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The French Administrative Court's Rulings on Compensation Claims Brought by Jewish Survivors of World War II

RÉMI ROUQUETTE[†]

I. INTRODUCTION

The politics of collaboration during the Nazi occupied Vichy government involved important anti-Semitic components, as much against French Jews (who were stripped of their French nationality before their deportation and extermination) as against foreign Jews: namely, refugees who had fled the anti-Semitic policies of their countries of origin. The Vichy government put in place laws of exclusion from society (Jews were prohibited from employment in most jobs and were subject to employment quotas, etc.) and the aryanization of assets,¹ which plunged the majority of the Jewish population into misery at best or an ignominious death at worst.

Starting with the implementation of the final solution (the Wansee Conference, at which the Nazis decided on the “final solution,” was held on January 20, 1942), the Vichy government used police and gendarmes to arrest massive numbers of Jews, as in the infamous

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1. “Aryanization” refers to the forcible dispossession of Jews of their property, with Jewish-owned businesses to be run by non-Jews, now referred to as “Aryans” in order to place the context of Judaism and its opposite in an allegedly racial, rather than religious, context. See, e.g., Emmanuelle Triol, *L'Aryanisation des biens: L'application judiciaire du statut des Juifs*, in JUGER SOUS VICHY, LE DROIT ANTISÉMITÉ DE VICHY 61–71 (Maurice Olender ed., 1996).

round-up of the *Vel d'Hiv*.² Mostly, but not exclusively, they rounded up those who were foreigners or who retroactively were deprived of French citizenship.³ For logistical reasons, the repression was even worse in the North than in the so-called “free” zone in the South.

When France was liberated, an August 9, 1944 Order put an end to these measures and, generally, to all those which were contrary to republican principles. The annulment of the Vichy “laws” has been deemed to apply retroactively to most of its measures and most notably to its racial legislation. However, there was no special provision for reparations; the survivors received the same compensation as war victims. The restitution of expropriated property was never even complete, which eventually led to compensatory measures in the 1990s.

This cleaning up of the legal order was accompanied by debate among French people initiated by General de Gaulle’s calling the Vichy government “an aside” and rejecting all responsibility for official acts that had gone against republican principles. On the legal level, there was denial of liability: inasmuch as the harms resulted from acts specific to the Vichy government, based on the voided legislation, they were not compensable, whereas the most ordinary harms (e.g., automobile accidents) were compensable. Likewise, appeals to administrative law judges were also rejected for the same reason.

With the progression of historical research and the concomitant lessening of resistance within French society, little by little, the French came to acknowledge that the Vichy government also had

2. The round-up derived its name from the herding of whole families into the *Vélodrome d'hiver*, a Paris indoor track located near the Eiffel Tower. It is to this mass arrest which occurred in July 1942 that President Chirac was referring in the 1995 speech from which M. Rouquette quotes. *See infra*, note 5.

3. On July 22, 1940, Vichy promulgated a law to denaturalize foreign-born citizens who had become naturalized pursuant to France’s law of August 10, 1927, known as the *loi Crémieux*. Vichy created a commission empowered to review the citizenship of each and every citizen naturalized under that law. The 1927 law was used as the benchmark because it had facilitated the citizenship acquisition process and because it was widely believed that most of France’s foreign-born Jewish citizens had been naturalized thereunder. *See* Loi du 22 juillet 1940, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 23, 1940, p. 4567; MICHAEL R. MARRUS & ROBERT O. PAXTON, *VICHY FRANCE AND THE JEWS* 324–25 (1995). *See also generally* Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy’s Suicide in Vichy France*, 50 HASTINGS L.J. 1 (1998).

been France, and it also had been the French State. Two major events marked this revolution in the way the French viewed the Vichy government: Jacques Chirac's 1995 speech about the *Vel d'Hiv*; and the *Papon* trials. To this must be added, although certainly of lesser importance, the case involving the decree that indemnified Jewish orphans, which was the source of the *Lipietz* lawsuit.

In the speech delivered by President Jacques Chirac at the ceremony commemorating the July 1942 round-up, President Jacques Chirac stated:

Fifty-three years ago, on July 16, 1942, 450 French police officers and gendarmes, under the authority of their (French) superiors, complied with Nazi demands.

On that date, in the capital and in the region surrounding Paris, nearly 10,000 Jewish men, women and children were arrested in the early hours of the morning in their homes and taken to police stations. One saw scenes of atrocity: families torn apart, mothers separated from their children, the elderly—some of whom were World War I veterans, who had shed their blood for France—shoved ruthlessly into buses and vans of the Paris police. One would also see some police officers who looked the other way, allowing a few people to escape.

For all those people who were arrested, a long and painful descent into hell had just started. How many among them were never to see their homes and families again? And how many, at that moment, felt betrayed? And what kind of distress did they endure?

France, land of the Enlightenment and of the Rights of Man, a land of welcoming and of refuge, France, on that day, committed an irreparable act. Breaking its promise, it delivered those whom she should have protected to their executioners. Driven to the Velodrome d'hiver, the victims had to endure several days under horrible conditions, about which we know, before being taken to one of the transit camps—Pithiviers or Beaune-la-Rolande—set up by the Vichy authorities.

The horror, however, had only just begun. More round-ups and more arrests were to follow—in Paris and in the provinces. Seventy-four trains would leave for Auschwitz. Seventy-six thousand Jews would be deported from France, never to return.

We continue to owe them a timeless⁴ debt.⁵

The speech of the President of the Republic acknowledged the continuity of the State, even when the most horrible government is in power. The speech was challenged incidentally for this very reason, but the speech was not a juridical act.

The *Papon* trial did add a legal aspect to this subject, and what a dimension: indeed, a criminal one. It was, first of all, a criminal trial that resulted in the only condemnation in our time of a high government official of the Vichy government, an official who had, afterwards under the Fifth Republic, pursued an administrative⁶ and political career.

But Papon, convicted by the *cour d'assises de Bordeaux*, [i.e., the trial court], maintained before the *Conseil d'Etat*⁷ that the government should have rendered him harmless because he had acted in his capacity as a civil servant (which is the common law principle). The *Conseil d'Etat* accepted this reasoning⁸ by agreeing that a part of Papon's mistakes had been committed while he was a civil servant although it found that he had been acting as a private individual for the rest. The legal and political novelty was mainly that: by agreeing with Papon that the French government should indemnify him, the Court was admitting that the current government could be held liable for the wrongdoings committed by the Vichy government.

Moreover, the *Papon* decision followed the *Pelletier* decision.⁹

4. The French word is *imprescriptible*, connoting both timeliness and an act not subject to a statute of limitations.

5. President Jacques Chirac, Remarks delivered at the Ceremony Commemorating *Vel d'Hiv*, the July 1942 Round-Up (July 16, 1995) (on file with author).

6. He was also responsible for the massacres of Algerians in 1962, when he was chief of police in Paris.

7. *The Conseil d'Etat* is the highest administrative court, theoretically with the sole function of quashing lower court decisions, but it also has jurisdiction as a court of first and last resort in connection with certain trials of high-ranking government officials, as was the case for Papon when he sought to obtain indemnification from the French government for the judgment against him.

8. *Conseil d'Etat* [CE Sect.] (High-administrative Court), Apr. 12, 2002, CE Sect., Rec. Lebon 139, concl. Mme Boissard (Fr.), available at http://arianeinternet.conseil-etat.fr/arianeinternet/ViewRoot.asp?View=Html&DMode=Html&PushDirectory=1&Item=1&fond=DCE&Page=1&querytype=advanced&NbEltsPerPages=5&Pluriels=True&dec_id_t=238689.

9. *Conseil d'Etat* [CE Ass.] (High-administrative Court), Apr. 6, 2001, CE Ass., Rec. Lebon 173, concl. M. Austray, available at [http://arianeinternet.conseil-](http://arianeinternet.conseil-etat.fr/arianeinternet/ViewRoot.asp?View=Html&DMode=Html&PushDirectory=1&Item=1&fond=DCE&Page=1&querytype=advanced&NbEltsPerPages=5&Pluriels=True&dec_id_t=238689)

That decision had validated a decree which allotted an indemnity to individuals who had become orphaned during the war due to the deportation of their parents as Jews. But in that case, the *Conseil d'Etat* had stated, albeit in dictum, that no principle of government nonliability existed with respect to acts committed by the Vichy government. The words were clear: "although the decree which was attacked aimed to acknowledge the sufferings endured by the orphans of certain victims of the deportations, it does not change the conditions under which individuals, who believe they are entitled pursuant to it, can file lawsuits against the government." The *Conseil d'Etat* therefore encouraged the survivors to look for government liability based on the anti-Semitic legislation, which Mr. Georges Lipietz was the first to do.

It is in this context that the *Lipietz* lawsuit took place in the early 2000s and instilled immense hope among survivors (Part II); a hope that was to be snuffed out a few years later by the *Hoffman* decision (Part III).

II. THE HOPES OF SURVIVORS

Starting with the *Pelletier* decision, survivors of the dark years¹⁰ had some hope of seeing the government held liable. On the one hand, the idea was rejected that the post-war Republic of France could not be held responsible for the crimes of a government that in fact had come in under the Nazi boot. On the other hand, the question of the statute of limitations appeared to be surmountable.

A. *The Decision of the Administrative Court of Toulouse*

This is exactly what happened, since by its June 6, 2006 judgment the Administrative Court of Toulouse, after having rejected defense arguments based on lack of jurisdiction and the statute of limitations, held the government and the SNCF liable to compensate the plaintiffs, with one third of the damages assigned to the SNCF.

One will note that the case was filed in 2001, but the court ruled only in 2006. This delay was exceptionally long, even for that time,

etat.fr/arianeinternet/ViewRoot.asp?View=Html&DMode=Html&PushDirectUrl=1&Item=1&fond=DCE&Page=1&querytype=advanced&NbEltPerPages=5&Pluriels=True&dec_id_t=224945.

10. The reference in the original to the dark or "black years" is the term commonly used to describe the years of Nazi Occupation. See, e.g., JEAN GUÉHENNO, *JOURNAL DES ANNÉES NOIRES 1940-44* (1947).

which most likely can be explained by a certain discomfort.

B. *Jurisdiction*

The issue of the Administrative Court's jurisdiction was a real consideration only with respect to the SNCF's liability.¹¹ The Administrative Court held that it had jurisdiction due to the fact that the SNCF was acting within the scope of governmental authority when it transported Jews to the internment camps. The Administrative Court therefore applied the normal legal criterion in its reasoning. Subsequently, the Administrative Court of Appeals, and later the *Conseil d'Etat*,¹² hearing, respectively, the appeals of the SNCF and the *Lipietz* plaintiffs, decided to set aside this legal criterion, deeming that only the government truly had acted within the scope of governmental authority, as if the SNCF had had no autonomy [and that, therefore, the administrative courts lacked jurisdiction over the SNCF].

The *Conseil d'Etat* deigned no more than to decide the case as an ordinary proceeding, in contrast to the far more careful attention it had paid to the appeal for indemnification previously brought by Papon against the government.

Most of all, the *Conseil d'Etat* reviewed the assessment of the facts which governed jurisdiction in a strange manner. It clearly indicated that, as far as it was concerned, the SNCF was not liable and that only the government was at fault. This ruling obviously discouraged other lawsuits. Above all, one may criticize the Court, which was supposed to decide only the appellate trial, for plunging into the heart of the initial trial and thereby usurping the very authority that it just declared to belong to the judge for criminal law matters.

What is strange in this decision is not the rule of law that was applied. The latter did not come as a surprise, and it was what the petitioners consistently invoked (contrary to what the SNCF argued, which was that the interned individuals were ordinary passengers

11. The SNCF, a government-owned company before the war, had become a government-owned industrial and commercial company in 1982; as with all institutions of this kind, private business law applies to it, public (i.e., administrative) law becoming applicable when issues of governmental authority arise.

12. Conseil d'Etat [CE] (High-administrative Court), Dec. 21, 2007, CE, Rec. Lebon 139, concl. Mme L. et autres (Fr.), available at <http://www.conseil-etat.fr/cde/node.php?articleid=823>.

using industrial or commercial services). The surprise is that the *Conseil d'Etat* denied that the SNCF had been acting within the scope of governmental authority on the basis of a lapidary analysis, following a somewhat summary opinion,¹³ without questioning whatsoever the theoretical content, not even the concrete dimension of the nature of acting within the scope of governmental authority. Thus, under its reasoning, the issuance of a certification of shipworthiness by a private company would come within the Administrative Court's jurisdiction, since in such a case conduct within the scope of governmental authority would exist,¹⁴ whereas the transporting of human beings in sealed cattlecars is not evidence of such conduct.

Actually, the *Conseil d'Etat* shirked its responsibility, deeming that it should share the task of handling the last lawsuits of the Second World War with the criminal law courts. In reality, one should not look for a legal reason in a solution that at heart was just an opportunistic decision.

The analysis of the SNCF's role in fact was completely erroneous. The report, kept virtually confidential, commissioned by the SNCF and submitted by the researcher, Mr. Bachelier, revealed quite clearly that the SNCF was zealous and did not even abide by the barely minimal requirements that Vichy had ordered [for the train transport towards the camps] when it even refused to provide water and access to toilets and limited humanitarian stops because the Red Cross interference slowed down the trains, etc. Moreover, the SNCF required payment for its services. Bachelier's report largely dismantled the myth of the SNCF as having been part and parcel of the French Resistance. It showed that the majority of the SNCF leadership collaborated with the Nazis and that the railway workers who were part of the French Resistance opposed the SNCF. By some sort of sleight of hand, the Administrative Court of Appeals of Bordeaux and the *Conseil d'Etat* deleted the SNCF's responsibility. Certainly on a formal level, these courts ruled only that they had no

13. The government commissioner, who has since become a *rapporteur public*, is to provide the administrative courts with a detailed opinion concerning the trial.

14. *SA Bureau Véritas et autres*, Nos. 33803 & 34462, Conseil d'Etat [CE] (High-administrative Court), Mar. 23, 1983, concl. M. Denoix de Saint Marc, available at http://arianeinternet.conseil-etat.fr/arianeinternet/ViewRoot.asp?View=Html&DMode=Html&PushDirectUrl=1&Item=1&fond=DCE&Page=1&querytype=advanced&NbEltPerPages=5&Pluriels=True&dec_id_t=33803.

jurisdiction (which however was nevertheless largely exercised against the SNCF) under the rationale that according to them only the State was liable. It should be emphasized that the chances of success in the criminal law courts are difficult to assess: one person, Mr. Schaechter,¹⁵ failed in the Paris Court of Appeals, but well before the SNCF's specific role had been revealed by the Bachelier report.

C. *The Statute of Limitations*

The statute of limitations had been set aside by the Administrative Court of Toulouse. With respect to the government, that had been very easy, the statute of limitations having been argued in a most irregular manner, probably on the order of higher ups (President Chirac was still in power), thereby allowing the government to respect the President's words without giving the impression of deliberately losing the lawsuit. But the Administrative Court of Toulouse did not abide by this procedural aspect. It set aside the statute of limitations by reasoning that it had not been possible for the plaintiffs to act before the April 12, 2002 *Papon* decision, the ruling which had, as previously mentioned, assigned liability for the first and last time for acts of the Vichy government. For the SNCF, the Administrative Court of Toulouse considered that the information needed to establish its liability had been known only after the beginning of 1996, the year the aforementioned Bachelier Report was completed.

D. *Reaction*

Once the Administrative Court of Toulouse's decision became public, it caused a huge amount of debate in the media and on the Internet. By contrast, the government remained totally silent. French legal journals also made very little commentary on the decision. Apart from a few anti-Semitic attacks (the majority of which were implicit rather than explicit because French law prohibits them), the decision was criticized for a whole host of reasons. Some objected to the trial for having occurred so long after the relevant events had taken place, forgetting that any lawsuit had been strictly impossible before. Others objected to a lawsuit against the Republic, rehashing

15. Mr. Schaechter, recently deceased, had discovered the bills that the SNCF had sent to the government for payment for the transportation of Jews, much to the displeasure of certain historians who were upset that a person not formally trained had accomplished the research that they should have done.

old arguments, such as Vichy was just “an aside,” deeming that all of the harm had come from the Nazis. Others, very numerous, maintained a view, which later on influenced other administrative courts, that the compensation should be symbolic only, which seems to us to be a form of disguised anti-Semitism that stems from the myth of Jewish cupidity. The fact that one almost never hears this type of criticism in situations where it would make sense (for example in defamation suits) only reinforces this analysis.¹⁶

Sometimes, solely the verdict against the SNCF was disputed, rehashing the myth of the State's¹⁷ making the SNCF into an institution of the French Resistance, when in fact it was essentially, if not exclusively, on the side of collaboration, except for the few instances where railway workers sided with the Resistance and against the SNCF management of the time. The Jewish community, curiously, strongly defended the SNCF, which raised suspicions that this defense was linked to the SNCF's monetary contributions to the remembrance of the Shoah. Let us also add that a part of the Jewish community criticized the fact that individuals had brought lawsuits on their own, even though many people who were persecuted based on the racially discriminatory laws never considered themselves to be Jewish because they were atheists or had converted to another religion long before. Finally, one must signal that part of the public believed, in part because of the false information published in newspapers, that the trial had been brought in Toulouse by Mr. Alain Lipietz, then well known as a member of the European Union's Green Party, when in fact, like his sisters and his mother, he merely succeeded in interest to his father, following the latter's death in 2003.

Elsewhere, from the victims' point of view, the decision of the Administrative Court of Toulouse created a great sense of hope. More than a thousand petitions were filed with the French administrative courts by survivors or their relatives, represented by at least fifteen lawyers.¹⁸ The victims had even more hope inasmuch as

16. This argument is not without analogy to those put forth by sexists who blame women who have been raped for asking the courts to require that the rapists compensate them.

17. The myth is illustrated by René Clément's movie *La Bataille du Rail* and Paul Durand's hagiographic book *la SNCF pendant la guerre*.

18. Let it be known that the author of this paper, who represented the jointly interested *Lipietz* parties, never took on another case of this kind but provided

the government had not appealed the Toulouse decision in favor of Lipietz (only the SNCF had appealed). Unfortunately, the new leadership of the French State changed the lay of the land. President Sarkozy, hostile to repentance and advised by Mr. Klarsfeld, himself very hostile to the Lipietz family lawsuit, clearly gave instructions to state authorities to systematically defend all of the appeals, which was done.

III. THE CRUSHING OF HOPE

There is a procedure in the administrative courts and the administrative courts of appeal that allows them to request an opinion from the *Conseil d'Etat*. This system, disputable in its theory because it is contrary to their duty to judge, generally is used only for deciding technical questions, never for assessing facts but always for legal issues.

However, the Administrative Court of Paris chose this technique in its *Hoffman* opinion and referred a question to the *Conseil d'Etat* on the issue of the statute of limitations and on the possibility of a solely symbolic compensation for the injury. Curiously enough, the Administrative Court of Paris did not receive the answer to the questions it asked but did receive an answer to a question it did not ask.

Indeed, in the February 16, 2009 opinion Number 315499,¹⁹ the *Conseil d'Etat* rendered a decision whereby the issue of the statute of limitations and that of the starting point for the running of the statute for the compensation action due to the Vichy government's participation in a crime against humanity were moot because, supposedly, . . . all the wrongs had been compensated.

A simple reading of the list established by the government and cited by the *Conseil d'Etat* of the people who had been compensated shows that this list is completely inaccurate. Sub-categories of victims did not receive anything if they did not fall into any of the foreseen cases, either because of their nationality or because of their relationship to those who died or for many other reasons. Except perhaps for that which concerns the restitution of assets (which is not

assistance to colleagues who represented others in similar cases without charging for these services.

19. This decree will be published in Lebon.

at issue in the current trials), not one victim received a sum comparable to that which he or she would have received had he or she been a victim of any other violation of law, and not one received the same amount as what Papon's victims received.

Moreover, if one reads any administrative law textbook, one would know that, when reparations are granted by the administration, the courts reserve the power and the duty to assess the damages by simply deducting the indemnities already paid.

The ruling of the *Conseil d'Etat* is all the more surprising inasmuch as it does not correspond exactly to the questions the Administrative Court of Paris posed, which concerned the allegations of harm that could be compensated and the deductibility of the amounts paid within the framework of joint claims. The response is even more astonishing given that the government never maintained that all the wrongs had been indemnified.

By declaring without the individual verification that normally comes from the administrative courts that all of the victims had been completely indemnified for all past wrongs, when this was not true, the *Conseil d'Etat* risked encouraging anti-Semitic stereotypes relating to money by creating the impression that they are partly based on truth.

Of all the possible legal bases for a ruling unfavorable to the victims, the *Conseil d'Etat* therefore chose the worst one. Granted, it seems to partially make up for it by tinkering with the theme of symbolic reparation, since it considers that "reparations for the exceptional suffering endured by the people who were victims of the anti-Semitic persecution . . . call for the solemn acknowledgment of the wrongs to which these people were collectively subjected." To begin with, this would have been more convincing if the *Conseil d'Etat* had commented on its own role under the Vichy government and its refusal after the war to apply common law principles to the victims of Vichy.

But most of all, lumping the injuries of each individual into a collective harm is to deny the particularity of each victim's situation, especially of those who did not identify with the Jewish community or its institutions. However, this is what the *Conseil d'Etat* did by pretending that the individual wrongs had already been compensated.

IV. SOME HOPES?

Is it permissible to despair? The courts still are hearing cases. The *Conseil d'Etat* as a judge of cassation theoretically maintains independence; nevertheless, the outlook is unfavorable.

A. *The Administrative Law Court*

The lower courts which adjudicate issues of fact and law (the administrative law courts and the administrative courts of appeal)²⁰ are not bound by the ruling on a new point of law made by the *Conseil d'Etat*. They are even less bound by it inasmuch as the manner of such a decision, already questionable in its principle, becomes even more so because the high court, instead of issuing an abstract opinion on a point of law as the law requires, engages in determinations of fact concerning who was indemnified or not, even though the referral has been received with respect to a single case, such that the court is incapable from a sheerly practical standpoint of identifying all existing situations.

Nothing in the law prevents the administrative courts from fully exercising their judicial powers in all the numerous ongoing lawsuits. Nor does anything in fact prevent them from doing so, because how would the *Conseil d'Etat* nullify decrees while taking into account harms that were not compensated, or were partially compensated, without overstepping its quashing or cassation function and intruding on the independent rulings made by the lower courts?

There is only a faint ray of hope given that the courts rarely stray from the case law of the *Conseil d'Etat*.

B. *The Conseil d'Etat, Judge of Cassation*²¹

Is there reason to hope that the *Conseil d'Etat* in its quashing or cassation role will not adhere to its opinion given when sitting as a court of referral?²² It is highly improbable because it has never yet occurred, but legally it is possible. The only hope is that it would not be conceivable that the formation of the cassation tribunal would include a judge who had contributed to the February 16, 2009

20. The term used in French is *juridictions du fond*, which, in contrast to *de cassation*, hear only issues of law.

21. This qualification of "judge of cassation" is given here to distinguish the function we saw earlier that the *Conseil d'Etat* assumed in the *Hoffman* case, in which the court had been asked to render a legal opinion on a new point of law.

22. *See id.*

decision.

C. *The European Court of Human Rights*

Legitimate hopes were crushed. It was hoped that the Strasbourg court would hear issues related to the right to a fair trial and to property rights. More particularly, it was reasonable to think that the *Conseil d'Etat's* decision largely disregards the principle that justice requires complete indemnification of harms.

V. CONCLUSION

With the *Pelletier* decision, the French *Conseil d'Etat* finally had agreed to apply common law to liability for the acts of the Vichy government. The *Conseil d'Etat* had opened the door, only to slam it shut a few years later with the *Hoffman* opinion. The result is upsetting, despite beautiful theoretical rulings. Indeed, besides Georges Lipietz, the only person who benefitted from the partial correction of the law was Papon, half of whose civil liability was paid by the State.

As for the European Court of Strasbourg, it recently²³ dismissed the claims for compensation of those who were deported on the grounds that even the moral wrong has been repaired, which is entirely false. It therefore affirmed the *Conseil d'Etat's* decision.

Translated by Alisha L. Jacobsen, as revised by Vivian Grosswald Curran and with footnotes in addition to those of the author supplied by Vivian Grosswald Curran.

23. Lipietz v. France, E.Ct.H.R., (16 Dec. 2009, No. 49637/09), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=859949&portal=hbkm&source=externalbydocnumber&tabl>.