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*Open Data on Administrative Court Judgments: A Review of the French Experience**

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ABSTRACT The use of open data is having an impact on administrative justice. In this article, it will be investigated what the effect of the use of open data may be in the administrative judicial process in France.

KEYWORDS: Open data – Administrative justice – Court judgments

1. *Introduction*

As one of the great masters of French administrative law pointed out, "Administrative litigation can be the subject of a sociological study. Such a study is important (...). It is also a difficult study, in particular because it must focus not just on published judgments and rulings, but on judgments and rulings handed down. This all the more important because there is a considerable difference between the two. It is quantitative (...). It is also qualitative: the published judgments and rulings are chosen for their legal interest, not to constitute a representative sample of the mass of judgments and rulings handed down".[1]

It is precisely this distinction between published and handed-down decisions that open data in administrative-court decisions intends to abolish. To understand this difference, three preliminary observations need to be made.

The first observation concerns terminology.[2] On the one hand, the expression "open data" refers to digital data of public or private origin that are freely accessible and usable ("open data"). On the other hand, "big data" refers to particularly voluminous sets of digital data, produced by new technologies and stored using high-performance computing tools ("mega data"). When we talk about open and big data applied to administrative case law, we are therefore referring to making the decisions of administrative judges available to the public in an accessible and reusable format.

The second observation concerns the legislative nature. The issue of open data as applied to the decisions of administrative courts is currently embodied in a single provision, namely Article L 10 of the Code of Administrative Justice.[3] This article lays down a fine principle: the decisions of administrative judges are "made available to the public free of charge, with due regard for the privacy of individuals".[4] However, this single article is misleading, insofar as the issue of opening administrative-court decisions to the public is at the heart of many other texts, particularly those relating to the protection of personal data.

The third observation concerns the legal nature of the decisions of the administrative judge.[5]

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[1] R. Chapus, *Droit du contentieux administratif*, Paris, Montchrestien, 13 ed., 2008, 5-6.

[2] D. Bourcier and P. de Fillipi, *L'open data: universalité du principe et diversité des expériences*, in *La semaine juridique*, No. 38, 16 September 2013, 1-9.

[3] This provision mainly stems from Law No. 2016-1321 of 7 October 2016 for a Digital Republic and Law No. 2019-2022 of 23 March 2019 on programming 2018-2022 and reform for the justice system. On this provision, see L. Cluzel-Métayer, *La loi pour une République numérique: l'écosystème de la donnée saisi par le droit*, in *Actualité juridique Droit Administratif,* 2017, 340-349 and L. Cadiet, *L'open data des décisions de justice. Mission d'étude et de préfiguration sur l'ouverture au public des décisions de justice*, November 2017, available at: *https://www.viepublique.fr/files/rapport/pdf/184000019.pdf.*

[4] Paragraph 2 of Article L 10.

[5] On the status of court decisions, see: E. Buat-Ménard

On the one hand, these decisions can be considered as public data.[6] As provided for in the Code of Administrative Justice, judgments are "public":[7] this means not only that the judgment is pronounced publicly, but also that once it has been pronounced, it is accessible to any person, who may request it from the court registry.

On the other hand, these decisions are not public data like any other, for at least two reasons. Firstly, as these decisions relate to the exercise of judicial functions, they cannot be assimilated to administrative documents within the meaning of the Code of relations between the public and the administration.[8] Secondly, these decisions contain personal information,[9] such as names and addresses, which must be specially protected. It is therefore easy to see why, if the decisions of administrative courts are made available to the public in the general context of opening up public data,[10] they must be subject to specific rules. And this is basically what Article L 10 of the Code of Administrative Justice symbolises. This also explains, at least in part, the difficulty of drawing up any specific rules.

Having made these introductory observations, we can now ask the following question: what are the consequences of open data on the decisions of administrative courts? To answer this question, we can distinguish two types of consequences. On the one hand, this openness helps to increase administrative case law (par. 2.); on the other hand, it raises questions about administrative case law (par. 3.).

2. *More case law*

Just as transhumanism is the promise of an augmented human being, open data represents the hope to access all the decisions of administrative courts. It is appropriate, firstly, to review the genesis of this principle of augmented case law (2.1.) and, secondly, to attempt to analyse its scope (2.2.).

2.1. *The origins of the principle*

The process establishing the principle of opening up all the decisions of administrative courts to the public is bound to be perplexing. This can be seen by recalling the Government's intention (2.1.1.) and, then, reporting on the parliamentary discussion (2.1.2.).

2.1.1. *The Government's intention*

As it has already been noted, the principle of opening all decisions of administrative courts to the public was established by Article 20 of the Law of 7 October 2016.[11] This provision merits consideration, both in terms of form and substance.

In terms of form, two points should be emphasised. The first is that this provision was not included in the initial bill for a Digital Republic.[12] It was introduced by amendment,[13] while the bill was being debated in the second assembly and the accelerated procedure had been implemented. As a result, no impact study was conducted on the subject and no cost-benefit analysis of the measure was drawn up.[14] The second point is that the opening up to the public of all decisions of the judicial judge followed the same route, culminating in Article 21 of the Law of 7 October 2016.[15] A common approach can therefore be seen in the decisions of both levels of court.

In essence, this provision is totemic to the law from which it stems, based on the idea

and P. Giambiasi, *La mémoire numérique des décisions judiciaires. L'open data des décisions de justice de l'ordre judiciaire*, in *Dalloz,* 2017, 1483-1491; L. Cadiet, *L'open data des décisions de justice,* 20-21; J.P. Jean, *Propos introductifs*, in *La Semaine Juridique*, suppl. No. 9, 27 February 2017, 9-12.

[6] See J.P. Jean*, Propos introductifs*, 9. On the notion of public data, see G. Koubi, *Equivoque de la notion de donnée publique*, in *JurisClasseur Périodique Administratif*, 7 May 2018, 23-28.

[7] Article L 10, paragraph 1.

[8] See CE, 27 July 1984, *Association SOS Défense*, rec. No. 314 and CE, 7 May 2010, *M. Bertin*, rec. No. 303168. See also Commission d'accès aux documents administratifs, *Rapport d'activités 2016*, in *La Documentation française*, 2016, 26-28.

[9] See L. Cadiet, *L'open data des décisions de justice,* 20-21, and N. Metallinos, *Ouverture des bases de données de jurisprudence et protection des données sensibles. Faut-il sacrifier la protection de l'intimité de la vie privée sur l'autel de la transparence?*, in *La Semaine Juridique*, suppl. No. 9, 27 February 2017, 44-48.

[10] See J.B. Auby, *Le droit administratif face aux défis du numérique*, in *AJDA,* 2018, 835-843.

[11] Law No. 2016-1321*,* cited above.

[12] Bill for a Digital Republic, Assemblée Nationale, Paris, No. 3318, 9 December 2015.

[13] Amendments No. 581 and 582, Senate, 25 April 2016.

[14] See *Etude d'impact relative au projet de loi pour une République numérique*, 9 December 2015.

[15] Law No. 2016-1321*,* cited above. This article is codified in Article L 111-13 of the Code of Judicial Organisation: "Without prejudice to the specific provisions governing access to court decisions and their publicity, decisions handed down by the judicial courts are made available to the public free of charge while respecting the privacy of the persons concerned (...)".

that "digital technology represents a new opportunity for development, growth and sharing for our country".[16] It was in these terms that the Government was able to justify opening up all the decisions of administrative judges to the public. The government amendment that gave rise to Article 20 of the 2016 Act was supported by the following statement: "Making data available is a strong driver for the development of new online services. Open data on decisions handed down by administrative courts will enable new applications to emerge (...)".[17] Are we talking here about confidence in the justice system, transparency, accessibility to the law or legal certainty? No, it is really about *business*: the decisions of administrative courts, like those of the courts, are supposed to be a growth factor. Logically, opening them up to the public is part of the chapter of the law devoted to the "data economy".[18]

2.1.2. *Parliamentary debate*

One might have thought that the meaning given to this opening up of court rulings would arouse hostile reactions from members of parliament. Only a few concerns were expressed, during a discussion that was neither intense nor exciting.[19] Of these, two are worth mentioning. The first concern was expressed in the following terms by a Member of Parliament: "What is the objective of the reform?[20] The Secretary of State for Digital Affairs responded as follows. On the one hand, she highlighted open data on court rulings as a "lever for economic growth" and a "strong driver for the development of new online services".[21] On the other hand, the response brandished the argument of access to the law as a democratic requirement. However, the least we can say is that she did so in a particularly clumsy manner: "A few years ago, we still had recourse to the voluminous red codes, then *Legifrance* was created and the decision was made to no longer use paper codes, separate for each subject, but a free online service listing all the articles of French laws. It is time to do the same for administrative court rulings".[22] The second concern related to the protection of personal data contained in court rulings. To those who were concerned, the Secretary of State offered this circular reasoning: "There is no risk, either in terms of invasion of privacy or re-identification. Judgments are already public".[23]

The genesis of the application of open data to the decisions of administrative courts is remarkable for three reasons. Firstly, it is underpinned by a rationale for the "commercialisation of judicial decisions".[24] Secondly, it takes the form of a legislative nightmare: a principle is laid down without giving any real thought to its consequences and the issues involved. Finally, it is hard not to be struck by the absence of the Ministry of Justice from this process. The scope of the principle laid down is equally remarkable.

2.2. *The scope of the principle*

By stating that the decisions of the administrative courts are to be made available to the public free of charge, the legislature intended that they should all be accessible and reusable. Such a principle is both a revolution (2.2.1.) and a return to basics (2.2.2.).

2.2.1. *A revolution*

The application of open data to administrative court rulings is regularly presented by stakeholders and observers as a "revolution".[25] This revolution is both quantitative and qualitative.

From a quantitative point of view, making all the decisions of the administrative courts available to the public will lead to a change of

[16] See the Law No. 2016-1321 of 7 October 2016 pour une République numérique, *Exposé des motifs*. See also the interview with Axelle Lemaire in *Revue pratique de la prospective et de l'innovation*, 2017, No. 2, 1-3.
[17] Amendment No. 581 above.
[18] Chapter No. 1 of Title No. 1 of the Law.
[19] V. L. Cluzel-Métayer, *La loi pour une République numérique: l'écosystème de la donnée saisi par le droit*, 345.
[20] Alain Richard, Senate debates, session of 27 April 2016.
[21] Axelle Lemaire, Senate debates, session of 27 April 2016. On the possible new services, see G. Deroubaix, *L'édition juridique et la diffusion du droit*, in *La Semaine Juridique*, suppl. No. 9, 27 February 2017, 92-94.
[22] Axelle Lemaire, Senate debates, session of 27 April 2016.
[23] *Ibid.*
[24] L. Cadiet, *Réflexions sur la justice à l'épreuve des mutations contemporaines de l'accès à la justice*, in *Dalloz,* 2017, 528.
[25] See in particular M. Bouvier, *Quelle indépendance financière pour l'autorité judiciaire*, Report to the First President of the Court of Cassation, July 2017, 83 and L. Cadiet, *L'open data des décisions de justice,* 17. For others, this is the "judicial headache of the 21st century" (*www.dalloz-actualite.fr/flash/open-data-des-decisions-de-justice-casse-tete-judiciaire-du-21e-siecle*).

scale. To get the full picture, it should be remembered that, at present, only some of the decisions handed down by the administrative courts are available on the *Legifrance* website. As provided for in the decree of 7 August 2002 on the public service for the dissemination of law on the Internet,[26] the site makes available to the public free of charge "the decisions of the Conseil d'État (...) and the rulings and judgments handed down by the other administrative courts selected in accordance with the procedures specific to the administrative-jurisdictional order".[27]By way of illustration, in 2022 *Legifrance* made available online:[28] 2,600 decisions of the Conseil d'État; and 17,000 judgments of the administrative courts of appeal. Making administrative court decisions available in open data could lead (in 2022) to the publication of: 9,800 decisions and rulings of the Conseil d'État; 31,000 rulings of the administrative courts of appeal; and 230,000 rulings and interim rulings issued by the administrative courts. In addition to *Legifrance*, there is the *Ariane Web* database. Although this is more extensive, it is still a "selective database".[29] On the one hand, it only includes judgments of the administrative courts of appeal whose "jurisprudential interest is considered to be major (category R) or justifying a special mention (category C +)".[30] On the other hand, the decisions of the administrative courts are not included, nor are those of the specialised courts.

From a qualitative point of view, the change is significant. Two elements can be highlighted. The first is that opening up this "massive body of case law"[31] to the public makes it possible to see what is usually hidden, i.e. for the most part the rulings of the administrative courts. The second factor is that opening up the case law to the public will give a better understanding of the reality of litigation. As Pascale Deumier points out, "the law as applied by the first judges constitutes the intermediary link between the legislative ideal and the actual law".[32] Today, however, this law is largely unknown. While open data on the decisions of administrative judges can therefore be seen as a revolution, it also represents a return to the sources.

2.2.2. *A return to our roots*

The least we can say is that the publication of administrative-court decisions is not a new idea. How can we fail to think of the Recueil Lebon?[33] Two well-known points should be borne in mind. Firstly, this collection is a private initiative: it was initiated by lawyers at the Conseil d'État and the Cour de Cassation. Secondly, the creation of such a collection is based, in Macarel's words, on "the twofold need to order administrative case law properly and to make it known".[34]

In addition to this twofold reminder, it should be emphasised that today's Lebon is not the same as its origins'. Today, it is accepted that the decisions included in the collection are those on file with the Conseil d'État, i.e. those it considers to be of legal interest. The original aim of the compendium's authors was to be exhaustive. The aim was to reproduce all the decisions handed down, presented in chronological order. In his preface to the collection of tables from An VIII to 1839, Lebon explained this in the following terms: "Was it necessary to reproduce all the decisions indiscriminately? Was it necessary to make a selection, to cut out those that were of no practical or scientific interest and those that merely reproduced case law that had already been established? We found it very difficult to make such a selection".[35] It is generally written that the increase in the number of decisions handed down by the Conseil d'État after the First World War led the authors of Lebon to stop

[26] Decree 2002-1064 on the public service for the dissemination of law via the Internet.
[27] Article 1 of the aforementioned decree No. 2002-1064. On this service, see B. Munch, *Le service public de la diffusion du droit*, in *La Semaine Juridique,* suppl. No. 9, 27 February 2017, 87-91.
[28] We borrow these figures from L. Cadiet, *L'open data des décisions de justice*, 26.
[29] O. Dutheillet de Lamothe and P.Y. Martinie, *La diffusion de la jurisprudence administrative*, in *La Semaine Juridique,* suppl. No. 9, 27 February 2017, 64.
[30] *Ibid.*
[31] M.A. Frison-Roche and S. Bories, *La jurisprudence massive*, in *Dalloz,* 1993, 287.
[32] L. Cadiet, *L'open data des décisions de justice,* 191.
[33] On the Recueil Lebon, see P. Cassia, *Une autre manière de dire le droit administratif : le 'fichage' des décisions du Conseil d'État au Recueil Lebon*, in *Revue française de droit administratif,* 2011, 830-847, and C. Maugüé and J.H. Stahl, *Sur la sélection des arrêts du Recueil Lebon*, in *Revue française de droit administratif,* 1998, 768-781.
[34] *Revue critique de législation et de jurisprudence Thémis*, 1819, tome I. Quoted in *Le Conseil d'État. Son histoire à travers les documents d'époque (1799-1974)*, in CNRS, 1974, 279.
[35] Quoted by C. Maugüé and J.H. Stahl*, Sur la sélection des arrêts du Recueil Lebon,* 769.

reproducing all the decisions in full and, therefore, "(...) to abandon their desire for exhaustiveness".[36] Consequently, it may be considered that making all the decisions of the administrative courts available to the public constitutes a return to the sources: it makes it possible to revive the original ambition of the authors of Lebon.

Nonetheless with open data administrative caselaw has grown, this phenomenon is also at the heart of many questions.

3. *Case law under scrutiny*

Growing up, but at what price? Open data raises many questions for administrative caselaw. Among these questions, we can distinguish between those that can be considered technical (3.1.) and those that are more profound and metaphysical (3.2.).

3.1. *Technical issues*

Once established the principle of opening administrative-court rulings to the public, it was time to reflect on the technical issues, which were considered unresolved in the current state of the law.[37] Essentially, there are two main issues, one relating to the dissemination of decisions and one relating to their re-use.

3.1.1. *Dissemination of decisions*

Article L 10 of the Code of Administrative Justice, as amended by the Law of 7 October 2016,[38] provides that the decisions of administrative judges are "made available to the public free of charge, respecting the privacy of the persons concerned";[39] it adds that "this availability is preceded by an analysis of the risk of re-identification of the persons".[40] This article has been deemed not to provide sufficient protection for the personal data contained in court decisions made available to the public, for two main reasons: the first concerns the level of protection; the second concerns the scope of the persons protected.

With regard to the level of protection, we need to go back to what Article L 10 calls an "analysis of the risk of re-identification". As the Senate's rapporteur for the text pointed out, "the risk analysis will not be carried out on a case-by-case basis, but it will constitute a framework to be taken into account when putting court decisions online".[41] This is therefore a sort of general obligation of means,[42] very different from the obligation of result in the system for disseminating administrative documents, as set out in article L 312-1-2 of the Code of relations between the public and the administration. The latter states that administrative documents containing personal data may only be made public "if they have been processed in such a way as to make it impossible to identify the individuals concerned". It is important to emphasise this point: what this article provides for is not simply a "pseudonymisation" of personal data, but a genuine "anonymisation";[43] any information that might make it possible to recognise the person concerned must be removed from the document.

This is the path taken by the law of 23 March 2019 on the 2018-2022 justice programme.[44] This amended Article L 10 of the Code of Administrative Justice to specify that "notwithstanding the first paragraph, the surnames and forenames of the natural persons mentioned in the judgment, when they are parties or third parties, shall be concealed before being made available to the public. Where disclosure would be likely to undermine the security or privacy of these persons or their entourage, any information enabling the parties, third parties, judges and members of the court registry to be identified shall also be withheld". This means deleting surnames, first names and addresses, as well

[36] C. Maugüé and J.H. Stahl, *Sur la sélection des arrêts du Recueil Lebon*, 771.
[37] This only reinforced the feeling that these provisions of the Law of 7 October 2016 had been drafted a little too hastily.
[38] Law No. 2016-1321, cited above.
[39] Paragraph 2 of article L 10.
[40] Paragraph 3 of Article L 10.
[41] C.A. Frassa, *Rapport au nom de la commission mixte paritaire chargée de proposer un texte sur les dispositions restant en discussion du projet de loi pour une République numérique*, Assemblée Nationale, No. 3902, 30 June 2016, 11.
[42] See L. Cadiet, *L'open data des décisions de justice*, 36.
[43] On the distinction between "pseudonymisation" and "anonymisation", see E. Geffray, *L'ouverture des données judiciaires, attentes et initiatives. Anonymisation et pseudonymisation: quelle exigence pour quelle protection*, in *La Semaine Juridique*, suppl. No. 9, 27 February 2017, 41-43. For a comparative perspective, see B. Fauvarque-Cosson, *La diffusion de la jurisprudence en Europe: jusqu'où anonymiser les décisions de justice?*, in *La Semaine Juridique,* suppl. No. 9, 27 February 2017, 56-63.
[44] Law 2019-2022, cited above.

as any other information that could be used to identify the persons concerned, such as their job title or the land registry reference of a plot of land they own.

With regard to the scope of the persons protected, it was considered that the reference in article L 10 to "the persons concerned" should be understood as referring to the persons mentioned in the decision, i.e. the parties and third parties. A relatively unexpected debate then arose as to whether legal professionals, and in particular magistrates, should be concerned by this protection. On the one hand, this debate, far from being closed, has given rise to radically different opinions.[45] Secondly, in the Cadiet report, this was the only issue on which there was no consensus.[46] On this subject, it should be remembered that in French law, it has long been affirmed, notably today in article L 10 of the Code of Administrative Justice, that "judgements are public. They mention the names of the judges who hand them down".[47] In a way, mentioning the names of judges is an extension of the public nature of court rulings.

Furthermore, in its opinion on the draft law on justice programming 2018-2022,[48] the Conseil d'État, meeting in Assembly, expressed a very clear-cut opinion on the subject. Firstly, it felt it was necessary to provide for the possibility of blacking out not only the names of parties and third parties, but also those of judges and court staff: on the one hand, the possibilities of exploiting and cross-referencing digital data could lead to profiling; on the other hand, disclosure of these elements could "undermine the security or privacy of these persons or their entourage".[49] Secondly, for reasons of consistency, this information must be blacked out, not only on the electronic version of the decision, but also on the paper version, which can be obtained from the court registry.[50] Lastly, a decree of the Conseil d'État will be required to specify which information may be blacked out.[51] The Act of 23 March 2019 followed these recommendations of the Conseil d'État in all respects and amended Article L 10 of the Code of Administrative Justice accordingly, which now contains an article worded as follows: "The identity data of magistrates and members of the court registry shall not be re-used for the purpose or effect of evaluating, analysing, comparing or predicting their actual or supposed professional practices. Violation of this prohibition is punishable by the penalties provided for in Articles 226-18, 226-24 and 226-31 of the Criminal Code".

3.1.2. *Reusing decisions*

As we have seen, one of the major challenges of applying open data to the decisions of administrative courts is the re-use of these decisions. It is this re-use by companies exploiting information technologies in the legal field, in order to offer innovative legal services ("*Legaltech*")[52] , that constitutes an opportunity for economic growth.

However, in order to strengthen the protection of personal data, and also to bring French law into line with the European regulation on the protection of personal data adopted on 27 April 2016[53] and which came into force on 25 May 2018, the legislator felt it necessary to carry out a twofold reform. Firstly, to confirm that automated processing of court decisions falls within the scope of the French Data Protection Act of 6 January 1978.[54] Secondly, to specify that such automated processing is only possible insofar as it does not allow the persons concerned to be re-identified. This is precisely the purpose

[45] See A. Debet, *Données personnelles, droit à l'oubli et droit à l'information du public*, in *La Semaine Juridique,* suppl. No. 9, 27 February 2017, 34-40. See also the positions expressed in L. Cadiet, *L'open data des décisions de justice,* 48-49.

[46] "The hearings held and the written contributions received by the taskforce reveal significant differences in the positions and analyses of the contributors on this issue. Nor did the exchanges between the taskforce members on the subject lead to a consensus recommendation" (L. Cadiet, *L'open data des décisions de justice,* 43).

[47] Paragraph 1 of Article L 10.

[48] Conseil d'État, *Advisory opinion on the draft law for justice 2018-2022*, 12 April 2018, No 394535.

[49] Conseil d'État, *Advisory opinion on the draft law for justice 2018-2022*.

[50] *Ibid.*

[51] *Ibid.*

[52] G. Deroubaix, *L'édition juridique et la diffusion du droit*, 92, and L. Cadiet, *L'open data des décisions de justice*, 194-196.

[53] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC. On this text, see in particular. G. Desgens-Pasanau, *La protection des données personnelles. Le RGPD et la nouvelle loi française*, LexisNexis, 2018.

[54] Law No 78-17, relating to information technology, files and civil liberties.

of Article 8 of law of 20 June 2018 on the protection of personal data.[55] This provides that the re-use of public information contained in the judgments mentioned in Article L 10 of the Code of Administrative Justice is possible "provided that the processing implemented has neither the purpose nor the effect of allowing the re-identification of the persons concerned".[56] Beyond these technical clarifications, open data raises more fundamental questions for administrative caselaw.

3.2. *Metaphysical questions*

By definition, all metaphysical questions are dizzying (Who am I? Where am I going?). The two questions that follow are no exception to the rule: the first concerns the concept of administrative caselaw (3.2.1.); the second, the role of the Conseil d'État in writing French administrative law (3.2.2.).

3.2.1. *What is administrative case law?*

The fact that all the decisions handed down by the administrative courts have been made available to the public has prompted us to (re)examine administrative case law and, more specifically, to ask what its content and contours are. This is no small question. It is even less so when we are dealing with a body of law that is often presented as case-law source of law.

Defining caselaw is tricky, because it raises a question of the ontology of law and, as such, may "appear effectively and objectively insoluble".[57] Basically, as the *Vocabulaire juridique*[58] shows, the term "caselaw" can be used either to designate all court decisions, or to refer only to court decisions which lay down a rule relating to the application of the law and which, as such, are called upon to "became precedents". From a theoretical point of view, neither of these meanings seems to have become established: the meaning given to the term "caselaw" has always oscillated between these two definitions.[59] Simply, from a practical point of view, because of the increase in the number of decisions handed down, it has proved easier to apprehend decisions laying down a principle, rather than all court decisions. When René Cassin and Marcel Waline wrote, in the preface to the first edition of the *Grands Arrêts de la Jurisprudence Administrative (GAJA)* - the bible of French administrative law! - that the ambition of such a work is to "present an overview of administrative case law",[60] there can be little doubt that it refers to a narrow conception of case law. It is this tendency of administrative caselaw to focus solely on decisions of principle that open data may curb or even challenge. The role of the Conseil d'État in writing administrative law also appears to be under threat.

3.2.2. *What role does the Conseil d'État play in the development of administrative law?*

The question is a classic one, and the answer is a given: this role is considerable, and the Conseil d'État is in the position of an operator with a historic monopoly. However, the implementation of open data may lead us to question this self-evident fact: this applies both to the drafting of texts and to the production of case law.

When it comes to legislative and regulatory texts that lay down rules of administrative law, the Conseil d'État is never far away, as it is demonstrated, for example, by the drafting of the Code of Relations between the Public and the Administration.[61] From this point of view, the drafting of Article 20 of the Law of 7 October 2016[62] was a strange moment. As we have seen, the Ministry of Justice seems to have been absent from the process of drafting the legislative article laying down the principle of opening up to the public all decisions of administrative judges. In reality, there is another major absentee: the Conseil

[55] Law No. 2018-493*, supra.*
[56] Article 8 of the Law No. 2018-493. This provision stems from a recommendation made by the "Cadiet" report (see above, 41).
[57] M. Deguergue, *Jurisprudence*, in *Dictionnaire de la culture juridique*, D. Alland and S. Rials (eds.) PUF-Quadrige, 2003, 887.
[58] G. Cornu (ed.), *Dictionnaire de la culture juridique*, PUF-Quadrige, 2007, 530.
[59] V.E. Serverin and A. Jeammaud, *Concevoir l'espace jurisprudentiel*, in *Revue trimestrielle de droit civil,* 1993, 91-96 and F. Zenati, *La jurisprudence*, Paris, Dalloz, 1991, 106-107.
[60] M. Long, P. Weil, G. Braibant, P. Delvolvé and B. Genevois, *Les grands arrêts de la jurisprudence administrative*, Paris, Dalloz, 2017, VI.
[61] See O. Renaudie, *La fabuleuse histoire de la fabrique du CRPA. Dits et non-dits*, in *Lectures critiques du Code des relations entre le public et l'administration,* G. Koubi, L. Cluzel-Métayer and W. Tamzini (eds.), Libraire générale de droit et de jurisprudence -Lextenso, 2018, 35-48.
[62] Law No. 2016-1321, cited above.

d'État.

If big and open data constitute a revolution, it is perhaps also for this reason: it is not certain that there are many precedents in this area, i.e. cases in which the legislature has amended the Code of Administrative Justice while keeping the Conseil d'État out of the picture. Dare we say that this is a "data coup"?[63] There is no denying that it provoked a number reactions, including President Stahl's, forìhom "the drafting of the text is laborious and disfigures, by an unsightly bloat, the otherwise noble preliminary provisions of the Code of Administrative Justice (...)".[64] From this point of view, the legislative texts currently under discussion sound like a revival: it is anything but a coincidence that the 2018-2022 Programming and Reform Bill for the Justice System[65] proposes to remove the three paragraphs of Article L 10 from the Preliminary Title of the Code of Administrative Justice, stemming from the "Lemaire" Act,[66] and to include them in a new, less "noble" Article, L 751-1.

As far as administrative case law is concerned, the importance of the Conseil d'État in its production needs no further demonstration. However, here again, open data on the decisions of administrative judges could lead to changes in this area. Two areas need to be distinguished.

The first is symbolic. On the one hand, making all the decisions of the administrative courts available to the public means shifting the focus to the judgments of the administrative courts, which are by far the most numerous. Drowned in the mass, the decisions of the Conseil d'État could lose their importance and centrality. Put it in another way, this would have the effect of challenging the evidence that administrative case law is essentially the one of the Conseil d'État. On the other hand, making all the decisions of the administrative courts available would break with a certain judicial paternalism. This paternalism can be seen in a number of ways, for example in the selection of decisions to be included in Lebon.[67] When Presidents Maugüé and Stahl write that this selection is "(...) without bias or arbitrariness, as long as it is made by the Conseil d'État itself",[68] they are mistaken. Paul Durand puts it perfectly in his famous article on knowledge of legal phenomena: "The necessary selection made by the editor of a collection distorts our knowledge of case law. It depends on intellectual preoccupations, directed towards a specific legal phenomenon, or on the desire, more or less conscious, to guide the formation of the law".[69]

The second area is normative. The reflex that we may have is caselaw of principles emanating from the Conseil d'État is not threatened by the "mass caselaw", insofar as the judgments of the administrative courts have no normative relevance. This would be a mistake. On the one hand, the decisions of the lower courts are of great importance to practitioners and litigants.[70] On the other hand, the decisions of trial judges appear to be mainly marked by the assessment of "cases". However, "the normative aspect of this other dimension of litigation can be understood less by analysing decisions of principle than by analysing the recurrences within these [banal judgments]".[71]

4. *Conclusion*

In conclusion, open data on the decisions of the French administrative courts does indeed seem like a revolution. However, from a purely communication point of view, it is also a return to basics, insofar as this opening up makes it possible to revive the ambition of the creators of the Recueil Lebon to publish all the decisions of the administrative courts.

In addition, two points should be emphasised. The first is that the prospect of a new administrative law, based no longer on a few leading judgments, but on all the

[63] We borrow the expression from A. Basdevant and J.-P. Mignard, *L'empire des données. Essai sur les algorithmes et la loi*, Seuil, Don Quichotte, 2018, 9.
[64] "Open data et jurisprudence", in *Droit administratif*, 2016, No. 11, 10. See also C. Vigouroux, "*Open data et juge administratif*", in *La Semaine Juridique,* suppl. No. 9, 27 February 2017, 29-32.
[65] Bill aforementioned.
[66] Law No. 2016-1321, cited above.
[67] See P. Cassia, *Une autre manière de dire le droit administratif: le 'fichage' des décisions du Conseil d'État au Recueil Lebon*, 830-847.
[68] C. Maugüé and J.H. Stahl, *Sur la sélection des arrêts au Recueil Lebon*, 771.
[69] P. Durant, *La connaissance du phénomène juridique et les tâches de la doctrine moderne en droit privé*, in *Dalloz,* 1956, 16.
[70] See M.A. Frison-Roche and S. Bories, *La jurisprudence massive*, 288.
[71] P. Deumier, *La jurisprudence d'aujourd'hui et de demain (à propos de la loi J 21, du rapport de la Commission de réflexion sur la réforme de la Cour de cassation et de la loi République numérique*), in *Revue trimestrielle de droit civil,* 2017, 604.

decisions handed down by the administrative courts, is nothing more than a promise and, perhaps, a pipe dream. The second point relates to the conclusions of the public rapporteurs.[72] For litigants, listening to the conclusions allows them to "(...) grasp the court's thinking as it develops and to make their final observations before the decision is taken".[73] For the public, reading the opinion helps to better understand the decision and to clarify what is sometimes tacit. This leads us to wonder whether it might not be more appropriate to publish these conclusions on a general basis, in order to establish "real and complete communication between the [administrative judge] and the outside world".[74] Basically, it would be a matter of making these conclusions available in open data,[75] which is both a natural and necessary complement to open data on the decisions of French administrative courts.

[72] On this subject, see I. de Silva, *Les conclusions, fragments du discours contentieux*, *Le dialogue des juges. Mélanges en l'honneur du président Bruno Genevois*, Paris, Dalloz, 2009, 361 and E. Sagalovitsch, *Pour une évolution du statut juridique des conclusions du rapporteur public*, in *Actualité juridique Droit Administratif,* 2018, 607.

[73] ECHR, 13 June 2013, *Marc-Antoine v France*, rec. No. 54984/09, in *Droit administratif*, November 2013, 30, with note by Gweltaz Eveillard.

[74] A. de Laubadère, *Le Conseil d'État et l'incommunicabilité*, in *Études et documents du Conseil d'État,* 1979-1980, No. 31, 18.

[75] On this subject, see E. Sagalovitsch, *Open data des conclusions du rapporteur public: une nouvelle étape est franchie*, in *Actualité juridique Droit Administratif,* 2023, 2305.