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# Doctrinal Reflection and Administrative Case Law: What Interaction?

By Siyouri Hind

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*Keywords:* *doctrine - contentious discussion – role - juge- jurisprudence- administrative law- lawyer- royal commissioners of law and right.*

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## I. Introduction

In order to shed light on the role of doctrine before the administrative jurisdiction, attention should be paid to the place that doctrinal opinions may occupy in the case law rendered by judges, to the participation of members of administrative jurisdictions in scientific activities organized by the university and the links that the Lawyers have with the University.[1]

To measure the impact of the presence of doctrinal reflection in the contentious debate is to put the focal point on the influence of the doctrine and on the look at it and by it at the time of the registration of a request to the litigation secretariat until the moment of the reading of the judgment, it is to invoke only the actors of this contentious discussion : the court formation, the appointed lawyer(s) and the Royal Commissioner for Law and right. It is about doctrine in the classic sense of the term, that is to say the ideal corpus produced by academics, researchers and practitioners of public law : treatises, books, thesis, articles, studies, various communications, etc. in other words, neither is it the doctrinal work of the royal commissioners of law and right, because there is both a methodological doctrine of the commissioners and several conclusions considered to be substantially doctrinal work nor of the organic doctrine crystallized in particular in the opinions of the other members of the administrative jurisdiction which relates more to considerations of administrative or jurisprudential policy, nor to the doctrine, also more methodological of the lawyers in the exposure of their means, nor finally to the administrative doctrine. This is ultimately what has been designated by some Commissioners "*the literature on the subject*".[2]

What place does university doctrine occupy in the work of each of these actors in the contentious debate? It is to this concrete question that this contribution proposes to answer in a pragmatic way, by addressing in a first paragraph the role of the doctrine in the drawing of the contours of the jurisdictional debate(II) and by deciphering in the second the nature of its presence in the contentious discussion(III).

## II. Doctrine and Structure of the Jurisdictional Debate

The doctrine guides, frames and structures the jurisdictional work of administrative courts and court officers. His work consists of a multidimensional reflection on the different elements and stages of judicial work via several scientific methods, in particular: criticism, synthesis, analysis, identification of the origins, definition and purposes of legislation or of a legal decision. In this sense, recourse to the doctrinal corpus of ideas seems to have a structuring function(I) in all stages of the jurisdictional debate. Consequently, the illustration of this function by practical cases will undoubtedly enrich the remarks of this paragraph (2).

### *a) Structuring function of the doctrine*

The purpose of this paragraph is to analyze the function of doctrine via the examination of the recourse of the actors of the contentious debate to doctrinal works (1) before seeing whether doctrinal reflection could contribute to innovation and stimulate change( 2).

#### i. *Recourse to doctrinal works*

Doctrine is defined by Bonnecase as "*the state of conceptions of law and the set of positive solutions, as reflected in the works of legal writers*".[3] The author puts forward a simple, descriptive, rather modest and discreet, even unknown, but so important aspect of the doctrine. The role of doctrine therefore seems to culminate insofar as it presents a legal construction,

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[1] BRIARD, F.-H., "The doctrine and contentious debate before the Council of State". In: MARYVONNE, H-Th. (dir), Faculties of law inspiring law? Toulouse University Press 1 Capitole, 2005, pp. 97-106.

[2] Conclusions BONICHOT, under C.S. Ass. April 14, 1995, p. 181.

[3] See MARYVONNE, H-Th. (dir), Faculties of law inspiring law? : Works of the IFR, Toulouse University Press 1 Capitole, Mar. 13, 2018.

defines it, replaces it in all legal relationships, indicates its limits, the conditions of implementation, specifies its effects on the life of societies and makes a systematic, analytical, critical and comparative examination of it.[4]

The primary (*essential*) instruments used by the Royal Commissioner for Law and right or the lawyer, in their daily work, often do not emanate from doctrine. Thus, analysis of the legal rule, verification of qualifications, examination of the existence of a distortion, legal logic, explanation, identification of precedents, all these activities are not often done at first examination by appealing to the doctrine. However, this does not in any way exclude the recourse of each to the doctrine sometimes without really realizing it. Everyone can rely on the doctrinal reflection at a certain moment of the instruction for the reframing of the debate and the return to the source or to the composition of certain legal concepts. Thus, courses and treatises on litigation or administrative law, thesis, conference proceedings, articles, commentaries on case law, legal dictionaries, publicist doctrine, and even better civil doctrine, form the literature often consulted by those involved in the litigation debate. Sometimes we also appeal to non-legal doctrine in the case of sociological study.[5]

A book, an article, a meticulously elaborated synthesis contribute to the structuring of thought, to the refreshing of legal memory and to putting positive law into perspective. They help the lawyer to build his means for the defense before the administrative jurisdiction, the commissioner to think about the law and also guide the decision of the judge. The work that each of them does within the framework of a given case is a little as if each time you take a stroll in a new and original place, strollers examine, each in turn, the height and geography of their journey before deciding on the chosen destination.[6]

President Guy Braibant had spoken of the tree and the forest: when examining a tree (the file) and discussing its growth (*the judgment*), it is essential to pay a visit to the forest (jurisprudence and legal framework) in which it is planted, and to identify the species to which it belongs.[7] It is prior to any activity of persuading in a given sense, of drawing up conclusions of a certain nature that these actors in contentious discussion always feel a certain need to clearly define their position in time and in the space of the contentious debate. This is an inevitable, legitimate and constructive reflex; it is only the doctrinal work understood in the broad sense that can allow the satisfaction of this need, in particular in the case where neither the examination of the standards in force nor the research of jurisprudence ensure this overview, nor grant this position making it possible to find one's way or to guarantee a certain legal security. This approach is used by all the actors in the litigation process: the Lawyer for drafting his pleas, the rapporteur for drafting his note, the Royal Commissioner for Law and right for drawing up his conclusions. The doctrine directs, frames and structures the jurisdictional work and that of the auxiliaries of justice. It is a perpetual source used to inform and enlighten the judge on the way in which his case law is perceived as well as on his understanding, approval or criticism.[8] Nevertheless, it also fulfills, precisely through its critical role, a function of innovation and encouragement of change.

ii. *Doctrinal reflection: tool for innovation and incitement to change*

The jurist, maker of doctrine, is supposed to be a mobilizing agent to stimulate the process of law reform unless he abandons his traditional garb and adopts other arsenals, thereby departing from his wisdom and his proverbial prudence. Recourse to the law generally takes place only after the entry into force of a radical change on the occasion of the use of other means, especially since we cannot act on people's mentalities by dint of ukases. We thus enter fully into the relationship between the jurist and the decision-maker of a reform of the law. The contribution of the doctrine in arguments and in an ideal corpus and the resulting debate with other jurists can tend to the improvement of given structures, institutions or situations. Jacques Chevallier argued in his summary report[9] that it is up to academics to be, more than "*system makers*", "system renovators".

However, legal reform is not decided by jurists whose main mission is to inform decision-makers on the path or paths to take in order to carry out such a reform and to opt for the choices they deem most appropriate. Jurists must fully play their role in this area, and on their part decision-makers are expected to listen to the doctrine. The latter can, under the effect of certain constraints, grant little interest to the arguments and ideas of jurists who are often freer in the formulation of their opinions and their proposals. However, decision-makers should not resist positive change that does not serve their own interests. Moreover, in the case where the decision-maker and the jurist are presented by one and the same person, the reform triggered by the decision-maker would be based on the doctrinal ideas provided by him as a jurist, which does not rule out any possibility of to forge a system or legal norms cut off

[4] BRAUDO, S., "Definition of Doctrine": Legal Dictionary. URL : https://www.dictionnaire-juridique.com/definition/doctrine.php

[5] MARYVONNE, H-TH. (dir.), Faculties of Law inspiring law, op.cit.

[6] Ibid.

[7] BRIARD, F.-H., "The Doctrine and the contentious debate before the Council of State", op.cit., pp. 97-106.

[8] On the perception by the "perplexed" doctrine of the uncertain scope of a judgment: Conclusion Bergeal under CE S. March 27, 1998, La Nantaise and L'angevine Reunited, p. 109. Quoted in BRIARD, F.-H., "The Doctrine and the contentious debate before the Council of State", op.cit., pp. 97-106.

[9] CHEVALLIER, J., "Summary report": In The doctrine in administrative law, French Associations of Administrative Law (FAAL), n°3, Litec, 2010, pp. 235-246.

from reality, because their realization would be done in a vacuum that would have ruled out any fruitful dialogue or fruitful debate. This is the reason why the following will examine the nature of the relationships established between the doctrine and the political decision-maker (a), the doctrine and the legislator (b) and the doctrine and the administration (c).

a. *Doctrine and political decision-maker*

The political decision-maker is the one who is in the sphere of power either of the State or of any form of organization and who can bring about improvements in terms of the law to an activity or to a structure of society.[10]. The achievement of this mission is dependent on the arguments and ideas that it brings together and which would justify its choices and positions. Doctrine also participates in the debate to assess certain orientations of the political decision-maker, or to suggest other alternatives. The jurist certainly does not have the possibility of deciding, nevertheless, he is not deprived of the power to inform, to propose and even to influence the decision maker. The latter is in fact the detonator of the last word, since it is to him that the command of the legal habit sought returns which does not often go in the same direction desired by the political decision-maker, in particular when the jurist is not on the same side as him.

The jurist is indeed supposed to be neutral and to focus on the scientific study of certain questions which will have to be the subject of a reform. However, it is not possible to deprive him of listening to the society in which he lives and develops. The jurist cannot be forced to be completely impassive if not insensitive to the evils that shake the environment to which he belongs. It is obvious that the political decision-maker, obsessed with his interests or those of his group, will tend to base himself on a doctrine made by people having the same orientations or accommodating jurists whose ultimate objective is only to achieve material interests. However, a doctrine on command, occasional and dependent can in no way be perceived as admissible or even as scientific. To conclude, it should be noted that the political decision-maker must be receptive to doctrinal tendencies in order to ensure the acceptability by all or at least by the majority of the population concerned of any change in the law, knowing full well that these doctrinal tendencies reflect the needs and expectations of such a population.

b. *Doctrine and legislator*

Once his decision has been taken, the political decision-maker will entrust, if he himself does not have the power to legislate, this mission to the competent bodies or authorities (parliament or other legislative institutions). In this case, the jurist will have the opportunity to play an important role in the legal ordering. Its doctrine may influence the general debate engaged with the other stakeholders for the purpose of drafting or amending legislative texts. From this perspective, it has the possibility of influencing the modification or reform being established either directly or via representatives of currents of opinion and groups with the same doctrinal postures. This is unquestionably only achievable within the framework of the consecration of the principles of democracy. Thus, divergent or rebellious doctrinal ideas cannot find their place or be admitted in an authoritarian regime. In some cases, the legislator sees himself listening to the doctrine and even shows a certain sensitivity with regard to its critical reflection. The arguments put forward by it can represent strong reasons sometimes pushing it to invalidate certain decisions of the case law which can be explained by a lack of audacity. This is the case, for example, of certain decisions such as those which had reduced to nothing the possibilities of using the exception of illegality [11] against administrative acts or those opposing foreclosure to applicants who brought actions before a court incompetent.[12]

c. *Doctrine et administration*

As an instrument of the executive, it is obvious that the administration plays, through civil servants, an important role in the creation of legal norms. Nevertheless, these jurists sometimes lack competence since they are not specialized. To this end, the public authorities issue administrative regulations and other circulars which form their own doctrine (tax administration doctrine, for example).[13] Having reasons other than those of the legislator, these authorities sometimes seem to make an inaccurate interpretation of a reform in force. The "administrative doctrine" can also attribute to itself a function of revealing the discrepancy between the reform it is responsible for implementing and the realities or interests envisaged by the administration. In this situation, the jurist, who contributes to the production of works critical of the situation or the institution in place, will be able to enlighten public opinion and decision-makers on the real scope of the reform  The doctrine can thus play the role of guide, with the aim of suggesting other adjustments likely to improve the changes that have occurred. It is therefore supposed to be present at all times in order to reveal any deviation harmful to the

[10] BOUDAHRAIN, A., "The Role of Doctrine in Law Reform", In: Proceedings of the symposium on "Law and practice in Morocco", Sidi Mohamed Ben Abdallah University, FSJES Fès, 1995, pp.63-72.

[11] The exception of illegality is the legal remedy by which a party to the dispute asks the judge, during the proceedings, to find the illegality of an act and to declare it inapplicable in the case.

[12] ROUSSET, M., "Retrospective and prospective, the dynamics of administrative litigation", op.cit., pp.368-369.

[13] BOUDAHRAIN, A., "The Role of Doctrine in Law Reform", op.cit., pp.63-72.

general interest and to guide public decision-making by taking into account the realities of the context.[14]

## III. Perception of Case Law by the Doctrine

The doctrinal work undoubtedly constitutes a means of structuring and orienting the jurisdictional process by means of several approaches aimed in particular at examining the source and basis of an administrative judge's decision, establishing a definition, identifying a interpretation of case law, to plead for more protection of the rights of citizens or to demonstrate their enthusiasm for case law. In this context, it seems judicious to elucidate what is put forward via the presentation of certain practical cases illustrating each point.

*a) Identify the source and the basis of a decision of the administrative judge*

The decision of the Court of Appeal of Rabat n°522 of 16/4/2008 relating to the judgment of the administrative court of Meknes of 24/11/2005 annulled the decision of the disciplinary council [15] of the rural commune "Ain Louh" under which the work of Mrs. Aberbach, agent of an additional service of the municipality, was suspended and she was deprived of her remuneration and her allowances for a period of three days from 5/10/2004 to 7/ 10/2004 following an argument with his colleague at work.

In fact, Ms Aberbach did not become aware of this decision until 6/10/2004, which constitutes an overrun of Article 3 of the law on disciplinary procedure. Moreover, the administrative decision only referred to the minutes of the disciplinary council without, however, recalling the reasons justifying it. It is therefore tainted with an excess of power due to a defect of form.

In this regard, Mohamed Laaraj[16] analyzed the judge's decision concerning the right to be informed of the reasons for the administrative decision and its conditions of validity, in particular in the case mentioned above where the administration relied on a decision or a document not relating to the case, something which constitutes an insufficient reason in the eyes of the administrative judge. Thus, alluding to the remarks related in the minutes of the disciplinary council and to those of the investigator cannot be a sufficient means of justification. Indeed, a decision that is not reasoned is considered illegitimate for the administrative judge.[17]

In noting the source of this decision, Mohamed Laaraj underlined that it is a rule which was adopted by the French legislator in the law of July 11, 1979 and which stipulated in its article 3 that the justification is supposed to expose the legal considerations and realistic basis for the decision. This means that justification on grounds other than those relating to the matter in dispute is not valid.

a. *Establish a definition*

We note in this respect the Jaafar Hassoun case against the Ministry of Justice where the judge explicitly cited the doctrine to define the notion of "*the non-existent administrative decision*". The Claimant worked as an exceptional judge and president of the Marrakech administrative court. He was also a member of the Supreme Court for the 2007-2010 term. However, he was surprised on August 19, 2010 when the Minister of Justice took the decision to suspend his representation, judicial and administrative functions, to send him back to the Superior Council of the Judiciary as a disciplinary council while publishing this decision in the audiovisual media, to freeze his salary and prevent him from administering and managing the administrative court of Marrakech. The Applicant explains that the said decision has no basis in fact or law, given that there is no legal text which allows the Minister of Justice to take such a decision against the members of the Superior Council of the Judiciary while confirming that it is a non-existent decision, because article 62 of the Statutes of the Magistrates only concerns the cases in which the judges commit prevarications during the exercise of their judicial functions and does not concern the judge who holds a post of delegate in a constitutional institution.[18]

In replying, the Minister of Justice requested the declaration of the inadmissibility of the request, since it concerns a simple preventive measure which does not have the properties of an administrative decision that can be the subject of an action for annulment [19]:

> "*Whereas the doctrine and the administrative jurisdiction define the non-existent administrative decision as any non-existent decision at the material and legal level and which cannot generate legal effects, and this on the basis of several criteria including usurpation of power, detachment whole of the public service, the absence of one of the pillars of the decision and the existence of an imperfection tainting the legitimacy; that from judicial case law, the non-existence manifests itself in some cases such as the issuance of the decision by an individual or a private body not enjoying any legal authorization or the said authorization no longer exists,*

[14] BOUDAHRAIN, A., "The Role of Doctrine in Law Reform", op.cit., pp.63-72.
[15] Decision 159 dated 30/09/2004.
[16] LAARAJ, M., Freedoms and fundamental rights in the applications of administrative justice, REMALD, Coll. "Textbooks and University Works", n°117, 2018, p. 112. (In Arabic)
[17] See comment by LAARAJ, M. on the decision of the Court of Appeal of Rabat n°522-16/4/2008 concerning the right to be informed of the reasons for administrative decisions, ibid.
[18] Examples of questionable judgments published and commented on by the Administrative Court: Examples of questionable judgments published and commented on by the Administrative Court: Law and Justice, Internal document/quantitative and analytical report OTPJ.
[19] Judgment 3318 - Case Jaafar HASSOUN vis-à-vis the Ministry of Justice, Administrative Court of Rabat Division of Appeals of Full Jurisdiction, Judgment n° 3318 Dated 15/11/2010, File n° 303/5/2010.

*the usurpation of the competence of the legislative or judicial power or the issuance of the decision by a civil servant or a body not enjoying any legal authorization to issue it*."

In this regard, it can be seen that the judge expressly and clearly referred to the definition of the concept of "*the non-existent administrative decision*" as it has been developed by the doctrine. Thus, when reading several doctrinal works, it is appropriate to emphasize that the authors proceed to clarify and define certain concepts[20] in order to properly base their comments, their criticisms, or their interpretations. These definitions are sometimes used by the judge to justify his decisions.

b. *Provide an interpretation of case law*

The interpretation made by Hassan Ouazzani Chahdi[21] to the decision of the administrative court of Rabat of 12/10/2004 is revealing.[22] Professor Ouazzani considered faulty the silence and negligence of the administration, which had not undertaken the necessary checks following the complaint sent by the applicant's father to the Minister of National Education so that an investigation could be opened into the falsification of his daughter's exam paper and seeing that the director of the Academy did not take any action on his request. On this subject, emphasizing that there is not yet a text obliging the administration to respond systematically to citizens' letters, the author considers that the court thereby wanted to give a "signal" to the administration by general so that in future letters or complaints from individuals do not go unanswered.

c. *Plead for more protection of the rights of citizens*

A few years before independence, jurits demanded the introduction of recourse for excess of power. In a report presented to the Congress of Lawyers of Morocco in 1953, Busquet insisted on "*the need for the institution in Morocco of an administrative jurisdiction of annulment and interpretation*".[23]

Indeed, the four decades of the protectorate were marked by doctrinal manifestations aspiring to the establishment of a remedy for excess of power with the aim of protecting the citizen against the abuses and errors of the administration. Thus, to compensate for the emptiness widely decried at the time, Morocco equipped itself from the second year of its independence with recourse for excess of power[24] in order to guarantee better protection of the rights and freedoms of the administered within the framework of the state of law.

d. *Show enthusiasm for case law*

The president of the administrative court of Meknes issued two ordinances, the first concerns the Attaoui[25] case and the second relates to the Ismaili[26] case, issuing a personal penalty against the administrative official who objected without any reason to the execution of the decisions taken In both cases, it is respectively the refusal to reinstate an illegally dismissed municipal agent and the refusal to return a property wrongfully occupied. Indeed Benabdallah considers in this regard that:

*"If a condemnation must be pronounced for non-performance, it must not be against the administration, because it would then be the taxpayer who would pay it, but against the person responsible for it who must know in advance that, by virtue of the law, if he wants to afford to oppose in one way or another the execution of a court decision with the authority of res judicata, he will have to pay for this luxury out of his own money and not on behalf of the public treasury, i.e. citizens and litigants*"[27].

This orientation was strongly applauded by the doctrine. M'hamed El Antari noticed that:

"*This last means seemed the most effective because the real person responsible for the non-execution of court decisions is the natural person who presides over the destiny of the legal person. The responsibility of the natural person is entire in case of non-performance unless the general interest opposes the realization of this one*."[28]

The doctrine guides, frames and structures the jurisdictional work of the administrative courts and the auxiliaries of justice. It is thus a permanent source of information which allows these courts to know how its case law is perceived, understood, felt, approved or criticized.[29] But the doctrine also has, precisely through its critical role, a function of innovation and incitement to change, a function that pushes the observer to wonder about the role that the doctrinal corpus could play in the contentious debate.

[20] Definition of "discretionary power". In: SAYEGH, A., The Issue of the Execution of Administrative Judgments in Morocco, REMALD, n°62, 2009, p.55 (in Arabic); see also in the same work the definition of the notion of "legitimacy" and that of "sovereignty", p.56.

[21] OUAZZANI CHAHDI, H., "A Novelty in the Jurisprudence of the Administrative Court of Rabat. Cumulative appeals for annulment and compensation in the same judgement": Diwan Al Madhalim, n°2, June 2005, pp.56-62.
See Judgment 1003 of 12/10/2004 of the Administrative Court of Rabat, REMALD, Nov-Dec 2004, p. 217. (In Arabic).

[22] Ibid.

[23] GTM 1953, n°1128, p.86.

[24] BENABDALLAH, M-A., Contribution to the doctrine of Moroccan administrative law, REMALD, Coll. "Textbooks and University Works", n°77, Volume I, 2008, p.68.

[25] AC Meknes 3/4/1998 ord.Ref – Attaoui against commune of Tounfit.

[26] AC Meknès 23/6/1998 ord. Ref Ismaîli.

[27] BENABDALLAH, M.-A., "The penalty against the administration". Note under AC of Rabat, March 6, 1997 Al Achiri heirs: REMALD n°20-21, 1997, p. 247.

[28] EL ANTARI, M., "The censorship of the personal penalty by the administrative chamber of the supreme court would be the end of a hope" note under ASC, March 11, 1999 rural commune of Tounfit against Mohamed ATTAOUI: REMALD n° 31 March-April 2000, p. 138.

[29] On the perception by the "perplexed" doctrine of the uncertain scope of a judgment: Conclusion Bergeal under SC. S. March 27, 1998, La Nantaise and L'angevine Réunited, p. 109.

## IV. Doctrine and Litigation Movement

The function that doctrinal thought fulfills before the administrative courts should have the scope of an ideal corpus promoting change via the influence that it can generate with the actors of the litigation process by contributing to prepare, question, inspire, spur, jostle or rush this work. Thus, an activity of identification of the role that doctrine could have in the movement of litigation and case law is important. This can only be done by examining the position of doctrinal reflection in the decision-making process of the administrative judge (A) as well as in the work of the other actors in the contentious debate (B).

*a) Place of the doctrine in the decision-making process of the administrative judge*

The formation of administrative jurisdictional decisions is certainly the work of the judge. However, he cannot detach himself from considerations relating to the political and social environment to which he belongs as well as to the ideas that can clarify and guide the content of his decisions. In this regard, it seems appropriate to question in the context of this paragraph the extent of doctrinal ideas in the production of the jurisprudential decision (1) while advancing situations where the judge expressly appeals to them (2).

i. *Presence of the doctrinal corpus in the production of case law*

In all the situations mentioned above, the doctrine seems to mark its presence through a reflexive activity of structuring and informing the contentious debate. She tries to exercise her "authority" in the sense that Dean Carbonnier[30] understood it or her "magisterium" as it was put forward by Hauriou.[31] It has, indeed, on the process of formation of the stops as much influence as "the wind on the solidity of the pyramids of Giza"[32], insofar as the opinion of the academics does not seem to be what could guide the approach of making the decision known by its praetorian character.

Thus, the taking into account of the provisions of the texts and their interpretation, the existence of a harmonious connection of the decision with the judgments which preceded it, certain jurisprudential policies as well as administrative, social, budgetary and human reasons may have more weight than the ideal content of law professors. While they often call upon him to ensure the lucidity and homogeneity of their work, the members of the administrative jurisdictions and the lawyers show all the same a certain incredulity vis-à-vis anything that can abusively systematize and rule out any solution responding to a concrete case from being realistic.

It is because of the pragmatic nature of the jurisprudential work that certain Commissioners do not hesitate to affirm that the doctrine is "resigned"[33]. Moreover, it cannot be denied that certain critical reflections or even certain currents of thought have truly participated in the past and will continue to participate in the future, and sometimes in a revealing way, in the evolution of case law. In this extraordinary process where doctrinal reflection can represent a catalyst for the work of case law, the moments of formulation of case law constitute an opportune occasion for this exchange. In this respect, it seems very judicious to underline that the doctrinal reflection accompanies in various situations, in a tacit or express way, the justifications and the motivations presented by the judge within the framework of the formation of his jurisprudential decision without however concluding to its pre-eminence over other factors which can exert a real influence on the actors of the contentious debates.

From an empirical point of view, it seems interesting to pay attention to what can be called "the instrumentalization of doctrine". It is a question of seeing if in a judgment or in a given judgment the reference to the doctrine represents the starting point of the reflection and the reasoning of the judge on the case which is submitted to him, thus representing an independent variable which will determine the development and the nature of the decision or, on the contrary, it constitutes only an instrument of legitimization of this decision.

ii. *Tribute paid to the doctrine by the administrative judge: practical cases*

in order to illustrate the express presence of doctrinal thought in the process of the formation of the jurisdictional decision, we have seen rigorous to present some situations relating to the treatment of the administrative judge of certain cases while appealing to doctrinal principles and ideas serving as a basis for motivating or justifying its decision. To do this, it was imperative to collect a large number of court decisions in order to broaden the field of research. In this context, in addition to the literature consulted, the researcher also contacted the administrative court of Rabat in order to gather material likely to provide more visibility to the work carried out.

Thus, the Mohamed Bouarsa case[34] against the national post office is revealing. The judge referred to

[30] HAKIM, N., The authority of French doctrine in the 19th century: Doctoral thesis in law, LGDJ, 2002.
[31] AVRIL, P., "The role of doctrine during the transition from the Fourth to the Fifth Republic". In: Faculties of Law inspiring law?, Works of the IFR, Toulouse University Press 1 Capitole, 2018, pp. 197-201.
[32] Ibid.
[33] SENERS conclusions under SC S., May 12, 2004, Gillot, request no 236, 1834.
[34] Mohammed BOUARSA case against the national post office. AC of Agadir, judgment n°95-593, 19/10/95, quoted in Procedures pursued before the administrative courts, Work of the study day organized at the Faculty of Law Rabat-Souissi, Private Law sector, the June 15, 1996: REMALD, coll. No. 9, 1996, p.172.

French doctrine to justify that the act of subscribing to telephone service is not an ordinary civil act, she enthusiastically considers that it:

*"Is unfair to consider the subscription to the telephone service as an act…Since the beneficiary is in a forma, or even objective situation subject to the laws of the service."*[35]

For its part, the judgment of the Administrative Court of Rabat concerning the case "Samari Latifa" against the President of the Council of the Rural Commune Bni Khaled[36] includes an express reference to Egyptian doctrine by the judge in order to demonstrate that the grievance intended for a non-competent authority, being concerned by its object, produces its legal effect if the applicant presents a justified excuse. Thus, the judge pointed out in this context that:

*"Whereas even by referring to comparative doctrine, we find that Professor Abdelfattah Hassan had mentioned in his book on "administrative law", first part, the action for annulment, p248 that: "the administrative grievance produces its effect even if it is presented to a non-competent authority as soon as the latter is linked in one way or another to its object".*

Moreover, in the order issued in the context of the case of the National Office for Drinking Water against Lhaj Ali Mimoun[37], the judge in chambers relied on Moroccan doctrine, in particular the work of El Bachir Baji[38] and Professor Elkachbour's[39] article when he considered that the expropriator has the obligation to submit the lawsuit within a period not exceeding two years under the control of the judicial power.

In addition, in a judgment of the administrative court of Casablanca[40] pronounced on December 26, 2001, the judge based himself on the conditions laid down by the doctrine and the case law to qualify a decision as being administrative. He pointed out that:

*"If the legislator has not identified a specific form or formula of the administrative decision, doctrine and case law have on the other hand laid down conditions for the consideration of a decision as being administrative, in particular the fact that the decision must emanate from a national administrative authority, and that it is executive…"*[41]

For its part, the Administrative Court of Rabat expressly referred to the doctrine to relate the conditions of the State's liability in the judgment relating to the Rachid Lezaar case on behalf of his minor daughter Nisrine Lazaar[42] who had an accident during the physical education session at Al-Fath College in Salé. In this regard, the judge stated that:

*"Whereas it is proven from the elements, the data of the dispute and the documents which were presented that the daughter of the applicant had on 28/10/2016 a school accident in the college Al-Fath, Laayayda in Salé, during the practice of sports exercises as part of the physical education session. Starting from the doctrinal and jurisprudential principles relating to the elements and conditions of the engagement of administrative liability based essentially on the fault, the damage and the causal link, and taking into account the rules relating to the responsibility for school accidents such as 'they are determined in article 85bis of the Dahir of Obligations and Contracts ... the responsibility of the teaching department for this accident is engaged…"*[43]

Furthermore, in the Essaid Belkhi case[44], the claimant received two letters from Attijari Wafa Bank informing him that the collector of Salé Tabrekt ordered the reservation of the amounts of his two bank accounts, and this for the payment of the tax on the premises he rented out during the years 2014-2015. However, the local subject to taxation was sold at the beginning of 2013. Indeed, based on the doctrinal opinion stipulating the verification of the commitment of the administrative responsibility of the service concerned before the determination of the value of the compensation due to the party who suffered the damage, the judge decided that:

*"Whereas it is agreed by doctrine and case law, in the context of compensation for damages due to the work and activities of public law persons, that to decide on the merit of the party who has suffered damage as a result of these work and these activities to be compensated. It is essential to check beforehand whether the administrative responsibility of the service concerned is engaged before determining the value of the compensation due".*

Indeed, the doctrine is also present in the judgment of the administrative court relating to the case of Rachid and El-Moukhrtar Afourid[45] against the municipality of Martyl following the assault exercised by the latter on their plot of land in the absence of any compliance with the legal procedures for expropriation. In this context, the judge appealed to the doctrine regarding the transfer of ownership of the building that was the subject of the assault to the party who exercised it while obliging him to compensate those who suffered the harm. Thus, it provides that:

*"Whereas the jurisprudence is seen to decide, within the framework of a judgment stipulating the compensation of those who suffered an assault, of the necessity of the transfer*

[35] DUGUIT, L. and VEDEL, G., Administrative law, 1968, p.688.
[36] TA of Oujda, judgment n°13/94, 19/10/94. Quoted in: Procedures pursued before the administrative courts, op.cit., p.218.
[37] AC of Oujda, Ordinance n°12/96, 27/06/96.
[38] BAJI, EL-B., "Law on expropriation for public utility", p. 254 and 255. Quoted in Procedures pursued before the administrative courts, op.cit., p.194.
[39] ELKACHBOUR, "Law on expropriation for public utility" : RMDEC,, FLESS Casablanca, n°12C, p.99.
[40] Allal El BARAKA case against the Urban Agency of Casablanca, judgment n°652, 26/12/2001, AC of Casablanca, quoted in Bouachik, A., Practical Guide to Jurisprudence in Administrative Matters (Volume I): REMALD, Coll . "Management Guides", n°16, 2004, p.128.
[41] Ibid.
[42] AC, Judgment No. 3694, Case No. 927-7112-2016, 18/10/2017.
[43] AC, Judgment No. 3694, File No. 927-7112-2016, 18/10/2017.
[44] AC of Rabat, Judgment No. 1096, File No. 920/7112/2016, 28/3/2017.
[45] AC of Rabat, Judgment No. 2389, File No. 923/7112/2016, 30/5/2018.

*of the property of the building object of the assault and of the judgment compensation to the party who has exercised it in accordance with the doctrinal rule of unjust enrichment (Decision of the administrative chamber at the Court of Cassation No. 345 dated 28/4/2011).*"

Thus, according to the case law consulted, one observation deserves to be underlined: the Moroccan administrative judge refers in certain cases to the doctrine by citing French, Egyptian or Moroccan authors. Nevertheless, he sometimes contents himself with quoting the rule or the doctrinal principle without making an express reference to its author. Nevertheless, he sometimes contents himself with quoting the rule or the doctrinal principle without making an express reference to its author. Indeed, it is important to emphasize that the reference to doctrinal reflection is certainly timid[46]. However, it is not to be denied that if the doctrine was not exclusive nor the only one to cause the movements of the jurisprudence, it undoubtedly contributed to it.

## V. Work of the Actors of the Contentious Debate under the Influence of the Doctrine

The lawyer and the Royal Commissioner for Law and right, as key players in the contentious debate, often appeal to doctrine in order to provide the lucidity and coherence required in their remarks. The Royal Commissioner for Law and right seems to provide the instance of the judgment via conclusions describing results that are often more fruitful than those obtained by the reporting judge, if the latter is satisfied with the study of the documents in the file, the set of factual and legal data relating to the case.[47]

For his part, the lawyer, by defending the interests entrusted to him, puts forward the most convincing arguments in order to win the case. It is, indeed, this dialogue between the judge and these actors (lawyers, royal commissioners of law and right) that makes case law evolve. It therefore seems judicious to wonder how the Moroccan administrative judge can perfectly accomplish this mission of royal commissioner when the duration of his recruitment does not exceed two years (susceptible to renewal in certain cases) (1), before examining the place that the lawyer can attribute to the doctrine in the elaboration of his plea(2).

### a) *Doctrine and work of the Royal Commissioners of Law and right*

The Royal Commissioner for Law and right is a neutral and independent body. It has a different role than that of the public prosecutor. He cannot intervene in the formulation of the judgment. Its mission is, indeed, to present to the court the factual and legal data of the case, and to suggest one or more solutions by highlighting the advantages and possibly the disadvantages of each of them. While the conclusions of the Royal Commissioner for Law and right have only a limited role, when it comes to simple cases in which the case law is perfectly established, his role can be crucial in cases which present a certain delicacy. The reflection it generates, the jurisprudential and doctrinal research in local law and comparative law must contribute to the progress of administrative jurisdiction and to the affirmation of the specialization of the judge.[48] This function will be of capital use given that Law 41-90 did not provide a solution for many problems that the legislator was perhaps not in the practice of encountering, and that the authors of the text certainly also ignored.

The Commissioners sometimes rely explicitly on the doctrine which highlights the ambiguity of a solution, notably in the Bouarsa case against the national post office. In the absence of a legislative text, the Commissioner expressly referred to the distinctive criteria of the administrative contract as delimited by the doctrine in order to determine the nature of the act in question.[49] Indeed, the commissioners argue their conclusions by referring to jurisprudential decisions [50] or by also basing themselves on the doctrine which sometimes contradicts itself on a question of interpretation or which is rather unanimous on other [51]. We quote in this context the statement of Commissioner Abdallah Laalaj who underlined on the occasion of the Bouarsa case mentioned above that:

"*If the two conditions characterizing the administrative act are met in this case…, doctrine and case law unanimously deem them insufficient to confer on the act submitted for trial the quality of an administrative act. On the other hand, it is mandatory that the act include conditions that are not very frequent in the general rules*".

The Royal Commissioner is a neutral body called upon to carry out a meticulous and in-depth study of the cases submitted to it. Its role can sometimes prove to be fundamental to the point that the main decisions of the French Council of State relate to

[46] Of a large number of judicial decisions consulted, the number of those which expressly appeal to doctrine is limited.

[47] ROUSSET, M., "Retrospective and prospective, the dynamics of administrative litigation", op.cit., pp.368-369.

[48] ROUSSET, M., Administrative litigation, op.cit., p.40-41.

[49] LAALAJ, A. Conclusions, ACof Agadir, judgment n°95-593, 10/19/95, Case of Mohammed Bouarsa against the national post office, Quoted in: Procedures pursued before the administrative courts, op.cit., p.173. (In Arabic).

[50] See BELAASRI, F. Conclusions referring to the case law of the Egyptian Council of State concerning the brick industrial institution case against the Wali of Meknes. AC of Meknes, judgment n°22/96, 03/21/96, quoted in: The Procedures pursued before the administrative courts, ibid., p.283. (In Arabic)

[51] LAALAJ, A. Conclusions, AC of Agadir, judgment n°95-593, 10/19/95, Case of Mohammed Bouarsa against the national post office, Quoted in: Procedures pursued before the administrative courts, ibid., p.174. (In Arabic)

famous names of commissioners such as "Romieu", "Aucoc"[52]. The Royal Commissioners for Law and right could also be important relays of doctrinal reflection while being themselves a source for doctrine which will identify from their conclusions the elements it deems essential to elucidate such and such a decision. Among the members of the administrative courts, it is therefore inevitably the commissioners who pay particular attention to discussions of doctrine.

> "*A Royal Commissioner for Law and right presents to the formation of judgment, and in complete independence, his written opinions which he can explain orally on the factual circumstances as well as on the applicable rules of law. Its opinions are developed on each case in open court*".[53]

For the accomplishment of this activity, there is certainly a place for doctrinal thought which constitutes a source of evolution even if it proves to be important to admit that the diversified and well-chosen doctrinal references do not necessarily represent the main mechanism for a Commissioner to convince *the formation of judgment*. Before certain Anglo-Saxon courts (for example the Supreme Court of the United States and the European Court of Human Rights), dissenting opinions often contribute to balancing the decision rendered by the expression of separate opinions or those who do not agree with the chosen solution.[54] However, the Moroccan tradition seems to be far from this approach; when the judgment has been rendered, criticism or praise appears to be permitted only to outside commentators. However, what could be the case for the actors in the contentious debate before the administrative courts? In other words, is there a kind of combination between action and observation, doctrine and the actors of the contentious debate?

Certain attitudes of the members of the formation of judgment require little emotional states.

A subsequent public intervention by a judge after his participation in the investigation would, without a doubt, be considered as a violation of judicial solidarity, a prejudice to the authority of the judgment and also a possible breach of the secrecy of the deliberation. Moreover, the elaboration of a commentary by a Royal Commissioner for Law and Law, which takes place episodically before the Administrative Courts of Appeal (ACA) and the Administrative Courts, does not prove to be practicable with the Court of Cassation : the Commissioner states his opinion during the judging session, it is not necessary for him to go back on the solution approved later by publishing a good article which could suggest that its author intended to "up the game » to the formation of judgment.

*b) Place of doctrine in the lawyers work*

Lawyers have a strong place in terms of the influence exercised by doctrine on the process of developing case law, they are essential relays in this area. As legal practitioners, they will be prompted by certain doctrinal opinions to resist the dominant case law, to put forward an ambitious and daring means, to contest an adopted solution, to provide reasoning which, to appear implausible at first sight, could be prove efficient at the end of the course.[55] Admittedly, lawyers frequently drink in doctrine, but they are not, like academics, in search of the truth. They defend the truth of their clients, and their perception of doctrine is often inescapably "*utilitarian*".[56]

Lawyers are free to comment. Being the representatives of the party whose rights are threatened, they are often the most informed of the details of the case, which they generally know in depth, sometimes for long periods of time (they have a broad knowledge of the clients, the places, the hidden sides of case, etc.). Some lawyers can sometimes show a real attraction to the production of an article which can be vengeful if the decision pronounced seems to be questionable, in particular in relation to the interests they defend. Spurred on by passion, bitterness and vigor on the occasion of certain cases defended without being won, in particular in Section, they misguidedly tried this exercise.[57]. However, this type of attitude does not seem to be applauded. The administrative jurisdiction that plans to maintain confidence in its legal assistants can indeed consider it as an expression of defiance on the part of one of the parties to the trial and his lawyer who aspire to have the last word. The Lawyer who adopts this attitude, prolongs the debate in vain, and also plans to carry it out in a doctrinal framework far from any objectivity: how to show a height of view and perspective in a dispute of which we have in-depth knowledge and moreover only for one party in question? This "reservation" does not in fact rule out the possibility for this same lawyer to write a case law note in cases which have not been the subject of it, but which sometimes do not appear to be far from the interests for which he is pleading. Moreover, the big question to which it seems necessary to pay a lot of attention in the Moroccan context is that of the training of lawyers. The latter generally had a civilian background. This was partly due to the exclusion from administrative litigation of the disciplines making up the private law course at

[52] HADDAD, A., Applications of the administrative process in Moroccan law, Oukad publications, 1999, p.25. (In Arabic)

[53] Dahir No. 1-06-07 of Moharrem 15, 1427 promulgating Law No. 80-03 establishing administrative courts of appeal (BO No. 5400 of March 2, 2006), art. 3 paragraph 2.

[54] L'HEUREUX-DUBE, C., "The Practice of Dissenting Opinion in Canada – Dissenting Opinion: Voice of the Future? »: Notebooks of the Constitutional Council n° 8 (file: debate on dissenting opinions) - July 2000.

[55] See BRIARD, F.-H., "The Doctrine and the contentious debate before the Council of State", op.cit., pp. 97-106.

[56] Ibid.

[57] See note BRIARD, F.-H., under CE October 25, 1991, Department of Ille-et-Vilaine, p. 136, D., 1992, quoted in: BRIARD, F.-H., ibid.

the university. The effectiveness of the mission of legal council and assistance is dependent on a better knowledge of the methods and legal procedures of administrative litigation, regardless of their degree of complexity. The admissibility of appeals does not in any way mean that the rights of citizens are satisfied. The lawyer is indeed supposed to appropriate the techniques of drafting conclusions, briefs and other documents required for the smooth running of the trial. This question seems to be daunting since upon consulting the statistics of the Supreme Court between 1980 and 1989, it emerges that out of 687 appeals for annulment for abuse of power judged by the Administrative Chamber, 123 had been rejected for defects of form, knowing that the formal rules governing the admissibility of requests were laid down in 1957 and that they are uncomplicated.[58] In this context, we recall the case of the introduction before the Administrative Court of Fez by a lawyer of an appeal for abuse of power in the name of the applicant without however providing any means of annulment.[59] The error sometimes seems intentional, given that the appeal was lodged despite the obviously inadmissible nature of the appeal resulting clearly from the foreclosure. This is what emerges in fact from the consultation of two judgments where the loss of the case already seems obvious because the appeal was lodged two years after the date of the expiry of the time limit.[60].

It therefore seems of great importance for Lawyers in administrative matters to use doctrinal ideas since they represent a real tool for summarizing, referencing and systematizing case law. The doctrine can indeed reach the point of insinuating itself directly into the contentious debate. Thus, Lawyers sometimes solicit law professors in order to develop consultations that can be included in the debates. This approach is practicable, particularly in the case of trials that seem to raise sensitive or unusual issues. The client himself can also orient his council in this direction with the aim first of seeking the opinion of an academic as to the solidity of his position and then of arousing the attachment of a doctrinal figure to his cause.

By way of conclusion, it is estimated that each will have to effectively accomplish its own mission while avoiding any confusion of genres. That the administrative jurisdiction rules, that the Lawyers plead for the interests of their clients, that the Commissioners formulate their conclusions, that the doctrinal body reflect, criticize or encourage freely and in complete independence and that it carry out this colossal, permanent and essential work of explaining administrative case law, taking into account and estimating its effects, interpretation of solutions, criticism, examination of shortcomings or paradoxes, questioning and calling into question. This is the wish that must be formulated by the actors of the contentious debate in order to always encourage the administrative judge to "*leaf through a few works of doctrine and take the last step*"[61].

[58] ROUSSET, M., "Retrospective and prospective, the dynamics of administrative litigation", Proceedings of the International Colloquium organized by the FSJES Marrakech, February 4 and 5, 1994, Serie: "Seminars and Colloquia", n°5, 1996, pp.368-369.

[59] Ibid.

[60] ASC. July 17, 1969, El Outmani, PR. 187 (in Arabic) ; ASC. July 17, 1969, Fama Diouri, PR. 196 (in Arabic).

[61] See LATOUR, B., The Law Factory. An ethnography of the Council of State: Coll. Pocket Discovery/ Human and social sciences n°191, 2004.