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ABSTRACT

In this article about « the State » published in a *Handbook on administrative Law*, it is claimed, in the first part, that the french professors of public law have forgotten that the State played a key role in the elaboration of the administrative law. It is a striking feature when we compare the works of the two great Founders of the administrative law, ie Léon Duguit and Maurice Hauriou (under the 3rd Republic) and their followers (Jèze, Waline and Vedel) who ignored the theory of State. In the second part of this article, it is argued that, nevertheless, the theory of State may be useful to explain not only the structure of the « State apparatus », but also some famous "case studies" (as some decisions of Conseil d'Etat : *Dehaene, Popin, Papon*,) which illustrated both the unity and continuity of the State. All these cases reveals that the concept of sovereignty still continues to irrigate the french administrative law.

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be a non-negligible drawback in these times of accelerating specialisation of legal knowledge, there may even arise an advantage in that the non-specialist invariably brings a fresh outlook to an area cultivated by experts who may have grown indi erent to its originality from having worked it so much. is 'being at odds' is also evocative of the warning by Gaston Jèze, in his great book: ' e separation of constitutional law and administrative law constantly made in France is entirely arti cial. It fails to re ect political and social conditions'.[3] True, the teaching of administrative law is now remote from that of constitutional

1. R. Bonnard, *Précis de droit administratif*, 3rd edn (Paris, LGDJ, 1940) p. 21.
2. First published as 'L'Etat' in P. Gonod, F. Melleray, P. Yolka (eds), *Traité de droit administratif*, tome I, (Paris, Dalloz, 2011) pp. 207-267.
3. G. Jèze, *Principes généraux du droit administratif*, 3rd edn, tome II, (Paris, Giard, 1930), p. 213, note 1.

law. But should we not attempt to narrow the gap? In some sense, this chapter is intended to contribute to this operation.

Obviously, the difficulty lies in knowing how to proceed. The question that has guided my brief reflections on the subject of the state appears with hindsight to be twofold. First, it can be asked: *What does administrative law teach us about the state?* And second the question may be turned around: *What does the theory of the state teach us about administrative law?* Plainly, scholars of administrative law concern themselves above all with the first question, or more exactly, they seek to describe the state from the vantage point of administrative law. The danger with such an undertaking is that the vision of the state might vary in each discipline. Have we not learnt for some time now that there is a conception of the state according to Community (i.e. European) law? This diffraction of the concept of state by each different discipline of public law may result in us losing sight of its unity. Accordingly one should always keep in view a certain theory of the state in order to maintain the unity of the concept, which is the point of it. In short, so far as possible the aim is to reconcile two contradictory requirements: to take account of the specific character of administrative law when it is confronted with the question of the state; and to do justice to the transverse character of the state, as a phenomenon that exists independently of administrative law.

The reading proposed here is designed to emphasise that the state, viewed from the angle of administrative law, is characterised as *the state in action*. The state, which acts, comes into contact through its administration with individuals and groups. Herein lies the major difference with constitutional law which does not directly affect all individuals because it essentially concerns relations between rulers and the ruled – at least institutional constitutional law does, the branch that does not concern rights and freedoms. By contrast, administrative law governs and organises the state's action in society through the apparatus referred to as the administration. If we take state action as the main inroad into administrative law, the view we have of the discipline changes. It is not review by the law courts or administrative litigation that is in the limelight but instead the state's (i.e. the administration's) forms of action.[4] State action may take on two very different forms: policing and public service. In other words, administrative law bears on the state's legal activity apprehended via its age-old arm of the administration.

One advantage in taking the state in action as the guideline is that it compels us to think about its *means* of action. This is where the painful encounter occurs between law and economics through the central issue of the financing of the state's action. We are aware today that 'even in social democracy, states are in debt and can no longer provide for their general interest missions on their own'.[5] Administrative law is thus challenged head-on by the simple fact that the state has lost the monopoly on performing general interest missions. The state is compelled for financial reasons to invent ways of having private-sector operators carry them out through various contractual arrangements.[6] It is fashionable to speak of the state no longer 'administering' but instead 'regulating' action (a sort of post-modern state). But if the

4. I must be brief here on why French administrative law from Laferrière onwards has been built on review and not on action. See the remarks by P. Gonod (also based on the works of P. Legendre and J.-J. Gleizal) 'La réforme du droit administratif : bref aperçu du système juridique français' in M. Ruffert, *The Transformation of Administrative Law in Europe. La mutation du droit administratif en Europe* (Munich, Sellier, 2007) pp. 72-73.

5. Interview with Fanny Picard, 'Alter Equity', *Le Monde*, 5 March 2011.

6. However ingenious the new arrangements or legal and financial mechanisms (e.g. public-private partnership, PPP) designed to regulate the state's action, the resort to these various techniques is not only a legal and accounting artifice for dissimulating the growing debt of central and local government ('Le partenariat public/privé, un cache dette ?', *Le Monde*, 28 April 2011) but the final bill is picked up no longer by the tax-payer but by the end-user. This transfer from tax-payers to users means that those users who have most need of public services because they are the less well-off and the poor are the primary victims of these changes in administrative law. Contemporary doctrine usually maintains an embarrassed silence about who foots the bill, but it can be seen from examining Maurice Hauriou's writings that classical scholarship was fully aware of the political and social issues surrounding administrative law (see I, B, 2 below).

state is no longer directly in charge of the 'commonweal', it has lost the essential part of its legitimacy to act.

As this chapter seeks above all to encourage readers to see administrative law as an eminently political law, it does not contain all the mandatory topics that feature in textbooks on administrative law: the juristic personality of the state, decentralisation and deconcentration, ministerial services and deconcentrated services of the state, and the production of normative sources of administrative law (notably regulatory power) which primarily concerns the government. us, the chapter on 'Les structures administratives' of René Chapus' textbook[7] begins with a section on 'the state' and that treatise contains valuable chapters on themes allied to the questions examined here.[8] is study seeks rst to highlight the progressive disappearance of the state from the contemporary science of administrative law and to question the reasons and the scope of what in many respects is a surprising phenomenon (section I). is observation then leads to a short call for the state to be taken into consideration again in order to understand administrative law (section II).

I – REFLECTIONS ON 'OVERLOOKING THE STATE' IN CONTEMPORARY ADMINISTRATIVE LAW DOCTRINE

A review of the many contemporary textbooks on administrative law reveals surprisingly that no explicit connection is made between the state and administrative law. More speci cally, the impression is that the state is not 'theorised' by contemporary administrative doctrine. is initial astonishment prompts our question: *Why is the state forgotten when it is at the heart of administrative law?* Yet this rst question is perhaps naive and above all anachronistic if we dare raise a far more radical question: *If the state is no longer nowadays at the heart of administrative law, is it not because there is no longer any state?* But if there is no longer any state, can there still be any administrative law? ese questions are somewhat dizzying, even if eminent jurists have already diagnosed the state to be dead or a thing of the past. I shall not try to give a full answer here but more modestly to delve into this hypothesis that contemporary doctrine overlooks the state. First I shall try to account succinctly for how the state has been ignored. Next this situation shall be contrasted with the preponderance – the ubiquity even – of the state in classical administrative doctrine. Finally an explanation shall be given of how this transition from past to present circumstances – from this 'surfeit of state' to this 'interstellar vacuum of state' to exaggerate the contrast – has been possible.

A. The Initial Observation: The Omission of the State from Contemporary Science of Administrative Law

Nowadays the state is no longer a concept employed in administrative law doctrine. is is the initial observation that can be made with no polemical intent from simply lea ng through the literature without attempting to be exhaustive. Let us begin with the textbooks and with René Chapus' great *Droit administratif général* that has dominated administrative law literature for three decades.[9] e general introduction holds a surprise: the word state (*Etat*) does not feature there a single time (save in the expression *Conseil d'Etat* and once for 'foreign states'). We learn from it that administrative law is composed of 'rules

7. R. Chapus, *Droit administratif général*, t. I, 15th edn (Paris, Montchretien, 2001) pp. 201 .
8. E.g. P. Gonod, 'L'administration et l'élaboration des normes', p. 529 and A. Rouyère, 'Les personnes publiques spécialisées', t. 1, p. 333.
9. Chapus, *Droit administratif général.*

of public law' that govern the activity of the administration and that the questions asked by doctrine in the domain are about how to de ne this law (criterion of public service of sovereign authority) and how to understand the autonomy of administrative law with respect to ordinary law. True, the reader with a modicum of knowledge is aware that many of the concepts – administration, sovereign authority, public service and even *Conseil d'Etat* – are merely indirect ways of speaking of the state. But the unwitting reader cannot spot that there is a principled connection between French administrative law and the state, although the introduction to the textbook is supposed to present administrative law in its full scope.

e same observation could be made of other contemporary textbooks and their introductions in which the subject matter of the discipline is discussed. e state does not feature in the de nition of administrative law, which is sometimes characterised as 'the set of rules of French public law applying to administrative activity'[10] – even if public law is de ned there as applying to the state and its relations with third parties – or sometimes as 'the set of special rules governing administrative activity'.[11] In some textbooks, the very term 'state' does not appear in the index.[12] It is usually mentioned indirectly in inevitable developments on decentralisation or deconcentration or in the exposition of the forms of state intervention. Obviously the picture needs to be nuanced because some textbooks do explicitly raise the issue of the state, questioning its role and its legitimacy[13] while other authors have made the state the primary theme of their research.[14]

From there to inferring that the disappearance of the state in the developments dealing with administrative law means the disappearance of the state from administrative law itself is but a small step; but a step I shall not take. e fact of the matter is that the state is very much present in the textbooks, but only as an important feature and not an exclusive one relating to 'administrative organisation' or to administrative entities. René Chapus deals with it in the chapter referred to above and describes it as a 'public authority that is one of a kind'.[15] e state supposedly has three speci c features: rst it encompasses in its own way the other public authorities. Next it is not just an administrative institution but a political one too, and in that it stands apart from regional and local authorities. Finally, taken as an administration, it is characterised by its complexity because of its dual organising principle: the state can rely on both a 'central administration' and on 'outside services' of the state. It is then taught that the administration is subordinate to government (art. 20, Const. 1958), that the highest political authorities (President of the Republic, Prime Minister and ministers) act as administrative authorities when they take administrative measures. e point of intersection between constitutional law and administrative law is therefore formed by political authorities exercising executive power and taking administrative measures. Accordingly all the textbooks necessarily describe the speci c features of regulatory authority, the normative expression of the state's power to create law. In addition, administrative law should also cover the regional and local administration of the state, the symbol of which is presumably the prefect. However, such studies are increasingly relegated to textbooks on administrative institutions.

However much space is attributed to it (which varies with each textbook), one thing is certain: while the state is still studied as an administrative institution, it is not – not any more – central to the construction of administrative law. ere is no longer any discussion of its nature nor of the meaning of the

10. D. Truchet, *Droit administratif* (Paris, PUF, 2008) p. 28.
11. P.-L. Frier and J. Petit, *Précis de droit administratif*, 5th edn (Paris, Montchrestien, 2008) no 40, p. 30.
12. Truchet, *Droit administratif* and J.-L. Autin and C. Ribot, Droit administratif général, 5th edn (Paris, Litec, 2007).
13. G. Dupuis, M.-J. Guédon and P. Chrétien, *Droit administratif*, 10th edn, (Paris, A. Colin, 2010) pp. 117-119.
14. J. Chevalier, *L'Etat post-moderne*, 3rd edn (Paris, LGDJ, 2009).
15. Chapus, *Droit administratif général*, no 201, p. 159. See also, D. de Béchillon, 'L'Etat est-il une personne morale comme les autres ?' in AFDA, *La personnalité publique*, (Paris, Litec, 2007) pp. 127-132.

expression 'state' although these are far from straightforward matters, as shall be seen (see section II). It is as if the general theory of the state or the theory of the state no longer fertilised the discipline called administrative law, including what is called general administrative law.

1. A phenomenon of un-realisation of administrative law

is disappearance of the state is not alien to the trend towards a degree of unrealism of administrative law in the sense of an ever sharper separation of this law from the living reality of its environment. Because of its double tropism of adjudication and rule-making (see below), administrative law is increasingly about administrative acts rather than the juristic activity of the administration, just as it is more about the *Conseil d'Etat* than state administrations. Here, the domination of the formal concept of the functions of the state over the material concept has been crucial. In browsing through the textbooks, one could be excused for thinking that nowadays, behind the questions of norms, legality, hierarchy of norms, overlapping norms – the celebrated 'court dialogue' between Paris, Luxembourg and Strasbourg! – public services or so many other means of legal technique, etc., administrative law could do without the state, although it is the main actor in touch with individuals and groups. Similarly, instead of putting the state to the fore, more attention is given to the individuals who govern, the civil service or public servants. is phenomenon is even plainer for the major courses on administrative law (second year) which appear increasingly as *the* course on *general* administrative law compared with which the third year and graduate courses are on *special* administrative law. is balkanisation of the discipline is tantamount to postponing the study of the public function or public services for some students forever – I am thinking of those students who go on to study private law. As a result it is increasingly the more 'normative', the more formal and the least material part of administrative law that is studied in the major courses on administrative law. Yet if there is a subject area in which one must think about what the state is in order to understand the ideas involved, it is the law of public function, or the law of the major public services, or public economic law.

Let us sum up: the triumph of the most stringent positivism, combined with a sort of idolatry for the hierarchy of norms cultivated to excess because of the primacy accorded to the principle of lawfulness and because of the more recent discovery of the principles of compliance with the constitution and with international treaties, has led many jurists to unite in the belief that the science of administrative law is but a pure and simple technology of rules albeit a highly sophisticated technology that delights the commentators of this henceforth 'Europeanised' law.

But, were this rst phenomenon not enough, there is a second that has had an even greater impact on the absence of any consideration of the state. is is the progressive *autonomisation* of the discipline with respect to what nowadays appear to be auxiliary sciences of administrative law. Two convergent facts have speeded the normative *Isolierung* of administrative law. e rst and earliest is the institutional sectioning between administrative law and administrative science. Administrative science was supposed to vivify administrative law by studying the players and reminding students that litigation was merely the 'pathology of law' to borrow Jean Carbonnier's evocative expression. But the two disciplines are no longer in touch; the teaching of administrative law is ever less open to the actors, to those who make the law and to what might be called administrative 'life'. For its part, administrative science is tending to become a sociology of public policies, or even a 'science of government' (the crude disguise of public policies) that is supposed to revive French political science as it gasps for breath. One might fear that such a development in sociology could prompt jurists to the same tense re ection as felt by the constitutional lawyer

faced with the evolution of political science into a sociology of actors the main characteristic of which is that it takes no interest in political institutions. Few administrative lawyers mix the two disciplines; from this vantage point, the contribution to the present Treatise by Jacques Caillosse is a fortunate exception. Besides, administrative law, which was once entitled 'administrative law and administrative institutions' and taught alongside 'constitutional law and political institutions', has been reduced to its purely normative shell. e study of administrative institutions is taught as a separate course in some universities and in others is part of a broader course on judicial and administrative institutions. is massive e ect of specialisation means that students lose the big picture of administrative law. One of the points of an analysis of administrative law focused on the state is precisely that it lends systematic unity to what would otherwise appear to be a proliferation of rules.

2. Learned research on the state in administrative law

If we now turn to learned literature, that which is supposed to indicate on-going research, the situation is identical, or even more worrying. It su ces to ask what was the latest PhD thesis to tackle the problem of the state. Barring error, the most recent to deal explicitly with the question was by Bertrand Delcros on *the unity of the legal personality of the state*.[16] It dates from 1976… Since then, there has not been a single thesis on the question of the state in administrative law, which is astonishing when one thinks of the in ation in the number of PhD theses since that time. e only thesis that verges a little on our subject matter is by Charlotte Denizeau, connecting the question of the de-statisation of the authorities with the construction of Europe.[17] e same observation holds for the articles on administrative law that elude the question of the state. It is striking to see that the writings of the grand masters of the discipline in the immediate post-war years, de Laubadère, Rivero and Vedel,[18] or of the ensuing generation such as René Chapus and Paul Amselek contain no major studies of the state in administrative law. In yet more recent literature, it would be hard to nd a substantial and highly doctrinal article on the question of the state in administrative law. is oversight is surprising when one thinks about it, because for readers familiar with the founders of the disciplines of public law, the state was obviously central and crucial.

B. The Ubiquity of the State in Classical Administrative Law Doctrine and its Meaning

e founders of administrative law built their discipline on the base-course of the state. Rather than seeking to be exhaustive, it will su ce to show that the two uncontested masters of the discipline, Maurice Hauriou and Léon Duguit, devoted much of their e ort to thinking through this relationship between the state and administrative law. Whereas they are o en set against one another, Duguit being the founder of the public service school and Hauriou the authority school, it can be argued that they shared the idea that the state was 'central' to thinking about administrative law. eir books contain questions that are no longer asked today and that they pondered because they thought doing so would better account for their subject matter. Accordingly, for Hauriou, it is essential to look into the question of the legal personality of the state because it provides insight into certain subject areas, especially the relations of the state with third parties or alternatively the problems of responsibility.

16. B. Delcros, *L'unité de la personnalité juridique de l'Etat* (Paris, LGDJ, 1976).
17. C. Denizeau, *L'idée de puissance publique à l'épreuve de la construction européenne* (Paris, LGDJ, 2004).
18. See G. Vedel, *Pages de doctrine*, 2 volumes, (Paris, LGDJ, 1981).

1. Duguit: a theorist of the state and of administrative law

We shall begin with the case of Duguit because this 'anarchist of the professorial chair' – as his friend Hauriou ironically nicknamed him – was the first to revolutionise French public law by publishing in 1901 and 1903 his two masterful *Etudes de droit public*, which are actually two volumes of a single book on the state. It is often observed that he wanted to propose a new theory of the state, shorn of the doctrines of sovereignty and moral personality. He intended to replace the state as a power with the state conceived of as cooperation among public services, in keeping with what had become his overarching idea: 'The state is no longer a sovereign power that commands: it is a group of individuals holding a force that they should employ to create and manage public services. The idea of public service becomes the fundamental idea of modern public law'.[19] In his thinking, sovereignty is replaced by public service. It is also common knowledge that Carré de Malberg came out against this argument in the preface to his *Contribution* à *la théorie générale de l'Etat* asserting to the contrary that the state is first and foremost a power of domination (*Herrschaftsgewalt*).[20]

But Duguit did not settle for this thesis that made the state into a cooperation among public services. In the second volume of his *Etudes de droit public (L'Etat, les gouvernants, les agents)*, he set about studying the actors of the state who included both the 'rulers' (who come under what we now call constitutional law *stricto sensu*) and the 'agents', who could be presented as government employees. In short, he describes the state from the vantage point of the *actors*, without going down the road of the state as a juristic person or collective entity, the relevance of which Duguit contests. Gaston Jèze was to take up this way of describing administrative law that is inseparable from a general vision of public law in which constitutional law and administrative law are closely related.[21]

However, to describe Duguit's contribution to public law in this way alone would miss the essential part of his input, which is the insight that administrative law enables us to grasp the state in action. Unlike constitutional law, administrative law directly affects individuals because it governs the 'outside activities of rulers and of agents'.[22] Such law shares with public international law the fact that 'the state joins in relation with another personality',[23] which is not the case of constitutional law which moved principally – at the time – among the organs of one and the same state. In his own doctrine, Duguit illustrates this claim by the description he gives of the administrative act as an 'individual and concrete act that must be accomplished for the management of the service'[24] and so contrasting with statute. The administrative act creates 'subjective legal situations' to use his own terms. If administrative law apprehends the state in its direct relation with third parties, usually those it administers, it is because the state intervenes increasingly in social life. Duguit constantly reiterates that the domain of administrative law is continuously expanding 'because of the constant increase in state activity' which, he claims, is quite simply an 'irresistible fact'.[25] But it is not just the expansion of the state's area of intervention that administrative law reflects but also the procedures, the channels through which it acts. From this point of view, it is less the state, as such, than its modes of action that it is worth the jurist's while to examine.

19. L. Duguit, *Les transformations du droit public* (Paris, Armand Colin, 1913), p. XIX.
20. R. Carré de Malberg, *Contribution* à *la théorie générale de l'Etat*, tome I (Paris, Sirey, 1920).
21. See O. Beaud, 'Duguit, l'Etat et la reconstruction du droit constitutionnel français' in F. Melleray (ed.), *Autour de Léon Duguit* (Brussels, Bruylant, 2011) pp. 29-55.
22. L. Duguit, *Traité de droit constitutionnel*, t. I, 3rd edn (Paris, de Boccard, 1927), p. 706.
23. *Ibid*., p. 708.
24. Duguit, *Les transformations*, p. 163.
25. *Ibid.*

In other words, what Duguit's work attests to, is the recognition of the fact that, in France, administrative law has domesticated the state and brought it under control. Duguit never stops praising the end of the 'imperialist system' of administrative law by which the administrative act is essentially a manifestation of authority.[26] His unrelenting and obstinate struggle against the state as power, that is, against an administrative law dominated by the mark of the state's unilateral authority is at the same time a way of saluting the liberal evolution of the *Conseil d'Etat*'s case law, which has meant the citizens (*administrés*) have rights they can invoke against the administration. He could even declare, not without some pride, at an international colloquium on administrative sciences in Brussels in 1901, that the participants 'were able to observe that no other modern public law protected the citizen (*administré*) as completely as French law' and that this was down to the *Conseil d'Etat*, 'a high court, … administrative in its origin and its procedure, judicial in its independence and the impartiality of its members, [which] had successfully created the components of proceedings that were essentially protective of the citizen (*administré*)'.[27]

For that matter, there is rather too much of a tendency to ascribe the liberal contribution of administrative law to no more than this judicial control of administrative activity. e second volume of *Etudes de droit public, l'Etat, les gouvernants, les agents*[28] indicates that Duguit wanted to reveal the structuring principles underpinning a liberal constitution of the administration. Under cover of speaking of the principle of separation of the 'rulers' (political authorities) and of the 'agents' (administrative authorities), he stated several fundamental components of such a constitution, all part of what would be called an 'art of separation'. ere is on one side the 'modern principle of the separation of rulers and agents'[29] which has various favourable implications for the guarantee of the rights of individuals, a capital one of which is the subordination of the administration to the government and to the political authorities, which prohibits civil servants and public service workers from escaping the legal rules (means of forestalling the emergence of an unaccountable bureaucracy), as Duguit states expressly referring to the law, 'a general rule abstractly formulated by the rulers'.[30] On the other side, the second rule also stemming from the separation between rulers and agents implies, vice-versa, that the 'powers' of the 'agents' must not be exercised by the 'rulers'. e outcome is therefore that the principle of the separation of rulers and of agents leads to a distribution arranged into 'state functions'[31] prohibiting any authorised authority from overstepping its area of competence. In Duguit's thinking, this distinction is less organic than material: rulers act in the 'domain of objective law' and the 'agents' in the domain of subjective law.[32]

ere is besides the *theory of competence* which, for Duguit, is thought of as 'an objective power that law recognises to a particular o cial to properly and e ectively accomplish a speci c number of legal measures'.[33] Competence is the way for him to disqualify the notion of subjective law and discover an objective legal institution that opposes the o cial considering himself to be entitled to wield that power. It is a polemical concept through which one can oppose the patrimonial conception of the state. e o - cial is not the owner of his position and he is supposed to exercise a power that does not belong to him in the highly regulated context of a series of authorisations. e theory of competence for Duguit – as

26. Duguit, *Les transformations*, p. 145.
27. *Ibid.*
28. L. Duguit, *Etudes de droit public*, *l'Etat, les gouvernants, les agents*, (Paris, Fontemoing, 1903), republished by Dalloz, 2005, preface F. Moderne.
29. *Ibid*., IV, para. 1, p. 369.
30. *Ibid*., p. 365.
31. *Ibid*., p. 367.
32. *Ibid*., p. 378.
33. *Ibid*., p. 496.

for Jèze – appears to be a liberal legal construction aimed at tying the official to observance of the legal rule and dissociating the public function from its title holder. Although he criticises Jellinek's conception, Duguit moves closer to it in this fundamental dimension: the modern state is not a patrimonial state.[34]

It arises from all of these notations that for Duguit, as for so many of his contemporaries, the reconstruction of administrative law, its refoundation as it were, had as its principal issue the formation of the rule of law (*Etat de droit*). As Marcel Waline clearly saw, in the tribute he paid to Duguit on his death, his guiding idea 'was none other than the submission of the state to law' or more specifically 'the problem of limiting rulers by the Law'.[35] Such was the ambition that pervaded his writing, the breathe that inspired those countless pages in which he endeavoured to magnify public services as opposed to public power, an expression which seemed to him to symbolise terribly the old administrative law of the monarchy, that 'imperialist system' which made the state a potentially authoritarian authority negating individual rights. In this respect his theory of the state and of law is 'normative' in the sense that it is axiologically determined by an ideal of limiting power by law and, applied to the domain of administrative law, an ideal of limiting administrative power by administrative law.

From the foregoing, it transpires that Duguit never sought to limit the question of the state to the single domain of administrative organisation. He studied the state also in its relation with the creation of law (and not only administrative law) and included the study of administrative law in a far more general framework, which is that of all of public law. He never stopped thinking of administrative law as 'a part of public law'. Thus, he began from the idea that it could not be understood without a proper perception of the 'Whole', of all of public law, and it was precisely the state that corresponded to that. It is for that 'systematic' reason that the presupposition of any conception of administrative law resides in the notion of state and in the idea of a 'unity of public law'.[36] With other arguments, another method and another sensitivity, Duguit's alter ego Maurice Hauriou also sought to rebuild administrative law by founding it on a theory of the state.

2. Hauriou or another way of putting the state at the centre of administrative law

For almost any question of administrative law, we must go back to Hauriou for with him, as Jean Rivero wrote, 'begins the administrative law which is still ours'.[37] We must go back to him too because, from the multiform work of the eminent administrative law scholar, the note on the *Canal de Gignac* decision is often remembered in which he exclaimed 'They are changing our state'[38] because the *Conseil d'Etat* considered that an owner's association was a public establishment and so supposedly conflated collective interest and public interest. We shall return to this famous Note (see section II below) but it is more judicious to observe – again with Jean Rivero – that one of the peculiarities of Maurice Hauriou's work lay in administrative law being rooted both in 'a comprehensive view of the state' and 'in humble reality'.[39] Although the second observation about the connection the Toulouse professor makes between economic and social facts is a profound one, we shall confine ourselves here to the first observation about administrative law being rooted in 'a comprehensive view of the state'. Such an anchor point should come as no surprise from a jurist who did not hesitate late in life, when drafting the preface to his collected notes on

34. See O. Beaud, 'Compétence et souveraineté', *Association française pour la Recherche en Droit administratif, La compétence*, (Paris, Litec, 2008) pp. 5-32.
35. M. Waline, 'Les idées maîtresses de Duguit et d'Hauriou', *L'année politique française et étrangère*, 1929, t. 4, p. 387.
36. See the chapter by O. Jouanjan, 'La Constitution', p. 383.
37. Jean Rivero, 'Maurice Hauriou et le droit administratif', *Pages de doctrine*, t. I, p. 32.
38. M. Hauriou, *La jurisprudence administrative*, t. I (Paris, Sirey, 1929), p. 419.
39. Rivero, 'Maurice Hauriou et le droit administratif', p. 33.

legal decisions to present himself as 'a theorist of administrative law'.[40] My claim is that he sought to build a theory of administrative law with a theory of the state for it to lean upon. More exactly, it occurred to him that administrative law, as living law, was the best way to account for the evolution of the modern state such as it was to be found in France. If late in his career Hauriou was unfaithful to administrative law by turning to constitutional law, it was probably because of political events, the 1914–1918 war and the victory of Communists in Russia in 1917. is sensitivity to political and social givens also enlightened the way he devised his course on administrative law.

If there is one book in which this close union between administrative law and the theory of the state appears, it is in his *Précis de droit administratif*, the treatise that made his name. He makes a systematic connection in it between administrative law and the state through the intermediary of his idea of 'the state's administrative regime'.[41] e introduction of this central notion of 'administrative regime' was an innovation in the 7th edition, the one which came immediately a er Hauriou's major book on the state, *Les Principes de droit public*.[42] It enabled him 'to relate administrative law to the general organisation of the modern state by dealing with political centralisation, the administration and the administrative function, constitutional modi cations that entail a centralised administration, especially the institution of an administrative tribunal'.[43] So the concept of administrative regime is the bridge connecting administrative law to the state and to the country's political forces. is is what arises from its de nition: it is '*a certain way of being of the state* arising from the administration having become the main force in the state'.[44] In France, it should be added, for neither England nor the United States had an autonomous administrative law. e state's administrative regime was therefore the concept which, in Hauriou, aimed to describe the interleaving of the two phenomena of the autonomy of this system of law and the political and social importance of the administration in the working of the French state. Today's reader is struck by the close association Hauriou draws between administrative law and the particular type of administrative organisation underpinning it. He says so unequivocally, 'our administrative regime is tied to our centralisation'.[45] e major point with which he begins his textbook is nothing other than the addition of administrative centralisation to political centralisation by virtue of which, in French organisation, a strong central administration is superimposed on local administrations.[46] is centralisation has meant the French are used to being not merely governed but also administered with the result that they have been accustomed to enjoying public services nationwide. Hauriou understood the very powerful connection between centralisation and the feeling of equality among the French, which the nest historians of the administration have constantly recalled.[47] Public services improve the lives of individuals and Hauriou quite consequently praises the administrative state. e administrative regime provides services for individuals, not just facility of action but also 'the creation of new goods and the extension of civil life'.[48]

However, if the state and administrative law are emancipatory, it is because the administration has become public. Hauriou speci es that the substance of the administration, in material terms, is the *service rendered* to individuals. Such a service can be provided just as well by a feudal administration (domi-

40. Hauriou, *La jurisprudence administrative*, t. I, Préface, p. VII.
41. M. Hauriou, *Précis de droit administratif*, 7th edn (Paris, Sirey, 1911) Préface, p. XII.
42. M. Hauriou, *Les Principes de droit public*, 1st edn, (Paris, Sirey,1910) republished Dalloz, 2010.
43. *Ibid*., Préface, p. XII.
44. *Ibid*., p. 1.
45. *Ibid*., p. 105.
46. *Ibid*., p. 3.
47. P. Legendre, *Histoire de l'administration en France de 1750 à nos jours* (Paris, PUF, 1968), reprinted. *Trésor historique de l'Etat en France. L'administration classique* (Paris, Fayard, 1992).
48. Hauriou, *Les Principes de droit administratif*, p. 4.

nated by the lord and performed for a charge) as by a private administration. The progress made by the public administration is precisely that the service for individuals is done in the name of a collective body, usually the state, for public reasons and not for profit.[49] The concrete consequence is the expropriation of the administration from the public powers and the end of the feudalisation of power, which Hauriou calls 'the individual patrimonialisation of powers'.[50] Lastly, this public administration is also tied up with the state because it exercises its power 'on a territorial basis', on the foundation of a territorial competence and not any personal competence. Consequently, merely being an inhabitant of a territorial constituency gives access to the services supplied by the administration. Another way to describe this important fact that Jellinek had established: the modern state is a 'state of settlers' and not of nomads.

With his own language that is sometimes difficult to grasp, Maurice Hauriou describes the modern state as an 'administrative state' the principal quality of which is to dissociate public power from private powers, to isolate the public service as not only directed or controlled by the state but also as governed by a purpose of general interest, by 'reasons of public utility'.[51] There is therefore in the foundation of administrative law an eminently political dimension that consists in postulating autonomy of public interest that is something other than the sum of individual interests. Although on many occasions he denies wanting a 'collectivist regime', Hauriou does, however, conceive of administrative law in close consonance with the development of the social state that he interprets, positively, as an extension of property (and not wealth) to all individuals. Administrative law then becomes, via the administrative regime, a vector of social progress. State intervention improves the lot of the poorest. The state appears as an instrument of emancipation of individuals and of social concord.

Admittedly, it will be argued that such a conception of the state in Hauriou seems to mask his best known argument that French administrative law is a law of exception compared with civil law, that it is a law based on 'prerogative'[52] and that administrative rights are 'direct acting'.[53] It is in this that it is distinct from ordinary law (private law). Hauriou uses a recurring expression to explain this point. Administrative law is more concerned about 'the exercise of law than the enjoyment of rights', which is another way of claiming that this law gives precedence to the exceptional means the state has of imposing its decision on individuals. Specialists well know that Hauriou's hallmark is that he reconstructed all of administrative law on his theory of 'executory decision'. He puts it admirably in the 1929 preface to his collected case law in which he observes that 'the procedure by executory means' characterises the acts of public power and therefore administrative law.[54] True enough! But it would be a serious mistake not to see the connection between this means and the end, between public power and service, 'the work to be done, the goal'.[55] The state is indeed a public power that acts with out-of-the-ordinary means (the famous 'prerogatives of public power'), but it does not do so just for the benefit of the rulers; it is supposed to do so in the interest of the citizens.

Besides, although, unlike Léon Duguit, Maurice Hauriou gives precedence to the prerogative of the administration, liberty is no less of a concern for him. In the practical organisation he is constantly hunting down the checks and balances of this potential authoritarianism of the administration. He sees at least two of them: the principle of legality ('let it [the administration] make the law, but let it obey the

49. *Ibid*., pp. 7-8.
50. *Ibid*., p. 8.
51. *Ibid*., p. 8.
52. *Ibid*., p. 102.
53. Hauriou, *Les Principes de droit public,* p. 102.
54. *Ibid*., Préface, p. VIII.
55. F.-P. Bénoît, *Le droit administratif français* (Paris, Dalloz, 1968), no 117, p. 82.

law') and judicial review (*recours de plein contentieux*) ('let it act, but let it "pay for" the loss or damage').[56] His study of administrative law leads him to justify the superiority of the French system over the English system for the guarantee of the rights of the citizens. But Hauriou is too much of a historian not to see the trace le by the construction of the monarchic state. Politically, this means that administrative law entails the domination of the unitary state over the entire country and the predominance of subjection of the citizens. 'Subjection to the Administration is but the modern form of subjection to Government and if at least we are convinced that the true function of the state is to create a good regime of life for us via a good centralised administrative regime, we submit only for our own good.'[57] Where a liberal sees in this administrative system an intolerable supervision of individuals in a democratic regime, Hauriou sees rather in this protector state a benevolent guardian through which to reconcile necessary authority and essential freedom.

In reading him in this way, one cannot help thinking that Maurice Hauriou has undertaken to describe French administrative law as a powerful 'photographic developer' of what the French state is. If he o en resorts to history, to comparative law and to a degree of psycho-sociology, it is in order to better explain how a state lives and evolves. He explains this paradox of an administrative state which, against the condemnation of it in the name of liberal principles by all nineteenth-century publicists – Tocqueville being just the rst of many[58] – achieves the prodigious feat (this 'miracle', Prosper Weil was to write) of domesticating the public power with which the administration was endowed.

Of this grandiose undertaking by the duo of law professors from southwestern France, nothing, or precious little remains. is has already been asserted for Léon Duguit,[59] but it holds for Maurice Hauriou too. In other words, the evolution of the discipline was, from this point of view, marked by a decoupling between the theory of the state and administrative law.

C – The Disappearance of the State from the Science of Administrative Law; Markers and Attempts at an Explanation

For the state to have disappeared from the science of administrative law, it required scholars to deliberately set it aside from their thinking about administrative law.[60] On the hypothesis proposed here, the two leading actors in this movement of erasing the state from administrative law are Gaston Jèze and Marcel Waline, their work having been pursued in this direction by their worthy successor, Georges Vedel.

1. Gaston Jèze, the rst author in the shi consisting in obliterating the state

On my own interpretation, Jèze was the rst to make the state vanish from administrative law as it is taught to students. Whereas the rst edition of his textbook on administrative law[61] contained a re ection in the introduction on the state and how to study it, the second edition[62] contained a preface that was very di erent in its inspiration which reveals the author's intention to dismiss the theory of the state from administrative law. It contains the following statement capturing the new book's intent:

56. Hauriou, *Les Principes de droit administratif*, p. 102.
57. *Ibid*., p. 105.
58. L. Jaume, *L'individu effacé* (Paris, Fayard, 1989).
59. P. Gonod, 'L'actualité de la pensée de Léon Duguit en droit administratif ?' in F. Melleray (ed.), *Autour de Léon Duguit*, pp. 332 .
60. It is assumed that a textbook on administrative law, like any law textbook, purports also to be a re ection on the discipline taught…
61. Jèze, *Principes généraux du droit administratif* (Paris, Berger-Levrault, 1904).
62. Jèze, *Principes généraux du droit administratif* Tome I, (Paris, Giard, 1914).

> I shall not, a er so many others, summarise and analyse the statutory and regulatory provisions as to general, regional, local or special French administrative organisation. *I assume readers to be familiar with that organisation.* is book is not the place to seek the description of any public institution: the organisation of the state, departments, communes, the main public establishments, the courts of law. I purport to descry in statutes, regulations, administrative practices and court decisions the legal principles that dominate all of French administrative law: legal techniques (legal situations, legal acts, theory of voidance, withdrawal of legal acts, res judicata); theory of the public service process as opposed to the private law process; general theory of public function; general theory of estate); legal means to ensure the creation, organisation and regular operation of public services (appeals, theory of responsibility, etc.).[63]

is excerpt is most enlightening. e organisation of the state is not essential to an understanding of administrative law that has supposedly reached such a degree of maturity that its rules can be described – the juridical technique that privileges the study of acts – without becoming engaged in a description of the state itself. Such a description of the object of administrative law presupposes the radicalisation of two arguments central to Duguit's thinking. For one thing, Jèze takes from his master the central idea that consists in reconstructing administrative law around public service; even the constitutional law of rulers is interpreted in the light of public service, which is besides a nonsense. at being so, the state disappears because it is replaced by the public service and by all the related ideas associated with it. It is e aced or concealed by this notion that is broader than the state in the narrow sense because there are local public services. For another thing, Jèze is closely inspired by Duguit in studying public law on the basis of juridical acts. Accordingly, the administrative organisation is thought irrelevant for describing French administrative law. It is su cient to study the acts, processes and legal techniques. Such a *purification* of administrative law presupposes, beforehand, that anything that troubles the author should be cast out of this law. For example, neither the state's juridical personality nor its sovereignty are thought relevant. e state's personality is not considered a form of juridical technique (although why not is a mystery) whereas sovereignty is held to be an ideological notion, expressing an outworn nationalism.[64]

e invention of the distinction between 'technical' and 'political' points of view allows Jèze to relegate the big issues to the domain of politics where a positivist jurist, worth his salt, must refrain from venturing.[65]

So much therefore for the state in administrative law. is is why readers of the rst volume of *Principes généraux du droit administratif*, signi cantly entitled 'juridical technique of French public law', are surprised to nd that the word 'state' does not even feature in the index and, more surprisingly still, that the word does not appear in any of the book's titles or chapters. Jèze works the wonder of constructing an administrative law without a state or even an administration. However, it would be unfair to deny the coherence underlying this obliteration of the state. In Jèze's view, it is because the state as a collective being does not exist that precedence must be given to the point of view of individual actors. It is the rulers and agents that must be examined. e republican underpinning is not at all missing from this reorientation because the administrative state, the state as Hauriou envisioned it, is perceived as the rump of the monarchic state (the imperialist system Duguit speaks of). Another legacy from Duguit. e state is to be republicanised and the way to do this is by having it disappear as a juridical person. e baby has been thrown out with the bathwater, and along with the juridical personality of the state, the state too

63. Jèze, *Principes généraux du droit administratif*, tome I, 3rd edn, 1925, republished (Paris, Dalloz, 2005) p. VII.
64. *Ibid*., p. 338-339.
65. D. Maslarski, 'La conception de l'Etat de Jèze', *Jus Politicum*, no 3, http://www.juspoliticum.com/La-conception-de-l-Etat-de-Gaston.html.

has vanished. But the state cannot be got rid of so easily and it reappears albeit in camou age in many passages. e agent of the state is a public agent; the state as actor is the public service; the continuity of public service is the continuity of the state too. Accordingly, it is a set of metonymic processes that makes the state vanish from the domain of administrative law (see D below).

In a way, Jèze is disloyal to Duguit's legacy. His work and in uence were to eclipse that of Roger Bonnard, dean of Bordeaux faculty of law. Bonnard may be considered, in terms of ideas, the most loyal of Duguit's disciples. He is of note in the history of doctrine because he attempted to introduce the idea of subjective public rights into French doctrine. But, on opening his textbook, one also nds the assertion of a close connection between administrative law and the state. He argues forcefully: 'Administrative law is one of the branches of public law … More than any other juridical discipline, administrative law is closely attached to the theoretical conception of law and of the state. Any exposition of administrative law necessarily stems from a certain conception of law and of the state. *No appropriate scientific knowledge of administrative law is to be had unless it rests on a theory of law and the state*'.[66] More concretely, for the author, administrative law cannot be properly set out unless one has 'taken sides (*sic*) … on the ideas of the theory of the state: that concerns both the juridical personality and the sovereignty of the state'.[67] Which he does, even if only in a cursory manner.

Administrative law doctrine was not to go the way Bonnard wanted, but the way Jèze did. Jèze was to receive valuable support in his mission to 'positivise' administrative law in the person of Marcel Waline, one of the most signi cant twentieth-century French administrative law scholars, who shared with Hauriou and Jèze the quality of being a remarkable commentator of case law.[68]

2. e Second Agent in the Disappearance of the State: Marcel Waline

In his article on the constitutional foundation of administrative law, Georges Vedel pays tribute to Marcel Waline's textbook observing that 'on this point as on many others, [he] returned to a conception of administrative law that was more realistic and truer to the case law data'. He even added in a footnote this intriguing comment 'In some respects, M. Waline's book was revolutionary. Particularly in the primacy given in the plan to the study of litigation'.[69] A reading of the foreword to the rst edition of his textbook of 1936 con rms this claim and indicates the reorientation Waline quite knowingly imposed on French administrative law. e argument remains an ambitious one: it is still a matter of 'dealing relatively fully with "key theories", those that lay down principles governing all forms of activity of the administration'.[70] However, its author insists on how bold it was to begin the textbook with the study of litigation: 'convinced that one cannot study a case law based system like this one without knowing at least the organs that have laid down the rules and without knowing how, on what occasion and in what form, those organs are called upon to adjudicate. More concretely, how can one cite, on each page, in support of case law rules of the *Conseil d'Etat*, if the readers know neither what the *Conseil d'Etat* is nor what its decisions are, how and when they are made?'[71] e reorientation made is therefore plain enough: administrative law is the law produced by the *Conseil d'Etat*, in response to the extension of the state's attributions.[72] Not only should the law of administration be studied from the angle of litigation, but in the analysis of its institutions, of

66. Bonnard, *Précis de droit administratif*, p. 21.
67. *Ibid*., p. 40.
68. See the preface by D. Labetoulle, *Notes d'arrêts de Marcel Waline*, tome I (Paris, Dalloz, 2001).
69. G. Vedel, 'Les bases constitutionnelles du droit administratif', *Pages de doctrine*, tome II, p. 134 and footnote 22 p. 134.
70. M. Waline, *Manuel élémentaire de droit administratif* (Paris, Sirey, 1936) p. VII.
71. *Ibid*., p. VIII.
72. *Ibid*., p. VII.

its 'organs' as is said, the core factor is no longer the administration, nor the state in the broad sense, but the jurisdictional organ, namely the *Conseil d'Etat*.

One of the e ects induced by this change of perspective is the reversal of the order of priorities. Henceforth, as one learns from reading the general introduction to Marcel Waline's textbook, it is no longer the question of the state that is of primary interest for administrative law scholars but the question of the autonomy of administrative law. His elementary textbook begins with a rst chapter aiming to explain the 'justi cation and reason for being of an autonomous administrative law'.[73] e big question no longer features the state but the internal arrangement of the state: 'Why is there an autonomous administrative law? *Why is civil law not applied to relations of administrative agents and of citizens?*'[74] One must at all costs justify the peculiarity of this law that could have been governed by the ordinary law (civil law) whereas it is made up of 'particular rules' bearing as much on the action of the administration as on responsibility and contracts.[75] Now, what explains the French singularity compared with other nations, and notably with the United Kingdom, is admittedly the existence of an 'administrative regime', but in the nal analysis, this regime, as a regime that departs from ordinary law, exists only thanks to the specialised court, the *Conseil d'Etat*, which has historically produced an autonomous body of law. In other words, it is the existence of two systems of courts (judicial and administrative) in France that explains the autonomy of administrative law. e principle of separation of the two systems of courts becomes the alpha and the omega of this law. It has become even more so thanks to a decision of the *Conseil constitutionnel*.[76] For Waline it is clear that to forsake this principle of separation would be to 'forsake administrative courts (and this) would by the same token be to forsake administrative law'.[77] e connection between the administrative courts and administrative law henceforth occupies the essential part of the 'theoretical' considerations of administrative law jurists. e path of this change might easily be traced from Waline to end with its most remarkable formalisation in the *Que sais-je ?* by Prosper Weil[78] that made such an impression.

Furthermore, a reading of the textbook reveals that Waline follows in the footsteps of Jèze in excluding the analysis of the state from the examination of juristic persons of public law. When he mentions the subjects of administrative law, that is, the French administrative organisation containing the persons who are to be subject 'to its rules' (and also the holders of rights and obligations under this law), he unfailingly mentions the juristic persons, in the rst rank of which gures the state that is characterised as 'the principal juristic person of public law'.[79] One would therefore expect a more precise description of the state as a moral person, but the author then continues, 'but as this study is largely the subject of treatises on constitutional law, we shall here again con ne ourselves … to a few indications about state administrations'.[80] e problem is that, already at the time Waline was writing his textbook, French science of constitutional law, under the aegis of Joseph Barthélémy, was curtailing its interest in the theory of state and the theory of the legal personality of the state.[81] To use a contentious metaphor, the state is the victim of a 'negative con ict' between the two disciplines of constitutional law and administrative law. Neither

73. *Ibid*., p. 1.
74. *Ibid*., p. 1 (italics added).
75. *Ibid*., p. 2.
76. 86-224DC du 23 janvier 1987 *Conseil de la Concurrence*.
77. Waline, *Manuel élémentaire de droit administratif*, p. 31.
78. P. Weil, *Le droit administratif*, 3rd edn (Paris, PUF 1968).
79. Waline, *Manuel élémentaire de droit administratif*, no 399, p. 244.
80. *Ibid*., no 399, p. 244.
81. O. Beaud, 'Joseph Barthélémy ou la n de la doctrine constitutionnelle classique', *Droits* no 32, 2000, pp. 89-108.

discipline declares itself to have jurisdiction to deal with it. e administrative law scholars simply describe the state from the point of view of its administrative organisation, that is, they study the ministers and ministerial departments and also the relations between the state and other administrative organs by distinguishing between decentralisation and deconcentration. No one concerns themselves with the state as a public juristic person. Only the work of Georges Burdeau in the science of public law was to maintain an interest in this question of the state as an institution. But he did so in his *Traité de science politique* which is thought of as a political science book by those who have never opened it.

In some way, Waline's work re ects a radicalisation compared with that of Jèze. In his 1936 Foreword, Marcel Waline makes a philosophico-juridical profession of faith. He concedes that 'any systematic exposition of any branch of law is necessarily written from a certain conception of law and of the jurist's attitude to the established law'.[82] Relying explicitly on Jèze's work, he explains that his conception of law is clearly positivist. One must – he writes – con ne the o ce of the scholar to a 'role of interpreter, exegetist and commentator'[83] without him wanting to impose his opinions and values on positive law. But what is marking is less this positivist profession of faith – which was rather classical at the time – than the implicit and unjusti ed disappearance of any thinking about the state, the theory of the state as a sort of presupposition of administrative law. Here there is a sharp contrast between Waline and Bonnard. ese claims have been commented on by stating, not inexactly, that they completed 'the considerable reduction of the re exive eld of the locus where the gures of doctrine were to develop'.[84]

3. e Finishing Blow: e Disappearance of the Notion of Administrative Function (Georges Vedel)

In point of fact, the author who con rms this disappearance of the state from the scope of administrative law is none other than Georges Vedel, the inspired and in uential continuator of the Jèze-Waline line. is shall be proved by demonstrating that he contributed to eliminating the question of the autonomy of the notion of 'administrative function' from doctrinal discussion. Now, this alone leads to the disappearance from administrative law of all thought about the functions of the state.

Here a ashback is required. Classical doctrine constructed its theory of administrative law based on the autonomy of the administrative function conceived primarily, although not exclusively, as a function of the state. In thinking of administrative law and its autonomy, it was necessary to dissociate the administrative function from the executive function (or even from the 'governmental function'). Here again, Maurice Hauriou and Léon Duguit are two irreplaceable guides. In his comment on the decision in the *affaire des boulangers de Poitiers (Poitiers bakers* case*)* (1901), Hauriou observes that 'We are not used to scrutinising the problem of the administrative function in France. We live in the throes of this rather super cial conception that the Administration is what certain so-called administrative organs do. Administration is what the executive power does. As for wondering whether this activity is conditioned by a function to ful l that is supposedly the administrative function, it is something we have not o en enquired into. is indi erence rightly astonishes foreign commentators who fail to understand that we con ne ourselves to this extent in the contemplation of the principle of the separation of powers'.[85] What Hauriou wants to do, is to rehabilitate this notion of the administrative function because he sees in it the notion that is capable, of itself, of legitimising state intervention, that of 'public administration in

82. Waline, *Manuel élémentaire de droit administratif*, p. IX.
83. *Ibid*.
84. J.J. Bienvenu, 'Remarques sur la doctrine contemporaine du droit administratif', *Droits*, no 1, p. 154.
85. Hauriou, *La jurisprudence administrative*, tome I, p. 163.

economic relations whenever there is a political need for it'.[86] In the case of the bakers, it is a question of the economy. But the state could intervene in any other domain, the arts, education, and nowadays the environment, whenever political interest so requires. Simply, adds Hauriou, a few arrangements must be made to prevent interventionism degenerating into 'collectivism'.

As for Duguit and Bonnard, they too track down the autonomy of the administrative function, but unlike Hauriou, they do so with regard to the legislative function and the jurisdictional function. is is the sense of the *material* classi cation of juridical acts which has as its e ect that it distinguishes between the act of the administration (individual in its object) and the legislative act (general in its object). As a result Bonnard can, following Duguit, de ne the administrative function as 'the function of the state that consists in accomplishing, in view of the functioning of public services, attributions of general situations, creations of individual situations and material e ects, by means of acts-conditions, subjective acts and material acts'.[87] It is precisely this discussion that Carré de Malberg's *Contribution à la théorie générale de l'Etat* very broadly takes up. He devotes the second part of the book to 'State Functions'. Most instructively, he inserts between 'legislative function' (chapter 1) and 'jurisdictional function' (chapter 3), the 'administrative function' and not the 'executive function'. As emphasised, the originality of the Strasbourg scholar was to di erentiate the administrative function from the executive function.[88] He realised that a legal analysis of the competences of the so-called 'executive' power, as it resulted from article 3 of the constitutional law of 25 February 1875, did not correspond to what one might call an administrative function. Indeed it is hard to consider that the legislative initiative, the right of pardon, diplomatic relations, and military power come within the administrative function. And it is all the more di cult to do so because the acts or actions arising from these domains escape, for the most part, from administrative litigation. rough the work of Carré de Malberg, one can make out a distinction between governmental function and administrative function which never really gained a foothold in French doctrine. French doctrine remains the prisoner of the notion of executive power which relied on an extremely vague conception of execution.[89]

By my interpretation, it is this connection between the administrative function and the state that Georges Vedel breaks in his famous article on 'les bases constitutionnelles du droit administratif'.[90] He asked on what constitutional grounds an administration exists. e answer is familiar: for him, it is the executive power that represents such a constitutional basis of the administration and so of administrative law. In fact, his study is a re ection on limiting cases, those in which there is no law on which to ground administrative competence. In this case, the judge looks to the constitution and falls on executive power which is de ned organically 'especially by article 3 of the statute of 25 February 1875 and article 47 of the Constitution of 27 October 1946'.[91] But further on Vedel associates the notion of executive power with the notion of public power and the notion of public power prerogatives. He speci es that 'the constitutional mission of "execution of laws" entrusted to the Government includes the normal use of public power. In that it contains prerogatives, public power is conferred on the executive because it acts … for the account of the sovereign collectivity. In that it constitutes a regime of limited and conditioned competences, public power is no less one of the marks of the executive because the executive does not act for its

86. *Ibid*., p. 164.
87. Bonnard, *Précis de droit administratif,* p. 65.
88. O. Jouanjan, 'La notion d'exécution dans l'histoire constitutionnelle française', *Revue française d'histoire des idées politiques*, 2011, 34, p. 343.
89. *Ibid*.
90. Vedel, *Pages de doctrine*.
91. *Ibid*., pp. 156-157.

own account'.[92] From this results the following de nition of the administration in the narrow sense and of administrative law: 'It is nothing other than the exercise of public power by the executive power. Administrative law is the body of special rules applicable to the activity of the executive power in that it uses public power'.[93] e paradox of this de nition is that it mixes a formal conception (executive power) with a material notion (public power), but the historical scope of this article – which was roundly criticised by Charles Eisenmann – is precisely to have dismissed the doctrine of the autonomy of the administrative function. is no longer exists insofar as the activity of the administration is henceforth subsumed under the very imprecise expression of 'executive power'. e result is substantial. Doctrine has lost the habit of dealing with administrative law by starting from the administrative function, that is, from the speci c function the state performs when it acts as an administrative authority. It is another way of uncoupling administrative law from the state.

Conclusion

If these developments were not enough to carry conviction, empirical evidence could be added from the fact that the 'Jèze–Waline–Wedel line' has relegated the state and classical doctrine to historical oblivion. One need only read the introduction to René Chapus' textbook mentioned above to be convinced of this. We learn from it that the two teachers two whom he pays tribute and from whom he borrows most of his line of argument are his 'maître', Marcel Waline,[94] and Georges Vedel. Hardly surprising when you think about it.

Excursus on two dissidents: Charles Eisenmann and Francis Paul Bénoît

It would be an exaggeration to claim that doctrine has unanimously followed the 'Jézian' strand evoked above. ere are at least two exceptions. e rst is Charles Eisenmann, one of the most respected gures in administrative law, o en cited but seldom read. Although an assailant of Léon Duguit's crypto-jusnaturalism, the prominent author of *Cours de droit administratif* has a vision of the state similar to Duguit's in that it borrows two of its features from Emile Durkheim, who was instrumental in awakening Duguit's work. e rst common feature is the idea that 'far from being a threat to the individual, the growth of the state is an opportunity'. is is the 'process of individualisation of society'.[95] In modern law, the development of individual freedoms is inseparable from the extension of the state, from its intrusion, via law, into private life. Moreover, Eisenmann also takes from Durkheim the idea that 'the state must be understood as a concrete thing, that is both di use and complex. e state is not an a priori concept, an essential, globalising pre-notion. e state, the Administration, they are rst of all "people". e state is not a vision of the world applying to individuals, independently of them'.[96] We shall see later that he also thought through, further to Kelsen, the multiple voices of the terms of the state (cf. II below).

As for Francis Paul Bénoît, he is one of the rare post-war scholars to try to conceptualise the state. In

law'.[97] Such missions are 'the issuing of primary legal norms – constitution, statute, decree – and [the] conception and … general action concerning the a airs of the country, both internally and externally.[98] To this functional description there corresponds an organic whole because these missions are conducted by the Parliament and the Government'.[99] In contradistinction to this type of state there is the state as a collective body whose missions correspond to the 'chapter headings of administrative law'.[100] Such missions are those of policing and of public services[101]and correspond to 'a whole array of services to the inhabitants'.[102] Juridically, the decisive point is that this array of missions is characterised by 'its subordination to the norms and directives arising from the authorities of the Nation-State'.[103] It is the nation-state that lays down the framework for the administrative activities to be conducted by the state as a collective body. It is therefore a principle of functional separation between the government and the administration that purportedly explains this double personality of the state. e correct legal analysis should be re ected by 'the duality of personalities, this state of positive law'.[104] ere is therefore an interesting attempt to describe not just the relations between the government and the administration but to relate the classical hierarchy between these two gures by inventing the double personality of the state. e state acts behind di erent masks and administrative law as a scienti c object describes just one facet of the state: that of the state as a collective body. is term is poorly chosen, but the endeavour to rebuild administrative law on a material conception of the administrative function is worth knowing and discussing.

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To conclude on this disappearance of the state from the arena of administrative law, one cannot fail to come back to the contemporary way of doing administrative law. Administrative law is now exclusively studied from the standpoint of litigation, that is, according to the case law of the *Conseil d'Etat*. It is therefore conceived of largely as judge-made law. e discipline has set itself the purpose of describing and analysing administrative case law, primarily that of the *Conseil d'Etat*.[105] Was this not already the case of Maurice Hauriou's administrative law? Did he not admit at the end of his career that he had been able to re-found the discipline of administrative law through his readings of the decisions of the *Conseil d'Etat* and that his own conception was 'the litigational conception of administrative law' borrowed from Edouard Laferrière?[106] So it is not this preponderance of the litigational vision that alone explains this absence of claimants for the notion of the state in administrative law doctrine. One cannot fail to wonder about the possible connection between the disappearance of the state as a theme of re ection of administrative law doctrine and the concomitant appearance of what Jean-Jacques Bienvenu has called 'the jurisdictional ideal' whereby 'doctrine repeats *a priori* and *a posteriori* and more fully the intellectual scenario of the jurisdictional act'.[107] Doctrine is no longer in a position to think about its subject, administrative law, without the crutch of the decisions of the *Conseil d'Etat*. Commentaries on decisions have now very

97. Bénoît, *Le droit administratif français*, no 32, p. 28.
98. *Ibid*., no 32, p. 28.
99. *Ibid*., no 55, p. 43.
100. *Ibid*. no 33, p. 28.
101. *Ibid*., no 33, p. 29.
102. *Ibid*.
103. *Ibid*. no 33, p. 29.
104. *Ibid*. no 34, p. 29.
105. See here P. Wachsmann, 'La jurisprudence administrative', p. 563.
106. See Préface, *La jurisprudence administrative de 1892 à 1929* (Paris, Sirey, 1929), republished La Mémoire du droit, p. X.
107. Bienvenu, 'Remarques sur la doctrine contemporaine du droit administratif', p. 154.

much changed meaning. ey no longer have anything to do with those of a commentator like Hauriou who generally took a decision as a pretext to try out his own thinking, his theory of the state, for example, and to test it against the givens of positive law. Although unable to prove any causal connection between the two facts, one cannot but observe the concomitance between the fact that doctrine now behaves in a way that is largely dependent on – pledged to – the case law of the *Conseil d'Etat* and the fact that the state is no longer considered a relevant object for understanding administrative law.

D – The State Forgotten or Denied?

1. e state is in part forgotten because it is masked by the terminology

One no longer speaks of the state in administrative law, but it is referred to in roundabout ways. It is surprising to observe that in the index on Maurice Hauriou's case-law commentaries the state does gure as an entry but there is just one sub-entry whereas we have seen earlier the close connection between the state and administrative law for the Toulouse scholar. e same remark might be made for the commentaries of Marcel Waline in which the word 'state' is not among the fuller items in the index. at is down to an obvious fact: the state is ubiquitous in administrative law but its presence is hidden, dissimulated by a multiplication of metonyms, words that conceal its presence and that take the part for the whole. ere is constant talk of 'public power' or 'public service' instead of the state, rather as in constitutional law one speaks incessantly of the republic (indivisibility, unity, territory) instead of the state. Similarly, one deals with the responsibility of the public power for what is obviously state responsibility. Or again, the administration stands in for the state with the result that the state disappears behind the administration, as if the administration were not the state as an administrative actor. Or again, the state disappears behind its organs. Is it not Hauriou himself who, instead of speaking of the state, speaks of 'the day-to-day administration of ministers and prefects' that must be considered as 'a vast exercise of rights duplicated by a vast litigation prompted by that very exercise'?[108] Similarly, to make the administration a branch of the executive power, is indeed to deal with the state. So it is masked by expressions that describe the part but that hide the 'whole'. In contrast with such a reductionist approach, placing the state in the foreground of administrative law is to stop looking at the trees alone to try to see the forest, from above.

ere is another reason for this obliteration of the state from the ordinary language of administrative law scholars that can be discovered, for example, when Marcel Waline, opposing the police and the public service, explains that these are 'two entirely di erent and contradictory forms of intervention of the public authorities in the life of society'.[109] us the administrative authority must be put in the plural – the public authorities – because administrative law concerns several other authorities. ere is the state, of course, but also territorial collective bodies, public establishments, and so on. e state is therefore not the only 'subject of administrative law', to take up Marcel Waline's expression.[110] Unlike international law – for a long time – or constitutional law, in which the state did not have any competitors as a subject of that law, administrative law is a sort of decentralised law in which the state occupies a crucial but not exclusive position.

108. Hauriou, *La jurisprudence administrative*, Preface, p. VIII.
109. M. Waline, *Droit administratif* (Paris, Sirey, 1960) p. 600-601.
110. *Ibid*., pp. 246 .

2. The contrast between the discourse of administrative law doctrine and the official discourse of the state

Rather than the state being overlooked, should we not speak in part of a sort of denial of the state? I would not like to conclude these developments without marking a degree of astonishment at the gaping divide between the discourse of administrative law doctrine which, as seen, is now silent about the question of the state and the other official discourse of the state, that held by political leaders, who place the state at the centre of administrative law. Take for example the speech made by the Prime Minister, F. Fillon, on 20 September 2010 to the *Conseil d'Etat*. It is a speech that could feature in an anthology of administrative science.[111] It contains all the arguments that make the state the pillar of French society, of administrative law, its most solid legal foundation, and that make the *Conseil d'Etat* the keystone of the entire edifice. It condenses the most recurrent themes of the state ideology underpinning French administrative law and which, despite all the recent developments, remains its hallmark. The state is the guarantor of the general interest, the guardian of freedoms, it speaks in the domain of administrative law through the voice of the *Conseil d'Etat* which is both the state's legal advisor and the creator of judge-made law that is the delight of commentators and the admiration of many foreign jurists. Even allowing for the circumstances and the genre of this type of exercise, it must be agreed that it was made by the head of government, the person who also directs the state administration.

E – The Real Question: The Loss of the State's Centrality in Administrative Law

There is another possible interpretation. The state is no longer ubiquitous in contemporary administrative law literature because it is no longer at the heart of modern administrative law. In other words, *why be nostalgic about this state-centred administrative law?* The law evolves. Administrative law too. And it has become both 'Europeanised' and 'democratised'.

Since the topic of the Europeanisation of administrative law is analysed in this Treatise, just one observation on this point shall be made here. To my mind, it is not so much the Europeanisation of French administrative law that has changed its relationship with the state as the fact that community law (European law since the Lisbon Treaty) has changed substantially. It has come to be dominated largely by liberal principles hostile to state intervention and favourable to an ever broader application of competition law, including in areas traditionally governed by public services. Accordingly, whatever the semantic tricks some have made use of, the contradiction between this European law of liberal inspiration and state-centred and potentially interventionist administrative law has only been removed to the advantage of one of the two principles. In recent years, the winner was incontrovertibly European law which has become a vehicle of full-blow liberalism. It seems certain to me that this European law (since the Maastricht Treaty) has contributed *to removing the state from administrative law*, and even devitalising it, which might account for a sort of doctrinal disenchantment.

The second observation relates to the other major evolution of the *democratisation of administrative law*. This does not mean the removal of the state from administrative law. It is realised that the intention has been to promote the individual within administrative law. The question of administrative citizenship has become crucial, with the result that administrative law is no longer thought of solely from the standpoint of the state (whether public power or cooperation of public services) – top down –, but also from the standpoint of citizens – bottom up. The theme of the relations between the rights of the admi-

111. http://www.gouvernement.fr/premier-ministre/discours-du-premier-ministre-a-l-assemblee-generale-du-conseil-d-etat

nistration and of the citizens has arisen as an autonomous branch of this law.[112] It can henceforth be maintained, with good arguments, that administrative law is not just the law of the administration but also the 'law of the administered'[113] in that, by defending the general interest against speci c interest, this law is 'an essential guarantee for the protection of the interests of all against the interest of each'.[114] us, this textbook, which is novel in many ways, devotes its nal part to 'the citizen's guarantees', therefore tending to replace the classical category of the citizen, something of a subject, by the more buoyant category of the citizen. To escape this position as a subordinate, the citizen or user must become someone in the frame for justice to rely on his rights as a citizen. In this case, administrative law changes tack. It is no longer about the objective defence of legality but more about the defence of the subjective rights of the citizens. It is unsurprising then to observe the rediscovery of the arguments of Joseph Barthélémy and Bonnard.[115]

It transpires from these initial considerations that while the state is no longer much studied by administrative law doctrine and its position in the political centre ground is under threat, it is far from having le the stage. It would be a serious mistake to believe that one can do without knowledge of the state to understand French administrative law. at is at any rate what I would now like to demonstrate.

II – FRAGMENTS OF A THEORY OF THE STATE APPLIED TO ADMINISTRATIVE LAW

It would be unrealistic to try to take up the challenge of proving the fruitful alliance between the theory of the state and administrative law in just a few pages. We must settle here for a little probing to provide something for administrative law scholars to think about, or at least that is what is hoped for. is shall be done by showing that the state is open to various meanings (section A) and that administrative law con rms the argument that the state is characterised by a double feature: it is endowed with unity, because it is sovereign (section B) and it enjoys continuity because it is an institution (section C).

A – The Multiple Meanings of the Term 'State'

We saw earlier that Francis-Paul Bénoît saw two meanings to the state – the state as a nation and the state as a collective body – depending on whichever perspective was adopted, that of constitutional law or that of administrative law. It is incontrovertible that in public law the term 'state' does not have the semantic unity that seems to be attributed to it. ere is in particular a pair of quite strong meanings that, further to Kelsen, Charles Eisenmann highlighted by distinguishing between 'state collective body and state apparatus' or again between 'state as collective body' and 'state as an apparatus of organs'.[116] He was to conceptualise this distinction later in the form of the opposition between the state as a collective body and 'the state as governing apparatus'.[117] e state as a collective body refers to the 'the state in its entirety', the whole collective body, in its total unity,[118] including both rulers and ruled, that is, the individuals who are also members of the state. By contrast, 'the state as governing apparatus' has a narrower

112. D. Maillard Desgrées du Lou, *Droit des relations de l'administration avec ses usagers*, (Paris, PUF, 2000).
113. Autin and Ribot, *Le droit administratif général*, p. 2.
114. *Ibid*.
115. N. Foulquier, *Les droits publics subjectifs des administrés. Emergence d'un concept en droit administratif français du XIXème au XXème siècle* (Paris, Dalloz, 2003).
116. C. Eisenmann, *Centralisation et décentralisation*, (Paris, Sirey 1948), p. 19.
117. C. Eisenmann, 'Les fonctions de l'Etat', in *Ecrits de théorie du droit*, (Paris, Editions Panthéon-Assas, 2002), p. 183.
118. *Ibid*., p. 183.

sense, referring to 'a group of men who form the governing apparatus of this social unit, of this political collective body that is called the state'.[119] is latter meaning is therefore considered to be the 'narrow sense' of the term state. Yet it can itself be construed in two ways since the state as apparatus can refer either to the central power or the 'subdivisions of the state', or the 'local organs'[120] that are referred to as decentralised administration.

e primary vocation of administrative law is to grasp the state as a governing apparatus insofar as it primarily seizes the action of the agents of the administration. It is only marginally that it captures the state as a political collective body, as 'state in its entirety' as Eisenmann put it. It is to be shown that from this administrative guardianship or state supervision of decentralised persons this narrow sense of the term state may also be interpreted in two ways, broad and narrow. is shall be demonstrated based on the writings of Maurice Hauriou that remain, to my mind, very relevant to the purpose.

1. State as apparatus in the broad sense

An initial interpretation of arrangements governing relations between the state and decentralised entities leads to a broad meaning of the term 'state as apparatus'. is is what arises, for instance, from reading Maurice Hauriou's note on the *Canal de Gignac* decisions.[121] It is famous because its author is infuriated to learn that the *Tribunal des Conflits* has characterised the owner's union association as a public establishment. He sees in this serious confusion between what for him are two very di erent things: collective interest and public interest. e threat was of transforming administrative law into a law bringing about a collectivist regime in that any collective interest became a public interest. e court supposedly failed to discern the corporative character of the union association and mistakenly bundled it onto 'the administrative side'. Hauriou then adds the comment: 'if the union association, an instrument of agricultural production, has become a member of the state, a state establishment, there is no reason why a factory too, as an instrument of industrial production, should not become a public establishment, and I say that it is serious because our state is being changed'.[122] People remember this famous passage for the idea that Hauriou was opposing 'collectivism'. But it would be a mistake to overlook the second lesson in this passage: a public establishment is implicitly considered to be 'a member of the state'. is comes down to asserting therefore that the state is not composed solely of the state apparatus, of the public administration directly attached to the unitary state (the central administration and the outside services), but that functionally decentralised entities, such as public establishments, are part of the state. It must be understood from this that Maurice Hauriou speaks of the state in a broad sense. He distinguishes the legal personality (the juristic personality) from objective individuality. Elsewhere he writes that the juristic personality of the state is indivisible in itself, consequently, that the personalities of departments and communes should not be considered as forming parts of it; describing these collective bodies as members of the state means that one aims only at their 'objective individuality'.[123] When Hauriou uses the term 'state' in this broad sense, it is in the sense of 'objective individuality of the nation', which may include both decentralised entities and ordinary individuals. e observation must then be extended to the legal entities of public law that express territorial and functional decentralisation. In the same way that public establishments are 'members of the state', in the same way *communes* and *départements*, and nowadays

119. *Ibid*., p. 183.
120. *Ibid*., p. 183.
121. *Tribunal des conflits*, 9 déc. 1899.
122. Hauriou, *La jurisprudence administrative*, t.I, p. 419.
123. Hauriou, *Les Principes de droit public*, p. 688.

régions, are also 'members of the state'. us the state broadly construed contains both the central state and all its dismemberments and all decentralised entities.

e vocabulary betrays this will to construct the relation between state and decentralised collective bodies as forming a great Whole. us, Hauriou, who is happy to see the *Conseil d'Etat* acknowledge that *communes* are entitled to invoke rights, 'freedoms that can be relied on against the state administration', characterises the administration in the same movement as 'higher administration'.[124] e *Conseil d'Etat* is not found wanting either, because when asked to examine whether the President of the Republic can, by decree, create a tax on licence holders of Rennes Chamber of Commerce in order to pay its debts, it is forced to justify the addition, not provided for by statute, of new mandatory spending recorded ex o cio by the state in the budget of a public establishment. Its extensive interpretation of the statute is based on the idea that chambers of commerce are, like all public establishments, subject to 'overriding control by the government'.[125] Hauriou is bound to observe that administrative supervision of such establishments can exist without any text, such a matter revealing simply that 'supervision involves a minimum of control by the central power'.[126]

us the normative and institutional network resulting from the connections between the state administration and the decentralised administrations appears to be structured by dependence of the lower, partial legal order (to speak like Kelsen and Eisenmann) with regard to the higher or total legal order insofar as the decentralised authorities remain subject, in the nal instance, to potential supervision by the central authority or even subject to a change in the legislation in which they could not participate (see below). is dependence testi ed to a 'subordination' of decentralised administrations with respect to the central administration (re ected by the terminology that can be distinguished from 'lower' administrations and a 'higher' administration) but a subordination that is no longer synonymous with a hierarchical relationship between these two powers.

us, through the close ties binding the central administration to the decentralised administrations (territorial, special or specialised), it can be argued that the whole constituted by the central state/local authority network corresponds to a state in the sense of the 'global' or 'total' legal order Kelsen speaks of, somewhat like, in a completely di erent domain, the federation of Member States forms a whole that is termed the Federation.[127]

2. State as apparatus in the narrow sense

However, the dominant tendency is to use a narrower meaning of the state conceived of as the central public power. Here Hauriou is again a good seismographer of variations in doctrine because he also conceives of the state in a narrow sense when describing the relations between the state and local authorities. In his *Précis de droit administratif*, he evokes decentralisation both territorial and functional distinguishing between on the one side the administration of the state and on the other 'local administrations' and 'special administrations'. He observes that decentralisation gives rise to competitors to centralised public administration: 'the state administration is no longer alone, the administrative world is peopled with many beings, secondary ones true, but that must be reckoned with, the state enters into relations

124. Hauriou, Note sous C.E. 1901, 22 fév. *Cne de Monticello*, *La jurisprudence administrative*, t. I, p. 276 about automatic inclusion in the budget by the Prefect; the same expression is used to designate the state administration in C.E. 2 déc. 1902, *Gossoin*. *Ibid.* p. 292-293.
125. C.E. 20 nov. 1908, in *La jurisprudence administrative*, t. I, p. 277.
126. *Ibid*. p. 280.
127. O. Beaud, *Théorie de la Fédération*, 2nd ed. (Paris, PUF, 2009), chap. 3.

and thereby appears as a legal entity, at the same time as local or special administrations also take on legal personality; … day-to-day administration becomes in fact a legal *co-administration*'.[128] ere is therefore henceforth a multiplicity of legal entities, administrative entities, and legal relations are established among them. It might be thought that the state disappears, but the central state, or as Hauriou o en calls it 'the central power' remains dominant: it is the main being to which those 'secondary beings', the decentralised entities, are subordinate. From this standpoint, the note he dra s on the *Maire de Néris les Bains* (7 June 1902) case enables him to draw up a highly stylised contrast between absolute centralisation and administrative decentralisation. In the rst case 'there is not just retained jurisdiction, but if one might put it so *retained administration*, any decision being made or supposedly made by the central power. Not only had a legal position come about whereby decision-making was the work of one and the same public power, but habits of mind were created that made an appeal by a subordinate against an act of its superior inconceivable; that would have appeared contrary to what the Germans call an *ex-officio duty*'.[129] Decentralisation and the 1884 statute considerably changed things to the point that the *Conseil d'Etat* accepted to nd admissible an appeal for acting *ultra vires* by a mayor of a commune (subordinate authority) against a prefectoral decision voiding one of his acts. is was a considerable development for Hauriou. With the *Mairie de Néris* decision, he wrote, we have transposed to mayors the case law pertaining to deliberating assemblies of local authorities. ose authorities represent 'decentralised administrations … which are separate from the state; they are outside the hierarchy; for them, one cannot invoke the unity of the public power, which is broken in terms of the autonomy conferred by decentralisation, nor the ex-o cio duty that is annihilated by the fact that the authorities stem from election by the people and not from appointment by a hierarchical superior'.[130] Decentralisation presupposes that the relationship between the state and local authorities should be thought of no longer in the form of a hierarchy but of hierarchical supervision and presupposes taking into consideration the multiplicity of the legal entities that are public. e state in the narrow sense must be understood in contrast to these new forms of collective bodies that are within its dependency, without being under its direct authority: these are not subdivisions of the state. e state is still unitary (see below), but it is decentralised.

B – The Meaning of Dismemberment within the State: The Example of Independent Administrative Authorities (IAA)

In concluding his thesis Bertrand Delcros observes that 'the structure of the single legal personality of the state is ever less monolithic, centralised and hierarchised'.[131] ere are increasingly individualised services, increasingly separate personalities within the state (postal services and parliamentary assemblies) that enjoy broad autonomy and a form of 'limited' legal personality that results from the existence of nancial autonomy and specialised competence. e thesis dates from 1976 but since then this tendency of the state to di ract has much increased in what is called the evolution of administrative structures. e proof of this is that in this Treatise a whole chapter has been devoted to the topic of 'specialised public entities'.[132] It is no longer just public entities that are functionally decentralised – public establishments – but a whole series of new entities that re ect the multiplication of administrative institutions within the

128. Hauriou, *Les Principes de droit administratif*, 7th edn, p. 141.
129. Hauriou, *La jurisprudence administrative*, t. II, p. 249.
130. *Ibid*. p. 250.
131. Delcros, *L'unité de la personnalité juridique de l'Etat*, p. 292.
132. A. Royère, chap. III, p. 333.

state, the most marking being the category of *independent administrative authorities*. ey belong to this state in the narrow sense of the state as apparatus studied above.

ese authorities have a decision-making power that is both regulatory and individual, and o en a power of sanction is vested in them. ey are peculiar as institutions in that, although administrative authorities, they are organically and functionally independent of the state's hierarchical power which is supposed to unify the administrative apparatus under government responsibility. us they seem to conciliate the irreconcilable: administration and independence. Administration presupposes in theory at least dependence upon political power (art. 20: the administration is at the disposal of the Government) whereas the independence evoked by the acronym IAA is independence *from political power* and especially from Government.[133]

Arising initially in the area of public liberties, they developed above all in the area of economic public law, to the extent there is now a sub-category of 'regulatory authorities' for regulating the market economy. True, the administrative tribunals, by subjecting their acts to their supervision, have dampened the hopes of those who saw in these new institutions *sui generis* authorities[134] and who thought they saw a new legal category in them. Since the pioneering study by Paul Sabourin[135] con rmed by the thesis of Martin Collet,[136] it has been known that these are authorities endowed with greater independence from the political power, but principally 'administrative' authorities. e *Conseil d'Etat*, in *Retail* in 1981[137] and the *Conseil constitutionnel*, more recently with regard to the Defender of Rights[138] recalled the administrative character of these IAAs which are therefore not constitutional public powers. In another genre but still in the same register of a return to a degree of administrative 'normality', the fact that the major bodies have entered into the composition and management of IAAs largely relativises the institutional innovation that consisted in appealing to representatives of civil society in their composition.

e purpose here is not to describe these institutions in detail because it su ces to refer to very sound articles on their performances,[139] on the gradual jurisdictionalisation of some of their decisions under the in uence of the ECHR[140] and on the e ects of the attribution of legal personality to some of them.[141] Here we shall con ne ourselves to attempting to grasp the meaning of these IAA for understanding the state. From this point of view, it is argued sometimes that their emergence 'calls into question the very concept of the state'[142] and sometimes they must be seen as 'the sign of the speci city of a state being born, … bearing law of a new kind'[143] – a law of regulation, graduated normativity, a law of consensus. In fact, IAAs attest to the adaptation of forms of state intervention to new missions,[144] but they are not outside the state. ey represent it, being invested with sovereign powers (regulatory power, individual decision-making power and supervisory power) granted to the classical administration of the state.[145] us,

133. CC no 84-173 DC du 26 juillet 1984, cons 4.
134. See the thesis by M. Collet, *Le contrôle juridicitionnel des autorités administratives indépendantes* (Paris, LGDJ, 2003).
135. P. Sabourin, 'Les autorités administratives indépendantes. Une catégorie nouvelle ?' *AJDA*, 1983, p. 275.
136. Collet, *Le contrôle juridicitionnel*, p. 362.
137. CE, Ass., 10 juillet 1981, Rec., p. 303.
138. *Décision N° 2011-626 DC du 29 mars 2011*, cons. N° 2.
139. *RFDA*, 2010, pp. 875 , see especially the articles by J.-L. Autin, J. Chevallier and J.B. Auby.
140. CE Ass. *Didier*, 3 déc. 1999, *Grands arrêts de la jurisprudence administrative*, n° 104.
141. See especially D. Labetoulle, 'La responsabilité des AAI dotées de la personnalité morale : coup d'arrêt à l'idée de « garantie de l'Etat ». A propos de l'avis du Conseil d'Etat du 8 septembre 2005', *RJEP/CJEG*, n° 635, octobre 2006, pp. 359-64.
142. C. Teitgen Colly, 'Les autorités administratives indépendantes : histoire d'une institution' in C.-A. Colliard, G. Timsit (eds), *Les autorités administratives indépendantes*, PUF, 1988, p. 25.
143. G. Timsit, 'Synthèse', in C.-A. Colliard, G. Timsit (eds), *Les autorités administratives indépendantes*, p. 319.
144. J. Chevallier, 'Le statut des autorités administratives indépendantes : harmonisation ou diversi cation ? ', *RFDA*, 2010, p. 900.
145. P. Sabourin, 'Les autorités administratives indépendantes dans l'Etat', in Colliard, Timsit (eds), *Les autorités administra-*

legally, they are organs of the state with executive power vested in them. at we are compelled to arrive at such a conclusion should cast doubt on the use of the overly so concept of 'executive power'[146] and prompt scholars to revisit the category of state functions (see I above). I shall attempt, more modestly, to propose a newish explanation about the genesis of such a change and try to evaluate what may be deemed an ambivalent phenomenon.

1. Content and meaning of the change made by the birth of IAAs

To understand the appearance of these administrative UFOs, the focus must be widened so as not to study the domain of the administration alone. A brief historical review might be illuminating. In the late 1970s and early 1980s France discovered the idea of IAAs. is type of institution was known to specialists of Community Law who had had to examine the High Authority provided for by the ECSC Treaty and invented by Paul Reuter who, having taken an interest in the ght against trusts in the US had discovered US federal agencies.[147] ese were born in the late nineteenth century in de ant re ex against the authority of the US President and in the context of a largely under-administered country (which we tend to forget when speaking of the US federal state). By what chance did these institutions, born in other contexts and for very speci c historical reasons (ght against US presidential power, overriding of sovereignty in the case of Europe) suddenly appear in France at the turn of the 1980s? e historical explanations have already been given: new needs that were poorly provided for by traditional powers; inadequate legislation for so law, illegitimacy of judicial power and unsuitability of classical administration,[148] or more generally 'the crisis of the welfare state'. Without necessarily denying the validity of these explanations, I would like to propose another explanation for this genesis.

Let us begin with something surprising: the legitimacy of these IAA is justi ed by the fact that their members supposedly have two complementary qualities: technical competence and impartiality. But if one thinks about it, were these qualities not those of the Administration? As Jean Rivero said in 1988: 'Why, overnight, did the legislature and through the legislature the government feel the need to assert that, in some areas, the authorities had to be guaranteed independence which, it seems a contrario, the usual structures could not provide them with? is self-mistrust is something quite surprising'.[149] 'Self-mistrust': the expression hits home. e IAAs are the living proof that, at one point in time, the French state, i.e. the political leaders who represent it, no longer trusted its own administration, that is its ministers, by transferring the burden of 'regulating' one or other domain from o cials to other supposedly more impartial members, and suspecting 'chains of interfering interests'.[150] e primordial question is straightforward: Why this sudden mistrust of the classical administration?

Without claiming to be exhaustive, I would like to emphasise a major fact – ignored by administrative scholarship (without exception) – which is the politicisation of the senior civil service.[151] is fact can nonetheless shed light on the birth and success of the IAA formula. France was lucky enough to be endowed with an impartial civil service which, like the UK civil service, was sheltered from political uphea-

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tives indépendantes, p. 94 .

146. See colloquium organised by G. Bacot on 'L'exécution dans l'histoire constitutionnelle française', *RFHIP*, 2011, No 34).

147. See A. Cohen, *Histoire d'un groupe dans l'institution d'une* « communauté » européenne (1940–*1950)*, Paris I, PhD esis, 1999, typewritten.

148. Teitgen Colly, 'Les autorités …' in Colliard, Timsit (eds), *Les autorités administratives indépendantes*, pp. 37-43.

149. 'Conclusion' in Colliard, Timsit (eds), *Les autorités administratives indépendantes*, p. 310.

150. J.B. Auby, 'Remarques terminales', *RFDA*, 2010, p. 932.

151. Another hypothesis would be worth investigating: the loss of centrality of the ministry and minister in the working of the French administration.

val. In a way, the Fi h Republic changed this profoundly. Initially, the Gaullist Fi h Republic, which is in part a 'Republic of o cials' saw the advent of ministers who were technicians and not members of parliament, who were o en former senior civil servants. is change began to fudge the boundaries between the administration and politics. But the real break occurred in 1981 with the major change when the le -wing parties came to power a er twenty years of exclusively right-wing rule, which led to an inevitable reinforcement of the politicisation of the administration, as a corollary to the *presidentialisation* of the constitutional regime. is phenomenon was ampli ed by the series of political changes between 1981 and 2002. While ministerial departments took on even more importance, appointments to the major positions in central administration were increasingly political, notably because of the pressure of political parties (that General de Gaulle wanted in vain to set apart from his institutional system). ere was talk of a 'French style spoils system' that had not existed before and doubt about the impartiality of the civil service. Was it not the phenomenon Jean Rivero observed in 1988: 'Perhaps they [legislature and governments] perceived that the dependence on parties, party political attitudes did not go down well with public opinion and might run counter to the rule of law'?[152] e connection with the development of IAAs is obvious. True, the rst IAA concerned the authority protecting computer data (CNIL, statute of 6 January 1978), but the prime sector for these IAAs was broadcasting. It was time to move on from the Gaullist era when the *ORTF* was the voice of France. e great change in government resulted institutionally in the birth of the *Haute Autorité de l'Audiovisuel* which, a er many adventures, has become the *Conseil supérieur de l'audiovisuel.* e composition of the institution was the key point and an attempt has been made to restore in these instances a form of political pluralism that seems to have been roughly dealt with by the patent or rampant politicisation of the civil service. e IAAs appeared as an institutional Open Sesame.

Let us summarise. By creating independent administrative authorities, it was attempted to restore *impartial* institutions to the French administrative system. Why make a mountain out of a molehill? Since the political authorities had stopped believing in the e ectiveness of the classical French administrative state and the impartiality of the civil service, they promoted a mysterious idea of regulation with very fuzzy contours and entrusted the management of these matters to administrative 'dilettantes' although they were supposedly independent. It remained to be seen empirically whether this wager would pay o in full and whether the IAA would manage sensitive matters more neutrally and impartially than the ministerial administration or the administrative tribunals did before.[153] Some recent a airs on economic regulation suggest that the answer is not necessarily positive.[154]

2. An ambiguous evaluation: progress of the rule of law or not?

It is di cult to make an unequivocal judgment of the action of IAAs because the arguments surrounding them are so contrasting. Some praise their autonomy and their political independence and see in that a progress of the rule of law. Others are more sceptical about the scope of the institutional renewal. ey see in the creation of IAAs a new ruse by the political power pretending to play the game of depoliticisation of certain sectors but behind the scenes it gets its own way and instrumentalises IAAs which have

152. Rivero, 'Maurice Hauriou et le droit administratif', *Pages de doctrine* (Paris, LGDJ, 1980), p. 310.
153. ere is a shortage of scienti c monographs on IAAs. And there probably will not be any given the tradition of secrecy in the French administration. Shame about that.
154. See the EADS and AMF a airs, judiciously recalled by J.-L. Autin, 'Le devenir des autorités administratives indépendantes', *RFDA*, 2010, p. 878.

become a 'convenient screen for power'.[155] Some recent developments attest to IAAs being taken back in hand by the political power.[156] Lastly, some are concerned about the counterpart that is the 'di raction of the state' and the fact that the state is no longer capable of 'de ning the main orientations' of its action.[157]

If one takes the criterion of the rule of law, the real sticking point may not be where it is generally thought to be, namely with the infringement or otherwise of the principle of the separation of powers.[158] But it touches on the question of responsibility. e fact that it was thought a good idea to keep these administrative bodies from 'any hierarchical dependence on political power' has the major drawback that 'the action of independent administrative authorities escapes from all political responsibility, although they play an essential role for liberties and economic regulation'.[159] True, in theory the government may be thought responsible for the activities of administration of the state to which IAAs belong. is was acknowledged by the *Conseil constituionnel* in 1986.[160] But, it will then be asked, 'How can the government be held responsible for authorities over which it has little if any power? It seems paradoxical that the government's responsibility should be complete whereas its control is partial'.[161] Leaving aside a recent decision by the European Union Court of Justice which has drawn the attention of French scholars,[162] we shall concentrate here on internal law.

IAAs are based on the idea that 'own competence'[163] must be given to collective bodies which it has been said should be independent of political power. It is di cult then to claim that the government can be found responsible for decisions over which it has no direct control. Accordingly, it is hard to see how any real political responsibility can be implemented in the event of malfunctioning of these institutions. Certain reports from parliamentary assemblies[164] are critical attesting in their own way to the concern of members of parliament about seeing the action of a section of the executive escaping de facto from their control. e contradiction underpinning this institution cannot be overlooked: the IAAs have power but their members are in fact unaccountable. Here as elsewhere, it is unhealthy to see pockets of unaccountability developing. Moreover, institutions whose legitimacy relies exclusively on 'the personal credibility of their members'[165] is fragile. Such credibility is not ensured because of the discretionary nature of appointments that may prompt debate. e multiplication of the people appointed to such 'independent' positions considerably strengthens the 'power of patronage' (M. Hauriou) of politicians and increases 'jobs for the boys'. But a 'boy' is not necessarily a competent and impartial administrator. It may be a former elected politician given a position in reward for past services or found a job a er an electoral defeat. It may be a friend or a favourite, and so on. e big loser in this development is the taxpayer. e 'old boy' network costs the country dearly. e parliament has shown concern about the budgetary excesses

155. Sabourin, 'Les autorités administratives indépendantes dans l'Etat', in 1988, p. 11.
156. Autin, 'Le devenir des autorités administratives indépendantes', p. 882-83.
157. J. Chevallier, 1986, no 25.
158. See Collet, *Le contrôle juridictionnel*, p. 12-13, Q. Epron, 'Le statut des autorités de régulation et la séparation des pouvoirs', *RFDA*, sept. oct. 2011, pp. 1007.
159. D. Truchet, preface to Collet, *Le contrôle juridicitionnel*, p. VI.
160. Décision n° 86-217 DC du 18 septembre 1986, cons. 23; see C. Teitgen-Colly, 'Les instances de régulation et la Constitution', RDP 1990, p. 249-252.
161. Epron, 'Le statut des autorités de régulation', p. 1003.
162. ECJ, judgment 9 March 2010, *Commission v Germany*, case C-518/07; see Jacques Ziller, 'Les autorités administratives indépendantes entre droit interne et droit de l'Union européenne', *RFDA* 2010, n° 5, p. 901 and Epron, 'Le statut des autorités de régulation'.
163. See on this point and the articulation with art. 20 Const., P. Wachsmann, 'Sur l'indépendance des autorités administratives d'Etat' *Mélanges Autin*, forthcoming.
164. Sénat, 2007, A.N. rapport Dosière and rapport Vanneste, 2010, see Epron, 'Le statut des autorités de régulation'
165. P. Sabourin cited by Timsit, in Colliard, Timsit (eds), *Les autorités administratives indépendantes*, p. 316.

of certain IAAs. is would-be impartiality is acquired at a high price because of the old French custom by which institutions are added to others without giving any thought to abolishing the old ones.

At a time when a degree of renewed authoritarian control of certain sectors (broadcasting, Defender of Rights) by the executive is coming about, it is probably awkward to cast too much discredit or suspicion on IAAs especially when specialists of the question agree that they have met with 'incontrovertible success'.[166] However, the duty of lucidity means it must be asserted that the changes in the forms of state action that these authorities re ect does not go without posing certain problems for the rational and e cient management of public a airs. e inevitable interleaving of problems of constitutional law and administrative law can be seen in this. e political concentration of powers to the advantage of the O ce of President of the Republic has adverse e ects across the board. e administrative sphere does not escape these. For that reason alone, this 'mismatched' study of IAAs may not be without interest.

C – The Unity of the State or the Emergence of Buried Sovereignty

Ever since Duguit and Jèze, sovereignty has had poor press in administrative law doctrine. It is no longer really thematised.[167] It is not prohibited, however, to seek out examples where case law suddenly throws up this ghost of the past that was thought long buried beneath the stratum of public service. We shall not go looking for examples where one might expect to nd them, in the relations between administrative law and community law[168] or in the complex relations between administrative law and international law.[169] ey shall be taken from two major judgments that deserve to be re-read with an eye to the state: the *Dehaene* (1950) and *Popin* (2004) decisions so as to highlight what are called the state potentialities of ordinary administrative law.

1. e state, the condition for the existence of legality or a fresh state-centred reading of the Dehaene case

Let us take a well-known leading decision, *Dehaene*.[170] At the time the Communist Party was the most powerful party electorally in France and it started a national strike in which it associated government workers. A department manager at the Indre et Loire prefecture, Mr Dehaene, intended to strike but his superior, the prefect, prohibited him from doing so on the basis of ministerial circulars. Defying the ban, the civil servant went on strike and was sanctioned (along with ve of his co-workers). He was rst suspended by the Interior Ministry (Home O ce) which sought to sanction all civil servants of a certain rank having gone on strike. But the suspension was postponed and nally he was reprimanded. He attacked this disciplinary measure and claimed there was a violation of the right to strike which was recognised by the Preamble to the 1946 Constitution which stated ' e right to strike is exercised within the framework of the statutes regulating it'. e real legal di culty was that no statute materialising the constitutional provision could readily be found.

is judgment is usually presented as the perfect example of the tribunals having to reconcile two contradictory requirements. One the one hand, compliance with the right to strike, which had become a constitutional right; on the other hand, the need to ensure public services were not interrupted, which

166. Autin, 'Le devenir des autorités administratives indépendantes' *RFDA*, 2010.
167. Beaud, 'Compétence et souveraineté'.
168. e.g. G. Lebreton, 'Le Conseil d'Etat est-il souverainiste ?' in C. Puigelier and F. Terré, (eds), *Jean Foyer, In Memoriam*, (Paris, Litec, 2011) p. 163-75.
169. E. Picard, 'Droit international et contentieux administratif : les rapports du droit international et du droit interne', *Encyclopédie Dalloz de contentieux administratif.*
170. 7 juillet 1950, *GAJA*, n° 63, pp. 395 .

was legitimised by the requirement of 'safeguarding the general interest'. Moreover, the judgment is sometimes referred to in order to criticise the somewhat over extensive use of the principle of continuity of public services that leads, not unparadoxically, to reinforcing the power of the state.[171] But instead of discussing this decision in terms of the lawfulness or otherwise of civil servants' right to strike, as is usually done and not without good cause[172] it can be looked at di erently here *from the state's point of view*. From this point of view, the usual interpretation underscoring the importance of the principle of the continuity of public services can be wrong-footed. It seems to me that rather than on the continuity of the state, the decision bears essentially on the question of public policy, on its primacy over other considerations and that it bears on the unity of the state which may be threated by centripetal forces arising from society. Without wanting to take the paradox to extremes, there is nothing to stop us from seeing in this kind of case law the re ection of the major issue of state sovereignty extended this time to include its superiority over civil society. e state is the political unit that does not countenance competitors within its orbit. ere is no room for two sovereigns in a state political order and a state that is challenged or dominated by political parties or by trades unions would no longer be sovereign. It is this age-old lesson taught by Hobbes and Hegel that, without necessarily having read those philosophers, the members of the *Conseil d'Etat*, with their insuperable knowledge of French legists, took up in the *Dehaene* case law. at at any rate is what is to be demonstrated.

It shall be done by beginning with an astute remark by Marcel Waline in his note on this decision: 'keeping to the strict legal principles, the line of argument of the applicants was quite defendable … e ultra vires act seemed agrant'.[173] However, the *Conseil d'Etat* found against them: despite the letter of the Constitution which seemed to require a statute, the executive authority supposedly had nonetheless the right to limit by its own motion the right to strike of civil servants, which conferred on it, in the case in point, the prerogative of prohibiting it on pain of disciplinary sanction. What can explain such an a priori surprising solution? Let us look at the explanation in terms of legal technique, as Jèze would put it. As is known, in the absence of a statute that was supposed to 'regulate' the right to strike recognised by the Constitution – and it is already a judgment to nd there is no general statute (because there were particular statutes referred to by the applicant) – the *Conseil d'Etat* recognised that the government, in the case in point, had the right to set out, under its supervision, 'the nature and scope' of limitations that must be made to this right to strike because the government is 'accountable for the smooth running of the public services' it is in charge of. It imposes rather rm bounds on the right to strike which is a means of defending occupational interests alone, but which must not be denatured. e *Conseil d'Etat* sees that its limits prevent 'abuse or use contrary to the requirement of public policy'. Besides there was no real conciliation in the case at hand since the *Conseil d'Etat* considered that the strike envisaged, if recognised, 'would cause serious infringement of public policy'. It is, *in concreto*, the prohibition, that is, the principle of continuity of public services, that prevails over the right to strike.

In actual fact, behind the classical expressions ('requirements of public policy' or 'continuity of public services'), what is at stake here is the *defence of the state* against a use of the right to strike of civil servants that was deemed *abusive* by the government (a characterisation validated by the *Conseil d'Etat*). True, the word 'state' does not appear a single time in the judgment by the *Conseil d'Etat* but it su ces to read the conclusions by Mr Gazier and the note by Marcel Waline to realise the strong 'state density' of this case,

171. Judiciously observed by J.-F. Lachaume, *Grands services publics* (Paris, Masson, 1989), p. 307.
172. *GAJA*, n° 63, pp. 365, pp. 398 .
173. *Notes d'arrêts*, t. II, p. 563.

in order to understand therefore that the state literally 'saturates' this decision. e government commissioner dismisses the two extreme solutions: that defended by the civil service unions defending an unlimited right to strike (absolute and non relative right) and that directly opposing it of the unlawfulness in principle of such a right to strike granted to civil servants (which was the state of positive law before the war). e half-way solution proposed by Mr Gazier, and adopted in the judgment, was inspired by the opinion of the *Conseil d'Etat* of 12 June 1948 interpreting the provision at issue in the Preamble to the Constitution in the sense of a balance (see above), except that the safeguard contemplated here is that of 'the essential interests of the nation'.[174]

e term 'nation', which has disappeared from court's decision, puts us on the trail of the state because, as is known, the nation in French public law is o en used to describe the state. It appears from reading the submissions that that defence of the state is at the heart of the line of argument of the government commissioner. e most interesting point in this decision is the understating of 'ordinary' legal considerations, as Mr Gazier admits with unusual openness in his pleadings: ' ese are less legal but more pressing considerations although far more di cult to weigh, that are to dictate our choice'.[175] What are those considerations? Nothing less than urgency which is joined here with the need to defend public policy, the whole being advanced to dismiss the claim of the civil service unions. Confronted with this claim of an absolute right to strike, the government commissioner employs language that is perfectly clear: 'It is not possible for the state to accept it. It would be tantamount to resigning. e government alone, and not trades unions, which are private entities unknown to the Constitution, is accountable to the representatives of the Nation for the smooth working of public services. To admit unrestricted strikes by civil servants would be to open up parentheses in constitutional life and, as said, o cially consecrate the notion of a state subject to eclipses. Such a solution is radically contrary to the most fundamental principles of our public law'.[176] e expression 'a state subject to eclipses' met with success and rightly so because it clearly showed the absurdity of a state that would no longer be subject to the rule of continuity, one of the applications of which is the rule of continuity of public services. But what is more important in this line of argument is that the only authority that is authorised to represent the state is the government, and not the trades unions. e unity of the state is the unity of its representation, as Hobbes had rightly seen.

Marcel Waline was quite right to see this judgment as an extension of the celebrated *Heyriès* decision on the exceptional circumstances that legitimised this sort of legal aberration by which a decree can stand in for statute, contorting the principle of legality for the bene t of urgent need. Because of the 'national peril' engendered by these repeated strikes fomented by the Communist Party and in the course of which, Waline notes, part of the forces of law and order made common cause with the rioters, 'self-defence of the state' had to be admitted as Hauriou wrote in his note on the *Heyriès* case. But Waline is even more explicit in his note on *Dehaene*. He observes, 'It will be said there is a very dangerous principle there, by which reasons of state prevails over legality. However, let us re ect on it: *all legality would fall in one go if the state were to disappear*. And the state is in present circumstances threatened with disappearance at least the state as we know it, that is, the national state. And the general strike, especially that of the public services, is precisely one of the most formidable weapons of the enemies of the state'.[177]

us the state appears quite simply for what it is: the condition for the existence of legality. is highly

174. Cited by Gazier, concl., Dalloz, *Notes d'arrêts*, p. 669.
175. *Ibid*. p. 668.
176. *Ibid*., p. 668.
177. *Ibid*. p. 664, emphasis added.

sophisticated normative system of legality is at risk of collapse if the state is divided, eroded by civil war. Waline alludes to this in speaking of 'the national state' and of 'enemies of the state' (the Communists at the time). e language of decisionism is to be found: Waline does a Carl Schmitt without knowing it, Schmitt being the sulphurous German jurist who de ned sovereignty as the decision taken to establish the state of exception.[178]

But Marcel Waline goes even further in his reasoning. is pre-eminence of the defence of the interests of the state relative to rights and freedoms is supposedly one of the characteristic features of administrative law. More speci cally, the *Conseil d'Etat* as the guardian of the state is subject less than the courts or law to observing 'strict application of legal inferences'. Waline borrows almost naturally the language of Hauriou and of the members of the *Conseil d'Etat* to justify this twist to legal principles: 'if administrative hearings were to be adjudicated by exactly the same methods and the same habits of reasoning as civil trials, there would be no need for administrative tribunals. What fundamentally distinguishes administrative law from private law is that there is involved at each instant, more or less visibly, but always at least in transparency, the idea of the primacy of the *public interest* or at the least of *primordial* public interests, as the *Marc* decision of 3 June 1908 said'.[179] How could this defence of the state be better announced or more exactly this dependence of administrative law on the state? is pre-eminence of the public interest is always latent, ready to be 'revealed' by the event, by the extraordinary circumstance, or urgency, which upsets legality and superimposes on this ordinary legality this 'higher legality'[180] completely overturning the hierarchy of norms. e state – or to be precise its self-defence – thus arises, like a *deus ex machina*, called for by public law jurists who do not reason like private law jurists. Private law jurists are attached to the letter of the law, to their Civil Code and delight in the exegesis of articles and paragraphs of the Code.

ey sometimes suspect administrative law of being a sort of reason of state shaped by the *Conseil d'Etat*. But it is rare for private law practitioners to have to decide on the legal problems raised by a general strike decided on by a political party seeking to rouse civil servants, some of whom have pledged allegiance to the party, against the state itself.

In short, the *Dehaene* decision shows that administrative law is tied in with the state, that it is even intimately involved in its defence in that the state is the guardian of public order. Even if the language of law resorts to periphrases such as 'the safeguard of the general interest' or 'serious infringement of public order', 'public policy requirements' (*Dehaene* decision) or 'essential interests of the nation' (opinion of *Conseil d'Etat*) or 'pre-eminence of public interest' (Waline) it is invariably the state that is spoken of.

e state which, when threatened by its 'enemies', ipso facto re-conquers the right to defend its existence including by contorting legality, a twist that the *Conseil d'Etat* 'recti es' by invoking higher principles that it characterises as circumstances demand. Administrative law then teaches the deep-seated connection uniting modern public law with this purpose that is public safety considered primarily as the defence of public policy. For there to be law, there must be a state, and not a state of nature. Although the connection might seem tenuous with the *Dehaene* case, it exists, but it is simply veiled by this euphemistic use of language described above, by virtue of which we no longer dare to put the face of the state as the sovereign power behind seemingly neutral expressions (public policy, public safety).

If we had to conclude on this point, it would have to be underscored that the logic of sovereignty underlying this idea that the state is the guardian of public policy. One way to express this logic is to

178. *Théologie politique*, 1922, French translation, Gallimard, 1988.
179. *Ibid*., p. 664.
180. 'Superlegality' Hauriou was to say, Note on *Heyriès*.

think about the celebrated expression of Max Weber that public power must always be in a position to expropriate 'independent private powers'.[181] For Weber the modern state is like the outcome of a process that has seen a certain type of community (consecrated as the political community *par excellence*) monopolise the exercise of legitimate constraint to the detriment of various 'law communities' (*Rechtsgemeinschaften*), feudal power, orders, churches, cities, etc. ese once ensured their members the *particular rights* that were privileges in the sense of statutory rights. In other words, the modern state put an end to a sort of anarchic pluralism since these multiple 'communities of law' did not form a hierarchised whole.

e state, in expropriating these powers and by monopolising legitimate physical violence therefore united the political body and made it hierarchical. Once the monopoly was established, the rights an individual might enjoy because a member of a particular group, whatever it might be, supposedly only exist by virtue of the explicit or implicit authorisation of the state – authorisation in the broad sense which usually takes the form of statute.

A er a fashion, Max Weber described the result achieved by implementing the state programme drawn up by Jean Bodin when he examines the control of 'Bodies and Colleges' by the Sovereign in the Republic.[182] e programme is pursued by Hobbes in chapter 26 of *Leviathan*[183] in which he describes sovereignty as a form of internal domination by the state. It dominates all other 'political and public' bodies and exercises control over 'private bodies'. Once the principles are established, it is enough for Hobbes to examine the legal means that make this subjection possible, this control of the state over the intermediate or civil bodies. For the political bodies there is an easy means which is to set out the limits in charters or letters patent establishing those groups. Otherwise, for the other groups, there is a general means, which is control by the law.[184] e state therefore controls all private groups – companies, foundations, associations – in its territory.

Let us come back to the *Dehaene* decision which illustrates, in its way, this idea of the state's domination of particular groups. e prohibition of the right to strike for certain civil servants is the apparent theme of the decision. But the crucial point is that the *Conseil d'Etat* authorises the government to uphold the sovereignty of the French state. Sovereignty means that the state is and must remain not only independent of particular groups but above them. e state is the custodian of public policy and of the unity of political power. It cannot see this monopoly of representation of political unity defeated, whether directly by trades unions which are private powers or indirectly by political parties which are mixed (semi-public, semi-private) organisations. e extreme concision of the decisions of the *Conseil d'Etat*, which is one of the remarkable characteristics of its case law, should not prevent the administrative law scholar from observing that, in some extreme cases, administrative law is there to defend the state (which means also to defend citizens, if it is understood that the state is also a community of citizens).

2. e Popin decision or the unexpected emergence of indivisibility of sovereignty

e contrast has been emphasised above[185] between the modernising and progressist discourse evoking an erasing of the state and the sudden return of the state when least expected and for rather minor motives. Let us return to the ruling in *Popin*[186] in which the *Conseil d'Etat* employs without beating about

181. *Le savant et le politique*, French translation (Paris, Plon, 1959), p. 107, *The Profession and Vocation of Politics/Science as a Vocation*.
182. *Six Livres de la République*, III, 6.
183. Hobbes, *Leviathan*, XXII, Of Systemes Subject Politcall and Private.
184. e law of the state, of the Commonwealth, says Hobbes (*ibid.* p. 239).
185. J. Caillosse, preliminary chapter, p. 149, see note 2 above.
186. CE Sect 27 January 2004, *Popin*, *GAJA*, n° 113, p. 858.

the bush the language of state sovereignty. e applicant, a university professor, was the subject of a disciplinary measure imposed in rst instance by the disciplinary board of her university but the measure was then li ed on appeal to the national tribunal. She then sued her university for damages. However, the *Conseil d'Etat* dismissed her claim on the ground that it was made against the wrong party and that she should have sued the state which alone was found answerable for the exercise of the jurisdictional function by administrative tribunals, whether specialised or not. e solution is all the more original because the university has been a legal entity since the 1968 Faure statute and it seems a priori normal for the entity imposing the disciplinary measure, the university, to be sanctioned if its decision is overturned on appeal. But against this organic consideration, based on the existence of two separate legal entities (the university and the state), the *Conseil d'Etat* based its ruling on a consideration of the functions of the state. 'Because justice is done indivisibly in the name of the state' only the state is accountable 'for harm that might result for citizens from the exercise of the jurisdictional function ensured under the supervision of the *Conseil d'Etat* by administrative tribunals.' e functional decentralisation by departments by virtue of which the university is autonomous cannot call into question the core of sovereignty of the state that lies in the trilogy of legislative, executive and jurisdictional functions. ese state functions are never fully attributed to the decentralised authorities. ey are only conceded to them on the proviso of state sovereignty. It is tantamount to reading Jean Bodin repeating page a er page that the King's sovereignty is not 'transmitted' to the magistrates. In his submissions, Rémy Schwartz justi es this monopoly of justice by the state: 'our legal and political history has made justice, whatever the organ tasked with carrying it out, the expression of the will of the people in the context of the exercise of national sovereignty which is by nature indivisible… e French Republic has just one people, one sovereignty and one justice'.[187]

Beyond this discourse, which like many others, con ates rather hastily people with state and republic with state, the crux of the argument must be grasped: justice, and the term must be understood in its material (and not organic) sense, that is the jurisdictional function consisting in adjudicating disputes with the authority of the state, belongs *exclusively* to the state. Ever since the Revolution, it has been said that justice is done in the name of the French people, but that has no real legal scope. It is merely an argument of legitimacy. In terms of the theory of the state, the central argument lies in the stark assertion of the *oneness of justice*. In other words, if the exercise of 'university' justice is attributed to the universities, the power to do justice in itself belongs to the state and the state alone. But the unitary state concentrates the other two legal functions (lawmaking and law enforcement). In the meaning given to the indivisibility of sovereignty, the three eminently sovereign functions (and justice) are held by the state and by it alone and it cannot 'delegate' their exercise to third parties or, if preferred, it can only delegate their exercise provided that it retains the right to resume control of the delegated function (delegated here to specialised administrative tribunals acting under the control of administrative justice). It is in this that it is deemed accountable for its poor functioning, if the function was exercised by a third entity to which the state entrusted the function. It might also be said that the state in the narrow sense is accountable for mistakes made by its 'dismemberments' (by the state in the broad sense).

Let us extend our argument now. If we are to understand this oneness of justice and this indivisibility of the power of the state, of which the jurisdictional function is one component, it must be understood what a unitary state is, France being one of the nest examples. Georges Burdeau de ned it perfectly but under another name: ' e centralised state is a state in which none of the component collectivities,

187. Cited in *GAJA*, p. 860.

whether geographical, sociological, occupational, religious or other, can rely on a right to lay down the rules that concern it'.[188] It is therefore the state that denies to all human groups the right to a form of self-government and that claims the monopoly of interpreting the public good. We can borrow from Maurice Hauriou what is probably the best legal description of the unitary state characterised by 'political centralisation which, in fact, leads to the unity of law or of statute in the country (unity of legislation)'.[189]

e unity of law presupposes therefore both the unity of statute and the unity of justice. Accordingly, decentralisation is always possible from the point of view of the administration because administrative decentralisation complies with the unity of statute. Conversely, it is impossible from a political standpoint: decentralised authorities, whether territorial or functional, have neither legislative power nor jurisdictional power.

One should not fail to point out the assimilation between the oneness of justice and the oneness of legislation, true pillars of the unitary state which intends to maintain, despite everything, a monopoly on the production of law. Whereas the constitutional revision of 2003 constitutionalised the principle of the free administration of local authorities, it did not break with this principle of the unity of legislation.

e timid exception that article 72(4) opened up allowing them to 'derogate, experimentally and for a limited purpose and time, from the legislative or regulatory provisions governing the exercise of their competences' is very tightly framed. A piece of legislation or a regulation is needed expressly authorising them to undertake such derogatory action and this innovation must not infringe the rights and liberties guaranteed by national law. As one astute observer said 'there is no question of course of having a civil code for Brittany, a criminal code for Alsace, nor *horresco referens* a general code of taxation for Corsica. Against that, common sense and subsection 4 provide'.[190]

e equivalent of the decision in *Popin* features, for the unity of statute, in the constitutional and administrative case law on decentralisation, the decision of the *Conseil constitutionnel* on the 1991 statute on the status of the territorial authority of Corsica.[191] is statute makes Corsica a territorial authority with a particular status that replaces the region without calling into question the existence of the two *départements*. is new entity has broader competences than those entrusted to the regions by the statue of 2 March 1982 because, in addition to regional powers, it enjoys powers transferred directly by the state. is decision by the *Conseil constitutionnel* is o en recalled because it censored the expression 'the Corsican people a component part of the French people', which amounts to denying the existence of a speci c people within the French people, in the name of the indivisibility of the French Republic. But the most interesting point in this decision seems to lie in the very clear rejection of any legislative joint participation. A decentralised French local authority, even when it is Corsica (which has a status that derogates from ordinary law) is not a Spanish region or a German *Land*. Although the principle of a bill on legislative matters is deemed constitutional, on the other hand, the obligation for the Prime Minister to reply when a 'proposal to modify the legislation or regulation emanating from the deliberative organ of a local authority' is brought before him is deemed unconstitutional because it is an infringement by the legislature of the relations between the government and parliament laid down by the Constitution. e *Conseil constitutionnel*

having privileged information with regard to bills submitted for an opinion to the Corsican Assembly. It is the idea of the oneness of legislation that is at issue here.

e unitary state has therefore a long future ahead of it in France. Its existence reveals that state sovereignty means in particular the domination of the state over the other local authorities and groups. With regard to decentralisation, the examples of such domination could be multiplied. Administrative police, with the question of the articulation of police powers between the state and local authorities could be a prime area of enquiry. It has been possible to show that the existence of a power of substitution of action for the bene t of the state, in the event of failings by local authorities (violation of the obligation to act) was one of the plainest examples of the supremacy of the state over local authorities.[192] It might also be observed that, through the intervention of statute, the state multiplies the obligations upon local authorities, requiring them to exercise special police powers. is was the case in the early twentieth century when the legislature stepped in to require the *communes* of major cities to better ensure public cleanliness.[193] is is nowadays increasingly the case for maintaining public peace and quiet[194] or for other special police powers (environment). e superiority of the state over local authorities is stark. It is not case law but *statute* that reveals this domination by the state. If this example were to prompt administrative law scholars to study statute again, that too o en ignored source of law, and so illuminating for understanding what the unitary state is, it will not have been taken in vain.

D – The Continuity of the State or the Lessons of the Papon/Hoffman-Glemane case law

To prove that the general theory of the state is useful to administrative law, it is worth examining the rule of the continuity of the state. is is usually described by the rule of the continuity of public services. But it is illustrated here by another more untoward example: the question of responsibility for the deeds or misdeeds of the Vichy government. By proposing a re-reading of the law in force based on categories of state, it will be attempted to demonstrate that neither the legislation, the regulations nor administrative case law accredit the political and legal argument of some form of legal non-existence of Vichy.

at argument is contained in two complementary assertions. First that Vichy was not a true state but legally merely a 'de facto authority' (wrongly claiming to be a 'de facto government'). Second the French Republic never ceased to be, thanks to the existence of the Free French (*la France libre*). e legal proof is supposedly provided by the order of 9 August 1944 of the provisional government of the French Republic restoring republican legality. In this text, the Vichy régime fails to achieve constitutional standing since it is a 'de facto authority, claiming to be the "government of the French state" ' (art. 7). By virtue of that order, the deeds of the Vichy power expressly referred to by it are 'null and of no e ect' with the exception of the others which have been implicitly validated. e expression 'null and of no e ect' is meant to characterise a government considered to be a 'usurper' government without the legitimacy of a 'de facto government'.[195]

192. B. Plessix, 'Une prérogative de puissance publique méconnue : le pouvoir de substitution d'action, *RDP*, 2003, pp. 579 , see especially p. 598.

193. CE 15 juillet 1902, *aff. Marc et chambre de co-propriétaires*, concl. Teissier, Hauriou, s. *La jurisprudence administrative*, tome II, pp. 563 .

194. See for example the regulations on travellers and itinerant communities, Nathalie Wol , *La tranquillité publique et les polices administratives*, thesis Paris I, 2008, no 514 .

195. See Julien Laferrière, *Manuel de droit constitutionnel*, 2nd edn, (Paris, Domat-Montchestien, 1947), pp. 843-44. On Vichy and also the order of 9 August 1944, see the thesis by E. Cartier, *La transition constituionnelle en France (19401945)* (Paris, LGDJ, 2005).

By this conception there is supposedly a radical discontinuity between Vichy and the governments of the subsequent Republics, explaining the solution of retroactively declaring the most loathsome deeds of that regime to be void. We shall call this the 'Gaullist' or 'Gaullo-Mitterrandian' argument because it is political in origin, dating from the declarations by General de Gaulle and taken up under the Fi h Republic by François Mitterrand. But although the deeds can be voided, the harm done cannot be undone retroactively and that is the problem. It should never be forgotten that, for the victims of Vichy, 'refugees, antifascists, Jews carefully listed, then duly handed over, Gaullists or Communists executed, free-masons persecuted, retroactivity does not erase a jot of the crimes perpetrated'.[196] e jurist owes it to himself to nd the means of legal technique to compensate the victims or their relatives or successors. It is the presence of third parties, of the victims of the régime, that creates the requirement for someone to be accountable for the harm caused by the rulers. at someone is the state.

It is suggested by this that the Gaullist line of ignoring the 'statehood' of Vichy is quite simply unrealistic let alone legally erroneous. e proof of this is that without expressly saying so positive law, from the Fourth Republic onwards, with the many special statutes on reparation (statues on war damages) and also the little cited but very real case law,[197] recognised the responsibility of the state with regard to the victims of the Vichy régime. is presupposes admitting the principle of the continuity of the state explicitly or not, it does not matter. is is what was done, more clearly, in the recent and now familiar case law of the *Conseil d'Etat* composed of the decision in *Papon*[198] which has been held up as one of the 'major rulings'[199] and the opinion in *Mme Hoffman-Glemane.*[200] e 'state' potentialities of this case law have been somewhat underestimated.

At the end of a famous trial, Maurice Papon, former general secretary of the prefecture of Bordeaux and several times minister of the Fi h Republic, was sentenced to ten years' imprisonment in 1998 for complicity in crimes against humanity because of his active and personal participation in the deporting of Jews from his region. e next day, he was ordered by the civil law courts to compensate the victims. Arguing he had acted at the time as an o cial of the state, he brought an action against the French state, the classical action in issues of liability of government o cials.[201] It is not as a very subtle contribution to case law on liability of the public power and of civil servants that the decision in *Papon* shall be examined, but in that it is instructive about one of the singularities of the state: *its continuity*.

e *Conseil d'Etat* initially considered that two wrongs were combined in this case. First the personal and inexcusable wrongdoing by Maurice Papon, which was deemed to be separable from his o - cial function and therefore for which he could not third-party the state. Second the wrongdoing in the performance of his duties insofar as Mr Papon's action was part of a global context in which the Vichy regime, independently of the ird Reich (see 2 below) organised the deportation of Jews and for which he could third-party the state. e intricate legal question was whether it was possible to attribute the wrongdoings of the Vichy regime to the French state. What made the question intricate was that it was considered that earlier case law of the *Conseil d'Etat* had given a negative answer. In an o en cited 1952 decision,[202] the supreme administrative court had judged that a house arrest ordered by a prefect on the basis of a statute ruled void by the 1944 order could not give entitlement to an indemnity 'in the absence

196. D. Rémy, *Les lois de Vichy*, 2nd edn (Paris, Romillat, 1992), p. 12-13.
197. CE Ass. 30 janvier 1948, *Troptower*, Rec. p. 18 and CE, 22 fév. 1950, *Dame Duez,* Rec., p. 118.
198. CE, ass., 12 avril 2002, *Papon*, Rec. CE 2002, p. 139, concl. S. Boissard, RFDA 2002, p. 582.
199. *GAJA*, N° 111, pp. 837 .
200. 16 fév. 2009, concl. F. Lenica, *RFDA* 2009, p. 316 .
201. See the chapter on liability, J. Moreau, Titre II, chap. IV p. 631, note 2 above.
202. CE Ass. 4 janvier 1952, *Epoux Giraud*, Rec. p. 14.

of any legislative instrument determining the conditions in which victims of such deeds could claim reparation'. Ever since, the 1944 order seemed to have been construed as having as its e ect, if not its purpose, the release of the state from liability for arbitrary acts by Vichy (so long as there was no speci c instrument providing for compensation). More exactly, the *Conseil d'Etat* considered that the damage done by Vichy could not be made good other than under a special law of responsibility for war damage (1946 statute) – a highly restrictive body of law because an express statute is required to derogate from the principle of non-liability of the state – and that liability in ordinary law was not applicable.

Accordingly, to come to nd the state liable for the misconduct in the performance of duty related to the organisation of the deportation of Jews in France, the court, in the decision in *Papon*, had to overcome this case law that had remained enigmatic for scholars. It managed this by giving another interpretation to the order of 9 August 1944, ruling that its provisions providing for the nullity of certain deeds of Vichy 'could not have the e ect of creating a regime of non-responsibility of public power for acts or wrongdoing by the French administration in the application of those acts between 16 June 1940 and the restoration of Republican legality in continental France'. In other words, far from overturning the classical idea that illegality can constitute misconduct, the 1944 order con rmed it. Instead of excluding the liability of the public power, the nullity of the acts calls for it or implies it because of its seriousness. It is this obvious point – oddly not seen in 1952 – that the *Conseil d'Etat* recalled and was to repeat seven years later, more rmly still (*Hoffman Glemane*), reinforcing Waline's feeling that the decision in *Epoux Giraud* was a case of 'inexplicable absence of liability'.[203]

But the interest of the decision, for the present chapter, lies rather in the *imputability* of the misconduct and the acts to the state. e answer in the *Papon* decision leaves no room for doubt: the *Conseil d'Etat* acknowledges that 'the misconduct in performance of duty analysed above is something for which … *the state incurs liability*' with the result that the state has to contribute to covering part (half) of the civil law damages Mr Papon was ordered to pay. However, it was not self-evident that the state was responsible for two reasons. e rst was because of the nature of the Vichy government; the second the importance of the rule of the occupying power in the deportations.

1. e decision in Papon (2002) clari es the concept of the continuity of the state

e problem of imputability was raised by the government commissioner, Mme Boissard. For her, it had to be 'determined … whether the republican state could be ordered to indemnify the consequences of misconduct in performance of duty by the French administration under the aegis of the Vichy government by application of acts that were declared null and void at the *Libération*'.[204] e answer was not clear-cut because, she said, one can have 'doubts … as to the existence of legal continuity between the government of Vichy and the republican state'.[205] e very cautious formulation as to who committed the acts – misconduct 'by the French administration under the aegis of the Vichy government' – was probably an attempt to avoid the issue of the legal character of Vichy (was it a state or not?). But the important point for the demonstration lies in the response to the crucial question that was brutally straightforward: are the acts and wrongdoings of the Vichy regime liable to entail the responsibility of the 'state', that is, are they imputable to it?

203. Title of the note in *Note d'arrêts*, t. II, op. cit., no 215.
204. *RFDA*, no 3, 2002, p. 590.
205. *Ibid*. p. 589.

The question of imputability – The classical rule in issues of imputability does not seem to pose any particular difficulty. 'When the act emanates from a public authority, the state, or as the case may be some other public authority, is naturally responsible for it'.[206] Such a rule postulates the perpetrator of the deed is the same person as is held liable for it. But the case of the wrongdoings of Vichy is peculiar, as the *Papon* case reveals. There is a gap between the time of the events and the time when the victims or their successors claim compensation. Between the two, there had been nothing less than a change of constitutional regime: the Vichy regime had disappeared and the Republic reappeared.

A first line of argument, named the 'Gaullo-Mitterrandian' vulgate above, is that there were two public authorities insofar as Vichy was perceived as a legally separate authority from the Republic (Fourth and Fifth). So different that the government of the one could not be reduced to the government of the other. On the ground that the Vichy government was a simple 'de facto authority' and not a lawful government, this argument says that the Republics that succeeded it could not be held responsible for its acts. For the proponents of this discontinuity by principle, Vichy was not even a state, with the result that the act of a non-state (a 'de facto authority') could not be attributed to a real state ('the republican state'). In other words, the 'Vichy government' claimed to represent the French state (it was cumbersomely entitled the 'French State') but it was not in legal terms. Accordingly, the state represented by the superseding republics (Fourth and Fifth) had nothing in common with Vichy and so nothing to take from its legacy of debt and loathsome acts. That is why the first presidents of the Fifth Republic – and foremost General de Gaulle – never wanted to publicly acknowledge France's responsibility for the persecutions by the Vichy regime. Even as astute a jurist as Robert Badinter exclaimed 'The Republic cannot ever be held to account for the crimes of the men of Vichy'.[207] It was only in the speech on 16 July 1995 commemorating the 1942 round-up at the Vel d'Hiv that for the first time the French state, through the voice of Mr Jacques Chirac, officially and symbolically acknowledged its responsibility for the acts committed by Vichy.[208]

To be complete, it should be added that this Gaullo-Mitterrandian argument was supplemented by another idea which was the *continuity of the republic*. This idea was solemnly stated in article 1 of the order of 9 August 1944: 'France's form of government is and remains the republic. In law, (the republic) has not ceased to exist'. Thanks to the existence of the Free French (*la France libre*), the French republic supposedly continued in being between 1940 and 1946. This was set out explicitly in 1946: 'The provisional regime is over. After more than six years, the French republic has changed its constitutional institutions but has remained the French Republic'.[209] Such a claim obviously has a polemical dimension inasmuch as Vichy always claimed to be called 'the French State' with the result that the word 'state' acquired negative connotations and attempts were made to bring out the contrast by magnifying the 'Republic'. But as shall be shown, such a widespread opinion stemmed from a serious confusion between a form of government (the republic) and the state, a confusion that the 1958 constituent assembly made several times by using the term 'republic' instead of the more technically correct 'state'.

In contradistinction to this legal opinion that was taken up by politicians, I would like to explain why the argument of the continuity of the state seems better founded to me, regardless of the changes in government between 1940 and 1946 since one and the same public authority existed – the state. At any rate, it is this argument that explains why in the judgment in *Papon* and in the *Hoffman-Glémane*

206. M. Waline, *Droit administratif*, 8th edn (Paris, Sirey, 1959) p. 687, no 1169.
207. Cited by M. Verpeaux, 'L'affaire Papon, la République et l'Etat', *RFDC*, t. 55, 2003, p. 519.
208. See opinion in *Hoffman-Glémane*.
209. P. Tissier, 'Le régime de la France libre', *EDCE* 1947, p. 36.

opinion the *Conseil d'Etat* recognised the responsibility of the state for the torts committed by the Vichy government. e solution was hailed by eminent commentators who had realised that the argument of discontinuity was unsafe especially because it failed to recognise 'the unity and continuity of the state'.[210]

eir commentary is brief – a single line – which allows me to *demonstrate* at more length, that is systematically, why the question of the continuity of the state was central (that of unity having just a marginal role in the case in point).

The decision in Papon *comes down implicitly in favour of the continuity of the state* – e great interest in the *Papon* decision is that it annihilates the argument of discontinuity, which was more political than legal, and as said 'explodes … the Gaullist ction of the de facto authority represented by the Vichy government'.[211] As the government commissioner recalled 'de iure and de facto, there is no less continuity between these di erent periods in the history of our country. e Republic maintained in its service the agents who had served Vichy, except for those, of course, who had been the subject of measures of puri cation. It relied on the same structures, notably at local levels. It even made its own much of the normative corpus drawn up by the Vichy government, a er, it is true, nding the acts contrary to the fundamental principles on which it is based null and void … In the name of this continuity, we think that the republican state cannot escape the legacy of Vichy. It is bound to assume all the consequences of the present and past action of its services, even when those services, acting under the supervision of unlawful authorities, committed serious illegal acts'.[212] However, it will be observed that neither Mme Boissard not the *Conseil d'Etat* employed the word state to characterise the Vichy regime. Here again, circumlocutions such as 'the services' or 'the French administration' are used to designate as much as to mask the presence of the state. It will be noticed too that the government commissioner opposes 'the republican state' to Vichy, but still observes that they are linked by continuity because the latter cannot discard the cumbersome legacy of the former. Finally it will be observed that it is only implicitly that the *Conseil d'Etat* acknowledges the imputability to the state of the Fi h Republic of the acts and wrongdoings of the Vichy regime. In stating that the actions committed by Vichy 'entail the responsibility of the state' it therefore implicitly but necessarily accepts the continuity of the state and therefore dismisses the discontinuity argument.

Although the *Papon* decision, pursuant to the conclusions, determines this matter, it completely avoided the basic problem posed by a possible attribution to the French state of the 'acts of the de facto authority claiming to be "the government of the French state"'. First, by eluding the expression 'continuity of the state' while the notion could clearly explain that the state appeared to be both the author of the act or wrong and the entity owing the duty. To reduce the e ect caused by the time shi (existence of two players, Vichy and the Fi h Republic), one must use a legal ction and treat the state as an institution or a legal person, so that it has duration and permanence (see below). en and above all, more than silence about the continuity of the state, it is the passing over of the true reason for this continuity in the conclusion that is surprising. Why should the republican state inherit – so to speak – Vichy's 'debts'? e reason is *constitutional* and not administrative. Behind the matter of the continuity of the state lies the distinction between form of government and form of state. is transpires somewhat from the commentary of the *Grands arrêts* in which we learn that the *Papon* decision 'precludes accepting lack of responsibility

210. *GAJA*, p. 846, no 8.
211. F. Melleray, 'Après les arrêts Pelletier et Papon' *AJDA*, 2002, p. 838.
212. *RFDA*, 2002 (3), p. 5.

on the pretexts of the succession of political regimes'[213] and from the fact that the Gaullo-Mitterrandian argument on discontinuity disregards 'the unity and continuity of the state, *whatever the variations in its organisation*'.[214] ere is cause to explain at a little more length this classic argument of public law that the variation in political regimes is indi erent to the state which has a permanent identity (continuity of state) – at least for so long as it remains sovereign and controls its population and its territory (see 2 below). In the *Papon* case and all similar cases, looking at the nature of the Vichy regime as a form of government matters little when deciding on the question of imputability of responsibility. It matters not whether it was a dictatorship or if one prefers a non-republican government. Mme Boissard says nothing of this rule although an essential one of the indi erence of constitutional regimes, although such a rule would have enabled her to more robustly shore up the argument of continuity. She refers only to empirical points: continuity of the administration, identity of personnel, civil servants and norms from one regime to the next, and so on. But the continuity of the state is far more than that. It expresses the essential idea that the state is more than a political regime, more than the rulers that represent it at a given time.

e classical rule was laid down about jurists' ideas of 'de facto governments', these governments that ensured in the course of multiple revolutions, a sort of interregnum, separating one constitutional regime from another. e case is di erent from state succession insofar as it is not two states that succeed on another but two governments, that is, two political regimes. In this particular case, 'there is just one (community), which is unchanging, the state, of whose destinies the questions of the validity of acts of government are posed. e state, about which arise questions of the validity of the acts that will emanate from it and the commitments it has taken through the intermediary of its organs, has not disappeared. It remains the same. It does not change, despite the succession of its governments'.[215] is rule of state continuity must be transposed to the case of Vichy, which is indeed not a de facto government but which is a di erent political regime from that of the Fourth and Fi h Republics.

is brings out the conceptual weakness in the Gaullo-Mitterrandian argument. For extra-judicial reasons, it con ates the form of government and the form of state, wrongly identifying the political regime (the form of government) with the state. It considers that the di erence between constitutional regimes – Vichy versus the Fi h Republic – would imply a di erence in legal nature as regards the status of the state. But this is to mistake two separate things: the state and government in the broad sense (in the sense of form of government and political regime). e main source of the conceptual confusion lies incontrovertibly in the immoderate and thoughtless use of the word 'Republic' the content of which is usually ideological rather than legal. In France, there is too much of a tendency to confuse the Republic, which is just a form of government, with the state and this is what has constantly happened in analysing the legal regime of Vichy. Yet state and republic are separate things, that is, they are as separate as the form of state and the form of government. is is why the expression a 'republican state' used by the government commissioner in the conclusions on the *Papon* decision is very clumsy. From the point of view of the state, there is no di erence in kind between a republican state and a non-republican or anti-republican state. Both are states, even if, from the political and constitutional point of view, the di erence is crucial between republic and dictatorship. Even if common sense might be shocked that a republic should pay the debts of a dictatorship or see its obligations transferred, state continuity requires it. And it requires it to make good the losses caused to victims who had no choice and cannot do other than turn

213. *GAJA*, p. 840, no 1.
214. *Ibid*. p. 846, no 8.
215. F. Larnaude, 'Les gouvernements de fait', *RGDIP*, 1921, p. 460.

to the political regime succeeding the regime that oppressed them. What holds for Vichy held also in the nineteenth century when the republic succeeded the monarchy and vice versa. It is therefore misguided, to my mind, to criticise the *Conseil d'Etat* for having, in the *Papon* decision tarred all regimes with the same brush and 'acted as if no di erence divided a dictatorial regime from a democratic regime'.[216] It could not do otherwise from the moment it accepted state responsibility. What it can be criticised for, on the other hand, is for having done so belatedly and for having giving the impression of being the poodle to dominant opinion and the 1997 political declaration of the President of the Republic.[217]

In short, equating the rulers with the state or indeed the form of government with the state is a serious step backwards in legal thought and technique. Léon Duguit devoted an entire book[218] to the distinction between the state and rulers, not without good reasons. In other words, it must be understood that it is a step forward in constitutional science to have accepted that the state remains whereas forms of government come and go, change and transmogrify. I shall not get into the detailed discussion of how state continuity should be explained. Traditional and dominant doctrine does so by resort to the legal personality of the state. e state purportedly has not only rights and duties but also it is as a collective person, a legal entity, di erent from its members both the rulers and the ruled and so is permanent.[219] In other terms, the interest of treating the state as a legal person, bene ting from the privilege of duration, lies in the fact that one can attribute to an *abstract being*, the 'state', acts committed by a political regime that has disappeared or changed. Despite revolutions and changes of government, the state continues in being and is not a ected by constitutional changes, 'continuing to posses a unifying organisation'.[220]

is explanation in terms of legal personality of the state has been judiciously extended in constitutional doctrine by the work of Georges Burdeau who prefers to resort to the idea of institution and of 'institutionalised power' which succeeds 'individualised power'. He argues skilfully for the idea that 'the means of the exercise of institutionalised power do not a ect its existence … All these forms of government from the least personalised – the direct government of the people by the people itself – to the most strongly marked by the personality of the agent exercising power: authoritarian cæsarism are all technical means in the implementation of public power incorporated in the state institution. Personal will is detached from their real subject to be attributed to the single and objective centre of power that is the state; they have no quality as such but acquire their virtue only through their attachment to the legal mechanism of the institution'.[221] In this passage, he hails the force of law that creates ctions and abstractions by virtue of which the state is an arti cial person within which rulers are 'interchangeable'.[222] He also observes that the great bene t of this institution of power is due to 'the idea that the rulers cease to exercise Power as a personal prerogative. ey are subject to a function'.[223]

e major consequence of the institutionalisation of Power is its being made perennial, its continuity.[224] Just as the state is the centre to which responsibility for the acts of all its agents are imputed, equally it is the person responsible, regardless of the changes in constitutional regimes. e concept of institution and that of legal entity ful l the same functions of imputing actions by individuals (rulers and agents) to

216. Verpeaux, 'L'a aire Papon, la République et l'Etat', p. 525.
217. See Melleray, 'Après les arrêts Pelletier et Papon'.
218. Duguit, *L'Etat, les gouvernants, les agents* – tome II *Etudes de droit public*.
219. L. Michoud, *La théorie de la personnalité morale. Son application au droit français*, tome I, 1906, (republished Paris, LGDJ, 1998), p. 50, note 1; Carré de Malberg, *Contribution*, tome I, pp. 11 .
220. Carré de Malberg, *Contribution*, t. II, p. 498, note 11.
221. Burdeau, *Traité de science politique*, 1st edn, tome I, no 253, p. 258.
222. *Ibid*. no 253, p. 259.
223. Burdeau, *Traité de science politique*, 1st edn, t. II, no 187, p. 221.
224. O. Beaud, 'La notion d'Etat', *Archives de philosophie du droit*, t. 35, 1990, Sirey, pp. 119-141.

an abstract person. us, just as 'men die, the state is immortal' (Bossuet), one might say that 'political regimes die, the state goes on', which renders great services to third parties, victims, who can always bring actions against the state when the political regime that persecuted them has disappeared. Constitutional law teaches, as Burdeau puts it perfectly, that there is a 'transformation of the political regime without the existence of the state being a ected by what are in sum super cial changes in the ways in which power is exercised'.[225] One can see the great advantage of this doctrine in describing what happened under Vichy. It is astonishing that these categories were not used by the *Conseil d'Etat* and by administrative lawyers in general (but it is hardly surprising because of what was said above about the severance between constitutional and administrative law, see 1 above).

However, two observations are called for. e rst is that there is a ip side to this coin of the institutionalisation of power. It can lead to the absence of responsibility of agents or rulers. is was the constant line of defence of Papon and his counsel, Maître Varaut. It is not the civil servant who is guilty but the state, they repeated ad nauseam. e individual is nothing, the state is everything, which Burdeau's expression for praising and saluting the marvel seems to accredit: 'the state banishes the individual from the enterprise of government'.[226] It is this danger that the Court of Assizes of Bordeaux and the *Conseil d'Etat* managed to avoid by isolating the wrongdoing of M. Papon (his undue 'zeal', so to speak) from the state's misconduct. e other observation is that there is a minority doctrine that refuses to explain the continuity of the state by legal personality or by institutionalisation, either because the doctrine denies all validity to what it considers to be a myth, that of the legal personality of the state (Duguit), or because it considers that it has no basis for explaining constitutional discontinuity.[227] ese arguments fail to convince me simply because no more satisfactory explanation has yet been found than the institutionalisation of power to account for the continuity of the state. From the point of view of legal technique, the theory of legal personality applied to the state (and therefore adapted) has an explanatory value (accounting for positive law) that has not been bettered.

Lastly, this presentation could be open to the objection that the argument of the strictly Gaullist origin is more radical than the way it has been expounded. It amounts to arguing that the Vichy regime was not a state and so one cannot speak, logically, of the continuity of a state if moving from a non-state (Vichy is a 'de facto authority') to a state. It seems to me that the central point of the Gaullist argument lies in the negation of the sovereignty of Vichy and therefore in that of its state character. Since sovereignty is the one criterion of the state, Vichy, because it was subordinate to the Nazi state, the ird Reich, cannot be characterised as a state. Is that not what General de Gaulle claimed in his Brazzaville conference of 20 October 1940 in asserting ' ere is no properly French government. e organism located in Vichy and that claims to bear this name is unconstitutional and subjected to the invader. In its state of servitude, this organism cannot be, and is no more than an instrument used by the enemies of France against the honour and interest of the country'.[228] e clearest text is the organic declaration supplementing the manifesto of 27 October 1940 in which General de Gaulle declared: 'Considering that all French metropolitan territory is under direct or indirect enemy control; that consequently the organism called "Vichy Government" which claims to replace the Government of the Republic does not enjoy the fullness of freedom that is essential to the integral exercise of power'. e usurpation stems from Vichy, no longer

225. Burdeau, *Traité de science politique*, t. I, no 215, p. 259.
226. *Ibid*., no 213, p. 259.
227. G. Liet-Veaux, *La continuité du droit interne : essai d'une théorie juridique des révolutions*, Sirey, 1943, no 83 , pp. 121 .
228. *Bulletin officiel de la France libre*, 20 janv. 1941, cited by J. Laferrière, *Manuel de droit constitutionnel*, note 1, p. 863.

being sovereign (it lost its 'fullness of freedom'), obeying the foreign 'enemy', Nazi Germany. It is for that that it is a usurper government and that the rulers are usurpers to whom a rule creating an exception could be applied.

But this argument of the non-existence of the Vichy state has seldom convinced scholars. To con ne the argument to internal public law, it can be said that such an argument is excessively unrealistic. If Vichy were not a state, how could one explain the presence, among hundreds of other records produced in Papon's criminal trial of a prefectoral decision ordering the internment of a French Jew who had omitted to be recorded in the census and including at the top the wording 'In the name of the French People' with the words 'French State' on the o cial document with the heading of the Prefecture of Gironde?[229] Apparently Vichy was indeed a state and it made laws which were called 'laws of the French State'. For its victims and also for those who bene ted from it, the Vichy regime did indeed have the *appearance* of a state, just as it had the reality of police powers. Above all, it is beyond contest that until November 1942 (the date the free zone was invaded), the Vichy government acted with a real margin of manoeuvre and although limited it did have some freedom of action.[230] Lastly, the subsequent positive law of the Fourth and Fi h Republics invariably treated the Vichy government as if it were a state to draw the most useful and fairest consequences for citizens. In a way, it was attributed with capacity of state in retrospect.

The concrete legal consequence of the continuity of the state: the transmission of rights and duties – e court in *Papon* was only able to nd the French state responsible because it managed to set aside 'the position of certain governments that the debts of one regime are not binding on the ensuing regime'.[231] Such an argument was quite simply indefensible because the rule of state continuity implies exactly the opposite: *the debts of one political regime are binding on the state it represents* and therefore the political regime that succeeds it. e term 'debts' is used here in the broad sense and it would be better to speak of obligations to avoid the nancial connotation of the term debts (the succession of state debts is one of the problems posed by revolutions) and to better mark the connection with responsibility that is at the heart of the *Papon* case.

According to the classical rule of public law, state continuity implies the transmission of rights and obligations from one government to the next. ese result as much from contracts or treaties as from tort. is has been admitted throughout the nineteenth century by case law about the many revolutions France has experienced.[232] e rule also holds in public international law for the same reasons, to protect the rights of third parties. e undertakings that rulers give bind their successors because they are made by representatives of the state and not representatives of their government. Need sceptics be reminded that contemporary Russia, a er an eclipse due to the Bolshevik Revolution and the birth of the USSR (1917–1990) is still accountable for the acts of the Czarist Russian state? As such it has had to reimburse, even if at a largely symbolic price, the loans the Czar took out before the 1914 war from savers the world over. e same consequence arises in internal public law. It is this ultimately classical rule that the decision in *Papon* applies. e French state is responsible for torts committed by the state under Vichy.

229. G. Boulanger, *Maurice Papon. Un technocrate français dans la collaboration* (Paris, Seuil, 1994) Annexes, p. 285.
230. G. Vedel, *Droit constitutionnel*, 1949, p. 279.
231. *GAJA*, 17th edn., p. 846, no 8.
232. P. Martin, *Portée juridique des révolutions en droit public interne*, thesis (Montpellier, 1938), pp. 241 .

2. A forgotten aspect: the imputability of deportation to the French state and not the German state

In *Papon*, the question of imputability of the deportation of Jews to the French state posed another problem than that of the continuity of obligations and about which it seems most commentators[233] but not all[234] were silent. is problem resulted from the existence of an occupying power, Nazi Germany and from the possible imputation of deportations to such a state.

It is established case law that when the act or wrongdoing is by some *alien* public authority, the national state is not responsible. It was deemed that the French state was not answerable for the prejudice caused during the German occupation.[235] For her part, the government commissioner, Mme Boissard, cited in her conclusions several other decisions along the same lines.[236] is suspicion of extraneousness of the most repressive measures supposedly justi ed, claims Marcel Waline, the intervention of statutes to introduce the status of interned and deported persons 'because case law could not have substituted for them, because they were measures imputable to the enemy authorities, and it is di cult to know how legal responsibility for them could have been "shouldered" by the French state'.[237]

In *Papon*, the *Conseil d'Etat* refused implicitly to reason in terms of statutes on war damage – the statute of 20 May 1946 likening political or racial deportations to enemy actions (art. 3). As seen above, it considered that ordinary law administrative responsibility could be applied for misconduct in service. But a new problem arises: if the deportation of Jews is no longer 'an enemy action', the consequences of which are governed by the statute of 1946 on war damage (the special statute on compensation for such harm), the question is whether one should not consider such actions as imputable to an alien state (Germany), which would be the way to release the French state from responsibility for want of imputability. In other terms, to admit there had been a misconduct in service by the state (Vichy), it had to be considered necessarily that it was misconduct by the French state and it had to be demonstrated that the classical case law whereby facts arising from the action of a foreign state cannot be imputed to the national state did not hold.[238]

at is why the *Conseil d'Etat* took care to distinguish between 'deportation between 1942 and 1944 of persons of Jewish origin arrested and then interned in Gironde … organised *at the request of and under the authority of German occupying forces*' and the 'acts or wrongdoings of the French administration … which *did not result directly from constraint by the occupier*'. e list of such acts in which the Vichy government and Papon participated is not short. e decision stated they included 'the setting up of the Mérignac internment camp and the power given to the prefect from October 1940 to intern there aliens 'of Jewish race', the very existence of a service for Jewish questions within the prefecture, tasked notably with establishing and maintaining a le of persons 'of Jewish race' or Israelite confession, the order given to the police to assist in operations to arrest and intern persons featuring in the le and the administrative managers to assist in organising convoys to Drancy.'

233. *GAJA*
234. M. Verpeaux, 'L'a aire Papon, la République et l'Etat', p. 521.
235. M. Waline, *Droit adminstratif*, 8th edn., p. 687, no 1168, citing CE, 23 mai 1945 *Bro*, p. 137; 29 juillet 1945, *Veuve Grandjean*, p. 408; *Soc. des automobiles Georges Irat*; D. 1948, 3. 229, note M. Waline, 29 fév. 1947, *Demoulin*, p. 88; for an extensive interpretation for him, CE 1 fév. 1952, *Gans*.
236. 'Wrongdoing committed under the orders and authority of the German occupying forces could not entail the responsibility of the French state', CE 12 nov. 1948, *Sieur Quin*, Rec. p. 427.
237. Note sous ép. Giraud, p. 351; for the detail of these statutes see H. Mayras, 'La réparation des dommages corporels et matériels causés par la guerre', *EDCE* 1948, pp. 54 .
238. See conclusions Boissard.

Because there was this autonomy of the French administration, Vichy, and through it the French state, can be held responsible in the *Papon/Hoffman-Glemane* case law. e autonomous conduct of Vichy had to be asserted in order to ascribe the misconduct to it and not to the ird Reich and therefore to assert the responsibility of the *French* state. is is why, in *Papon*, the *Conseil d'Etat* draws a distinction between two separate cases within the overall constraint the German state held over Vichy. On one hand, there is the direct and immediate constraint by which the Vichy regime cannot be found liable for the wrongs done to victims. On the other hand, there is just an 'indirect' constraint, which opens up a sphere in which the Vichy regime had a degree of autonomy, leeway, through which it was able to take decisions implying its liability. is demonstration, given for the *Papon* decision, is taken up in the 2009 opinion in which it is clearly stated that 'this harm and loss of all kinds' incurred by Jews under the Vichy regime were 'caused by the actions of the state which supported deportation'.[239] One cannot therefore attribute to an authority of the ird Reich the sole responsibility for the deportation because the French state, represented here by Vichy, provided its 'support'. In his conclusions on the *Hoffman-Glemane* opinion, the government commissioner, Mr Lénica, emphasised this point very clearly by observing that the 'misconduct of the state … was to have organised, in the absence of direct constraint by the occupant, the operations that constituted the necessary prelude to deportation. It is indeed to have knowingly turned the working of the service against a part of the population'.[240]

ese developments were intended to demonstrate that in the *Papon* decision and the *Hoffman-Glemane* opinion, an adjective was missing: 'the misconduct in service entails the responsibility of the state' means 'the responsibility of the *French* state'. e second contribution of this case law lies in the assertion that the deportation of Jews was not just imputable to the German state; it could henceforth be imputed to the French state. In short, the rule of non-imputability for actions of foreign origin (see above) could not be invoked as a means of defence. In a sense, the recent case law (*Papon*, *Hoffman-Gleman*) re ects the awareness jurists have gained from the discovery by historians, foremost among whom is Robert Paxton, that Vichy not only 'collaborated' with Hitler but sometimes surpassed the expectations of the occupying power. It also shows quite concretely that there are instances where it is di cult to separate administrative law and constitutional law arti cially and the invocation of a general theory of the state may illuminate the case in question by legitimising the solution of compensation for victims by the French state. Whatever it might cost them, political leaders must not 'accept' the wrongdoing of their predecessors but have the state collectivity they represent shoulder the debt because it is the only way to repair the wrong in icted on victims by a dictatorial regime.

ese few examples fall well short of exhausting the substance of the wealth of relations between the state and administrative law. ey have been taken up merely to illustrate the argument that the one may usefully shed light on the other and vice versa. If this chapter could convince readers of the validity of this double lesson, it will not have been written for naught.

239. CE *Hoffman-Glemane*.
240. *RFDA*, 2009, p. 317.