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No.47
European Convention on Human Rights and French Administrative Justice: A Case Study on the Dialogue between National and Supranational Legal Orders *

Yukio OKITSU**

Introduction

Article 6 of the European Convention on Human Rights [hereinafter ECHR], 1 which guarantees the right to a fair trial, is one of its most controversial provisions, in that it has provoked a huge amount of judgments and decisions of the European Court of Human Rights [hereinafter ECtHR], 2 located in Strasbourg. The first sentence of Article 6, paragraph 1, reads as follows:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The present paper will discuss the impact of this provision on the French administrative litigation system, especially on a typically French institution named rapporteur public (formerly commissaire du gouvernement). There are a few reasons that support this choice.

First, a procedural right is a paradoxical one whose existence and realization depend on state institutions, even though it is considered a human right. If the state did not provide a court system, citizens could not have access to justice to exercise this right. Furthermore, when it is protected by international conventions, 3 the aporia becomes more complicated. 4 Whereas

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* Earlier versions of this paper were presented before the Research Group of Law of the EU Institute in Japan, Kansai (http://euij-kansai.jp/index_en) in July 2012 and at the Keio University French Public Law Workshop held in December 2012. I am grateful to the participants in those occasions for their valuable comments. Its Japanese version was published as Yukio Okitsu, Kôsei na Saiban to Ronkoku-tantô-kan [Fair Trail and Commissaire du Gouvernement/Rapporteur Public], in YOROPPA TOU CHITSUJO [A EUROPEAN ORDER OR EUROPEAN ORDERS] 75 (Shotaro Hamamoto & Yukio Okitsu eds., 2013). The present version is a newly written and updated one.

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2 ALASTAIR MOWBRAY, EUROPEAN CONVENTION ON HUMAN RIGHTS 344 (3d ed. 2012) (“The Court has delivered more judgments concerning this Article than any other right/freedom guaranteed by the Convention.”).

3 Aside from the ECHR, several international human rights instruments guarantee the right to a fair trial as follows: Universal Declaration of Human Rights art. 10, Dec. 10, 1948, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III);
the right to a fair trial might not be able to impose a single model for a judicial system on contracting states, it cannot be left to the sole discretion of domestic law to determine the essential content of such guarantees, in spite of the existence of national legal traditions.⁵

Second, a *rapporteur public* is an interesting example from this perspective. This institution, unfamiliar to both Japanese and Anglo-American legal systems, originated in French legal history and tradition, and possesses its distinctive features. He is a member of an administrative court, but at the same time, his work differs from that of a judge. It was this ambiguity that might have caused the Strasbourg Court to declare that there had been a violation of Article 6 of the ECHR by France in the case of *Kress* in 2001.⁶ In other words, French domestic law was deprived of a margin of appreciation or discretion in the application of this Article to this institution. Here we can see a conflict between the two legal orders—the French order and the ECHR order.

Therefore, I will demonstrate in this paper how this conflict arose at the beginning, and then was resolved in the end. By doing so, I will focus on the process of interaction, or dialogue, between national and supranational legal orders.⁷ However, I will not deal with any problems pertaining exclusively to European or international human rights law in general; neither will I refer to any discussions in legal philosophy or legal theories about legal orders.⁸ Instead, I will limit myself to making a case study of the relationship between domestic law and supranational law.

I will organize this paper as follows: in Part I, I will briefly explain what a *rapporteur public* is; in Part II, I will examine the pre-*Kress* case-law of the ECtHR; in Part III, I will analyze the case of *Kress* and the reaction from French law; and finally, in the Conclusion, I will mention some viewpoints that may help to interpret the correspondence between Paris and Strasbourg.

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⁴ MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS—CCPR COMMENTARY 307 para. 3 (2d ed. 2005) ("By their very nature, procedural guarantees are not directed at requiring States parties to refrain from doing something but rather require them to undertake extensive positive measures to ensure these guarantees. . . . Many of these claims . . . call for a highly developed legal system, which poor States are not always able to offer to the necessary extent.").


⁸ I owe my understanding about such discussions, especially “constitutional pluralism,” to Keisuke Kondo, *Kempô Tagen Shugi [Constitutional Pluralism], in YOROPPA TOIU CHITSUJO [A EUROPEAN ORDER OR EUROPEAN ORDERS]* 5 (Shotaro Hamamoto & Yukio Okitsu eds., 2013).
I. What Is a Rapporteur Public?9

Article L. 7 of the French Code of Administrative Justice (Code de justice administrative) provides the following:

A member of the court, in charge of the function of rapporteur public, shall express, in open court, with complete independence, his opinion on questions as to the case submitted to the court and on the manner in which it should be disposed of.10

In other words, the rapporteur public has a duty to make, at the hearing, his submissions which contain his own assessment of the facts and the law applicable to the case, and his opinion as to the solution which should be adopted according to his conscience. Its role is very close to that of an Advocate-General at the Court of Justice of the European Union, or the European Court of Justice [hereinafter ECJ].11 This is hardly surprising because it is said that the institution of Advocate-General was modeled on the French system, aside from the denomination borrowed from its counterpart at judicial courts called avocat général in order to avoid the misleading name commissaire du gouvernement used at administrative courts at the time.12

The institution of rapporteur public originated in Article 2 of the Royal Ordinance of March 12, 1831.13 Three members of the Conseil d’État (Council of State), which functioned as the administrative supreme court in France,14 were specially appointed and called commissaire du roi (King’s Commissioner) at first,

10 Code de justice administrative art. L. 7 (author’s translation).
13 1831 J. B. DUVERGIER, COLLECTION COMPLÈTE DES LOIS, DÉCRETS, ORDONNANCES, RÈGLEMENTS [sic] ET AVIS DU CONSEIL D’ÉTAT 58.
14 Even though it was the head of state, namely the Emperor or the King according to the era, who sovereignly signed judgments, and the role of the Conseil d’État was limited to advising him, its advice was generally followed aside from a few exceptions. It was only by the Act of May 24, 1872, passed in the Third Republic that the Conseil d’État was definitely vested with its proper power to deliver judgments, not in the name of the head of state, but in the name of the French people. This acknowledgment is known in the French language as the shift from the justice retenue (retained justice) to the justice déléguée (delegated justice).
and then commissaire du gouvernement (Government Commissioner) after the end of the July Monarchy with the February Revolution of 1848. This appellation continued to be used until the Decree of January 7, 2009 changed it to rapporteur public, probably under the influence of the case-law of the ECtHR.¹⁵

Contrary to what their name indicated,¹⁶ commissaires du roi/commissaires du gouvernement acted totally independently of the government and played the same role as that of their descendants, rapporteurs publics, as soon as they started their function. It was not uncommon for them to give an opinion unfavorable to the administration.¹⁷

The role the rapporteur public plays in a trial¹⁸ is more comprehensible when compared to that of his “mate,” the rapporteur (reporting judge).¹⁹ When a case is assigned to a sub-section (sous-section) of the Judicial Division (Section du contentieux) of the Conseil d’État, the president of this sub-section appoints one of its members as rapporteur. She examines the case during the written procedure—the first of the two phases constituting a trial. After careful inspection of the file, she prepares a report including a memorandum on the facts and the law and a judgment draft. Then the file is reexamined by the reviser, and finally goes to the rapporteur public in order for him to draw up his submissions.

After the rapporteur public has finished his preparation, the second phase of the trial—the oral procedure or the public hearing—takes place. At the hearing, he states his opinion as to the solution that should be adopted depending on the case. In contrast, the rapporteur never presents her opinion in

¹⁵ See infra Part III.4.
¹⁶ Based on its title, it is often maintained that the duty of commissaires du roi/commissaires du gouvernement was originally to defend the interests of the administration. See, e.g., Christine Maugüé, Rapporteur public, 1031 JURISCLASSEUR ADMINISTRATIF, para. 4 (2009). See also, Kress v. France [GC], 2001-VI Eur. Ct. H.R. 41, 54-55 para. 41. However, this view can be challenged, in my opinion, by the argument that the title commissaire du roi that was which had been used for the officers whose role was to ensure observance of law and execution of judgments during the period of the French Revolution. This was prescribed by the Decree of August 16-24, 1790, Title VIII (1790 B ULLETIN ANNOTÉ DES LOIS, DÉCRETS ET ORDONNANCES 221, 240) and the Constitution of September 3, 1791, Title III, Chapter V , Article 25 (JACQUES GODECHOT, LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, at 33, 62 (1995)). At a later time, Cormenin, then a member of the Conseil d’État and becoming its vice-president afterward, insisted that the office of commissaire du roi be established at the administrative court to protect state interests in his book entitled Du Conseil d’État envisagé comme conseil et comme juridiction sous notre monarchie constitutionnelle and published in 1818. See MARC BOUVET, LE CONSEIL D’ÉTAT SOUS LA MONARCHIE DE JUILLET 356 (2001) [hereinafter BOUVET, LE CONSEIL D’ÉTAT] and Marc Bouvet, Les commissaires du gouvernement auprès du Conseil d’État statuant au contentieux (1831-1872), in REGARDS SUR L’HISTOIRE DE LA JUSTICE ADMINISTRATIVE 129, 130-131 (Grégoire Bigot & Marc Bouvet eds., 2006) [hereinafter Bouvet, Les commissaires]. Nevertheless, it is worth noting that Cormenin’s idea was that an administrative court (tribunal administratif) should be instituted separately from the Conseil d’État, whose role should be limited to that of a consultative body of the government and have no judicial competence.
¹⁷ According to Marc Bouvet, there were 5 anti-administration opinions out of 16 cases in 1831 and 16 out of 113 in the first half of 1832 (BOUVET, LE CONSEIL D’ÉTAT, supra note 16, at 363). Also, 40% of the opinions stated in 1852 and 57% in 1864 were unfavorable to the administration (Bouvet, Les commissaires, supra note 16, at 146).
¹⁹ Her role is similar to that of a Judge-Rapporteur at the ECJ (Rules of Procedure of the Court of Justice art. 15, 2012 O.J. (L 265) 1, 11).
public, not to mention the judgment draft. Here is the biggest difference between the rapporteur public and the rapporteur. Although they both have a duty to examine the case minutely, the one—rapporteur public—expresses himself publicly and the other—rapporteur—does not.\textsuperscript{20}

Subsequent to the public hearing, the trial bench (formation de jugement) holds the deliberations in secret. The rapporteur naturally takes part in the deliberations because she is a member of the bench. The rapporteur public also attends the deliberations, but he has no vote. As a rule, he intervenes only if a member of the bench asks him any questions. It is believed that his attendance is beneficial because he is the person who has examined the case most recently and is, therefore, supposed to be the most acquainted with it.

The submissions he presents at the public hearing have no binding effect on the bench. The judgment may or may not follow the submissions. However, even if it rules in a sense contradictory to the opinion of the rapporteur public, the submissions allow us to understand the reasoning of the judgment more clearly. This can make up for a weakness that French legal traditions suffer from, where the reasoning of judgments is extremely concise and accompanied with no individual opinions, either concurring or dissenting. That is why rapporteurs publics have survived for more than 180 years.\textsuperscript{21}

\section*{II. The Pre-Kress Case-Law of the ECtHR}

As stated before, the ECtHR ruled that the intervention of the rapporteur public (then commissaire du gouvernement) violated Article 6 of the ECHR in the case of Kress v. France in 2001.\textsuperscript{22} This judgment did not appear suddenly, but it followed a sequence of precedents that the ECtHR established in the matter of the ministère public (public prosecution) in Napoleonic-Code-influenced countries.

In most civil law jurisdictions, especially those influenced by French law, public prosecutors have a duty not only to investigate and accuse a criminal, but also to present their submissions at public hearings in civil procedure as well as


\textsuperscript{21} On the advantages of rapporteurs publics, see Chauvaux & Stahl, \textit{supra} note 20, at 2119-2121 (indicating that their submissions allow the parties to understand that the case he made was really taken into consideration); Bruno Genevois, Le commissaire du gouvernement devant le Conseil d’État statuant au contentieux ou la stratégie de la persuasion, 2000 \textit{REVUE FRANÇAISE DE DROIT ADMINISTRATIF} [RFDA] 1207, 1217 (pointing to their contribution to making case-law, an interaction with scholars, and a dialogue between judges); Isabelle de Silva, \textit{Les conclusions, fragments d’un discours contentieux, in LE DIALOGUE DES JUGES. MÉLANGES EN L’HONNEUR DU PRÉSIDENT BRUNO GENEVOIS} 359, 360-364 (2009) (emphasizing their function of proposing a solution to the case, conveying messages to other courts, administrative agencies, legislators, and researchers, ensuring the transparency of a trial, and synthesizing the current case-law); Latour, \textit{supra} note 18, at 219 (“He [the commissaire du gouvernement] is, in a sense, an airtight chamber for the avoidance of certainty, a kind of injunction to avoid agreement, an obstacle deliberately placed along the entire length of the path of judgment, a grain of sand, occasionally a scandal, but in all cases an irritant, or a resistance; the commissioner is the most peculiar example of the producer of objections, or let’s risk the word, of objectivity.”).

\textsuperscript{22} Kress v. France [GC], 2001-VI Eur. Ct. H.R. 41.
in criminal procedure, as *rapporteurs publics* do in administrative litigation. Their submissions also include their assessment of the facts and the law, and their own opinion on the solution to the case. In those countries, the public prosecution attached to upper courts only has the task of making submissions in public, and is completely separated from the prosecution attached to lower courts that is in charge of investigation and accusation in criminal procedure. It is said that they intervene in order to ensure the uniformity of case-law, not to demand punishment for the accused.

However, their intervention can be brought into question in at least two points: (1) Is it fair that the prosecutor who expressed her opinion in open court then attends the deliberations of the judges held in secret?; (2) Is it fair that one of the parties has no opportunity to reply to the prosecutor’s submissions, in particular when the submissions are unfavorable to him? There are several cases where the interventions of public prosecutors in such conditions were alleged to have violated Article 6 of the ECHR before the Strasbourg Court.

At first, in the case of *Delcourt v. Belgium* of 1970, the ECtHR dismissed these kinds of challenge to the prosecution (*Procureur général’s Department*) attached to the Belgian Court of Cassation (*Cour de cassation*). However, about twenty years later, the Court changed its position and ruled that there had been a violation of Article 6 of the ECHR by the Belgian public prosecutor. Then it delivered one judgment after another which declared contradictory to the ECHR the practice of public prosecutors expressing their opinions at the trial in Belgium, Portugal, the Netherlands, and France. In these judgments, the ECtHR seems to base its position on the combination of two theories: the doctrine of appearances and the principle of equality of arms or adversarial trial. I will analyze them successively.

### 1. The Doctrine of Appearances

The doctrine of appearances requires that a procedure be fair not only in substance but also in appearance. It is represented in the adage “justice must not only be done; it must also be seen to be done,” to which the ECtHR is willing to refer. This adage, which allegedly derives from English case-law and can be discerned in early decisions of the European Commission of Human Rights.

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29 R v. Sussex Justices, *Ex parte* McCarthy, (1924) 1 K.B. 256, 259 (opinion of Lord Hewart, C.J.) (“It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”)
Rights,\textsuperscript{30} is cited by the ECtHR for the first time probably in \textit{Delcourt v. Belgium}.\textsuperscript{31} In this case, however, the Court denied a violation by “[l]ooking behind the appearances.”\textsuperscript{32}

Then, the ECtHR declared a violation of Article 6 based on appearances in \textit{Piersack v. Belgium} in 1982.\textsuperscript{33} This judgment was also related to a Belgian public prosecutor, but not the one who expressed his opinion in open court. The point is that the judge who presided at a court convicting a person of a crime had previously belonged to the very section of public prosecution that had dealt with the same case. Even though the Belgian Government argued that the said judge had not directly been involved in the case, the European Court casted doubt on the impartiality of such a judge by emphasizing that “even appearances may be of a certain importance”\textsuperscript{34} and stating as follows:

If an individual, after holding in the public prosecutor’s department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.\textsuperscript{35}

It is worth noting that this judgment used the doctrine of appearances in order to analyze the impartiality of a tribunal, guaranteed under Article 6 of the ECHR, and break it down into subjective impartiality and objective impartiality.\textsuperscript{36} According to the Court, impartiality normally means “absence of prejudice or bias,”\textsuperscript{37} and there are two approaches to discern it: a subjective approach is to “ascertain the personal conviction of a given judge in a given case”;\textsuperscript{38} an objective approach is to determine “whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.”\textsuperscript{39} In a subjective approach, it is hard for the applicant to prove that the judge had a personal prejudice or bias in ruling the case.\textsuperscript{40} On the contrary, an objective approach


\textsuperscript{32} \textit{Id.}


\textsuperscript{34} \textit{Id.} at 14 para. 30 (a) (citing \textit{Delcourt}, 11 Eur. Ct. H.R. (ser. A) 4).

\textsuperscript{35} \textit{Id.} at 15 para. 30 (d).

\textsuperscript{36} \textit{See generally}, Martin Kuijer, \textit{The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirement of Article 6 ECHR} 303-381 (2004); Pascal Gilliaux, \textit{Droit(s) européen(s) à un procès équitable} 490-527 (2012).


\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{See} Le Compte, Van Leuven and De Meyere v. Belgium, 43 Eur. Ct. H.R. (ser. A) 4, 25 para. 58 (1981) (“[T]he personal impartiality of each member [of a court] must be presumed until there is proof to the contrary.”).
may lighten the burden of proof imposed on the applicant. In addition, it has the function of encouraging judicial sections to organizationally separate from public prosecution and any other auxiliary functions in order to exclude any legitimate doubt. After that, an objective approach was also applied to judicial independence.

However, it does not seem that such an objective approach is the same as the doctrine of appearances invoked in the case-law regarding public prosecutors stating their opinion, though the two theories are both based on appearances. Whereas in the former, a certain appearance—which casts legitimate doubt on the impartiality or independence of a court—directly leads to a violation of Article 6, according to the latter, a certain appearance is only a condition for application of another doctrine—the principle of equality of arms or adversarial trial.

2. The Principle of Equality of Arms or Adversarial Trial

The principle of equality of arms is not explicitly mentioned in Article 6 of the ECHR. However, this principle is naturally guaranteed on the basis of the principle of equality before courts, which is not expressed either but supposed to be contained in the concept of “fairness” of a trial. The right to have an adversarial trial is also contained in the requirements of a fair hearing including the guarantee of rights of the defense.

Equality of arms sometimes overlaps with the right to an adversarial trial. In fact, the ECtHR held about the former the following:

41 See Procola v. Luxembourg, 326 Eur. Ct. H.R. (ser. A) 6, 16 para. 45 (1995) (condemning Luxembourg for the violation of Article 6 because “four members of the Conseil d’État carried out both advisory and judicial functions in the same case” and “[i]n the context of an institution such as Luxembourg’s Conseil d’État the mere fact that certain persons successively performed these two types of function in respect of the same decisions is capable of casting doubt on the institution’s structural impartiality.” (emphasis added)). Luxembourg then limited the Conseil d’État to only fulfill the advisory function and establish an administrative court and an administrative tribunal to assign them the judicial function in administrative matters (loi du 7 novembre 1996 portant organisation des juridictions de l’ordre administratif [Act of November 7, 1996, on the organization of administrative courts], 79 MEMORIAL A: JOURNAL OFFICIEL DU GRAND-DUCHE DE LUXEMBOURG [OFFICIAL JOURNAL OF THE GRAND DUCHY OF LUXEMBOURG] 2262).
43 Under Article 14 of the International Covenant on Civil and Political Rights, supra note 3, which expressly provides that “[a]ll persons shall be equal before the courts and tribunals,” the right to equality before courts and tribunals also ensures equality of arms. See United Nations Human Rights Committee, General Comment No. 32 on Article 14, supra note 5, paras. 8, 13; Nowak, supra note 4, at 321 para. 29.
44 Gillaieux, supra note 36, at 565 (pointing to the etymology of a French word “équité” (fairness) that originated in a Latin word “æquitas, -atis” meaning a spirit of justice, equality and just proportion). See also David Harris et al., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 246 (2d ed. 2009) (“[T]he right to a ‘fair hearing’ has an open-ended, residual quality. It provides an opportunity for adding other particular rights not listed in Article 6 that are considered essential to a ‘fair hearing’ . . . . A number of specific rights have in fact been added to Article 6(1) through the medium of its ‘fair hearing’ guarantee. The first of these to be established were ‘equality of arms’ . . . .”)
“[E]quality of arms” implies that each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.46

On the other hand, the Court once defined the latter as follows:

The right to an adversarial trial means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.47

At first, the two principles had the purpose of literally ensuring the equality between both sides of parties. However, public prosecutors or other auxiliary officers whose duty is to express their opinion at public hearings are not parties—regardless of whether they are judges. That is exactly why the Strasbourg Court based its position on appearances in order to identify such auxiliary officers with parties and apply the principle of equality of arms or the protection of rights of the defense.48 In other words, it is not the fact that a public prosecutor holds an office other than that of investigation and accusation that violates a right to a fair trial;49 but it is the fact that a real party—either a plaintiff or a defendant—has no opportunity to defend against the opinion stated by a prosecutor or another officer assimilated into a party by his appearances.

In any case, it is interesting to note that the ECtHR developed the content of the right to adversarial trial so that it no longer had to rely on appearances. In Lobo Machado v. Portugal and Vermeulen v. Belgium, the Court stated as follows:

That right [to adversarial proceedings] means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court’s decision.50

49 The ECtHR has never called into question the structural impartiality or independence of a public prosecutor who is to be involved in a trial in order to present his opinion, nor that of a court in which he is involved. See Delcourt v. Belgium, 11 Eur. Ct. H.R. (ser. A) 4, 17-18 para. 32 (1970) (“[I]t is established that the Procureur général’s department at the Court of Cassation functions wholly independently of the Minister of Justice.”); Id. at 19 para. 35 (“Nor could the independence and impartiality of the Court of Cassation itself be adversely affected by the presence of a member of the Procureur général’s department at its deliberations once it has been shown that the Procureur général himself is independent and impartial.”); Borgers, 214-B Eur. Ct. H.R. (ser. A) at 31 para. 24 (“The Court notes in the first place that the findings in the Delcourt judgment on the question of the independence and impartiality of the Court of Cassation and its procureur général’s department remain entirely valid.” (citation omitted)).
Compare the italicized phrase in these judgments to that cited above. While the Court once limited the right to an adversarial trial to the observations filed or evidence adduced “by the other party,” it extended this right to those filed or adduced “even by an independent member of the national legal service.” According to the latter interpretation, the violation of Article 6 can be justified without an appeal to appearances. However, the Court changed its position again and invoked the doctrine of appearances in *Kress v. France*.

### III. *Kress*, and France

Before investigating the judgment of the ECtHR in *Kress v. France* in detail, it is worth taking a look at the relevant holdings of two other courts: that of the French *Conseil d’État* on French *commissaires du gouvernement* and that of the European Court of Justice on its Advocates-General.

#### 1. The French *Conseil d’État* in *Esclatine*

After the ECtHR found a violation of Article 6 of the ECHR by public prosecutors whose office was to present their submissions in open court in several countries, it was feared in France that such case-law would also affect *commissaires du gouvernement* attached to French administrative courts. That fear was growing even more since the European Court condemned France of a violation by an advocate-general (*avocat général*) at the Court of Cassation (*Cour de cassation*) in the case of *Reinhardt and Slimane-Kaïd v. France*.

In the meantime, the French *Conseil d’État* itself had the opportunity to rule on the conformity of French *commissaires du gouvernement* with the principle of adversarial proceedings. The *Conseil d’État*, in the case of *Esclatine*, held, without mentioning the ECHR, that *commissaires du gouvernement* carried out “the judicial function entrusted to the court of which they are members,” and that “the exercise of this function is not subject to the principle of adversarial trial.” By doing so, it dismissed the case made by the claimant that the *commissaire du gouvernement* had violated the right to adversarial proceedings.

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51 Even though the judgments mentioned appearances (*Lobo Machado*, 1996-I Eur. Ct. H.R. at 207 para. 32; *Vermeulen*, 1996-I Eur. Ct. H.R. at 234 para. 33), this holding was related to the additional question on the participation of the public prosecutor in the deliberations of the judges. See *HARRIS ET AL., supra* note 44, at 252 (pointing out that the ECtHR has modified its reasoning by stating: “[I]t has treated cases of the lack of prior disclosure of the opinion of an *avocat général* or similar officer, and of an opportunity to comment on it, as a breach not of equality of arms, but of the right to an adversarial trial. This is appropriate in that such officers are not parties to the proceedings and the lack of prior disclosure, etc. affects the preparation of their case equally by all parties.” (footnotes omitted)).


This holding was reinforced with the submissions presented by Chauvaux, the commissaire du gouvernement in charge of the case of Esclatine.55 According to him, French commissaires du gouvernement are not like public prosecutors acting in other civil-law countries. Nor are they like advocates general attached to the French Court of Cassation. Instead, they are judges, and their function is judicial. The commissaire du gouvernement in charge of a case is a member of the trial bench, even though he does not have a vote. If he had a vote, the secrecy of the deliberations would be breached because he already presented his opinion at the public hearing prior to the deliberations.56 Apart from this point, his function is very close to that of the rapporteur (reporting judge) who has a vote in deliberations instead of presenting her own opinion in public. A commissaire du gouvernement is, as it were, a “rapporteur public.”57

This very stimulating reasoning however had two weaknesses: first, a commissaire du gouvernement was not a member of the trial bench according to the letter of the law;58 second, the ECtHR applied the principle of adversarial proceedings to the observations filed or evidence adduced “even by an independent member of the national legal service,”59 certainly including judges themselves. Nevertheless, the ECJ adopted the same kind of argument in the judgment rendered on its Advocates-General.

2. The European Court of Justice in Emesa Sugar

As stated above,60 Advocates-General assisting the Court of Justice of the European Union have a function similar to that of French rapporteurs publics (former commissaires du gouvernement) and public prosecutors in other countries expressing their opinion in open court. Thus, their conformity with the right to a fair trial can also come into question. Indeed, the European Union [hereinafter EU] is not a Contracting Party to the ECHR, whereas its accession to the Convention is being negotiated.61 However, the Court of Justice has consistently held that “fundamental rights form an independent part of the general principles of law, the observance of which it [the ECJ] ensures,”62 and that “[t]he European Convention on Human Rights has special significance in that respect.”63 This case-law is now stipulated in Article 6, paragraph 3 of the

56 Id. at 325.
57 Id. at 328.
59 See supra Part II.2.
60 See supra note 11 and accompanying text.
Treaty on European Union. Furthermore, the right to a fair trial is now guaranteed expressly under Article 47 of the Charter of Fundamental Rights of the European Union. That is why the ECJ had to rule on that question.

In the case of Emesa Sugar where the ECJ was called to make a preliminary ruling, the company Emesa Sugar sent the Court an application to submit written observations in response to the opinion delivered by the Advocate-General at the hearing. The applicant relied on the case-law of the ECHR concerning Article 6 of the ECHR, in particular the case of Vermeulen v. Belgium. The Court of Justice dismissed that application by an order. Regarding the function of an Advocate-General, especially the opinion that he presented, it held as follows:

It [the opinion of the Advocate-General] does not form part of the proceedings between the parties, but rather opens the stage of deliberation by the Court. It is not therefore an opinion addressed to the judges or to the parties which stems from an authority outside the Court or which ‘derives its authority from that of the Procureur Général’s department [in the French version, “ministère public”]’ (judgment in Vermeulen v. Belgium . . . ). Rather, it constitutes the individual reasoned opinion, expressed in open court, of a Member of the Court of Justice itself.

The Advocate General thus takes part, publicly and individually, in the process by which the Court reaches its judgment, and therefore in carrying out the judicial function entrusted to it. Furthermore, the Opinion is published together with the Court’s judgment.

It is easy to find, in this reasoning, the same structure as we found in the judgment Esclatine that the French Conseil d’État rendered, and in particular the submissions that the commissaire du gouvernement Chauvaux delivered in that case. In other words, the ECJ sought to insist that Advocates-General were not parties to the proceedings, but members of the Court who ensured “the judicial function.” But, if so, the same critique can be addressed to the Luxembourg Court: according to the Strasbourg Court, even judges cannot escape from the right to adversarial trial.

That said, the ECJ additionally relied on another argument. The Court of

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64 Consolidated Version of the Treaty on European Union art. 6 (3), 2012 O.J. (C 326) 13, 19 (“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”)
66 Case C-17/98 (order), Emesa Sugar (Free Zone) NV v. Aruba, 2000 E.C.R. I-665.
70 See supra Part III.1.
Justice pointed out that it may reopen the oral procedure on a proposal of the Advocate-General or at the request of the parties,\textsuperscript{67} in order “to prevent the Court from being influenced by arguments which the parties have been unable to discuss,”\textsuperscript{72} although the decision of reopening tends to be left to the Court’s discretion.\textsuperscript{73}

Interestingly enough, this issue was brought to Strasbourg later. As mentioned above, the ECtHR is not competent to review acts of the EU, which has not yet acceded to the ECHR. However, it has considered that Contracting Parties remain responsible for guaranteeing the rights contained in the ECHR even where they transfer competence to international organizations such as the EU, and the ECtHR is competent to review acts done by Contracting Parties as members of such organizations.\textsuperscript{74}

At first, the Strasbourg Court rejected the complaint of Emesa Sugar as inadmissible by stating that the substantive problem in that case, which was related to customs duties or charges, formed part of the hard core of public-authority prerogatives and did not fall under the scope of Article 6 of the ECHR that should be related to the determination of “civil rights and obligations” or “any criminal charge.”\textsuperscript{75} After that, the ECtHR, on the lines of the case-law issuing from the case of Bosphorus Airways,\textsuperscript{76} admitted that “the procedure before the ECJ was accompanied by guarantees which ensured equivalent protection of the applicant’s rights” \textsuperscript{77} in the light of the possibility for the party to submit a request for reopening the oral procedure.

Here we can see the dialogue between the EU legal order and the ERCHR legal order, which however is beyond the scope of the present paper.

\textsuperscript{67} Rules of Procedure of the Court of Justice art. 83, 2012 O.J. (L 265) 1, 22 (“The Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute.”)

\textsuperscript{68} Emesa Sugar, 2000 E.C.R. at I-673 para. 18.


\textsuperscript{70} Matthews v. United Kingdom [GC], 1999-I Eur. Ct. H.R. 251, 265-266 paras. 29-35.

\textsuperscript{71} Emesa Sugar N.V. v. Netherlands, no 62023/00, HUDOC (2005).


3. The European Court of Human Rights in *Kress*

In 2001, the ECtHR finally had an opportunity to rule on the conformity of French *commissaires du gouvernement* with the right to a fair trial. In the famous case of *Kress v. France*, the Strasbourg Court found a violation of Article 6 of the ECHR by the practice employed by them in Paris. Roughly speaking, there were two points that the Court discussed.

First, the applicant complained that she had not had a fair trial in that the *commissaire du gouvernement*’s submissions were not disclosed to her prior to the hearing and that it was impossible for her to reply to them at the end of the hearing. The Court dismissed this point. While it confirmed its constant case-law according to which “the concept of a fair trial also means in principle the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court’s decision,” the Court offered three reasons: (1) it was possible for the lawyers to ask the *commissaire du gouvernement*, before the hearing, to indicate the general tenor of his submissions; (2) it was also possible for the parties or their lawyers to reply to the *commissaire du gouvernement*’s submissions by means of a memorandum for the deliberations (in French version “note en délibéré”); (3) in the event of the *commissaire du gouvernement*’s raising orally at the hearing a ground not raised by the parties, the presiding judge would adjourn the case to enable the parties to present argument on the point. The Court, therefore, concluded that there had been no violation of Article 6 of the ECHR in this respect.

Second, the applicant made a case against the fact that the *commissaire du gouvernement* attended the deliberations of the judges, even if he did not vote, and that that made worse the infringement of the right to a fair trial resulting from the failure to respect the principle of equality of arms and the right to adversarial procedure. On the contrary, the French Government contradicted this point by saying that since the *commissaire du gouvernement* is a full member of the trial bench, on which he functions, in a manner of speaking, like a second reporting judge, there should be no objection to his attending the deliberations or even to his voting. The Court also denied any breach of the impartiality or independence of the *commissaire du gouvernement*. However, it made a counterargument as follows:

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80 *Id.* at 69 para. 76.
81 *Id.* at 70 para. 78.
However, the Court observes that this approach is not consistent with the fact that although the Government Commissioner [commissaire du gouvernement] attends the deliberations, he has no right to vote. The Court considers that by forbidding him to vote, on the ground that the secrecy of the deliberations must be preserved, domestic law considerably weakens the Government’s argument that the Government Commissioner is truly a judge, as a judge cannot abstain from voting unless he stands down. Moreover, it is hard to accept the idea that some judges may express their views in public while the others may do so only during secret deliberations.82

In addition, relying on “the doctrine of appearances,” the Court pointed out that “a party may have a feeling of inequality if, after hearing the Commissioner [commissaire du gouvernement] make submissions unfavourable to his case at the end of the public hearing, he sees him withdraw with the judges of the trial bench to attend the deliberations held in the privacy of chambers.”83 To put it shortly, it was for this appearance of inequality that the Court recognized a violation of Article 6.

In summary, the ECtHR did not find an infringement of the right to adversarial proceedings because the parties had a possibility of replying to the opinion presented by the commissaire du gouvernement—which the Court ventured is “vital in the Court’s view.”84 In contrast, it declared a violation of the right to a fair trial in terms of equality of arms. Although it did not expressly refer to that principle, the Court indicated the inequality between the parties and the commissaire du gouvernement caused by the latter’s attendance at the deliberations. Since the commissaire du gouvernement is not a party to the proceeding in the proper meaning of the word, the principle of equality of arms would not apply to him, unlike the principle of adversarial trial. However, the Court relied on the doctrine of appearances in order to make him appear on the same stage as the parties. In other words, the combination between the principle of equality of arms and the doctrine of appearances led the Court to the finding of a violation of Article 6.85

4. The French Government after Kress

Although French jurists, both academics86 and practitioners,87 vigorously

82 Id. at 70 para. 79.
83 Id. at 71 para. 81 (emphasis added) (citation omitted).
84 Id. at 69 para. 76 (mentioning the practice of memorandums for the deliberations).
85 See also supra Part II.
86 E.g., Joël Andriantsimbazovina, Le commissaire du gouvernement près le Conseil d’État et l’article 6 § 1 de la Convention européenne des droits de l’homme, 2001 RECUEIL DALLOZ 1188; Joël Andriantsimbazovina, Bien lu, bien compris, mais est-ce bien raisonnable?, 2004 RECUEIL DALLOZ 886; Fédéric Sudre, La participation du commissaire du
criticized the condemnation of commissaires du gouvernement issued by the Strasbourg Court. The French Government was forced to comply with the judgment.

At first, the Government issued a decree which provided that the commissaire du gouvernement attend the deliberations but not take part in it. However, it was obviously a makeshift, which the ECtHR immediately rejected. Then the Government amended the Code of Administrative Justice by a second decree. At administrative district courts [tribunaux administratifs] and administrative courts of appeals [cours administratives d’appel], the commissaire du gouvernement may not attend the deliberations any more. At the Conseil d’État, the commissaire du gouvernement may attend the deliberations unless any party requests that he do not. The Committee of Ministers of the Council of Europe and the ECtHR approved these measures as an execution of the judgment Kress.

The French Government did not relax the reform. It adopted two other decrees in 2009 and 2011. The decree of 2009 provided two things. First, it abandoned the appellation “commissaire du gouvernement” for “rapporteur public.” The intent of the Government for changing the name is not so clear. However, a guess is possible. In my opinion, the French Government aimed at emphasizing the closeness between a reporting judge and a rapporteur rather than avoiding the confusing title that would cause a mistake for a real protector of the government. Second, it reinforced the adversarial structure of a trial. Articles R. 711-3 and R. 712-1 of the Code of Administrative Justice, modified by the decree of 2009, expressly laid down the possibility for the parties or their lawyers to know the tenor of the submissions of the rapporteur.
public before the hearing. In addition, Article R. 732-1 of the Code, modified by the decree of 2011, reversed the order of the appearances of the rapporteur public and the parties: from then on, after the rapporteur public has presented his submissions first, the parties may make their oral observations in order to reply effectively to the submissions.

In 2013, the ECtHR delivered a judgment that resolved the remaining problem about rapporteurs publics in the case of Marc-Antoine. The applicant complained that he was not given a copy of the draft decision drawn by the reporting judge, which was only transmitted to the rapporteur public. The Court once blamed the advocate-general at the French Court of Cassation for this point in the case of Reinhardt and Slimane-Kaïd. It argued that “the imbalance thus created by the failure to give like disclosure of the report to the applicants’ advisers is not reconcilable with the requirements of a fair trial.” In contrast, regarding the rapporteur public at the Conseil d’État, the ECtHR dismissed the case made by the applicant by stating that the “procedural particularity, which gave the parties a glimpse of the line of thought developed by the court, and an opportunity to make their final observations before the court reached its decision, did not adversely affect the fairness of the proceedings.” The Court also added that “the applicant had failed to show in what respect the public rapporteur [rapporteur public] might be considered as an adversary or a party to the proceedings, which he would have needed to do in order to be able to claim a breach of the equality of arms principle.”

**Conclusion**

As stated in the Introduction, the right to a fair trial is a paradoxical right in that its exercise is dependent on the court system provided by the state and that it might not be able to suppose a single model for that system. This perspective was emphasized by the dissenting opinion in Kress:

Even supposing that the doctrine of appearances finds acceptance, does a European court, relying on it, in a system based on subsidiarity and respect for national courts, have to dent the reputation of an institution that has functioned to general satisfaction for a century and a half, that plays a vital role in a State based on the rule of law and that has done substantial work on behalf of justice and human rights . . . ?

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99 Id. at 665-666 para. 105.
100 Marc-Antoine, para. 32 (emphasis added).
101 Id.
And have the limits of “European supervision” in relation to characteristic national institutions—which are legitimate so long as they fulfil their Convention obligations to produce a specific result—not here been reached or overstepped? In our humble but firm opinion, our Court has already gone very far in this area in the past (since Borgers v. Belgium . . . , in fact, which represented a departure from doctrine previously established in Delcourt v. Belgium . . . ), and the majority of the Grand Chamber in this case go too far, despite the first point of the operative provisions.102

They criticized the position of the majority opinion relying on the concept of subsidiarity. Subsidiarity in the ECHR means that “the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court [ECtHR].”103 This principle appears in the “margin of appreciation” doctrine, which Contracting Parties sometimes enjoy in implementing protection of the rights.104 In other words, Contracting Parties can preserve traditional characteristics of their legal institutions within a margin of appreciation. But the ECtHR generally has not left Contracting Parties a margin of appreciation in the cases that I discussed above. Certainly the Court might have intended to protect the hard core of the right to a fair trial, such as the right to adversarial proceedings and the equality of arms principle.105

In my position, however, the control exercised by the European Court cannot be characterized simply by the contrast between the principle of subsidiarity and the excessive “European supervision.” Instead, it can be interpreted as an interaction or a dialogue between two legal orders. This interpretation is supported by two examples.

First, the French decrees of 2009 and 2011106 were certainly adopted to comply with the ECtHR judgments, but they went beyond that. They reinforced the protection of procedural rights without any direct instructions from Strasbourg. In fact, the Vice-President of the French Conseil d’État, Jean-Marc Sauvé, cited this example as a product derived from an interaction between French law and ECHR law.107

Second, it is symbolic that the ECtHR, in Marc-Antoine, directly approved that the “procedural particularity” of rapporteurs publics contributed to the protection of parties’ rights.108 Furthermore, it clearly held that the

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103 EUROPEAN COURT OF HUMAN RIGHTS, INTERLAKEN FOLLOW-UP: PRINCIPLE OF SUBSIDIARITY 2, para. 2 (2010).
104 Id. at 12-17.
105 See supra Part II.2.
106 See supra Part III.4.
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rapporteur public was “a member of the Conseil d’État, just like his colleagues on the bench, the only difference between them being the special duties temporarily vested in him.”109 This might show that the French Government, which once had failed to persuade the European Court of the rightness of their traditional legal institutions, finally succeeded in persuading the Court of the homogeneity between the rapporteur public and the judges, especially his “mate,” the reporting judge.

The dialogue between Paris and Strasbourg that this case study discussed seems to be finished for the time being. However, this dialogue certainly gave dynamism to both French law and European law—this is what I tried to show in this paper.

109 Id.