introduced an amendment providing that a government commissioner, nominated by the Minister in charge of the electronic communications sector, would be placed within the ARCEP. She would “communicate the analysis of the government,” with respect to policy in the domain of posts and electronic communications and would retire during the deliberations of the agency. However, she could put on the agenda any question related to sectoral policy and “the examination of this question could not be refused.”<sup>268</sup> The Minister highlighted the commissioner’s limited power and stated that her presence would “reinforce the dialogue” between the agency and the government.<sup>269</sup> This proposal is the reverse of the practice at CSA, which comments on government regulations that will apply to its operation. The amendment prompted strong reactions from ARCEP and members of the opposition who pointed out the risk of undermining the independence of the agency. The European Commission

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<sup>266</sup> Loi 90–568 du 2 juillet 1990 relative à l’organisation du service public des postes et télécommunications [Law 90–568 of July 2, 1990 on the Organization of the Public Postal Service and Telecommunications], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE, Jul. 8, 1990, p. 8069.

<sup>267</sup> Projet de loi portant diverses dispositions d’adaptation de la législation au droit de l’Union européenne en matière de santé, de travail et de communications électroniques [Bill Containing Various Provisions Adapting Legislation to the Law of the European Union on Health, Labor and Electronic Communications], no. 2789, déposé le 15 septembre 2010, available at <http://www.assemblee-nationale.fr/13/projets/pl2789.asp> (last visited April 14, 2013).

<sup>268</sup> Article 13 (nouveau); Après l’article L. 131 du même code, il est inséré un article L. 131–1.

<sup>269</sup> NATIONAL ASSEMBLY, XIII<sup>TH</sup> LEGISLATURE, SESSION ORDINAIRE DE 2010–2011, COMPTE RENDU INTÉGRAL TROISIÈME SÉANCE DU JEUDI 13 JANVIER 2011 [verbatim record of the debates at the National Assembly, Third Session of January 13, 2011] (3d Sess., Jan. 13, 2011, Minister Eric Besson), available at <http://www.assemblee-nationale.fr/13/cr/2010-2011/20110097.asp> (last visited April 14, 2013).

threatened to initiate a procedure against France charging violation of the EU directives because EU law requires ARCEP to be independent.<sup>270</sup> Eventually, the Senate deleted the amendment, and it was not passed by the legislature.<sup>271</sup> One wonders, however, if the Minister might achieve the same result by promulgating rules to be applied by ARCEP. So far the EU has not objected to that practice.

The industry and other concerned actors provide input through organized consultations or concertations. Many groups are affected by the actions of ARCEP, including the regulated industry, civil society groups (particularly consumer groups), other public authorities, and individuals. However, the telecommunications law of 1996 only envisaged stakeholder participation via two corporatist bodies, and ARCEP emphasizes concertation only with the regulated entities. In the first Annual Report of 1997, the Chairman identified dialogue with all *market* actors as a method of attaining the aim of balanced, fair, and sustainable competition consistent with the public service objectives of the agency.<sup>272</sup> These formal consultation requirements contrast with the few public consultations that the ART launched during its early period. They occurred on an *ad hoc* basis and were highly discretionary. They were not published on its website, and there is very little information about who was consulted or how ART responded.

The EU exercises external control over some aspects of ARCEP's choices.<sup>273</sup> For us, the most relevant EU control began in June 2004 with the transposition into French law of the 2002 EU "electronic communications package". The new statute modified the 1996 law to include the exact wording of the Framework Directive regarding consultation procedures.<sup>274</sup> Article L 32-1-III of the Code des postes et des communications électroniques (CPCE) now reads:

Whenever, in the context of the provisions of this code, the minister in charge of electronic communications and the Autorité de régulation des communications électroniques et des postes intend to take measures which have a significant impact on the market, they shall publicize the intended

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<sup>270</sup> *Arcep: UE menace la France de sanction* [ARCEP: EU threatens France with sanctions], LE FIGARO (Feb. 8, 2011), <http://www.lefigaro.fr/flash-eco/2011/02/08/97002-20110208FILWWW00503-arcep-ue-menace-la-france-de-sanction.php>; *Il n'y aura pas de commissaire du gouvernement à l'Arcep* [There Will Be No Government Commissioner to ARCEP], LE MONDE (Feb. 16, 2011), [http://www.lemonde.fr/technologies/article/2011/02/16/il-n-y-aura-pas-de-commissaire-du-gouvernement-a-l-arcep\\_1481174\\_651865.html](http://www.lemonde.fr/technologies/article/2011/02/16/il-n-y-aura-pas-de-commissaire-du-gouvernement-a-l-arcep_1481174_651865.html). Here the impact of EU law is stronger for ARCEP as compared to CSA, which is not required to be independent under EU law.

<sup>271</sup> See Digital Agenda for Europe, Broadband & Telecom Market Regulation, <http://ec.europa.eu/digital-agenda/en/scoreboard/broadband-telecom-market-regulation-10> (the independence and effectiveness of the NRA). See also the opinion of the Senate Commission on Economy that argued that the amendment was contrary to EU law, of little use given all the other provisions of the law regarding the relations between the agency and the government (<http://www.senat.fr/rap/a10-252/a10-2528.html#toc31>)

<sup>272</sup> ART, RAPPORT ANNUEL D'ACTIVITÉ 1997 [Annual Report 1997] (1997), p. 5.

<sup>273</sup> ARCEP must submit its market analyses of the electronic communications sector to the European Commission and to Member State agencies for their opinions. The European Commission has veto power on the definition of these markets and on the designation of operators with significant market power.

<sup>274</sup> Loi no 2004-669 du 9 juillet 2004 relative aux communications électroniques et aux services de communication audiovisuelle [Law 2004-669 of 9 July 2004 on electronic communications and audiovisual communications services], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], p. 12483, art. 3.

measures within a reasonable period before their adoption and receive comments on them. The result of these consultations is made public except in the case of confidentiality protected by law. The authority puts in place a service allowing access to those consultations.<sup>275</sup>

Other provisions oblige the agency to launch a public consultation on specific questions.<sup>276</sup> ARCEP immediately increased the number of consultations in 2004; since then the numbers have remained stable or increased. The number of comments received and, more importantly, published also rose, reflecting ARCEP's commitment to transparency.<sup>277</sup> According to Athanasios Psygkas's research, once the agency officials became familiar with participatory processes and developed a culture of consultation, they organized more frequent public consultations on subjects where a prior consultation was not legally required.<sup>278</sup>

Participants in ARCEP processes are mostly market players. According to Psygkas, in the most recent year for which data are available, 77 percent of the participants were from industry, 5 percent were from NGOs, 7 percent were individuals, and 11 percent were from local governments and other public authorities.<sup>279</sup> In spite of this tilt toward the regulated firms, the processes do permit the engagement of actors that would otherwise be left outside the regulatory process: namely, individuals, smaller NGOs, and local authorities. Further, as consumer groups themselves acknowledge, some consultations may have a very narrow technical scope that only concerns the industry.<sup>280</sup> In addition, the industry category encompasses both traditionally strong domestic firms, such as the incumbent operator, and smaller companies in the telecommunications business, as well as foreign companies. Participating firms may have divergent interests. For example, in the case of net neutrality, operators and content providers (both small and large) likely had opposing positions.<sup>281</sup>

Of course, mandating open hearings and consultations does not eliminate the possibility of informal, private meetings. Even if such meetings were to occur, Psygkas argues that they would not negate the impact of public consultations. He reports that lobbyists view participating in public consultations as a necessary prong of their strategy, as it helps to identify them as reliable and expert market actors and contributes to establishing a strong presence in the sector. ARCEP itself expects market actors to make their positions clear in the hearings.<sup>282</sup> According to Psygkas, the formal consultative bodies have gradually lost influence with the rise of public consultations. These bodies enter the picture late, at the end of the public

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<sup>275</sup> The article was translated by Psygkas, *supra* note 261.

<sup>276</sup> They deal with the management of scarce frequencies and interconnection obligations. CODE DES POSTES ET DES COMMUNICATIONS ÉLECTRONIQUES [C.P.C.E.] arts. L42–2, L38–4, D99–11.

<sup>277</sup> For detailed data, see Psygkas, *supra* note 261.

<sup>278</sup> The consultation on “orientations” regarding net neutrality in the summer of 2010 is one example. In April 2011, ARCEP launched a public consultation on access to optical fiber lines in “small houses” in very dense zones. On June 15, 2011, the Authority published its decision on market analysis and its recommendation on optical fiber lines. See Psygkas, *supra* note 261, for details.

<sup>279</sup> Calculation by Psygkas, *supra* note 261, from ARCEP website

<sup>280</sup> Psygkas, *supra* note 261, reported this from an interview.

<sup>281</sup> See the case study in Psygkas, *supra* note 261.

<sup>282</sup> Psygkas, *supra* note 261.

consultation process; during their meetings actors repeat comments that they have previously expressed.<sup>283</sup>

French law does not impose a general reason-giving obligation for regulatory acts.<sup>284</sup> However, the act that governs ARCEP requires it to give reasons for some decisions.<sup>285</sup> The Authority will often publish a synthesis or overview of the comments it received, a practice that may lead ARCEP to articulate reasons why it did or did not incorporate the comments into the final text. However, ARCEP has no obligation to publish such syntheses, and it can select which comments to summarize. Their content is entirely at the discretion of ARCEP. Between 2004 and 2010, the percentage of decisions with a published synthesis varied from 30 percent to 62 percent, and the median number of pages varied from 12 to 31.<sup>286</sup> There is no way of knowing how the length of the summaries compares to the actual volume of submissions.

Judicial review of ARCEP procedures is frequently limited to what Psygkas calls a “checklist obligation.” The court simply inquires whether the agency has fulfilled its obligation to hold a consultation. If it did not, its decision will be annulled; if it did, the Conseil d’État does not inquire further. However, if the law requires broad concertation, consultation with a closed group will not suffice.<sup>287</sup> Furthermore, the Conseil d’État held in 2009 that ARCEP could not modify the obligations it imposed on a major market actor without a new round of consultations, unless these modifications were anticipated in the original decision.<sup>288</sup> In its opinion the Conseil takes a broad view of the public accountability of consultations by noting that they constitute guarantees for consumers as well as for operators. However, the decision still fits in the checklist category in that the Conseil d’État simply looks to see if a consultation took place.<sup>289</sup> However, the adequacy of the consultation process does matter when the Conseil d’État determines the scope of review. This includes the number of comments received during those consultations and, more importantly, the number of comments published.<sup>290</sup> The existence of a comprehensive and well-advertised concertation prevents the firms from raising new

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<sup>283</sup> Psygkas, *supra* note 261, reporting on an interview.

<sup>284</sup> The requirements on reason-giving are imposed by the Loi no. 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs et à l’amélioration des relations entre l’administration et le public. The law applies to unfavorable individual decisions. It does not extend to *actes réglementaires* - although there are exceptions, e.g., one introduced by Loi no. 2002-276 du 27 février 2002 relative à la démocratie de proximité [Law 2002-276 of Feb. 27, 2002 on the *law on grassroots democracy*], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], 28 février 2002, p. 3808.

<sup>285</sup> CODE DES POSTES ET DES COMMUNICATIONS ÉLECTRONIQUES [C.P.C.E.] arts. L34, L34-8, L36-8.

<sup>286</sup> Calculated by Psygkas, *supra* note 261, from ARCEP data.

<sup>287</sup> For an example not involving ARCEP, see CE [Neither Ass. nor Sect.], June 6, 2007, Rec. Lebon 242 [[N° 292386]], [[*Association Le Réseau Sortir Du Nucléaire*]]. In *Nucléaire*, petitioners asked for the annulment of an authorization to Electricité de France (“EDF”) to proceed to the definitive termination and complete dismantlement of a nuclear facility. The Court held that it was insufficient to consult only with a closed observer group; that practice violated the requirement that the concerned public must be informed and permitted to express an opinion prior to the award of the authorization.

<sup>288</sup> CE, June 19, 2009, [[310453]] *Association des Renseignements pour Tous*.

<sup>289</sup> CE, July 24, 2009, [Rec. Lebon p. 872, N° 324642 *Orange et SFR*].

<sup>290</sup> For detailed data, see Psygkas, *supra* note 261.



issues before the court. If the firms had the opportunity to participate in the agency process, they cannot obtain a rehearing of their complaints before the court.<sup>291</sup>

The French statute speaks of “measures that have a significant impact on the market.” It thus appears to recognize that ARCEP can make decisions that have policy implications whatever their formal character. The requirement for public consultations seems based on a desire to assure democratic accountability not just to protect property rights or avoid individualized harms. Thus, even if ARCEP’s formal ability to issue decrees is limited, its procedures acknowledge its role as an independent policymaker that must consult broadly and justify its actions to the general public.

#### *D. Conclusions on Independent Agencies*

In both France and the US statutes constrain and frame the actions of regulatory agencies. In France, EU law also importantly limits national policymaking. These agencies exist only because the political branches have created them; they are not mentioned in the Constitution. In France some of them (like ARCEP) are mandated by EU law, a fact that shields them against political interference at the domestic level. However, if one of the functional justifications for independence is to limit day-to-day political influence, that goal is partially undermined by French practice and legal judgments that neglect the public welfare arguments for insulation. Of course, U.S. agencies are also subject to political pressures, and some political science research claims that they follow the shifting political complexion of Congress and/or the President. However, recent research challenges those earlier results.<sup>292</sup> In legal terms, the federal courts have permitted agencies to issue general rules even without explicit statutory language.<sup>293</sup> Court review of independent agency rules is not substantially different from review of rules issued by cabinet departments, although a justice does occasionally suggest that the Court should provide more stringent review of independent agencies.<sup>294</sup> The Supreme Court has only limited the delegation of appointment and removal powers to agencies; it has not limited their policy discretion.<sup>295</sup>

In short, the contrast between the nature of independence in France and the U.S. raises important questions about what independence is for. Is it mainly to assure impartial individual decisions or is independent policymaking essential to the agency’s mission as well? Is the agency meant to be independent of the industry it

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<sup>291</sup> This doctrine is illustrated by the line of cases related to the assignment of a fourth license for 3G mobile phone services, which Free Mobile ended up receiving. *See* CE Sect., Apr. 27, 2009, [no. 312741, *Bouygues*], Recueil Lebon p. 872; CE, Oct. 12, 2010, [no. 332393 *Bouygues*], Recueil Lebon p. 378.

<sup>292</sup> Key articles on both sides of this debate are collected in *ECONOMICS OF ADMINISTRATIVE LAW* (Susan Rose-Ackerman ed., 2007).

<sup>293</sup> *Nat’l Petroleum Refiners Assoc. v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

<sup>294</sup> *See* *FCC v. Fox Television*, 556 U.S. 502 (2009) (Stevens, J., dissenting). Justice Stevens, in his dissent, views the FCC, an independent agency, as “an agent of Congress,” leading him to conclude that the Court has a special mandate to review its actions to maintain stability.

<sup>295</sup> *See* *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (holding unconstitutional the removal provisions of the Public Company Accounting Oversight Board which gave the Securities and Exchange Commissioners, not the President, the power to remove Board members “for cause”).

regulates, of the rest of government, or of both? What if the government owns or partly owns some of the most important regulated firms? How is impartial, effective regulation in the public interest to be accomplished?<sup>296</sup> Our concern with democratic accountability implies that independence from the executive and the legislature ought to mean that agencies have a greater obligation to consult broadly beyond the regulated industry and to use transparent procedures. Lacking strong oversight from the political branches, they should, as a consequence, seek democratic legitimacy through participatory processes. Although CSA does acknowledge these pressures as a reason for accepting more public input, it faces no legal requirement to do so, except in the case of tenders for new TV and radio frequencies. ARCEP is supposed to contribute to the creation of a single market and does have a mandate for greater openness that comes from the EU, but the nature of its choices, compared to CSA, suggest that most of its decisions will have less public salience than those made by CSA. If public participation were to expand in France, the independent regulatory agencies would seem an obvious place to start on the grounds of democratic legitimacy.

#### IV. IMPACT ASSESSMENT, RISK ASSESSMENT AND *BILAN*

The third pressure on conventional administrative law comes from social science, especially economics, and technical scientific disciplines, such as engineering and biology. Technocratic experts are allied with the European Commission under its “better” (or “smarter”) regulation initiative and with the OECD. These institutions are pushing Member States to evaluate policies using Impact Assessment (IA). IA is a tool both to produce better laws and to reduce the costs imposed on business and citizens, particularly with respect to regulatory initiatives. The EU/OECD initiative claims to espouse a coherent way of evaluating policies. The reality is more complex. Proponents of IA urge systematic analysis using risk assessment and cost/benefit analysis, and they also support a heterogeneous basket of other goals, not all of which are consistent with the objective of balancing benefits and costs.

The move to incorporate IA into statutory and regulatory drafting processes is linked to claims that legislators and government officials, left to themselves, will produce statutes that do not accord with the public interest. IA requires lawmakers to balance benefits and costs and to seek the best overall outcome. Public input can help in the preparation of an IA, but such input might also generate laws that more closely track the concerns of citizens, unmediated by representative or elite bodies. The tension between French concepts of the public interest as articulated by elite officials and popular democracy are particularly salient here.

France gives constitutional status to something approaching IA in the Charter for the Environment. Article 5 of the Charter requires authorities to implement procedures for risk assessment, and article 6 requires policymakers to reconcile

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<sup>296</sup> Looking at the whole range of French independent agencies, some are set up to protect the citizen from the government. The first independent agency created in France in 1978, CNIL (data protection agency), gave citizens protection in the use of data collected by the government.

environmental values with economic development and social programs.<sup>297</sup> In 2003 the French government set up its own internal IA process for proposed rules and statutes, but these guidelines have no external legal force. The legal status of IA changed in 2009 under legislation that implements the July 23, 2008 constitutional amendments. The framework law requires the government to submit an IA along with every draft bill that it submits to the legislature.<sup>298</sup> The Conseil d'État reviews the IA, but the document is only made public when the bill is sent to the legislature and made available on the National Assembly website.<sup>299</sup> The assembly has ten days to determine if the IA is adequate and can submit it to the Conseil Constitutionnel for review.<sup>300</sup>

Although the French Organic Law is nominally procedural, the requirements have substantive implications for the definition of the public interest. Under article 8 of the Act, the IA must explain the way the bill dovetails with European legislation and its impact on the domestic legal system. It must show how the law will apply at the national and local levels of government, to overseas territories, and over time. The IA must include an evaluation of the economic, financial, employment, and environmental impacts, and an assessment of the financial costs and benefits expected for the public administration and for natural and legal persons. The Government must specify the method of calculation used, evaluate the consequences for public-sector employment, and list the consultations carried out. It should include a provisional list of any implementing secondary legislation that may be necessary.

There is no similar legal requirement for secondary legislation, such as decrees and ordinances. If draft bills should be subject to IA, why not draft decrees and ordinances? At present, IA remains an internal government practice framed by the guidelines prepared by the Conseil d'État and the Secretary of the Government.<sup>301</sup> The Sarkozy government issued two executive orders requiring administrative

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<sup>297</sup> Outside of the environmental area, France must comply with the Sanitary Phytosanitary Measures ("SPS") agreement of the World Trade Organization, which requires a risk assessment if a country wishes to exceed the standards, guidelines, or recommendations of international bodies. WORLD TRADE ORGANIZATION, AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES, available at [http://www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm).

<sup>298</sup> A 2008 amendment to the French Constitution, provides that an organic law must govern the presentation of bills tabled in the National Assembly or the Senate. See 1958 CONST. art. 39 (amended Jul 23, 2008). The provision was codified in an Organic Law of April 15, 2009, which took effect in the fall of 2009.

Loi 2009-403 du 15 avril 2009 relative à l'application des articles 34-1, 39 et 44 de la Constitution [Law 2009-403 of 15 April 2009 on the Application of Articles 34-1, 39 and 44 of the Constitution], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], April 16, 2009, p. 6528.

<sup>299</sup> *Projets de loi: Les études d'impact sont en ligne*, ASSEMBLÉE NATIONALE (Sept. 15, 2009), <http://www.vie-publique.fr/actualite/alaune/projets-loi-etudes-impact-sont-ligne.html>

<sup>300</sup> At its own discretion, the legislature can decide if amendments from members of parliament should also be subject to an IA before they are discussed. Organic Law, articles 9 and 15. Occasionally, the Government has asked a member of parliament to introduce a bill to avoid the IA requirement. See J.-P. Duprat, *The Judicial Review of Ex Ante Impact Assessment in France: An Attempt to Fuse the Principles of Legal Certainty and Institutional Balance* 6 LEGIPRUDENCE 379 (2012).

<sup>301</sup> See *Guide de légistique: Études d'impact*, ASSEMBLÉE NATIONALE (Oct. 18, 2012), <http://www.legifrance.gouv.fr/Droit-francais/Guide-de-legistique/l.-Conception-des-textes/1.1.-Necessite-des-normes/1.1.2.-Etudes-d-impact>. This document is a set of guidelines for drafting legal texts produced by the Secretary of Government and the Conseil d'État. In other words, it is not itself a law.

bodies to draft IAs for any regulations that affect local governments and business.<sup>302</sup> In August 2012 the Hollande government issued an executive order requiring that draft legislative and regulatory texts include an assessment of their impact on gender equality.<sup>303</sup>

The Conseil d'État reviews IAs as part of their established procedures, but if the Government does not prepare an IA for a piece of secondary legislation, that would not be legally enforceable. The requirement takes the form of a guideline or an executive order, not a law. President Sarkozy did create a Commissioner for Simplification that checks the quality of the IAs and gives its opinion.<sup>304</sup> This Commissioner, who continues to review IAs under the Socialist Government, is similar to the Impact Assessment Board that performs that function at the European Commission.<sup>305</sup>

#### A. *Impact Assessment: Alternative Concepts*

Fundamentally, Impact Assessment signals an interest in the functional efficacy of the law. Under the IA model, the state evaluates statutes and regulations to determine the effects they will have on human behavior and on the achievement of public benefits. That much seems uncontroversial. IA counsels a focus not on the formal properties of the law but on how it operates in the real world. Neatness, clear drafting, and consistency are valuable only as means to an end, not as ends in themselves.<sup>306</sup>

IA arose in American debates over environmental policy and later affected policymaking in Europe. In the U.S. these debates led to passage of the National Environmental Policy Act (NEPA) in 1970 that requires an Environmental Impact Assessment (EIA) for all public projects that might affect the natural environment.<sup>307</sup> The reports must be public, but they are only advisory. The courts have delayed projects when the EIAs were inadequate or non-existent, but if the government has carried out a satisfactory assessment, the project can go forward in spite of its

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<sup>302</sup> See Circulaire du 17 février 2011 relative à la simplification des normes concernant les entreprises et les collectivités territoriales (Feb. 18, 2011), JORF n°41 du 18 février 2011 page 3025, texte n° 3 <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023596423&fastPos=1&fastReqId=2124413186&categorieLien=id&oldAction=rechTexte> [hereinafter Circulaire du 17 février 2011]. The *circulaires* here are analogous to executive orders in the U.S. in that they do not have the status of enforceable law.

<sup>303</sup> Circulaire du Premier ministre du 23 août 2012 relative à la prise en compte dans la préparation des textes législatifs et réglementaires de leur impact en termes d'égalité entre les femmes et les hommes (JORF n°0196 du 24 août 2012 page 13760, texte n° 3).

<sup>304</sup> For a description of his mandate, see Michel Hainque & Charles-Henri Montin, *Better Regulation in France* (draft paper, 2011), available at [http://montin.com/documents/br\\_france.pdf](http://montin.com/documents/br_france.pdf). The authors are officials in the French Ministry of Finance, but the paper is not an official Ministry document.

<sup>305</sup> See J. B. Wiener & A. Alemanno, *Comparing Regulatory Oversight Bodies Across the Atlantic: The Office of Information and Regulatory Affairs in the US and the Impact Assessment Board in the EU*, in *COMPARATIVE ADMINISTRATIVE LAW*, *supra* note 47, at 309. The Impact Assessment Board, created in 2006, was created to control quality under the authority of the Commission President.

<sup>306</sup> For a critique of Polish legal culture along these lines, see MACIEJ KISIŁOWSKI, BRIBERS, ZEALOTS, AND THE BLACK LETTER OF LAW: LAWMAKING IN A POSITIVIST LEGAL CULTURE (unpublished J.S.D. dissertation, Yale Law School, June 2012) (on file with Susan Rose-Ackerman).

<sup>307</sup> 42 U.S.C. § 4321 *et seq.*

environmental effects.<sup>308</sup> The law does not create any rights to stop projects or to obtain compensation. Nevertheless, the law has affected the way environmental values are incorporated into policy. Although the Government has prevailed in all the NEPA cases reviewed by the Supreme Court, the law, nevertheless, creates a background set of procedural requirements for agencies whose actions may have environmental impacts.<sup>309</sup>

Some critiques of the EIA requirement point out that public projects have many effects that go beyond the purely environmental. The general term IA, then, broadens the analytic reach so that policymakers consider all the effects of a project or policy. Environmental values have no priority. IA can limit the reach of environmental policies by requiring regulators to consider the costs imposed on businesses and labor. As such, it bears a close relationship to cost/benefit analysis (CBA) in economics, but it is not quite the same thing. Reading the country reports that the OECD has prepared for most EU Member States, one is struck by the diversity of aims expressed. There is an interest in open, transparent, and wide ranging participation by all those affected. Decision-makers should canvass a range of options, including doing nothing, and explain why they have selected a particular outcome. In doing so they are to balance costs and benefits in some, not clearly articulated, way. The OECD documents do not confront the difficulties of choosing a discount rate, or of valuing life, health, and nature.

An IA does not necessarily require a hard cost/benefit analysis where everything is reduced to dollar values. However, in the absence of a systematic CBA, the technique is not clear about how to make tradeoffs. Descriptions of IA sometimes emphasize the simplification and the clarity of laws and legal changes that would make it easier for private firms to do business. Some of the rhetoric surrounding IA is distinctly deregulatory in that it puts a burden of proof on those who seek new regulations. "Impact" in those discussions is impact on economic interests, not impact on the environment, on the poor, etc. A major theme of the OECD report on France is the claim that France has too many overlapping regulations and needs to simplify and rationalize the rules in a business friendly way.<sup>310</sup> This is impact assessment as a reflection of a libertarian philosophy that seeks less state intervention. It may be true that France has many legal rules that serve little purpose, but it is decidedly one-sided to presume that this is true.

Three other themes also come up in the Organic Law and in discussions of "Better Regulation" by the OECD that point in different directions. First, documents discussing IA often refer to the value of public consultation, and the Law requires that government consultations be documented, presumably both to encourage wide consultation and to guard against capture of the process by narrow interests.<sup>311</sup> Greater openness and participation of this sort accord with democratic values, but

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<sup>308</sup> Judicial review was first carried out in *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied 404 U.S. 942 (1972).

<sup>309</sup> Richard Lazarus, *The National Environmental Protection Act in the U. S. Supreme Court: A Reappraisal and a Peek Behind the Curtain*, 100 GEO. L. J. 1507 (2012) (reviewing the case law and arguing for the Act's continued influence despite of environmental group losses in the Supreme Court).

<sup>310</sup> ORG. FOR ECON. CO-OPERATION & DEV. ("OECD"), BETTER REGULATION IN EUROPE: FRANCE 120-41 (2010) (dealing with the simplification of law).

<sup>311</sup> Loi Organique, *supra* note 298, art. 8; OECD, *supra* note 310, at 68-85.

they may be in tension with technocratic, data-driven techniques if the participants are poorly informed, a biased sample of the population, or both. Second, IA is sometimes confused with the New Public Management, a technique for carrying out public programs that tries to import values from the private sector into state bureaucracies by introducing such practices as managing for results and incentive payments for civil servants as well as contracting out to private firms.<sup>312</sup> Third, purely formal legal values are sometimes imported into IA, especially when traditional lawyers are charged with overseeing its implementation.<sup>313</sup>

Nevertheless, however multifaceted and fuzzy the concept, it is part of the debate in France and in the EU Member States toward systematizing and quantifying the costs and benefits of new statutes and of secondary legislation produced by the executive and the independent agencies. In France that debate has some special aspects related to its public law tradition. Respect for science, engineering, and technical knowledge is strong at least at the elite level. The use of expertise to aid decision-making is not contested. Even the Charter for the Environment incorporates the value of risk assessment in its text. Hence, to the extent that IA implies a careful study of the impacts of a policy based on the best scientific and technical data, it has had an easy reception in many areas of official French decision-making. It can counter emotional or populist appeals through a sober assessment of a policy's impacts.

But beyond that basic compatibility, two opposing views of IA link to different aspects of French public law. The debate over the use of IA and over its precise form—cost/benefit analysis—presents quite fundamental challenges even if its roots can be traced to earlier French contributions by engineers and economists.<sup>314</sup>

In the first place, IA could simply be a technique for discovering and quantifying the public interest based on the best data available. It is a pragmatic effort to think through all the effects of a policy before it is put on the agenda and to compare each proposal with other options. IA involves balancing (*bilan*) consistent with the jurisprudence of the Conseil d'État since the early 1970s. The precise balance struck is a matter for judgment by government officials and is subject to review in the administrative courts. It is linked to the proportionality principle with its focus on rights and the requirement that if rights' violations occur, they should be tailored in the least restrictive way possible. Under this view IA is essentially a procedural requirement in no deep tension with French ideas of a general will that produces laws in the public interest.

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<sup>312</sup> Loi Organique, *supra* note 298, art. 8; OECD, *supra* note 310, ch. 5 (describing the work of the Director General for State Modernization ("DHME")).

<sup>313</sup> OECD, *supra* note 310, at 120–41.

<sup>314</sup> France has a history of state ownership of business, especially public utilities and infrastructure. This tradition produced some of the earliest work dealing with the efficient operation of business in the public interest. Pierre Massé and Marcel Boiteux made seminal contributions on optimal pricing for state-owned enterprises with public welfare goals. See Pierre Massé, *The French Plan and Economic Theory*, 33 *ECONOMETRICA* 265 (1965); Marcel Boiteux, *On the Management of Public Monopolies Subject to Budgetary Constraints*, 3 *J. ECON. THEORY* 219 (1971). This work influenced U. S. public finance economists. Boiteux's article was translated from the original French article, published in 1956, by William Baumol and David Bradford. Baumol and Bradford drew on Boiteux's paper in *Optimal Departures from Marginal Cost Pricing*, 60 *AM. ECON. REV.* 265 (1970). We are grateful to Alvin Klevorick for pointing out this connection.

Second, IA could be a deeper challenge to the French concept of *service public* that, if widely adopted, could spark a debate over the content of fundamental republican values. If IA includes a commitment to cost/benefit analysis, it stands for a particular method of furthering the public interest by balancing costs and benefits to maximize social welfare. It evaluates options in an essentially utilitarian way, using estimates of monetary benefits and costs as a proxy for utility. Its synoptic vision seems consistent with French views of the state as a force for furthering general public values.<sup>315</sup> This general presumption might make French policymakers particularly open to IA that seeks to bring together all the diverse strands of a policy and unify them into a single recommendation that maximizes social welfare. However, the notion of social welfare embedded in CBA may be in tension with other traditional French notions.

We consider each of these IA concepts in the context of French public law. The first would not require much change in the operation of government agencies and administrative courts. The second could be a more direct challenge to traditional concepts although in some ways it fits well with French notions of the state. We conclude with a separate, overlapping issue—claims that France has “too many statutes.”

### B. *Impact Assessment as Balancing*

Policymakers cannot avoid making tradeoffs, even if they are not always explicit about the values and political pressures behind their choices. Given that a public body has made a decision, what role should the courts play in reviewing such choices? Should they consider the substantive value of policies by invoking public interest criteria? Should they, instead, only seek to protect individual rights, leaving governments and legislatures free to determine policy so long as they observe that constraint?

In practice, courts find it difficult to establish constraints independent of underlying substantive policy goals. Of course, some official actions are so clearly illegal that the administrative courts simply quash them. But in many other situations, French courts examine the *motifs* or the objective legal and factual grounds of the decisions.<sup>316</sup> The principle of proportionality, much debated in the European Union and the Member States, is one way of resolving difficult cases.<sup>317</sup> Nevertheless, in France the notion that judges should make explicit tradeoffs in reviewing governmental choices is a challenge to notions of law as a clear, normative body of precepts under which courts can unambiguously judge actions to

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<sup>315</sup> It is certainly consistent with the analyses of Massé and Boiteux, *supra* note 314, both technically trained analysts who contributed to the academic debate and were actively engaged in setting policy for state enterprises. When Boiteux's 1956 article was translated into English, he was the Director General of Electricité de France, of which he later became President. Massé, trained as an engineer, was Director General of Electricité of France after World War II and became a top planner under De Gaulle.

<sup>316</sup> We base our discussion of *motifs* and balancing (*contrôle du bilan*) on Pierre Laurent Frier, *Contrôle des Motifs*, RÈP. CONT. ADM. DALLOZ, 1 (September 2005). *Motifs* (reasons) are distinguished from *mobiles* (motives), which reflect intentions and are subjective and psychological.

<sup>317</sup> See PAUL CRAIG, EU ADMINISTRATIVE LAW chs. 17, 18 (2006), chs. 17 and 18.

be lawful or unlawful.<sup>318</sup> Jurists in that tradition criticize as “non-normative” modern laws that incorporate administrative principles and political concerns.<sup>319</sup>

In spite of their discomfort with tradeoffs, French public lawyers have engaged in balancing since the iconic Conseil d’État case of *Ville Nouvelle-Est*.<sup>320</sup> That case, decided long before the current push for IA, concerned official approval of an urban development project and dealt with the law of eminent domain (the taking of private property for public use).<sup>321</sup> The opinion mentioned the need for the court to make tradeoffs or to balance (*bilan*) competing values, but it provided no guidance about how to do this. The Conseil d’État held that:

A project may not lawfully be declared in the public interest unless “the infringement of private property rights, the financial costs, and the possible social costs are not excessive compared with the public benefits of the project” [authors’ translation].<sup>322</sup>

Guy Braibant, the *Commissaire du gouvernement* in this case, justified this evolution in the jurisprudence by saying that the Conseil d’État now has to acknowledge that the public interest is plural. He wrote that:

There is no longer, on one side, the public power and the general interest, and, on the other, private property. More and more frequently multiple public interests are present behind the expropriating authorities and the expropriated, and it may well sometimes happen that the private interests that benefit from the operations will weigh more in the decision making process than the public interests the operation may harm. Thus, it is not possible to keep to the old reasoning that amounted to asking if the takings, in themselves, were in the public interest. The various advantages and disadvantages, the cost and the return on investment or, as economists would say, the utility against the disutility have to be balanced [authors’ translation].<sup>323</sup>

Therefore, the Conseil held that it was appropriate for judges to balance the public interest versus harm to private property, financial cost, social disturbance, environmental damage, etc. Hence, because the Conseil d’État will make tradeoffs, the primary decision-maker ought to do so as well or risk having its decisions annulled. The language of that case has been repeated in subsequent cases dealing with housing, urban development, railway lines, airports, electric power lines,

<sup>318</sup> See the discussion of balancing as a “resistance norm” in LINDSETH, POWER AND LEGITIMACY, *supra* note 2, at 21–22, 30, 47–48, 166, 196, 256, 266, 272 (applying to Europe a concept developed in Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. R. 1549 (2000)).

<sup>319</sup> For a particularly strong statement of this view, see Yves Gaudemet, “*La loi administrative*”, REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L’ÉTRANGER 65 (2006) (arguing that the creation of the law is no longer a sacred work, quasi-religious; it is an earthly task, carried out in light of earthly concerns).

<sup>320</sup> Guy Braibant, 27 L’ACTUALITÉ JURIDIQUE, DROIT ADMINISTRATIF 404 (1971) (reproducing his conclusions on the case).

<sup>321</sup> In France with its dual court system, takings cases are rather complex. The administrative courts, as in *Ville Nouvelle-Est*, decide on the legality of the project. If the project is legally acceptable, disputes over the level of compensation are heard in the civil courts.

<sup>322</sup> CE Ass., May 28, 1971, *Ministre de l’équipement et du logement c/ Fédération de défense des personnes concernées par le projet actuellement dénommé “Ville nouvelle Est”*, Rec. Lebon 409.

<sup>323</sup> Prior opinion of the *commissaire de gouvernement* in the case. Braibant, *supra* note 320.



shopping centers, and supermarkets.<sup>324</sup> They all involve interference with private property (takings) and tradeoffs between private property rights and such factors as public sector costs, development, and rights to lodging. The Conseil d'État has articulated the need for tradeoffs but gives officials space (*marge d'appréciation*) to make such judgments so long as they stay within limits. These limits seem to rest on case-by-case judgments that resist generalization. However, the national government seldom loses when the Conseil engages in balancing. Only two large national highway projects did not pass the balancing test.<sup>325</sup> The other projects that were quashed were all local initiatives.

Nevertheless, the 1971 case represents an important acknowledgment by the Conseil that public law includes such tradeoffs. The case was apparently the first time that the administrative court accepted a role in the balancing process. To most commentators, balancing implies a more active stance than simple review for unreasonableness or "manifest error of judgment." However, it leaves the criterion open. Should the courts strike down a decision if it can locate one with higher net benefits, or should they approve any policy where, on balance, benefits outweigh the costs? At least one commentator argues that the latter position is the appropriate one.<sup>326</sup> Given that most cases involve some benefits and costs that cannot easily be evaluated using a single measuring rod, it would be hard for the courts to make the more precise judgment.<sup>327</sup> As we discuss below, there is a strong normative commitment embedded in the second view of IA. Whether or not the courts enforce this second concept, it could still play a role in the unfolding debate on the proper way to evaluate policies.

### C. *Impact Assessment and Service Public*

In the French republican tradition, the "general will" should produce law that reflects the public interest. As the 1789 Declaration states, "*La Loi est l'expression de la volonté générale*" ("The Law is the expression of the general will").<sup>328</sup> The state should act in ways that benefit the citizenry as a whole, not narrow groups with concentrated power or wealth. This public interest ideal permeates French discussions of public policy and public law, but it has no precise definition and can be invoked by politicians and policymakers with very different agendas. The general will, as a source of public interest norms, is problematically associated with the choices of representative legislatures that operate by majority rule and with the decisions of professional bureaucrats. In some policy debates everyone claims to speak for the general will and to articulate the public interest. Thus, to the extent that French critics of IA react with dismay to efforts to maximize net benefits through

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<sup>324</sup> Frier, *supra* note 316, provides citations to the relevant cases in paragraphs 92–95.

<sup>325</sup> Frier, *supra* note 316, ¶ 95, writing in 2005, mentions CE Ass., Mar. 28, 1997, Rec. 121. The second project was Sté civile Sainte Marie de l'Assomption, a highway project that would have harmed a hospital. See CE Ass., Oct. 20, 1972, Rec. 657.

<sup>326</sup> Frier, *supra* note 316, ¶¶ 97–101.

<sup>327</sup> See Bertrand Seiller, *Pour un contrôle de la légalité extrinsèque des déclarations d'utilité publique*, 59 L'ACTUALITÉ JURIDIQUE, DROIT ADMINISTRATIF 1472, 1472 (2003).

<sup>328</sup> See J.-J. ROUSSEAU, 2 AN INQUIRY INTO THE NATURE OF THE SOCIAL CONTRACT, OR, PRINCIPLES OF POLITICAL RIGHT ch. 7, at 1840.

CBA, it may push them to articulate explicit alternatives in an effort to counter policy recommendations that arise from CBA.

So far, the incorporation of IA into policymaking is in its infancy.<sup>329</sup> Even though the first guidelines date from 1998, the economic analysis of costs and benefits clashes with other ways of making tradeoffs.<sup>330</sup> Notice that this is not necessarily a question of business interests clashing with other interests. A competent CBA will take account of environmental harms and effects on health and safety. Quantification may be a problem, but no policy analyst argues that that is a reason to ignore such issues.<sup>331</sup> The fundamental issue is whether IA will evolve toward a formal CBA requirement consistent with applied utilitarianism. In contrast, some might want to tilt choices in the direction of preserving certain rights, others seek to further distributive justice through policies that aid the poor, and still others believe that economic growth measured in terms of GDP should trump other concerns. Such conflicts over fundamental values are central to the debate over CBA. CBA locates the best policy through a particular technique of aggregation that depends on a normative commitment to overall welfare maximization in spite of losses suffered by some members of the polity. Its ambitions are to produce comprehensive recommendations for government action.<sup>332</sup> This perspective is congruent with the position of post-war French scholar-officials who sought to rationalize planning in the public interest,<sup>333</sup> but it clashes with other notices of the public interest less closely tied to utilitarian values.

#### D. Impact Assessment and the Quantity and Quality of Statutes

The Conseil d'État drafted the original 2003 guidelines on Impact Assessment and supports Impact Assessment for draft bills. The motivation was not just to produce better bills, but also to limit the number of new laws.<sup>334</sup> It may seem strange to an American reader that the quantity of statutes should, in and of itself, be a source of concern as opposed to the burdens of regulatory and tax laws.<sup>335</sup> However,

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<sup>329</sup> The only legislative IA that led to a debate among economists concerned a draft statute on energy that implements the EU directive on energy. Some economists criticized the IA openly (See F. Lévêque).

M. Saguan, *Analyse critique de l'étude d'impact de la Loi NOME*, (CERNA, Working Paper Series, Paper No. 2010-09, 2010), available at [http://www.cerna.ensmp.fr/images/DocumentsWP/cwp\\_201009.pdf](http://www.cerna.ensmp.fr/images/DocumentsWP/cwp_201009.pdf)

<sup>330</sup> The first *circulaire* from January 26, 1998 required an IA for every draft statute or decree. In 2003 the requirement was softened to permit the need for an IA to be determined case by case.

<sup>331</sup> See Jonathan Wiener, *Better Regulation in Europe*, in 59 CURRENT LEGAL PROBLEMS 447 (2006), reprinted in JANE HOLDER & DONALD MCGILLIVRAY, EDs., TAKING STOCK OF ENVIRONMENTAL ASSESSMENT: LAW, POLICY AND PRACTICE (2007). (arguing for "warm" cost-benefit analysis that includes a wide range of costs and benefits, including those not easily quantified).

<sup>332</sup> For a discussion of the limits of cost-benefit analysis as a normative framework for policy, see Susan Rose-Ackerman, *Putting Cost-Benefit Analysis in Its Place: Rethinking Regulatory Review*, 65 U. MIAMI L. REV. 335 (2011). See also Susan Rose-Ackerman, *Étude d'impact et analyse coûts-avantages: Qu'impliquent-elles pour l'élaboration des politiques publiques et les réformes législatives?*, 140 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 787 (2011).

<sup>333</sup> See the work of Boiteux and Massé, *supra* note 314.

<sup>334</sup> Interview with Olivier Duthellet de Lamothe, Head of the Social Section, Paris, France (December 1, 2011).

<sup>335</sup> The debate in the United States has focused not on the mixture of statutes and executive branch rules but rather on the burden on the private sector. For a critique of rulemaking in the United

in France the concern is closely tied to debates over the proper role of the legislature vis-à-vis the elite civil service in furthering the public interest.<sup>336</sup> In the view of the Conseil d'État statutes should be general expressions of the public interest, and this view permeates debates in France about the number and quality of legislative enactments.<sup>337</sup> The Civil Code epitomizes what is meant by a "general" requirement. For more than two centuries, since the enactment of the Napoleonic civil code, tort law could be summarized in a single sentence: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it". This sentence sums up the three requirements of the law of tort: the existence of fault, of damages, and of a causal link between the two. It expresses the ideal of French legal drafting. The Conseil d'État has long lamented the "proliferation of laws," the "overproduction" of norms, and the inflation of rules by parliament and the executive.<sup>338</sup> The Conseil d'État argues that the growth in the number of legal texts means a loss of legal value. Law becomes trivialized; "*quand le droit bavarde, le citoyen ne lui prête qu'une oreille distraite*" ("when the law babbles on and on, citizens lend it only a distracted ear"). This multiplication of legal texts may result in a breach of equality before the law, a democratic deficit, and legal insecurity.<sup>339</sup> An interest in halting this "tide" was behind the Conseil d'État's support of IAs for draft laws. The Conseil understood the IA requirement as consistent with its own commitment to upholding the public interest.

Recent legal scholarship emphasizes that a comprehensive IA system for statutes can uphold an idealized hierarchy of norms.<sup>340</sup> The IA should explain how the bill will fit into the legal environment and which regulations will have to be issued or revoked in order to enforce the new law. Following Hans Kelsen, the hierarchy of norms in French administrative law scholarship expresses the requirement that inferior norms must be consistent with superior norms (adjudication must conform to rules, rules must be consistent with statutes, and statutes must not

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States, see THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* 273–74 (1991).

<sup>336</sup> On the historical roots see Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 *YALE L.J.* 1341, 1404–07 (2004).

<sup>337</sup> Concern with the quality of law is not only French. Research on legal drafting and the quality of law began in Germany and Switzerland in the 19th and 20th century and in the common law world in the 70s. See Laurent Eck, *Les études d'impact et la légistique*, in *LES ÉTUDES D'IMPACT ACCOMPAGNANT LES PROJETS DE LOI* (M. Philip-Gay ed., 2012); KARINE GILBERG, *LA LÉGISTIQUE AU CONCRET : LES PROCESSUS DE RATIONALISATION DU DROIT* (Thèse, Université Paris 2 Panthéon-Asses, 2007).

<sup>338</sup> See *RAPPORT PUBLIC DU CONSEIL D'ÉTAT 1991*, at 15. The principal author of the report was Françoise Chandernagor, a historian and member of the Conseil d'État. In 2005, the Conseil d'État reported that there were 10, 500 laws and 120, 000 decrees in force. In 1991 the Conseil d'État counted 7500 laws. In addition each year ministries issue more than 10, 000 executive orders. See *RAPPORT PUBLIC DU CONSEIL D'ÉTAT 2006: SÉCURITÉ JURIDIQUE ET COMPLEXITÉ DU DROIT*, FRANCE. Conseil d'Etat, *La Documentation française* at 239.

<sup>339</sup> For an analysis of the French definition of legal quality, see CHARLES-HENRI MONTIN, *LEGISTICS AND THE QUALITY OF LEGISLATION IN FRANCE*, <http://www.montin.com/documents/legistics.pdf> (last visited March 10, 2013).

<sup>340</sup> See M. Philip-Gay, "*L'obligation de joindre des études d'impact aux projets de loi Une illustration des évolutions récentes du droit issu de la Constitution du 4 octobre 1958*", in *LES ÉTUDES D'IMPACT ACCOMPAGNANT LES PROJETS DE LOI*, (MATHILDE PHILIP-GAY ED., 2012.) at p. 156.

be contrary to treaties and the Constitution).<sup>341</sup> This is a quite different set of principles from those that arise from cost/benefit analysis and risk assessment, the other intellectual traditions behind IA.

If IA expresses just what the Conseil and legal scholars have always asked the government to do, then its codification gives the Conseil added leverage. However, if it requires a technical CBA or risk assessment, it may be difficult for the Conseil to fulfill its responsibilities without a change in the training of its personnel. It would be instructive to know something about how the Conseil d'État reviews draft bills under the statute that requires IAs. We have no information on this and can only infer the Conseil's position from the unrepresentative sample of cases published in the GRANDS AVIS DU CONSEIL D'ÉTAT and in its annual reports.<sup>342</sup> It seems likely that, even before the IA requirement, the Conseil engaged in some type of balancing ex ante both because it does so ex post and because of its involvement in drafting earlier IA guidelines.

In spite of its ongoing interest in IA and the new legal status of IA reports on draft statutes, it does not appear that the Conseil d'État has increased its capacity in public policy analysis. Thus, it is not clear that the Conseil d'État can provide adequate review of technically sophisticated studies. However, it is at least possible that the IA requirement will slow down the volume of lawmaking simply because of the need for public justification. Perhaps some draft laws will never be submitted to the legislature because neither the government nor their Conseil d'État reviewers can find adequate justifications for them.

Nevertheless, there is a further reason to doubt the impact of the IA requirement on the quantity and quality of statutes.<sup>343</sup> The legislature, which is the object of the IA reports, lacks a staff able to review and critique the IAs. It also operates under pressure from the executive to pass bills in a short time frame. The statute itself only gives the legislature ten days to consider the bill and its accompanying IA. Neither individual members, nor committees, nor the political parties have adequate staff resources to balance and constrain the flow of draft legislative texts coming from the executive.<sup>344</sup> Under the Fifth Republic, Parliament generally enacts what the government proposes. There is little extended discussion because the majority is under the authority of the Government. The only exception would be especially contentious issues and periods of co-habitation when President and Prime Minister are of different parties, but this seems increasingly unlikely under the current electoral timing.

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<sup>341</sup> See Georges Vedel, *Qu'est-ce que la Constitution?*, in CAHIERS DU CONSEIL CONSTITUTIONNEL, 1998. See also Kelsen, *supra* note 74, at 257–65.

<sup>342</sup> See GRANDS AVIS DU CONSEIL D'ÉTAT <http://www.conseil-État.fr/fr/les-grands-avis/> and the ANNUAL REPORTS (2010) (2011), *supra* note 49; and (2012) *supra* note 69.

<sup>343</sup> See also Conseil constitutionnel [CC] decision No. 2009–579DC, Apr. 9, 2009, Recueil, 84, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/pdf/conseil-constitutionnel-42539.pdf> (holding that the government is not bound to undertake impact assessment from the beginning of the elaboration of the bill).

<sup>344</sup> The lack of staff in the Assembly was confirmed by our interview with Bertrand Plancher, UMP member, Paris, France (January 10, 2012). See also Kaare Strøm, *Parliamentary Committees in European Democracies*, 4 J. LEGIS. STUDIES, 21 (1998). Gibel Claude, *L'évolution des moyens de travail des parlementaires*, 31 REVUE FRANÇAISE DE SCIENCE POLITIQUE 211 (1981).

Thus, even if the Conseil d'État provides stringent oversight, the legislature may not be responsive to this material. Perhaps, however, groups with an interest in the legislative outcome can be a partial substitute for rigorous legislative review. The government must now be transparent about its calculations; thus, others can critique its methods. No longer is the Conseil d'État the primary arbiter of legislative quality. It has a first mover advantage because it reviews drafts before presentation to the legislature.<sup>345</sup> However, the draft that is sent to the legislature can now be subject to more intelligent criticism both inside and outside the legislature on the basis of the IA. Interest groups and concerned citizens have no legal right to challenge the quality of the analysis. Only the legislative leaders can submit an IA to the Conseil Constitutionnel.<sup>346</sup> Nevertheless, the increased openness could, in principle, help those outside the formal structures of government participate more effectively.

Given the limitations and potential strengths of the IA process, scholars should track the implementation of the Organic Law. It would be interesting to determine if IA has limited the number of drafts submitted and improved the quality of those that do reach the floor. Is the requirement merely a formal one that has little impact on the number and content of legislative proposals or has it had an effect? One study of the number of laws introduced by the Sarkozy government compared with previous governments showed no slowdown in the number and an increase in the length of individual statutes. However, that data covered the entire period since his election, not the more recent period when IA became a legal mandate, not just a guideline.<sup>347</sup> It made no attempt to consider the quality of these statutes as effective responses to social problems.

Although there has not yet been an in-depth study, the IAs that accompany draft bills appear to vary in quality. For one thing, the statutory mandate requires an IA for every bill, but not every bill's purposes fit into the IA framework. For example, in 2010 a statute came into effect that outlawed full-face coverings in most public places. The bill was directed against Muslim women who wear a face veil, but the statute did not mention them in the text. Clearly the justifications for the law cannot be captured in the framework of an ordinary cost/benefit analysis. In fact, the IA of the law does not make that effort. It is a fine piece of French republican rhetoric, but it hardly conforms to the principles underlying IA as stated by the OECD.<sup>348</sup> In contrast, the IAs that accompanied the proposed reform of pensions and of the electricity market in 2010 did deal with a number of important policy issues, although some were covered in a rather cursory fashion. Both include some quantitative data, but the pension IA emphasizes the impact on the public budget and does not attempt a comprehensive evaluation of the law's effect on the labor market,

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<sup>345</sup> See the discussion in CONSEIL D'ÉTAT, RAPPORT PUBLIC 2010 *supra* note 49 at 97–99.

<sup>346</sup> Interview with Plancher, *supra* note 344.

<sup>347</sup> See Olivier Rozenberg *Sarkozy législateur. La loi du plus fort ?*, Séminaire général du CEE, at [http://cee.sciences-po.fr/images/stories/seminaire\\_doc\\_applique/2011-2012/1111/111108\\_SGCEE/compte-rendu\\_sminaire\\_gnral\\_Olivier\\_Rozenberg.pdf](http://cee.sciences-po.fr/images/stories/seminaire_doc_applique/2011-2012/1111/111108_SGCEE/compte-rendu_sminaire_gnral_Olivier_Rozenberg.pdf).

<sup>348</sup> Bill 2520 du Mai 2010 Interdisant la dissimulation du visage dans l'espace public, Étude d'impact [Bill Prohibiting the Concealment of the Face in Public Space, Impact Study] May 2010; Loi 2010–1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010–1192 of October 11, 2010 on Prohibiting Concealment of the Face in Public Space] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE, October 12, 2010, p. 18344.

outside a few specific areas, such as gender.<sup>349</sup> As a general matter, even for policies that fit into the IA framework, the analyses may suffer in the rush to legislate. Reforms may be announced before having been discussed with stakeholders. How are civil servants to engage in the serious work of producing an IA if they feel that the decision is already taken? Lack of participation and the rushed IA process are linked to the same problem: politicians may prefer to announce policy initiatives rather than to engage in in-depth discussions and evaluation in order to find the legal tool best suited to the issue.

A final problem may simply be the lack of capacity in the bureaucracy to carry out competent evaluations. In spite of the elite nature of the French civil service, few have the requisite training in policy analysis needed to perform an IA that balances costs and benefits in a sophisticated way. Both engineering and a mixture of public administration and law are useful inputs provided by graduates of the *Grandes Écoles*, but neither provides a framework for the full-blown impact assessment envisaged by the OECD and the European Commission. An exception appears to be the *Cour de Comptes* (the Court of Accounts), which attracts analytically oriented members. It has a broad mandate to review government programs and the regularity of public accounts. It does not help make policy although obviously a critical analysis of an existing program could spur reform.<sup>350</sup> A full-scale commitment to IA by the French state would imply a dramatic reorientation of the training provided to those who aspire to the top of the French state officialdom. Training in public administration, law and engineering would not suffice.

#### *E. Conclusions on Impact Assessment*

The Impact Assessment requirement is a striking development, and it will be important to track its effect on the French lawmaking process and to observe how the *Conseil d'État* and the Constitutional *Conseil* interpret the concept. Although included in internal government guidelines since 2003, the codification of IA and the publication requirement could affect the statutory drafting process. Because IA can be interpreted in various ways that represent more or less radical challenges to French public law traditions, its use may be an important bellwether of the response of French institutions to developments in European law and to global trends in policy analysis and democratic accountability.

Any systematic evaluation of IA's effect is complicated by substantial confusion about what it means to carry out such an assessment. If these uncertainties are not confronted in a straightforward way, they could sink the entire enterprise as each new group of analysts defines the term in a different way. The OECD, which has been a strong advocate of IA, is not of much help here. Their publications simply list all the different goals of an IA without confronting the ways in which they might

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<sup>349</sup> *Projet de loi portant réforme des retraites et Projet de loi organique relative à la limite des magistrats de l'ordre judiciaire, Étude d'Impact*, No. 2760 (July 2010), available at [http://www.assemblee-nationale.fr/13/projets/pl2760-ei.asp#P84\\_5473](http://www.assemblee-nationale.fr/13/projets/pl2760-ei.asp#P84_5473); *Projet de loi portant nouvelle organisation du marché de l'électricité (NOME), Étude d'impact*, no. 2831 (April 2010), available at <http://www.assemblee-nationale.fr/13/projets/pl2451-ei.asp>.

<sup>350</sup> 1958 CONST. art. 47–2. The Court publishes annually all the anomalies it sees in the management of public money.

conflict in particular applications. Their spring 2010 report on progress in France is an extremely useful document that reviews and critiques the actions of the French state, but it neglects tensions at the heart of IA.<sup>351</sup>

Although some French supporters of IA point to the U.S. as an example, the IA requirement for draft statutes contrasts sharply with the American practice. Although any U.S. administration would be wise to back up its proposals with data and arguments and although Congress has greater staff resources than the French legislature, the process of submitting, discussing, and approving statutes in the US is not governed by enforceable legal standards beyond the need for a bill to pass both houses by majority vote and to be signed by the president (or to be passed over his veto by a two-thirds vote in each house).<sup>352</sup> It is true that the practice of cost/benefit analysis is well-developed in the United States compared to France, but it is carried out by the policy staff of departments, agencies and congressional committees. The White House reviews rules for consistency with cost/benefit tests, but does so under an executive order, not a statute. Only a few statutes require CBA, and it is never a condition for passage of a statute. Thus, in comparing France and the U.S., it will be important to determine how closely IA tracks a cost/benefit test, how strictly the Conseil d'État applies the test in its ex ante and ex post reviews of secondary legislation, and whether the Conseil Constitutionnel is willing or able to assess the quality of government IAs.

#### V. CHALLENGES TO FRENCH PUBLIC LAW, THE UNITED STATES MODEL, AND FUTURE PROSPECTS

To conclude we bring together the three challenges to traditional French methods of producing secondary legislation: public participation, independent regulators, and impact assessment. We summarize those challenges in light of U.S. administrative law and consider possible future directions for French public law that could move it in the direction of rulemaking accountability--that is, procedures that enhance the democratic legitimacy of government or agency policymaking outside the legislature.

##### A. *The United States and France, Compared*

In comparing the American and French law of policymaking there are a few basic similarities and a number of important differences. The most fundamental differences are the underlying view of statutory law and the bureaucracy. The French have greater faith in the competence of their elite civil servants to articulate the public interest.

In the U.S. the ideal is a statute that directly reflects Congressional preferences and does not require policymaking inside the executive. Delegation of policymaking authority is a pragmatic response to the reality of modern policy problems that

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<sup>351</sup> ORGANIZATION FOR ECON. CO-OPERATION & DEV. ("OECD"), BETTER REGULATION IN EUROPE: FRANCE (2010).

<sup>352</sup> Peter Strauss, *Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe and Vice Versa*, 12 COLUM. J. EUR. L. 645 (2005-2006); SUSAN ROSE-ACKERMAN STEFANIE EGIDY & JAMES FOWKES., AMERICAN EXCEPTIONALISM? "DUE PROCESS OF LAWMAKING" IN COMPARATIVE LAW (forthcoming 2014) (section on the United States).

require time and expertise to resolve. The Supreme Court accepts delegation under the Constitution, and the non-delegation doctrine is thought to have few teeth.<sup>353</sup> However, delegation is a functional necessity, not an essential feature of American democracy. Even if rulemaking is under the authority of the President, the background worry is a lack of accountability to the electorate. As a result, procedures insure that outsiders can participate, and they require transparency and reason-giving. Independent agencies are justified in functional terms, but they generally include political checks through such devices as political party balance on multi-member commissions. Political accountability to voters through their elected representatives is the ideal, and inside the bureaucracy political appointees fill most policymaking roles.

In France, in contrast, the guiding principle is that laws ought to state broad principles that express public welfare goals. Statutes should be neither too numerous nor too detailed. In the ideal they should embody principles that elected representatives across the political spectrum can accept.<sup>354</sup> Of course, that does not often happen, and majority rule prevails, but once a statute is passed, it is implemented by a government largely staffed by elite civil servants under a thin layer of political appointees. This elite group is charged with carrying out the law in accord with the public interest and absent pressures from partisan political forces or narrow individual interests. To the extent that one takes that view of the bureaucracy, not only would public participation be unnecessary; it might also be outright pernicious. Due process may be a way to protect the rights of individuals, but it is not bound up with the need to justify government policymaking in democratic terms. Independent agencies are an awkward fit with this view of officialdom. If the civil service is really imbued with a public welfare ethic, why bother to create an independent institutional structure? Such agencies look like an acknowledgment that the ideal does not always fit the reality. If officials claim a mandate to further the public welfare, rulemaking accountability is unnecessary.

There is a way to reconcile public participation, impact assessment, and even independent agencies. The reconciliation acknowledges that government officials may not have the background and breadth of experience to further the public welfare without input from outsiders—not only technical experts, but also ordinary citizens, businesses, and civil society groups. The ultimate decision is in the hands of the government officials, but by consulting broadly, they can carry out their responsibilities more effectively. An independent agency may be able to assure that policy choices are doubly insulated from partisan politics, not just in the legislature but in the Cabinet and the Presidency as well. These arguments can make

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<sup>353</sup> *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). A recent case upholding a broad delegation is *Whitman v. American Trucking Assn. Inc.*, 531 U.S. 457 (2001). However, given that the courts accept delegation, they then review agencies' interpretation of statutory terms. See Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000). See also the discussion of the *Chevron* case, *supra*

<sup>354</sup> This is exemplified by two important contemporary trends: simplification of the laws and especially a drastic move towards codification. A *Commission supérieure de la codification* (Superior Commission for Simplification) has been appointed whose role is to take existing laws and put them into intelligible and clear codes. Codification is supported by the Conseil constitutionnel [CC] [Constitutional Court] decision No. 2004-509DC, Jan. 13, 2005; see also Conseil constitutionnel [CC] [Constitutional Court] decision No. 2005-512DC, Apr. 21, 2005.



rulemaking accountability consistent with French traditions, but one needs to recognize the sometimes subtle differences between the U.S. and French models. In the U.S. case participation is not only designed to produce better executive decisions but also to give citizens assurance of the democratic legitimacy of executive policymaking. In France participation is justified as a way to help the officials make better decisions in the public interest.

These contrasting models of the relationship between statutes, democratic accountability, and public officials have several implications. These involve judicial review of process, substantive policy principles, ex ante review of draft regulations, and the status of independent agencies.

### 1. Process

The role of the courts in reviewing process reflects the differences between France and the US. In both cases the legislative process is not subject to review because that would represent too great an interference with partisan politics.<sup>355</sup> In the US, however, the courts review the administrative rulemaking process to assure public notice, open-ended hearings, and reason-giving. The first two factors assure that citizens, economic interests, and civil society groups have notice and can make their views known. The last factor, reason-giving, is an essential complement to participation in situations where a government body makes the ultimate policy decision. The government body must not only be open to outside input but must also explain its decision to the public in a reasoned way.

The APA emphasizes process, and limited judicial review keeps the courts from going too far in substituting their own policy preferences for those of the executive and the legislature. The Supreme Court has held back efforts by lower courts to expand the scope of procedural review.<sup>356</sup> The U. S. system is often criticized for being "ossified" because it takes too long and is too cumbersome.<sup>357</sup> Although the U. S. process could surely use reform, one should be careful what one wishes for. In the U.S., with its weak bureaucratic tradition, less public accountability could simply invite more special interest influence.

In contrast, judicial review of the legislative process is extremely deferential in the US. There is no Legislative Procedures Act. Absent claimed violations of rights or interference with the structure of government, the federal courts seldom get involved. Courts rarely look to the underlying factual justifications of a statute or require the legislature to supply the background information. There is no general requirement for impact assessment or for any other substantive criterion.

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<sup>355</sup> On the U.S. case, see ROSE-ACKERMAN ET. AL., *supra* note 352.

<sup>356</sup> *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978); see also Stephen Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978); Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 91 1805 (1978).

<sup>357</sup> Thomas McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 DUKE L. REV. 1385 (1992); Thomas McGarity, *The Courts and the Ossification of Rulemaking*, 75 TEX. L. REV. 525 (1997).

In France, the Conseil Constitutionnel has quashed statutes because the Government or the legislature used procedures that it judged to be in violation of the Constitution. For example, provisions not germane to the main purpose of a statute may be struck. It has also refused to approve statutes if the Conseil d'État did not review the Government bill. Conseil review is confidential and *ex ante*, not public and *ex post*. In line with its different concept of executive rulemaking, France has no legally required general procedures for public input into the production of decrees and ordinances. Preliminary public consultations are a legal mandate for large local projects of national interest, but not for national decrees and ordinances. Sometimes the law requires consultation with particular named bodies of experts or stakeholders, but those bodies have a closed membership, often selected by politicians or professional associations. The Conseil d'État will hold the Government to these consultation requirements. It will not, however, examine the quality of the advice or its representative character.

Recent developments, however, suggest that both the Conseil d'État and the Conseil Constitutionnel are more willing to evaluate the procedures that produce decrees and ordinances. The Conseil d'État struck down a decree on procedural grounds in December 2011. Similarly, the Conseil Constitutionnel has taken the rather dramatic step of constitutionalizing administrative procedures in several cases dealing with environmental policymaking. These new developments might signal a major change in approach, one that might be spearheaded by organized environmental groups and by independent agencies seeking greater popular legitimacy. More cases that challenge procedures are likely to arise and may already be making their way through the courts. French environmental lawyers are certainly aware of the possibility as indicated by the QPCs decided by the Conseil Constitutionnel in 2011 and 2012.<sup>358</sup> If more cases arise, they should be admissible because of the open-ended character of French standing law in contrast to the much more restrictive nature of U.S. standing doctrines. Hence, if environmental groups see weaknesses in existing procedures or wish to test the limits of the new 2012 statute that mandates public participation, they may decide to challenge them subject to their own funding and personnel constraints.<sup>359</sup>

One potential deterrent, not present in the U.S. case, is two-sided fee shifting: a losing civil society plaintiff may be required to pay the winning public body.<sup>360</sup> However, in France the legal charges do not appear to be high, at least relative to legal fees in the United States where one-sided fee shifting is common in statutes with citizen suit provisions.<sup>361</sup> If these French lawsuits proliferate and are successful, that development will give public officials an incentive to open their processes to public participation. However, as we pointed out above, the Government has responded to the constitutional challenges to environmental policy processes by

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<sup>358</sup> Denier-Pasquier Interview, *supra* note 153.

<sup>359</sup> Denier-Pasquier Interview, *supra* note 153.

<sup>360</sup> E-mail from Denier-Pasquier, , Representative of FNE to CESE, to authors (Jan. 23, 2012, 6:12).

<sup>361</sup> JEFFREY G. MILLER, *CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* (1987) (a winning plaintiff in a citizen's suit has its legal fees paid by the losing defendant, but the losing plaintiff does not have to pay the legal fees of the government agency or private firm on the other side of the law suit.)

amending the law to provide for more public input. However, the amendments are a rather tepid response, which are unlikely to facilitate a vigorous civil society response.

## 2. Substance

The United States and France are similar along a second, substantive, dimension. In both cases secondary legislation need not legally comply with any general policy norms—such as cost-benefit analysis—that go beyond the provisions of individual substantive statutes. In the United States the courts review general rules to assure consistency with the statutory text, to avoid decisions that either are arbitrary and capricious or are not based on substantial evidence. They do not impose a cost-benefit test on rules absent a specific requirement in the substantive statute. The remedy is usually a remand to the agency, not a judicial determination of policy. The focus is on requiring the agency to justify its choices.

Policymakers in France are meant to further the public welfare, but that concept is defined in various ways, and the courts have not articulated clear principles to guide the executive. Conseil d'État review of substance stresses legality, not policy efficacy. At the same time, the protection of individual rights is playing a growing role in judicial review of state action, drawing on U.S. and European developments.<sup>362</sup> This new direction may lead French public law doctrine toward a stronger and clearer articulation of the public welfare to provide a counterweight to the growth in rights jurisprudence. However, although the courts and the government invoke the proportionality principle to tradeoff rights and the general welfare, its precise contours are unclear.

Although our focus is on secondary legislation, changes in the justifications for draft statutes in France may signal an overall move toward stronger substantive conditions. As we have noted, the framework law that implements the 2008 constitutional amendments requires the government to prepare Impact Assessments to accompany draft statutes submitted to the legislature. The Conseil d'État reviews these documents before they are issued, and if requested by politicians, the Conseil Constitutionnel can also evaluate the quality of IAs. Furthermore, these IAs are publicly available on the website of the National Assembly along with the text of draft and enacted statutes. It is too early to tell, first, if these IAs are competently done and, second, if the IA requirement will be expanded to cover decrees and ordinances.

## 3. Review of Draft Regulations

There is a further contrast between France and the United States in the review of draft regulations. In both systems such review is routine, but the body engaged in review and the nature of the review differ. In the United States if a cabinet department issues a rule with the force of law, it is subject to White House review on cost-benefit grounds.<sup>363</sup> This review is governed by an executive order that the

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<sup>362</sup> For an extensive discussion, see LASSER, *supra* note 22.

<sup>363</sup> Exec. Order No. 13563, Jan. 18, 2011; 3 C.F.R. 638 (1993) (updating Exec. Order No. 12,866).

President could unilaterally rescind or modify at any time. Rules issued by independent agencies are exempt, but an executive order encourages them to carry out their own reviews and to review past rules to be sure they can be justified.<sup>364</sup>

In France, the Conseil d'État must review the content of much secondary legislation before it goes into effect. This review is routine, and the advice can be kept secret at the option of the government. There is no systematic legal basis for the Conseil to disapprove Government decisions that fail to balance benefits and costs. The Conseil cannot prevent issuance of a regulation, but if it disapproves and the Government goes forward, the decree risks future challenges in the administrative courts. Unlike White House review of regulations, the body doing the review has some independence from the executive structure of government. The Conseil d'État claims to be neutral with respect to substantive policy, but the line between review for legality and review of policy efficacy may be blurred in practice. Thus, in France when the government issues a decree, it must defend its action before the Conseil d'État, but it is not legally required to consult broadly, to issue public statements of reasons, or to conform to a particular substantive norm. The ideal is a policy that furthers the public welfare and complies with the law, but these principles give the government broad scope.

#### 4. Independent Agencies

Given the public welfare ideal and in line with U.S. defenders of the agency model, independent agencies would seem an ideal location for policymaking in the public interest, subject to Conseil d'État review. However, in French law their policymaking authority is strictly limited *because* of their isolation from partisan politics in the Cabinet and the Presidency. Here one sees the tension between the bureaucracy as a repository of republican values and the elected President and Prime Minister as representatives of the voters. One response has been for the independent agencies to try to enhance their public legitimacy vis-à-vis the ministries through heightened consultation and transparent policy analyses of major decisions. Nevertheless, there remains a fundamental mismatch between the policymaking justifications for agency independence and the French constitutional language that appears not to have anticipated the rise and functional value of these bodies.<sup>365</sup>

##### *B. Reform Initiatives*

French reform possibilities can draw on American experience while recognizing the differences outlined above. We pose four questions. First, should France move to a more open and transparent process of producing secondary legislation (decrees and ordinances) that would seek to enhance democratic legitimacy? Second, should the move toward IA in legislation be extended to secondary legislation? Third, should independent regulatory agencies obtain a policymaking role that includes delegated

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<sup>364</sup> Exec. Order No. 13579, Jan. 11, 2011, states that independent agencies "should" comply with Exec. Order No. 13563 "to the extent permitted by law." They also "should consider" retrospective analysis of old rules and should issue a plan.

<sup>365</sup> Of course, it is nothing new for constitutional texts to fail to anticipate modern developments. The U.S. Constitution did not anticipate independent agencies, much less political parties and a large civil service bureaucracy.

decree powers? Fourth, what role should the high courts, both the Conseil d'État and the Conseil Constitutionnel, play in reviewing these possible developments?

Some reform initiatives originated from France's memberships in the European Union and in the Council of Europe. Decisions by the European Court of Justice and the European Court of Human Rights influence French public law. The Aarhus Convention has pushed environmental law in a procedural direction. Nevertheless, the domestic response is not simply reactive but also represents a real engagement with these issues. Under a 2011 statute, the previous government made a few modest moves in the direction of openness and public input for decrees and ordinances, and these may form the basis of a more extensive reform.

Our particular emphasis on rulemaking accountability with its concern for democratic legitimacy is not identical to the pressures from European legal institutions that, outside of Aarhus, have concentrated on the protection of rights. Legally enforceable participation rights have not been at the forefront of legal developments in the EU, and even the Commission's espousal of IA is not tied to judicial review. The creation of independent agencies to oversee privatized industries is an EU-supported initiative, and the EU has pushed for more accountable policymaking in the Member States.<sup>366</sup> However, it has not gone so far as to require Member State courts to enforce public participation or IA norms.

#### 1. Participation and IA

Even in France, with its tradition of an expert, elite civil service, both political influence and inadequate training support reforms that lead to more open and participatory processes that involve the general public and draw on modern social science.

One route to reform may be through the Conseil d'État. Long the defender of the French public law tradition, it is responding to contemporary reform pressures. After a period of resistance to efforts by the ECtHR to reform the Conseil,<sup>367</sup> it has both modified its own practices and demonstrated an interest in issues of public participation, agency independence and IA. Its 2011 public report, *CONSULTER AUTREMENT, PARTICIPER EFFECTIVEMENT*, argued for an *administration délibérative*, similar to what we call rulemaking accountability. It recommends reforms in policymaking processes at all levels of government and in independent agencies. Processes should be based on open public participation and on the systematic evaluation of policies compared to alternatives.<sup>368</sup> The principal drafter of the report sees IA as complementary to enhanced public participation. Government policymakers first ought to frame the problem without selecting the preferred alternative. They would then organize a public *concertation* that is informal, open, and transparent. Then the policymakers, both technical experts and politically responsible officials, would select the best option using IA and decide if any new legislation is needed.<sup>369</sup> The recommendations are consistent with our perspective

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<sup>366</sup> See PSYGKAS, *supra* note 261.

<sup>367</sup> See LASSER, *supra* note 22.

<sup>368</sup> RAPPORT PUBLIC 2011, *supra* note at 49. Richard Interview, *supra* note 81.

<sup>369</sup> Richard Interview, *supra* note 81.

but leave unresolved the possible tensions between openness and competence that may arise in practice.

At the same time it recommends this new process, the report is critical of consultation through various commissions, councils, and committees. By the end of the 1990s there were about 4000 commissions. A 2000 law reduced their number through mergers and abolitions. In 2006 a government decree eliminated many more, and a new law limited the ability of the Government and the President to create such commissions. However, the report argues that there are still too many. It documents the creation of forty-five new bodies by the legislature since the 2006 reform.<sup>370</sup> Of course, some of these bodies may serve valuable functions; a pure count of the numbers is not dispositive, but apparently they sometimes are a way of appearing to deal with a problem without actually committing the government to taking action.<sup>371</sup>

There is a fundamental contrast between the consultation recommended by the Conseil d'État and the use of established, on-going bodies. Those bodies have members who represent the interests of concerned groups from, for example, business, labor, consumers, and the scientific community. Even if the members of such bodies are selected by the groups they represent, the bodies may exclude other interests, not acknowledged *ex ante*. Similarly, the process of selecting "representatives" may itself be biased against new or dissident members of the recognized interest groups. In seeking to limit the influence of established bodies, the Conseil d'État report aims to open up the consultation process. The process, of course, would need to be managed to produce useful information and debate. Here the report looks to the model of the CNDP and argues that consultation should occur early in the process of promulgating secondary legislation in the ministries and independent agencies. The state ministries and agencies would have the final say, and the Conseil d'État would retain its own power to review draft decrees and ordinances.

In addition to recommending a more systematic and open-ended consultation processes, the report would constrain the government to use the substantive criteria of IA. The report is not clear on just what model of IA they support, but the key features are a recognition of tradeoffs, consideration of a range of options, including doing nothing, and the use of data to back up policy recommendations. Legally mandated Impact Assessment of secondary legislation is an innovation that would go far beyond U.S. experience. IA is too new a development to have produced a judicial response. The support of IA by the EU and OECD largely neglects judicial review. A comprehensive OECD document assessing the state of IA in France does not mention the courts.<sup>372</sup> Our own view is that hard-edged cost-benefit analysis ought not to be codified as a general matter given the diversity of regulatory texts. In the statutory context consider the difference between the public policy justifications for statutes outlawing the face veil and reorganizing the electricity industry. A similar diversity of issues is dealt with in secondary legislation. It is hard to see how either the courts or the legislature could craft a generic law to cover the range of cases. A

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<sup>370</sup> RAPPORT PUBLIC 2011, *supra* note 49, at 139–42 (Annexe 1).

<sup>371</sup> Interview with Richard, *supra* note 81; see also Vanneste, *supra* note 242.

<sup>372</sup> See Organization for Econ. Co-operation & Dev. ("OECD"), *Better Regulation in Europe: France* (2010), available at <http://www.oecd.org/dataoecd/30/5/45706677.pdf>.

more limited response would be to set up a rebuttable presumption in favor of an economic cost/benefit test, but only for regulations that are primarily designed to correct a market failure and only if the statute does not include an alternative standard.<sup>373</sup>

The 2011 report is just that—a report—and does not necessarily have the full support of all the active members of the Conseil d'État. Nevertheless, it does acknowledge the importance of making the policymaking process inside the government more systematic. Coming from the Conseil d'État itself, this is a significant recognition on which to build in the future.

However, to have teeth, reforms of the administrative process would need to be codified into law and enforced by the administrative courts. One important factor is likely to limit the impact of these courts in supporting reform, even if a new statute were passed. The Conseil d'État has very limited remedies to deal with irregularities.<sup>374</sup> It can only quash decisions, not order measures tailored to the problem at hand. For that reason the administrative courts may delay the implementation of their decision to permit time for the administration to remedy the problem.<sup>375</sup> In other cases delay may mean that the contested project is very far advanced by the time it reaches the Conseil. Quashing a decision may require dismantling a large public project. Hence, administrators may simply gamble on the outcome of a court case, reasoning that even if they lose, the court will give them time to correct their errors.<sup>376</sup> This problem suggests either the need for a wider range of remedies or the ability to obtain a ruling from Conseil on an expedited basis using its recently obtained power to issue injunctions.

This problem is quite acute in the United States with its greater emphasis on process and the widespread use of injunctions. A rule cannot go into effect if the process was faulty; the agency must remedy the defect in a new proceeding. Pre-enforcement review of rules is justified to assure regulated bodies that a rule is both substantively and procedurally valid before they invest in compliance.<sup>377</sup> For major infrastructure projects injunctions halt work before costs become sunk. This makes enforcement of procedural requirements feasible but also delays project

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<sup>373</sup> SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 33–42 (1992).

<sup>374</sup> See Daniel Labetoulle, *Le vice de procédure, parent pauvre de l'évolution du pouvoir d'appréciation du juge de l'annulation*, in *MÉLANGES EN L'HONNEUR D'YVES JÉGOUZO* 483 (2009) (arguing that the treatment of procedural problems by French administrative judges is deficient).

<sup>375</sup> The possibility of a court-ordered delay to avoid a legal vacuum is a recent innovation. See *CE Ass.*, May 11, 2004, Rec. Lebon 197. Before 2004, if an administrative judge quashed a decision, it immediately disappeared.

<sup>376</sup> See Interview with Yann Agila, Att'y, Bredin Prat, Conseiller d'Etat, in Paris, France (Dec. 13, 2011). Agila suggested that Conseil review of procedures could learn from review of procurement irregularities. In procurement law, a court can stay a challenged process in a very quick intervention that permits a new, legally acceptable process to be carried out promptly. When a public body awards a contract, it must follow very strict procedures ensuring fair competition. If an irregularity occurs, competing bidders can apply for pre-contractual interim measures, and the judge can stay the procedure and can even order the whole tender to be started again.

<sup>377</sup> See *Abbott Labs. v. Gardner*, 387 U. S. 136 (1967). The practice, however, has its critics. See, e.g., JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990).

completion.<sup>378</sup> Injunctions may eventually lead to project cancelation, not on the merits, but simply because of the cost of delay.

## 2. Independent Regulatory Agencies

The final reform possibility concerns independent agencies and could draw lessons from the long U.S. experience with their strengths and weaknesses. However, reformers would also need to take account of the strong additional argument for independence in France that arises from continued state ownership stakes in major firms. The tension between functional reasons for independence and the constitutional text has not yet produced much of a legal response although these agencies, often mandated by EU directives, are central to many ongoing debates between France and the EU.

Some of these regulatory agencies are carrying out procedural innovations. Regulators risk capture by large, powerful regulated firms, and the concerned public is not always as well organized as in the environmental field. Nevertheless, regulators acknowledge that if the interests of the general public are ignored, the agency may lose its legitimacy. Standing outside the cabinet structure of government, they need to defend themselves against attack for being anti-democratic. At present, the concern for democratic legitimacy is answered by limiting the power of agencies to make binding rules and by requiring them to enforce rules promulgated by a cabinet ministry. However, an alternative route would give them the authority to issue regulations subject to a legal requirement to consult broadly and to justify their policies publicly. This ought to be in the self-interest of agencies wishing to avoid the accusation of capture, but a legal requirement could also push reluctant regulators in that direction. To the extent that the state still retains an ownership share in some of the regulated firms, for example, in broadcasting and in electricity, requiring public participation and debate can be a more effective way to enhance the agencies' democratic legitimacy than their current dependence on ministerial rules. True, one needs to be sensitive to the worry that only a biased sample of the affected public and the business community will take part. However, with the ultimate decision in the hands of the agency and with requirements for transparency and reason-giving, those concerns can be managed. The alternative, after all, is an opaque process where the regulated industry with its well-financed lobbying resources plays an important behind-the-scenes role. The basic point is that opaque policymaking by a government ministry is not obviously more democratically responsible than more open *concertations* organized by independent agencies that produce rules accompanied by a public statement of reasons that responds to public comments. Our proposal seems consistent with French republican values, but, of course, it will be for the Conseil Constitutionnel to decide if a mixture of rulemaking authority and greater public accountability will pass constitutional muster.

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<sup>378</sup> See Robert A. Kagan, *Should Europe Worry about Adversarial Legalism?*, 17 OXFORD J. LEGAL STUD. 165 (1997). See the case study of efforts to upgrade the Port of Oakland, California, in Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL'Y ANALYSIS & MGMT. 369 (1991). A more recent article revisits the Oakland case and paints a much more optimistic picture. See Christopher B. Busch et al., *Taming Adversarial Legalism: The Port of Oakland's Dredging Saga Revisited*, 2 LEGIS. & PUB. POL'Y 179 (1999).



### *C. Conclusions*

The heightened interest in public participation, independent agencies, and impact assessment in France highlights the tensions between traditional views of administrative law and modern trends. The expertise of the bureaucracy and its insulation from day-to-day politics were traditionally designed to preserve French republican views of the public interest from the short-term partisan pressures of political actors. As this faith in the civil service has eroded, the state faces demands for more openness and public participation, on the one hand, and more systematic, publicly justified reason giving, on the other. These demands are not always complementary. Sometime expert social science conflicts with popular beliefs and interests. Institutional innovations, such as independent regulatory agencies, are a response to fears of over-politicization. They provide an institutional solution, not one only based on an elite, meritocratic civil service. All are a challenge to conventional French public law. The system has begun to respond to these pressures, but they are still frequently resisted, and reforms have not coalesced around a consensus view. However, the recent decisions of the French high courts suggest a possible move toward more oversight of administrative processes. Furthermore, the efforts of those inside and outside the government suggest a move toward more open policymaking and the more systematic study of government programs. Future developments are by no means clear, especially with a new president and government, but the elements are in place to build upon recent reforms. It remains to be seen whether the glimmers of change that we have isolated are passing fancies or a real reformulation of policymaking that takes account of modern political and technocratic realities.