ADMINISTRATIVE LAW AND *DROIT ADMINISTRATIF*

A COMPARATIVE STUDY WITH AN INSTRUCTIVE MODEL

C. SUMNER LOBINGIER †

I. INTRODUCTORY

> "*Droit administratif* is, in its contents, utterly unlike any branch of modern English law", wrote Dicey [1] in 1885. . . . "For the term *droit administratif,* English legal phraseology supplies no proper equivalent. . . . In England and in countries which, like the United States, derive their civilization from English sources, the system of administrative law, and the very principles upon which it rests, are in truth unknown."

But in the more than half a century which has elapsed since that was written, these concepts have undergone a change which affected even that author himself [2] and it is now generally recognized that not only Continental nations [3] but Britain [4] and the United States [5] have an administrative law.

---

† B. A., 1888; M. A., 1892; LL. M., 1894; Ph. D., 1903; D. C. L., 1918, University of Nebraska; D. Jur., 1923, Soochow University, China, J. U. D., 1928, National University; Former Judge, Court of First Instance, Philippines; Former Judge, United States Court for China; Security and Exchange Commission Officer since 1934; author: THE PEOPLE'S LAW (1910), EVOLUTION OF THE ROMAN LAW (1923), THE BEGINNINGS OF LAW, A. B. A., COMPARATIVE LAW BUREAU BULLETIN (1933), and some 200 articles in legal encyclopedias and periodicals.

1. LAW OF THE CONSTITUTION (9th ed., Wade, 1939), Ch. XII deals with *droit administratif.*

2. See DICEY, LAW AND OPINION IN ENGLAND IN THE NINETEENTH CENTURY (2d ed., 1914) XXIX, XXXI; *The Development of Administrative Law in England,* (1915) 31 L. Q. REV. 148 *et seq.*

"In spite of Dicey's undisputed eminence and learning, had it not been for this inconsiderable fragment . . . demonstrating as it did, a remarkable ability to abandon, at the last moment, the ideas of a lifetime, it would have been difficult not to feel that in old age he had lost that capacity for the careful observation of political institutions and legal phenomena which had made him the most distinguished writer on English Constitutional Law of his time." ROBSON, JUSTICE AND ADMINISTRATIVE LAW (1928) 31.

"Dicey's French friends, especially Professor Jèze (I PRINCIPES GENERAUX DE DROIT ADMINISTRATIF (1904) 1) proved to him that his ideas of French administrative law were obsolete and in his later editions he made a few modifications; but nothing less than the rewriting of at least one half of his book would have enabled him to make the distinction clear." JENNINGS, THE LAW AND THE CONSTITUTION (1933) 206-7.

3. Administrative Law really originated in Rome. See Lobingier, *Historical Background of Administrative Law* (1940) 16 NOTRE DAME LAWYER 29. For its revival and growth in Continental Europe, see II GOODNOW, COMPARATIVE ADMINISTRATIVE LAW (1893) Bk. ii, ch. vii; FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928), 230 *et seq.*

"An appellate *Verwaltungsgerichthof* was e. g. established in 1863 for the Grand Duchess of Baden; a mixed court of a similar character in 1847 in Prussia." HOLLAND, JURISPRUDENCE (1923) 377-8. For *ante* Nazi Germany, see Marx, *Comparative Administrative Law* (1942) 90 U. OF PA. L. REV. 266, 276.

In *Belgium* "there is an Administrative Law though it is enforced by the ordinary courts" JENNINGS, THE LAW AND THE CONSTITUTION (1933) 207, citing VAUTHIER, PRECIS DE DROIT ADMINISTRATIF DE LA BELGIQUE (1928).

But what about the French system? Is it so different from ours which is yet in its formative stage? Has the French experience anything to offer us, for example, on the important subject of judicial review and the pending legislation thereon? Such questions can be answered only by a detailed comparison of the respective systems and an examination of *droit administratif* in the light of its history.[4]

II. French Administrative Tribunals

1. History.

The mediæval *curia regis* (or *aula regia*) of continental Europe seems to have been, like many other institutions of that period, a sur-

4. *Some Landmarks of British Administrative Law*:

1154-1189, "The reign of Henry II initiates the rule (reign) of law. The administrative machinery, which had been regulated by routine under Henry I, is now made a part of the constitution, enunciated in laws, and perfected by a steady series of reforms. . . . The whole of the constitutional history of England is a commentary on Magna Carta". Stubbs, Select Charters (8th ed. 1900) 21, 296.

1215, "*Magna Carta* itself . . . deals with some matters which are administrative". Port, Administrative Law (1929) 6, 7.

1531, Statute of Sewers, 23 Hen. VIII, c. 5 (See Freund, *op. cit. supra* note 3, at 249).

1547-1553, Paternalism of Edward VI, Dicey, The Privy Council (1887), 109 *et seq.*

1691, Statute of 3 Wm. & Mary, c. 12, sec. 24, requiring justices of the peace to fix carriers' rates.

All of the British writers on jurisprudence, beginning with Austin (4th ed., 1879, vol. I, p 173) use the term, and recognize the existence of, administrative law, although they do not agree as to its definition or scope. See Port, *op. cit. supra*, ch. 1. Thus in Britain "there has been a progressive delegation of judicial and quasi-judicial functions (often in connection with legislative authority) to officers of the Crown (i. e., executives)". Anson, Law and Practice of the Constitution (4th ed. 1935) 340 *et seq.* And ". . . there existed in England, even in 1865, a volume of administrative law which has since increased in bulk. It is now recognized by that name, at all events by the academic lawyer, though the hostility of the bench and bar persists." Wade, Appendix to Dicey, *op. cit. supra* note 1, at 490.

5. For an historical sketch of American Administrative Law see Chapter I of the *Attorney General's (Acheson) Committee Report*, Senate Doc. No. 8, 77th Cong., 1st Sess. (1941).

The U. S. Tariff Act of July 31, 1789 authorized the collector of customs to allow "drawbacks", after receiving evidence which justified it. 1 Stat. 332.

6. "An English student will never understand this branch of French law unless he keeps his eye firmly fixed upon its historical aspect and carefully notes the changes, almost amounting to transformation, which *droit administratif* has undergone . . . above all during the last 30 or 40 years. The fundamental ideas which underlie this department of French law are . . . permanent; but they have at various times been developed in different degrees and directions. Hence any attmpt to compare the administrative law of France with our English rule (reign) of law, will be deceptive unless we note carefully what are the stages in the law of each country which we bring into comparison". Dicey, *op. cit. supra* note 1, at 333-4.

"Other systems, including our own, may well find useful lessons in the experience of France with this simple, practical, and satisfactory method of controlling the legality of administrative acts." Blatchly and Oatman, *Suits of Excess Power in France*, Comparative Law Bureau Bulletin (1933) 158. *Cf.* Garner, *French Administrative Law* (1924) 33 Yale L. J. 597.

The leading exponent of *droit administratif* was the late Léon Duguit (1859-1928), "French jurist and political theorist, known for his application of philosophical positivism to jurisprudence and political theory (expounded in) his chief work, Traité de droit Constitutionel (3d ed. 3 vols. 1927-30) . . . Other important works: L'etat, le droit objectif et la loi positive (1901); L'etat, le Gouvernants et les Agents (1903); *The Law and the State* (1917) 31 Harv. L. Rev. 1-185; Les transforma-

vival, or at least an imitation, of a Roman model.[7] In Spain it lasted down to modern times and, besides advisory and judicial, "had administrative, functions".[8] In France the *Conseil du Roi* was, originally, "but a reduced form of the first *Capetians' curia regis*" [9] which soon differentiated into three branches, the *Conseil* proper, *Le Chambre des Enquetes,* or Court of Finance, and the *Parlement* or Judicial Court. In 1302 the States General were summoned for the first time [10] and *Le Chambre des Enquetes* proceeded to make preliminary examination of appeals.[11] The former met, for the last time before the Revolution, in 1614.

In the 16th Century all French tribunals were "being overshadowed by the growing jurisdiction of the *Conseil du Roi.* It claimed cognizance of all manner of cases in which the government was interested, and assumed power to withdraw cases, when it pleased, from the ordinary courts".[12] But "the growing power of the *Conseil du Roi* did not pass wholly unchallenged. At the end of the 16th century and the beginning of the 17th, keen conflicts of jurisdiction arose, not unlike the contemporary English conflicts between the common law courts on the one side and the Chancery Court of Requests and Council of Wales, on the other.[13] . . . In the 17th century, too, under Louis XIV and Richelieu, the *Conseil du Roi* emerged as the *Conseil Privé* [14] in contradistinction to the *Conseil Commun.*" It had, along with other jurisdiction that of a superior administrative court—"over appeals from the

TIONS DU DROIT PUBLIC (1913); trans. by F. and H. J. Laski as "LAW IN THE MODERN STATE" (1919); LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ (*depuis le code Napoleon*) (2d ed. 1920); SOUVERAINETÉ ET LIBERTÉ (1922); LE DROIT SOCIAL, LE DROIT INDIVIDUEL ET LA TRANSFORMATION DE L'ETAT (3d. ed. 1922); LES CONSTITUTIONS LES PRINCIPLES LOIS POLITIQUES DE LA FRANCE DEPUIS 1789 (with Henri Monnier; 4th ed., 1925)". Duguit "rejected the subjective (based on right) conception of law (for the) objective (according to which law is) a body of rules arising from social relationships (becoming legal) when the man of individual consciousness considers . . . socially organized sanction necessary". Bonnard, 5 ENCYC. OF SOC. SCIENCES 272. See also (1909) 24 POL. SCI. Q. 284; ELLIOTT, THE PRAGMATIC REVOLT IN POLITICS (1928); WILLOUGHBY, THEORIES OF DUGUIT (in ETHICAL BASES OF POLITICAL AUTHORITY (1930) ch. XXI).

7. "The official *palatino* (of Gothic Spain) was created in imitation of the *Senatus domesticus* of Hadrian". MADDEN, POLITICAL THEORY AND LAW IN MEDIEVAL SPAIN (1930) 126. During Hadrian's reign the Senatus had become largly an advisory body. See SOHM, ROMAN LAW (Ledlie's translation, 1907) 107.

8. Madden, *op. cit. supra* note 7, at ch. VI.

9. BRISSAUD, HISTORY OF FRENCH PUBLIC LAW (Garner's trans. 1915). IX CONT. LEG. HIST. SER. 378 *et seq.*

10. GUIZOT, HISTORY OF FRANCE (Masson's trans. 1881) 129.

11. I DURUY, HISTORY OF FRANCE (1888) 290.

12. IV HOLDSWORTH, HISTORY OF ENGLISH LAW (1924) 58.

13. "The relation . . . of *droit administratif* to the ordinary law of France may thus be compared, not with the relation of the law governing a particular class (*e. g.* military law) to the general law of England, but with the relation of equity to the common law." DICEY, *op. cit. supra* note 1, at 385.

14. *Cf.* the English "Privy Council", the seed of which, according to Port, had been drawn together by Henry I "into an administrative body those great officers of State who were at that time still largely of the King's Household (the Chancellor, the Justiciar, the Treasurer, the Earl Marshall, the Steward, etc.)". *Op. cit. supra* note 4, at 27, citing I STUBBS, CONSTITUTIONAL HISTORY (1903) 374-384, 425.

orders of *intendants* for redress against the acts of the state or acts of grace emanating from the chancellery (ennoblement, legitimation, patents of offices, etc.)".[15]

In 1789, on the eve of the Revolution, the States General were again convoked and on June 17 of that year, declared themselves the National Assembly. Its attitude toward the regular courts was one of suspicious hostility and among its first acts was a prohibition of their interference with administration.[16] Others followed conferring on the *Conseil des Ministries* "superior jurisdiction in administrative matters . . . each in his own department" [17] which, adds Brissaud,[18] "was the origin of the existing system of administrative jurisdiction".

Conseil d'État

Napoleon's work as a law reformer [19] began while he was still First Consul. As early as 1797 he wrote (in his diary): [20]

> ". . . we are very ignorant of political and social science. We have not yet defined . . . executive, legislative and judicial powers . . . I see but one feature which we have defined clearly in 50 years—the sovereignty of the people; but we have done no more to settle what is constitutional than in the distribution of powers . . . The legislature should no longer overwhelm us with a thousand laws, passed on the spur of the moment, nullifying one absurdity by another and leaving us, altho with 300 folios, a lawless nation."

The 1791 Constitution, had provided (tit. iii, ch. v., art. 3), *"les tribunaux ne peuvent entreprendre sur les fonctions administratives ou citer . . . les administrateurs pour raison de leurs fonctions"* (The courts shall not exercise administrative functions nor summon administrators on account of them). In the Constitution of the Year VIII (1799) Napoleon revived the *Conseil du Roi* under the title of *Conseil*

"Our Parliament and our law courts are but the outgrowth of the Council . . . it boasts a history stretching back to remote antiquity. . . . For a long period it contained all that was noblest in English political life." DICEY, THE PRIVY COUNCIL (1887) 146, 147.

"Here, then, begins that divergence between France and England which has led to such difference in theory and practice as regards administrative law." PORT, *op. cit. supra* note 4, at 296.

15. DICEY, *op. cit. supra* note 1, at 386.

16. *Loi des* 16-24 *Aout*, 1790.

17. *Lois* Sept. 11, 1790, Apr. 27 and May 25, 1791. BRISSAUD, *op. cit. supra* note 9, at 387.

18. *Op. cit. supra* note 9, at 388.

19. See articles by the present author: *Napoleon and his Code* (1918) 32 HARV. L. REV. 114; *The Napoleon Centenary and its Legal Significance* (1921) 7 A. B. A. J. 383; *Code Civil*, 2 ENCYC. SOC. SCI. (1937) 604.

20. JOHNSTON, THE CORSICAN: A DIARY OF NAPOLEON'S LIFE IN HIS OWN WORDS (1910) 69.

d'État.[21] conferred upon it jurisdiction to adjust administrative disputes and required its authorization (which was almost never given) for proceeding against government agents, except ministers, for acts (judicially construed to include delictual ones [22]) connected with their duties.[23]

The tribunal thus revived, whose members form part of the body now called the *Conseil d'État,* has grown in both jurisdiction and independence, for nearly a century and a half and its later history virtually coincides with that of *droit administratif.*[24] As early as 1845 it annulled for "incompetence and vices of form", a royal ordinance [25]—something unprecedented. The Constitution of 1848 provided (art. 89): "Conflicts of competence between the administrative and the judicial authority, shall be determined by a special tribunal." This became inoperative with the second republic's fall; but under the third, important changes were effected. A *decret loi* of September 19, 1870, passed by a revolutionary government, while the Germans were moving on Paris, repealed Article 75, above mentioned. Less than two years later an epoch-making piece of legislation [26] was enacted which gave to the *Conseil's* decisions the force of judgments, but at the same time revived the provision for a *Tribunal des Conflicts* to resolve questions of jurisdiction between the *Conseil* and the ordinary courts.[27] In 1889 the *Conseil* asserted exclusive jurisdiction of actions involving excess of power by administrative authorities.[28] These are but landmarks in its rapid expansion.

---

21. DUGUIT ET MONNIER, *op. cit. supra* note 6, at lxiv *et seq.*
On March 4, 1806 Napoleon wrote: "I need a special tribunal to judge public functionaries for certain infractions of the laws. There must be some vigorous exercise of power in such cases, and it should not be left to the sovereign, who will either abuse or neglect it. I complain every day of the arbitrary acts I am led to perform; they belong more properly to such a tribunal. I wish the state governed according to law and what must be done otherwise, legalized by a duly constituted body". JOHNSTON, *op. cit. supra* note 20, at 227.
"The *Conseil,* as constituted or revived by Bonaparte, was the very centre of his whole governmental fabric. It consisted of the most eminent administrators whom (he) could gather". DICEY, *op. cit. supra* note 1, at 348.

22. JACQUELIN, LES PRINCIPES DOMINANT DU CONTENTIEUX ADMINISTRATIF (1899) 127. See I DE TOCQUEVILLE, DEMOCRATIE EN AMERIQUE (Reeve's trans. 1875) 101, on this article. The French *Code Penal,* decreed by Napoleon, still protects (art. 114) the government agent who acts under the orders of his superiors.

23. "*Les agents of Gouvernement, autres que ministres, ne peuvent etre poursuivis pour des faits relatifs a leur fonctions qu'en vertu d'une decision du conseil d'etat; en ce cas, la poursuite a lieu devant les tribunaux ordinaires.*" *Code Penal,* art. 75.

24. "Administrative jurisdiction in France has had a remarkable history since 1872 and can now be said to have been brought into conformity with standards practically identical with those of our own courts. In the light of a full knowledge of the facts, there is certainly now no room for criticism on our part. As will be seen, the present system is altogether admirable and there is certainly much to admire if not to imitate". PORT, *op. cit. supra* note 4, at 21.

25. *Cf.* note 155, *infra.*

26. Law of May 24, 1872.

27. *See* PORT, *op. cit. supra* note 4, at 302-3.

28. Blatchly and Oatman, *Suits of Excess Power in France,* COMPARATIVE LAW BUREAU BULLETIN (1933) 143, 152.

2. Composition and Character

Thus, as M. David [29] observes, "there are many administrative tribunals in France: the *Conseil d'État, Conseil interdepartmental de Préfecture,*[30] *Cour des Comptes,*[31] *Conseil de l'instruction publique, Conseils Militaires de Revision.* It will be enough to give a brief account of the *Conseil d'État* which is the most important of these". Its members are

> "appointed by executive decree, with the advice and consent of the council of ministers, and they can be removed only in the same manner. . . .[32] Nor is the government free to select councillors of state at its pleasure; for one half of the seats in the council must be filled by *maitres des requetes*[33] and three fourths of these . . . must be *auditeurs de première*[34] *classe.*"[35]

Thus these councillors have become

> "administrative judges [*magistrats administratifs*]: judicial officers from the point of view of their practical permanence of tenure and their independence; administrative officers as regards the source from which they are drawn. Because they are originally administrative officers, *they are familiar with the problems of administration; they understand its difficulties and its needs.*[36] For the same reason they do not arouse in the governmental mind the distrust or jealousy which judges of the ordinary courts might inspire; and, on the other hand, they confront the government without that timidity which is not infrequently displayed by the ordinary judges . . . Whenever as a result of the complicated interplay of the rules determining competence, the *Court de Cassa-*

---

29. In DICEY, *op. cit. supra* note 1, at 497-8.

30. The prefects (a term borrowed from Roman administration) were Napoleon's "copies of the royal intendants" (DICEY, *op. cit. supra* note 1, at 335) and one was appointed for each department. The *Conseil* exercised quasi-judicial, as well as purely administrative, functions and its acts as well as those of the prefect were subject to review by the *Conseil d'État.* According to advices from Vichy the power of the prefects is to be reduced considerably under the proposed new constitution, and they are to function under the supervision of subgovernors.

31. Probable successor of *Le Chambre des Enquetes,* discussed p. 38 *supra.*

32. "Their positions are in fact permanent; since 1879 not a single councillor of state has been arbitrarily removed". Duguit, *The French Administrative Courts* (1914) 29 POL. SCI. Q. 385, 392. It has remained for the Petain regime to break this admirable record, by displacing, in a decree of Sept. 19, 1941, a prominent member of the *Conseil d'État,* Henri Mouton, because he was listed as *"a Masonic dignitary,"* and appointing in his stead Henri Chavil, Secretary General of the Police Service, under the Minister of the Interior. See New York Times, Sept. 20, 1941, § 1, p. 7, col. 6.

33. *I. e.,* Commissioners. See I GOODNOW, COMPARATIVE ADMIN. LAW (1893) 109.

34. These are "hearing officers", like referees, and about 40 of them are on the staff of the *conseil.* See Lobingier, *Trial Authority in Administrative Procedure* (1939) 23 J. AM. JUD. SOC. 115, n. 35.

35. DUGUIT, *op. cit. supra* note 32, at 392.

36. Italics supplied. "The members of the *Conseil* . . . (are) more apt than the judges of ordinary courts to calculate the consequences of their decisions and (this) perhaps makes these . . . more acceptable to and (less likely) to be challenged by, the administration. Judges of the ordinary courts . . . would most probably have been more timid than the *Conseil* in criticism of administrative acts". DAVID, in DICEY, *op. cit. supra* note 1, at 502.

tion (highest judicial tribunal) has had occasion to decide administrative cases, it has invariably rendered decisions less favorable to the individuals affected by administrative action than those rendered by the Council of State in similar cases." [37]

Le Tribunal des Conflicts is composed of nine judges, three chosen from the *Court de Cassation*, three from the *Conseil d'État*, and two others chosen by the above mentioned six. The *ex officio* President is the Minister of Justice (*garde de sceaux*); but "he rarely attends" and the Vice-President, chosen by the court from its own members, "generally presides".[38] *Le Tribunal des Conflicts*, like its complementary body, *le Conseil d'État* has won the esteem and confidence of Frenchmen [39] and foreigners; [40] but, "with the steady development and stabilization of policy . . . the business of the Tribunal. . . has . . . been consistently diminishing", due to the very fact of the council's efficiency.[41] Thus it is claimed that, by this dual system of courts, the French have accomplished a complete "separation of powers" as between legislative, administrative and judicial.[42] Neither assumes to exercise jurisdiction save in its own sphere.[43] The *Conseil d'État* has

37. DUGUIT, *op. cit. supra* note 32, at 392-3. Italics supplied.
". . . if anyone may complain of the jurisprudence of the Council of State, it is not private individuals but the administration itself." II LAFERRIÈRE, TRAITÉ DE LA JURISDICTION ADMINISTRATIVE (1896) 533.
". . . the council of state today enjoys a place in the public confidence, esteem and respect of the French people comparable only to that of the supreme court of the United States among Americans." Garner, *Judicial Control of Administrative Acts in France* (1915) 9 AM. POL. SCI. REV. 638.

38. "This addition of a politician to the judges, has been justly criticised and will probably disappear . . . ; but . . . the casting vote of the President has occurred but twice since the Tribunal's establishment". DAVID, in DICEY, *op. cit. supra* note 1, at 501.

39. "As long as the administrative courts were regarded with a degree of mistrust, litigants preferred to bring their complaints before the ordinary courts. The government was naturally inclined to contest the jurisdiction of these courts, and the Tribunal of Conflicts had frequently to intervene, in order to defend impartially the boundary between the judicial field and the administrative. . . . Today, on the contrary, the French people has complete confidence in the knowledge, impartiality and independence of the Council of State. The litigant knows that he is better protected against arbitrary administrative action by the Council . . . than by the *Court de Cassation*". DUGUIT, *op. cit supra* note 32, at 406.

40. "The Tribunal is . . . strictly impartial . . . its fairness and promptness are alike worthy of high praise". PORT, *op. cit. supra* note 4, at 303, 313.

41. *Ibid.* This tendency, however, is not unlikely to be checked by the necessity of the Tribunal's intervention in cases involving a public functionary's liability. See pp. 53-54, *infra*.

42. "There must be a careful differentiation between the functions of regulation (legislative), administration (executive) and adjudication (judicial). . . . The functions of regulation . . . are confided to . . . the President, acting with the ministers, the prefects and the mayors. The function of sublegislation is . . . given . . . only to the higher executory authorities". Blatchly and Oatman, *loc. cit. supra* note 28, at 143, 145.
"In contrast with America, France has discovered through *Droit Administratif* a way of maintaining intact the doctrine of the separation of powers, whilst at the same time reforming its administrative courts as regards their independence and impartiality. That in itself is a notable achievement." PORT, *op. cit. supra* note 4, at 22.

43. ". . . An ordinary court will not entertain an action in which a citizen complains that a rule of *droit administratif* has been violated; such action, if any is open

been compared, on the one hand with the English Privy Council [44] and on the other with the United States Court of Claims; [45] but the resemblance to the latter is only partial.

3. *Jurisdiction (Competence)*

a. *In General.* ". . . It is with regard to jurisdiction", said Port,[46] that "the French Administrative Law differed so fundamentally from English Law until the developments subsequent to the reforms of 1872". As we have seen, "the ordinary court to which one must resort who claims injury from a breach of *droit administratif*", is the *Conseil d'État* since it is "normally competent for administrative litigation". [47] Its territorial jurisdiction is nation-wide; jurisdiction of the subject matter has been exercised mainly through two processes or, as we would say, remedies:

b. *Le recours pour exces de pouvoir (ultra vires).* "The plea of *ultra vires*", observes Duguit,[48] is "the general synthesis which dominates all [French] law. An objective act,[49] whether by the President of the Republic or by the humblest official, may be assailed by any citizen for *ultra vires* and the *Conseil d'État* will pass on its validity;" but "the plea of *ultra vires*, which is at the root of public law, is based not upon the violation of individual right but upon the destruction of an organic rule of service".[50] A typical case was the annulment by the

---

to him, will therefore have to be brought before an administrative tribunal, *i. e.* as a rule, the *Conseil d'État*". DAVID, in DICEY, *op. cit. supra* note 1, at 500.

44. "This process . . . of differentiation, assisted at times, in France no less than in England, by legislation, has, of quite recent years, changed the *Conseil d'État* into a great tribunal of *droit administratif*, as it created in England the Judicial Committee of the Privy Council for the regular and judicial decision of appeals from the colonies to the Crown in Council". DICEY, *op. cit. supra* note 1, at 376-7.

45. PORT, *op. cit. supra* note 4, at 263.

46. *Id.* at 313.

47. DAVID, in DICEY, *op. cit. supra* note 1, at 498.

48. LAW IN THE MODERN STATE (Laski trans., 1919) 172, 244.

49. As opposed to "subjective right" which the author elsewhere defines as one's power to impose his purpose upon another. *Les Transformations générales du droit privé depuis le Code Napoleon* (1912), translated, 11 CONT. LEG. HIST. SER. 65, 69. The author follows Comte in declaring "The word *right* must be shelved from an exact vocabulary of political thought, just as the word *cause* from an exact vocabulary of philosophy. Everything becomes clear once we eliminate the idea of subjective right. We must replace it by the fundamental notion of modern law . . . the concept of a social function, of a legal situation to which the idea of public service is intimately bound. The noble jurisprudence of the *Conseil d'État*, on the plea of *ultra vires*, is only the translation of these ideas into practical terms. . . . Objective administrative law, most clearly seen in the sphere of *ultra vires* acts, is the great and original creation of French jurisprudence." DUGUIT, *op. cit. supra* note 48, at 168, 169, 171.

50. "*Le Conseil d'État* renders final decision in administrative controversies and upon all suits to annul, as in excess of power, acts of the various administrative authorities." Law of May 24, 1872, 1872 BULLETIN DES LOIS (12 ser.) Bull. 92, p. 505.

"The importance of this provision", according to Blatchly and Oatman, *loc. cit. supra* note 28, at 151, "is, that it not only recognized the doctrine of excess of power as developed by the Council of State, but also abolished any further possibility of 'retained justice', or the necessity of consulting the ordinary courts in administrative suits. The Council of State was now placed in the position of the supreme and final

Conseil d'État, on the application of two physicians and a taxpayer, of the resolution of a parish council to employ another physician for free medical service to all parish inhabitants; the ground being that such service could be furnished the poor alone.[51]

At first the exercise of this jurisdiction was limited to annulment; the *Conseil* merely set aside the *ultra vires* act. But, as regards this, as well as other features, *droit administratif* has undergone an evolution [52] and since the close of the century's first decade, it has been permissible to join in the same *requete*, a claim for annulment, or revocation with one for damages and interest.[53] Thus the owner of a large tract of land in South Tunisia, whose title was confirmed by judicial decree, but who had been refused enforcement thereof against native trespassers by the administrative authorities for fear of a native uprising, was awarded damages by the *Conseil* for the official non-feasance.[54]

c. *Le Recours Detournment de Pouvoir* (Abuse of power). "This", observes Port,[55] "clearly involves an examination . . . of the motives which prompted the action and . . . is a special development of" the remedy just discussed. It seems to have been applied as early as 1864 and has been greatly expanded. The *Conseil* has annulled: A War Minister's ruling excluding, on religious grounds, a grain dealer from competing for government contracts; [56] a decree of the central government dissolving a municipal council for irregularities in its election; [57] a grant by the Marne-et-Seine prefect to the owner of an omnibus line, of the exclusive privilege of meeting trains at a certain railway station; [58] a prefectural ordinance, purporting to be a sanitary measure, prohibiting the sale of waters from a certain mineral spring which had been found hygienic by chemical analysis; [59]

---

court in administrative matters." See also Duguit, *loc. cit. supra* note 32, at 394; Garner, *loc. cit. supra* note 37, at 638.

The administrative courts will not, however, review questions involving foreign policy; *e. g.*, the annexation of Madagascar. *Recueil* (1904) 662; *Revue de Droit Public* (1905) 91.

51. Casanova, Canazzi *et al.*, *Conseil d'État*, March 29, 1901, III Dalloz, Jurisprudence (1902) 34.

52. See Duguit, *op. cit. supra* note 48, at 165 *et seq.*

53. Sirey (1911) 12, 3, 129 (Blanc, Argaing, et Bèzie).

Such a proceeding was termed by Laferrière (*op. cit. supra* note 37, Introduction) *Contentieux de pleine Jurisdiction*. Duguit (*op. cit. supra* note 48, at 168) regards the former's explanation as "useless."

Suits are included in which the tribunal passes on facts as well as law and exercises extensive control over administration, with power to reform and censure.

54. *In re* Coniteas, *Conseil d'État*, Nov. 30, 1923, III Dalloz, Jurisprudence (1923) 59.

55. Port, *op. cit. supra* note 4, at 315.

56. *Recueil* (1905) 757. *Cf. Recueil* (1909) 307; *id.* (1910) 192, for annulments on similar grounds.

57. *Recueil* (1902) 55; Sirey (1903) 113. Such dissolution was held permissible to promote good administration only.

58. *Laferrière, op. cit. supra* note 37, at 531.

59. *Ibid.*

a prefect's order (inspired by cabinet ministers) closing a match factory, ostensibly for sanitary reasons the owner having shown that the real purpose was to reduce the number of such factories in order to enable the state to effectuate its monopoly;[60] a mayor's order subjecting charabancs to the same regulations as cabs, interested parties having shown that its real purpose was revenue, whereas traffic regulations belong to the domain of police power;[61] a mayor's dismissal of a police agent who, in the line of duty, had reported a complaint against an innkeeper at whose place the mayor's party committee met.[62] So a threat by a prefect to disapprove certain municipal council proceedings until the commune had leased its presbytery, was declared an abuse of power, although a law of 1884 empowered prefects to control those municipal councils which appeared to oppose the government's political and religious policies.[63]

4. *Procedure*

"Procedure in the great administrative court is modeled on modern ideas—simple, cheap and effective", concedes Dicey;[64] and Freund[65] adds: "The differences between the Anglo-American and the Continental systems of relief are formal and technical. It is surprising how much alike the principles are in substance."

a. *Parties.* The moving party is called the *requetant.* What Garner[66] terms a "very interesting evolution" has taken place as regards capacity to sue. "Originally it was necessary that (one) . . . show that the act complained of had violated a legal right; but this rule has been abandoned and it is now sufficient . . . that he possesses . . . the interest which any citizen would have in seeing the act nullified." Thus, as in the United States, a taxpayer may sue to prevent the municipal council from illegally appropriating public funds or otherwise increasing taxes;[67] a property owner may challenge a prefectural decree for overhead trolley wires; a qualified applicant

60. III DALLOZ, JURISPRUDENCE (1880) 41 (where the owner was not only allowed to retain the purchase price, but recovered a large award of damages).
61. III DALLOZ, JURISPRUDENCE (1900) 81; SIREY (1901) 3, 118.
62. *Recueil* (1900) 617. The claim of disciplinary action was considered a pretext only.
A mayor suspended a rural policeman in order to evade a statute forbidding dismissal, renewed the suspension each month and each time the *Conseil* annulled the order as equivalent to dismissal. *Recueil* (1909) 727; *id.* (1910) 606; SIREY (1911) III, 121. *Cf.* the equitable maximum of English law, Equity regards the intent rather than the form.
63. *Recueil* (1911) 289; SIREY (1912) III, 41.
64. *Op. cit. supra* note 1, at 403.
65. *Op. cit. supra* note 3, at 233.
66. *Loc. cit. supra* note 37, at 642.
67. *Conseil d'Etat,* Sentence of March 29, 1901 (Casanova's Case, cited note 51 *supra*).

for the civil service or even a group of those belonging thereto, may challenge the appointment, promotion or dismissal of another public servant where the effect would be adverse to complainants;[68] an innkeeper may seek the annulment of an *ultra vires* order prohibiting a fair on the square facing his inn.[69] After the Separation Law of Dec. 9, 1905, vesting ownership of church property in the state, the *Conseil* revoked, on the *requete* of the curate assigned by the Roman Catholic Bishop, a mayor's order forbidding religious services in the local church.[70] Hence, says Garner,[71] "today almost any citizen may knock at its doors and obtain the annulment of an illegal administrative act".

b. *Pleadings.* The moving party's plea, as we have seen, is termed the *requete;* his opponent may present a defense by an *exception.* The French Code Pénal, Article 47, was amended in 1832 so as to penalize "those who have infringed ordinances (*réglements*) legally made by administrative authority". With the development of *ultra vires* jurisdiction one charged with breach of an ordinance could challenge its validity by an *exception d'illégalité.* This is not unlike a demurrer to a *requete* charging an offense under such an ordinance.[72]

c. *Proof* (*preuve*). The French law of proof has never approached in technicality the English law of evidence and decisions[73] of the *Conseil d'État* seem to simplify it still more.

"Heretofore", says Duguit[74] speaking of pleas for abuse of power, "the plaintiff, to be successful, had to furnish direct and positive proof that the official had been actuated by motives foreign to the service. In the religious cases cited above it seems to have been sufficient for the plaintiff to establish that the reason given by the police upon which mayoral action must be based, did not exist in fact."

d. *Appeals.* When a suit is brought in a judicial court against a public functionary for an alleged *faute personelle,*[75] he often *élève le conflict* (*i. e.,* "raises" the controversy) to the *Tribunal des Conflicts* and obtains an *arrete de conflict,* thus challenging the original court's

68. *Recueil* (1909) 780 (Lot-Molinier Case); *id.* (1906) (Alcindor Case); *id.* (1908) 1016; *id.* (1910) 719.

69. Garner, *loc. cit. supra* note 37, at 643.

70. *Recueil* (1908) 127 (Deliard's Case) where the court said: "A Catholic priest, functioning in the municipality, has an interest, as indeed every Catholic thereof has, to seek the revocation of such a decree" which "has infringed the free exercise of worship".

71. *Loc. cit supra* note 37, at 643.

72. PORT, *op. cit. supra* note 4, at 310; Garner, *loc. cit. supra* note 37, at 639-40. The *Tribunal des Conflicts* "decides on *prima facie* grounds and does not seek proof of the facts alleged"; in other words the *Tribunal* treats the *requete* as an American court would in ruling on a demurrer thereto. PORT, *op. cit. supra* note 4, at 322.

73. *E. g., Recueil* (1909) 307; *id.* (1910) 192.

74. *Op. cit. supra* note 48, at 191. *Cf.* PORT, *op. cit. supra* note 4, at 317.

75. See note 129 *infra.*

jurisdiction. The *Tribunal des Conflicts* may annul the *arrete* and remand the cause to the judicial court, or let the *arrete* stand on the theory that the ground of the action is really a *faute de service.*[76] In effect, therefore, the *Tribunal* determines a question of jurisdiction by deciding one of liability.

e. *Costs.* "The complaint is required to be filed on stamped paper (stamp, 12 cents); there is now no *enregistrement* tax (unless the petitioner loses . . . in which case he is assessed $20 in costs) and, since 1864, the services of an attorney have not been obligatory. With an expenditure of only 12 sous, therefore, the citizen may take his case to the supreme administrative court and have an illegal act of the administration declared null." [77]

III. Points of Resemblance

1. *The Social Function*

The Social Function is prominent in both administrative law and *droit administratif.* The former expresses the notion by the phrase "the public interest"; [78] which is also used in the latter.[79] But, according to Duguit [80]

> "This idea of a social function which both statesmen and political theorists are beginning to place, as they begin to perceive it, at the very root of public law, is no more than the idea of public service . . . Public law has become objective just as private law is no longer based on individual right or the autonomy of a private will, but upon the idea of a social function imposed on every person. So government has in its turn a social function to fulfil."

2. *Inviolability of Private Property*

This is a time honored doctrine of both Romanesque [81] and Anglican law. In the former it was part of the Declaration of the

76. See note 129 *infra.*

77. Garner, *loc. cit. supra* note 37, at 644.
"The cost is a 60 centime stamp". Duguit, *op. cit. supra* note 48, at 172.

78. The phrase has been traced back to Chief Justice Hale's *De Portibus Maris* (*ca. 1670*) where he speaks of certain wharves as "affected with a public interest". It was adopted by the Supreme Court in *Munn v. Illinois,* 94 U. S. 113 (1876) and later cases, from which, however, dissenting opinions by Justice Stone and others are acclaimed as "a judicial recognition that the economic philosophy of *laissez faire* is being subjected to a challenge that cannot be ignored". McAllister, *Business Affected with a Public Interest* (1930) 43 Harv. L. Rev. 759-791.
The phrase "in the public interest" appears constantly in orders of the Securities and Exchange Commission.

79. The Conseil d'État allowed an indemnity to a contractor who had undertaken to furnish gas to a municipality and the price of coal thereafter nearly trebled; since the public interest would have been prejudiced by the contractor's insolvency. III Dalloz, Jurisprudence (1916) 25; Sirey (1916) 17.

80. *Op. cit. supra* note 48, at 39, 49. See also note 49 *supra.*

81. *Op. cit. supra* note 48, at 131. See also *loc. cit. supra* note 49, (first work) at 71.

Rights of Man [82] (1789) before it had appeared in the U. S. Constitution,[83] and is treated as a phase of *droit administratif*.[84] In the United States it has been declared distinct from police power [85] though analogous thereto [86] and inherent in sovereignty.[87]

3. *Jurisprudence ("Case Law")*

Notwithstanding Dicey's belief in the "utter unlikeness" of administrative law and *droit administratif*, he was keen to observe that the latter "is, like the greater part of English law, 'case' or 'judge made'. The precepts thereof are not to be found in any code; they are *based upon precedent*".[88] Here is a notable departure from other branches of French law which were the first to be codified in modern times [89] but which have attempted to exclude *stare decisis*.[90] It may surprise many foreign students of French law that a large, important and growing body of it is found in decisions, known in the civil law as "juris-

82. "The authors of the Declaration . . . loved the State but were still more lovers of the soil they owned. . . . The fact that every member of the Constituent Assembly was in some degree a landed proprietor is in part, at least, the explanation of this attitude. When private property is taken, the financial responsibility of the State is recognized. A little later the whole procedure was organized to secure expropriation. The principle had long been favored by the courts which gave compensation for damage to private property, even where no illegality or blame could be claimed". DUGUIT, *op. cit. supra* note 48, at 202. *Cf.* BEARD, THE ECONOMIC INTERPRETATION OF THE CONSTITUTION (1913).

83. U. S. CONST. AMEND. V (1791). Expropriation "is within the constitutional power" of the Federal government; its contractee is not liable for acts in the exercise thereof; and the right of recovery in the Court of Claims provides compliance with said Amendment." Yearsley v. Ross Construction Co., 309 U. S. 18 (1940).

84. See note 82 *supra*. *Cf.* HAURIOU, PRÉCIS ELEMENTAIRE DE DROIT ADMINISTRATIF (4th ed., 1938) bk. III, tit. ii, c. ii.

85. 20 C. J. 519, n. 48.

86. *Id.* (e).

87. 20 C. J. 515, n. 2 (e).

88. *Op. cit. supra* note 1, at 373-4. Italics supplied.

"Having thus become a supreme common-law court for administrative cases the French Council of State, especially during the last 20 years, has been working out a remarkable body of case law, which affords to the individual almost perfect protection against arbitrary administrative action—a higher degree of protection, I think I may affirm, than in any other country". Duguit, *The French Administrative Courts* (1914) 29 POL. SCI. Q. 385, 393. ("In France 'common law' (*droit commun*) means the general law, whether determined by statutory enactment or by the decisions of the courts". Translator.)

"During these 42 years (1818-60) various reforms were carried out, partly by legislation, but, to a far greater extent, by judge-made law. The judicial became more or less separated off from the administrative functions of the *Conseil*. Litigious business (*le contentieux administratif*) was in practice assigned to and decided by a special committee (*section*) and . . . such business was decided by a body which acted after the manner of a court,—was addressed by advocates, heard arguments and, after public debate, delivered judicial decisions. These were reported, became the object of much public interest and were, after a manner with which English lawyers are well acquainted, moulded into a system of law. The judgments of the *Conseil* acquired the force of precedent. The political revolutions of France, which have excited far too much notice, whilst the uninterrupted growth of French institutions has received too little attention, sometimes retarded or threw back, but never arrested, the continuous evolution of *droit administratif*". DICEY, *op. cit. supra* note 1 at 367-8.

89. See Lobingier, *Modern Civil Law*, 40 C. J. 1252.

90. "Judges are forbidden, when deciding cases brought before them, to lay down general rules or to follow a previous decision." Civ. Code, art. 5.

prudence", and in this respect, as Dicey [91] points out, *droit administratif* "resembles English law far more closely than does the civil law of France". Nor is this limited to formal features; the administrative courts have already wrought great improvements in the substance of French law.[92]

Another interesting by-product of this development has been an approach to the judicial opinion,[93] which affords the vehicle of Anglican "case law". While no one would wish to see the French law in any branch attain the bulky proportions of the latter, it gratifies one trained in Anglican law to note the tendency of French administrative judges to break away from the stereotyped phraseology and stilted style of the civil law "sentence" and to state succinctly the reasons for conclusions reached. Curiously enough there seems to have been some question among administrative agencies in the United States as to whether they should follow their own decisions; apparently, however, most of them run true to form as regards this fundamental feature of Anglican law.[94]

4. *Doctrine*

But "jurisprudence" ("case law") is not the sole source of *droit administratif;* another is what the civilians call "doctrine"—the opinions of learned jurists—which *droit administratif* shares with other French law as part of its Roman inheritance.[95] Dicey [96] thought that "the authority exercised in every field of English law by . . . eminent writers, has in France been exerted, in the field of administrative

91. *Op. cit. supra* note 1, at 373-4.

92. "*Decisions* have frequently given rise to doctrines altering and improving *droit civil* which have been subsequently admitted by the ordinary courts or introduced into *droit civil* by Parliament. In the law of torts . . . (*responsabilité délictuelle*) e. g., it may well be doubted whether the great evolution (of) the last 40 years would have taken place but for the . . . decisions of the *Conseil d'État,* founded on the dictates of natural justice. . . . (So with) annulment by the *Conseil* of (unlawful) acts, decrees or orders . . . by an administrative authority. . . . The members of the *Conseil* . . . (are) more apt than the judges of ordinary courts to calculate the consequences of their decisions and (this) perhaps makes these . . . more acceptable to and (less likely) to be challenged by, the administration. Judges of the ordinary courts would most probably have been more timid than the *Conseil* in criticism of administrative acts". DAVID, in DICEY, *op. cit. supra* note 1, at 502.

"No jurist can fail to admire the skill with which the *Conseil d'État,* the authority and jurisdiction whereof, as an administrative court, year by year receive extension, has worked out new remedies for various abuses which would appear to be hardly touched by ordinary law. . . . No Englishman can wonder that the jurisdiction of the *Conseil d'État,* as the greatest of administrative courts, grows apace; the extension of its power removes, as did at one time the growth of Equity in England, real grievances and meets the need of the ordinary citizen". DICEY, *op. cit. supra* note 1, at 398-9, 401.

93. ". . . from the very nature of judge-made law, reports have in the sphere of *droit administratif,* an importance equal to (that) which they possess in every branch of English law". *Id.* at 375.

94. See note (1939) 16 N. Y. U. L. Q. REV. 618; *cf.* note (1940) 49 YALE L. J. 1276.

95. Lobingier, *loc. cit. supra* note 89, at 1249.

96. DICEY, *op. cit. supra* note 1, at 375.

law, by authors or teachers such as Cormenin, Macarel, Vivien, Laferrière and Hauriou." [97] But in this he seems to overstate the authority of such writers in England [98] while understating it in France.

5. *Separation of Powers*

This is a time honored French doctrine—popularized,[99] though not originated,[100] by Montesquieu, and deeply implemented into French law.[101] But "as interpreted by French history . . . legislation and . . . decisions of French tribunals, it means neither more nor less than the maintenance of the principle that, while ordinary judges ought to be irremovable and thus independent of the executive, the government and its officials ought . . . to be independent of, and thus to a great extent free from, the jurisdiction of the ordinary courts".[102]

But while the doctrine does not mean exactly the same in all countries, and while "both in France and America such formulæ appear to have been drawn up without a sufficient regard either to the existing

---

97. Only the two last are included by Wade in his (9th) edition of Dicey's Law of the Constitution (p. 328, n. 2), where he assembles that author's bibliography of *droit administratif* as follows:

AUCOC, CONFERENCES SUR L'ADMINISTRATION ET SUR LE DROIT ADMINISTRATIF (3rd ed., 1885); BERTHELEMY, TRAITE ELEMENTAIRE DE DROIT ADMINISTRATIF (11th ed., 1936 (this has an ample bibliography on regulatory power); CHARDON, L'ADMINISTRATION DE LA FRANCE; LES FONCTIONNAIRES (1908) 79-105; DUGUIT, TRAITE DE DROIT CONSTITUTIONNEL (1st ed., 1911); DUGUIT, L'ÉTAT, LES GOUVERNANTS ET LES AGENTS (1903); DUGUIT, MANUEL DE DROIT PUBLIC FRANCAIS: DROIT CONSTITUTIONNEL (1907); ESMEIN, ELEMENTS DE DROIT CONSTITUTIONNEL FRANCAIS (1st Ed., 1896), HAURIOU, PRECIS DE DROIT ADMINISTRATIF (3rd ed., 1897); JACQUELIN, LA JURISDICTION ADMINISTRATIVE (1891); JACQUELIN, LES PRINCIPES DOMINANTS DU CONTENTIEUX ADMINISTRATIF (1899); JEZE, LES PRINCIPES GENERAUX DU DROIT ADMINISTRATIF (1st ed. 1904); LAFERRIÈRE, TRAITE DE LA JURISDICTION ADMINISTRATIVE ET DES RECOURS CONTENTIEUX (2d ed., 2 vols., 1896); TEISSIER, LA RESPONSABILITE DE LA PUISSANCE PUBLIQUE (1906).

98. He instances Stephen who ". . . transformed pleading from a set of rules derived mainly from the experience of practitioners into a coherent logical system. Private international law, as understood in England at the present day, has been developed under the influence first of Story's *Commentaries on the Conflict of Laws*, and next, at a later date of Mr. Westlake's *Private International Law*".

But the influence of these exceptional writers hardly overcomes Lord Eldon's ruling that "one who had held no judicial situation could not regularly be mentioned as an authority." *Johnes* v. *Johnes*, 3 Dow 1, 15, 3 Eng. Rep. R. 969 (H. L., 1814).

99. *Esprit des Lois*, liv, XI, C. 6, first published 1748. See for comment, PORT, *op. cit. supra* note 4, at 102-104.

100. The idea has been traced back to Aristotle (IV, Politics, 14); but "whether it can be proved that Aristotle recognized (such) a division may well be debated; undoubtedly (however) such a division has long been taken as the best basis for systematic study". PORT, *op. cit. supra* note 4, at 88.

101. See ARTUR, SEPARATION DES POUVOIRS (1905) *passim*; Duguit, *The French Administrative Courts* (1914) 29 POL. SCI. Q. 385, 387 *et seq.*

Napoleon wrote in 1797: "Montesquieu's definitions (of executive, legislative and judicial powers) are incorrect". See JOHNSTON, *op. cit. supra* note 20, at 69.

"But all that we need to note is the extraordinary influence exerted in France, and in all countries which have followed French examples, by this part of Montesquieu's teaching and the extent to which it still underlies the political and legal institutions of the French Republic." DICEY, *op. cit supra* note 1, at 338-9.

102. *Id.* at 337-8.

facts or even to the words of those whom the framers of the constitution ostensibly took as their guides",[103] it would be a mistake to regard the doctrine as discarded.[104] It remains with us and constitutes a point of resemblance between administrative law and *droit administratif*.[105]

6. *Absence of Juries*

In England the Board of Trade, which dates from Cromwell's time, administers, through its officers, the Merchant Shipping Act,[106] one of whose requirements is "to detain any ship which, from its unsafe and unseaworthy condition, cannot proceed to sea without serious danger to human life . . . The Board and its officers have more than once been sued with success" which, under English law, brought them before juries, with the result, it is claimed, "to render the provisions . . . with regard to the detention of unseaworthy ships, nugatory." [107] Doubtless many such instances could be found in the course of administration in the United States; although the tables are sometimes turned, as in the District of Columbia where juries are accused of being "biased for the government" and it required a Supreme Court decision [108] to establish the qualifications of Federal officers and employees as jurors. In France, on the other hand

> "Trial by jury, we are told, is a joke, and, as far as the interests of the public are concerned, a very bad joke.[109] Prosecutors and criminals alike prefer the *Tribunaux Correctionnels,* where a jury is unknown, to the *Cours d'Assises,* where a judge presides and a jury gives a verdict. The prosecutor knows that in the *Tribunaux Correctionels* proved guilt will lead to condemnation. The criminal knows that though in the inferior court he may lose the chance of acquittal by good-natured or sentimental jurymen, he

103. PORT, *op. cit. supra* note 4, at 105.

104. This is illustrated by the fact that Frankfurter and Davidson devote to the subject more than one-half of the latest edition of their case book.

105. See note 43 *supra.*

"In contrast with America, France has a way of maintaining intact the doctrine of the separation of powers, whilst at the same time reforming its administrative courts as regards their independence and impartiality. That alone is a great achievement". PORT, *op. cit. supra* note 4, at 21, 22.

106. 57 & 58 VICT. c. 60 (1894).

107. DICEY, *op. cit. supra* note 1, at 397-9, where the author advances the following explanation:

"The question, on the answer to which the decision in each instance at bottom depends, is whether there was reasonable cause for detaining the vessel, and this inquiry is determined by jurymen who sympathise more keenly with the losses of a shipowner, whose ship may have been unjustly detained, than with the zeal of an inspector anxious to perform his duty and to prevent loss of life. . . . Juries are often biassed against the Government. A technical question is referred for decision, from persons who know something about the subject, and are impartial, to persons who are both ignorant and prejudiced. The government, moreover, which has no concern but the public interest, is placed in the false position of a litigant fighting for his own advantage."

108. U. S. v. Wood, 299 U. S. 123 (1936).

109. See CHARDON, L'ADMINISTRATION DE LA FRANCE—LES FONCTIONNAIRES (1908) 326-328.

also avoids the possibility of undergoing severe punishment. Two facts are certain. In 1881 the judges were deprived of the right of charging the jury. Year by year the number of causes tried in the *Cours d'Assisses* decreases." [110]

Naturally, there are no juries in the French administrative courts [111] and here the American administrative agencies follow, consciously or not, the French model.[112]

IV. Points of Difference

1. *State Liability*

a. *In General.* "Immunity of the Sovereign from all legal action, in respect of both contract and tort, is well established" in England, wrote Port,[113] and "this immunity extends to servants of the Crown as such". The doctrine was brought to the American colonies as part of their common law inheritance and prevails in both state and federal [114] governments except where the immunity has been removed by statute.[115] "A comparatively modern development" of the doctrine is "the immunity of the judge" which "originated, somewhat mysteriously; in the sanctity of the record of a court . . . It was not until . . . the 17th century that . . . Coke interpreted the immunity . . . in terms of public policy." [116] Moreover, in the United States the President, and probably most governors are immune from writs of *mandamus*, prohibition, injunction, etc.[117] Old French law seems to have embodied the maxim *les torts du souverain ne se reparent pas;*

110. Dicey, *op. cit. supra* note 1, at 402-3.

111. They remain in the Assisse Courts only.

112. See Lobingier, *The Trial Authority in Administrative Procedure* (1939) 23 Jour. Am. Jud. Soc. 112, 120.

113. Port, *op. cit. supra* note 4, at 190.

114. The latter "as Sovereign, is immune from suit save as it consents to be sued." Stone, J., in U. S. v. Sherwood, 312 U. S. 584, 586 (1941).

115. Immunity was partially removed by the establishment in 1855 of the Court of Claims, which, however, was not, until 1863 given jurisdiction to decide cases, which it now has of "claims founded upon any law of Congress . . . regulation of an executive department, or . . . contracts"; but not of delictual claims, although Attorney General Jackson recommended that it be extended so as to include them. The "Tucker Act" of 1887 gives the U. S. District Courts "concurrent jurisdiction with the Court of Claims" up to $10,000.

But on June 10, 1941, President Roosevelt vetoed a bill to enable the Court of Claims "to hear, determine and render judgment upon" claims rejected by the Interior Secretary who was later judicially overruled.

"There can be little doubt that reform in this department of law is long overdue, particularly as regards the liability of the Crown to be sued in tort". Port, *op. cit. supra* note 4, at 189.

116. Robson, Justice and Administrative Law (1928) 51-52. See also Holdsworth, *Immunity for Judicial Acts* (1924), Jour. of Pub. T. of L. 17.

117. See Lobingier, *Constitutional Law*, 6 Am. & Eng. Encyc. of Law 1013-1014 (2d ed. 1898).

"In France . . . the administrative courts . . . pass upon a decree of the national president just as if it were the act of any other executive or administrative officer". Blachly and Oatman, *loc. cit. supra* note 6, at 146. *Cf.* note 50 *supra.*

from the application of which, however, the modern law, thanks to the *Conseil d'État's* progressive tendency, appears to have "moved far".[118] The first "move" seems to have been made when the National Assembly, in 1790, provided liability for damage to "immovables" (real property) by government action other than public works.[119]

b. *Adjudications.* In 1873, the *Tribunal des Conflicts,* on a second hearing, upheld the exclusive jurisdiction of the *Conseil d'État* to determine the government's liability for an accidental injury to a juvenile employee in a government tobacco factory[120] and in 1905 it held that an injury caused by a *gen d'arme* in firing at a mad bull was not one for which the government was liable.[121] Meanwhile, in 1899 the *Conseil* itself had absolved the state from liability for an accident which *requetant* charged was the result of inefficient performance of police duties.[122] But in 1908 the *Tribunal* affirmed the *Conseil's* competence to adjudicate the delictual liability of one of the 86 departments,[123] and in the year following, the *Conseil* held that the state could not escape liability for an injury occurring without the chauffeur's fault, in an automobile taken over by the military.[124] The next year brought from the same court a judgment for damages in favor of one whose leg had been broken when he was accidentally knocked down by a policeman pursuing a fugitive from justice.[125] Thus, observes Port,[126] "French administrative law has . . . extended the province of governmental responsibility beyond fault, even to include risks."

c. *Fautes de Service et Fautes Personelle.* An early decision[127] of the *Tribunal des Conflicts* is said to have "created . . . the distinction between official and personal acts"[128] expressed by the above phrases—a distinction not wholly unlike that between our acts *virtute*

118. PORT, *op. cit. supra* note 4, at 319.
119. LAFERRIÈRE, *op. cit. supra* note 37, at 189. A supplemental law was passed in 1807.
120. Sentence of Feb. 1, 1873. See DUGUIT, *op. cit. supra* note 32, at 401 (Blanco's case).
121. *Recueil* (1905) 140; SIREY (1905) III, 113.
122. SIREY (1900) III, 1 (Lepreux's case).
123. Feutry's case.
124. Sentence of Feb. 5, 1909 (Lefébure's case).
125. *Recueil* (1910) 1029 (Pluchard's case).
126. *Op. cit. supra* note 4, at 321. "The hundreds of decisions, nullifying the acts of the government and condemning it to pay damages for its wrongful acts, is [are] . . . a sufficient refutation of the charge that the Council of State lacks independence." Garner, *French Administrative Law* (1924) 33 YALE L. J. 597, 626.
127. Pelletier's case, *Recueil* (1873), Suppl. I, 117; SIREY (1874) 228, an action in a judicial court by the owner of a newspaper which the commanding general of the department, then under siege, had suspended. "Outside this act", said the *Tribunal, "requetant* has imputed to respondent no personal act involving his individual responsibility". It further held that "the decree which abolishes Art. 75 (see page 40, *supra*) has not extended their (judicial courts') jurisdiction nor suppressed the prohibition of their taking cognizance of administrative acts" which that in question was declared to be.
128. DUGUIT, *op. cit. supra* note 48, at 238.

officii and *colore officii*. The distinction is not, however, always easy to apply [129] and may best be understood by reference to typical cases.

Faute Personelle: Where sanitary agents, imputing to a ship's passenger a disease with which he was not afflicted compelled him to transfer to a hospital where he died of neglect; [130] a suit in a judicial court against a public teacher for alleged obscene remarks before his pupils, disparaging the army, the Catholic church, etc., was elevated by the prefect to the *Tribunal des Conflicts* which annulled his act; [131] an inspector of indirect taxes had accused a young clerk of dishonesty as a result of which the latter was dismissed and summoned the former before the correctional court, from which the prefect elevated the case to the *Tribunal* which likewise annulled his act; [132] a mayor's order to a subordinate municipal officer to sound church bells at a civil funeral was annulled by the *Tribunal* on a *requete* by the curate, as lacking authority and being the personal act of the mayor.[133]

d. *Actes de Gouvernment.* An exception was formerly made of acts described as above, as when the *Conseil d'État* dismissed, on the ground that the act was "procedural", a *requete* against seizure by the prefect of police, with the Interior Minister's approval of the Duc d'Aumale's works.[134] Similarly the Paris Court of Appeal refused jurisdiction of a proceeding by Prince Napoleon, against the Interior Minister and the prefect of police, arising out of the decree expelling him from France.[135] But the *Tribunal des Conflicts* held that the

129. "French law draws an important distinction between an injury caused to a private individual by act of the administration or government, which is in excess of its powers (*faute de service*) though duly carried out, or . . . without any gross fault on the part of a subordinate functionary (*e. g.*, policeman acting in pursuance of official orders); and (such) injury caused by the negligent or malicious manner (*faute personnelle*) in which such functionary carries out official orders which may be perfectly lawful. In the first case the policeman incurs no liability at all and the party aggrieved must proceed against the state in the *tribunaux administratifs*; in the second case the policeman is personally liable and the party aggrieved must proceed against him in the *tribunaux civils* (HAURIOU, PRECIS DE DROIT ADMINISTRATIF (10th ed. 1921) 366-380; LAFFERRIÉRE, TRAITE DE LA JURISDICTION ADMINISTRATIVE ET DES RECOURS CONTENTIEUX (2d ed. 1896) 652) and apparently cannot proceed against the state." DICEY, *op. cit. supra* note 1, at 399.

"French authorities differ as to . . . the precise criterion . . . to distinguish a *faute personnelle* from a *faute de service* and show a tendency to hold that there is no *faute personnelle* on the part, *e. g.*, of a policeman who has *bona fide* attempted to perform his official duty." *Ibid.*

130. Sentence of March 15, 1902.

131. "Even if proved", said the *Tribunal*, "respondent's remarks could not be considered as connected in any way with his function of teaching". *Recueil* (1908) 597; SIREY (1908) III, 83. From this Duguit derives the "definition of personal as equivalent to the pursuit of an end unconnected with function". *Op. cit. supra* note 48, at 241.

132. *Recueil* (1909) 726. The *Tribunal* found that "the facts show clearly that they had no connection with S.'s administrative function and were exclusively personal to himself".

133. *Recueil* (1910) 323, 442; SIREY (1910) III, 297.

134. *Recueil* (1867) 472. *Cf.* Duguit, *loc. cit. supra* note 32, at 395.

135. SIREY (1876) II, 297. "This was the last time that the French court invoked so arbitrary and despotic a principle to declare a plea non-receivable." DUGUIT, *op. cit. supra* note 48, at 181.

decrees of the year 1880 against the religious congregations were subject to review by the administrative courts;[136] in 1889 the same Tribunal denied the quality of an *acte du gouvernment* to seizure of pamphlets and portraits of the Count of Paris by the prefects under orders of the Minister of the Interior;[137] and in 1911, in upholding the competence of the administrative courts to pass upon the liability of a French Minister to Haiti for refusal to marry a French couple, the *Tribunal* declared political considerations irrelevant.[138] Meanwhile, in 1889, on a *requete* by Prince Murat and the Orleans Princes, the removal of the former's name from the official army registers was annulled by the *Conseil d'État.*[139] Where the Minister of War opened negotiations with an inventor for the purchase of his patent and kept them pending without result until the latter lost his chance of selling to another, the Seine tribunal awarded him Fr. 100,000 in a judgment against the state.[140] Thus, in 1914 Duguit wrote, "it is the well settled practice of the *Tribunal des Conflicts* and the *Conseil d'État* to reject all such pleas for the dismissal of complaints".[141]

e. *Discretionary Acts.* In Anglican law, administrative discretion is not a subject of judicial control. The writ of mandamus, *e. g.*, runs only to compel performance of a clear duty.[142] "In France", thought M. Duguit,[143] "the discretionary act no longer exists"; and he cites a case[144] where a priest had been excluded from an examination for a university fellowship in philosophy. That action was upheld by the *Conseil d'État* which said: "In refusing to admit *requetant* to the examination the Minister of Public Instruction has exercised only powers conferred by law"; since a fellowship would entitle its holder to teach in the state secondary schools—which was then forbidden by law. Here, therefore, was no clear duty to admit the *requetant* and the *Conseil's* decision would have been sound under Anglican law.

---

136. "If the petitioners think that the measure taken against them was unauthorized by law they should go to the administrative courts for annulment." SIREY (1881) III, 85.

137. SIREY (1890) III, 32.

138. ". . . it matters little when, as in this case, the intervention of the diplomatic authorities is not contrary to the treaty nor prohibited by local legislation refusal should have been inspired by political motives." *Recueil* (1911) 400; SIREY (1911) III, 105.

139. SIREY (1889) III, 29.

140. *Le Temps,* Jan. 13, 1911.
"No decision shows better how far our age has travelled from the imperialist conception of law . . . (it) recognizes that the state is responsible, not for what it has done, but for what it has failed to do." DUGUIT, *op. cit. supra* note 48, at 233-4.

141. *Loc. cit. supra* note 32, at 395.

142. 38 C. J. 582.

143. *Op. cit. supra* note 48, at 185.

144. *Revue de Droit Public* (1912) 453.

i. Contractual Liability. The cases thus far reviewed relate mainly to delictual liability; and here, says Port,[145] "the extension of state liability, in respect of both contracts and torts, has proceeded *pari passu*". Thus, as early as 1896 the *Conseil d'État* ordered [146] the Finance Minister to pay a pension to Savoy ecclesiastical foundations in lieu of rent charges which they had surrendered in 1860. The Chamber of Deputies refused to appropriate the money but the minister asked a reconsideration urging that the Chamber had no option. "In the . . . law of contract", says David,[147] "the *Conseil* has admitted . . . revision . . . far beyond the doctrine of impossibility of performance . . . in *droit civil.* The (contractor) . . . with an administrative authority is thus much better protected than the (contractor) with another private individual."

2. Administrative Legislation

"Another contrast between the administrative law of the two countries" (France and Britain), observes Port,[148] "lies in the fact that in France there is a general right to make rules for carrying legislation into effect. The President may issue *Décrets,* and the Prefects and Mayors may issue *Arrets,* for the purpose of effective administration, which do not depend on a particular statutory provision. In England, where no such general right resides in administrative authorities, it is highly important that adequate powers should be given by Statute."

The French rule seems hardly consistent with the "Separation of Powers" doctrine.[149] Why should these administrative (executive) officers have the "general right" to legislate? The United States law follows that of England in this particular: there is no implied legislative power in administrative agencies. Nevertheless, in both systems there has been an extensive *delegation* to such agencies, of rule making (which is really legislative) power.[150] And here we encounter another maxim, supposed to be deeply rooted in the Anglican law, viz. *potestas delegata non potest delegari.* In the Federal government especially, where all power is delegated, it seems difficult to reconcile this maxim with actual practice. Thus while the French and Anglican legal systems do differ, in theory at least, as regards administrative legislation,

145. *Op. cit. supra* note 4, at 22.
146. *Recueil* (1896) 660. This was followed 8 years later by a similar ruling. *Recueil* (1904) 533.
147. DICEY, *op. cit. supra* note 1, at 502.
148. *Op. cit. supra* note 4, at 330. In Ch. VI of the same work the author discusses the very extensive "legislation of administrative bodies" always exercised, however, under delegated power.
149. See page 50, *supra.*
150. See FRANKFURTER AND DAVISON, CASES ON ADMINISTRATIVE LAW (2d ed. 1935) 213 *et seq.*, and material there cited.

they are not so far apart in reality; for each appears inconsistent with itself.

3. *Unconstitutionality*

In the United States the doctrine has been developed [151] that courts, at least of last resort, may annul legislation which, in their opinion, infringes the Federal, or a state constitution. The doctrine has been adopted in various other countries [152] but can hardly be called a general one as yet. In France, as we have seen,[153] the *Conseil d'État* exercises the power to annul acts of administrative officers and even of municipal councils, *i. e.*, local legislation—and M. Duguit [154] long since expressed the belief that

> "French jurisprudence will certainly be led by sheer force of circumstances to this conclusion . . . The path from the consideration of administrative ordinance to formal statute is easy and short. It is, therefore, likely that, in the near future this change will become established."

---

151. For a sketch of "its historical development" see Lobingier, *Constitutional Law*, 6 AM. & ENG. ENCYC. OF LAW (2d ed.) 1080 *et seq.*

152. Argentina, Australia and Canada long since adopted the doctrine. "At the present day", wrote M. Duguit (*op. cit. supra* note 48, at 91), "it is extending itself all over Europe. In Germany, Professor Laband (*Droit Public*, II, 322) tells us that, after much discussion, the immense majority of German jurists are in favor of judicial review. In Norway the power has been logically deduced from the recognized character of the judicial function, without the need of a formal text. It was recognized in 1890 by the Supreme Court of Norway and in 1893 by the district court of Christiana. In 1914 the first chamber of the Areopagus asserted the doctrine in the clearest terms (*Revue de Droit Public* (1905) 481). A recent decision of the court of Ilfor, confirmed by the Rumanian Court of Cassation, has assumed this attitude in very remarkable terms. They owe their clarity to a most unusual opinion rendered by MM. Berthelémy and Jèze (*Id.* (1912) 139; SIREY, IV, 9) in a suit between Bucharest and its tramway company, which (latter) asked the court to withhold application of the law of Dec. 18, 1911, as infringing the Rumanian Constitution (Arts. 14 and 30) by impairing the right of property. The court accepted the plea in a very striking judgment, which was affirmed a month later by the Supreme Court as follows: 'If a plea of statute unconstitutionality is presented, the judge cannot refuse to try the issue. Just as where two ordinary statutes conflict, it is his right and duly to decide which must be applied, so must he do where one of the two is the constitution. Within these limits, the right of judicial review is incontestable. The power derives primarily, naturally and logically from the character of the judicial function of which it is the business to enforce the law—and equally the constitution,—no clause of which denies the judiciary such power (*Id.* at 365).' It is clear from these facts that if European jurisprudence does not yet admit that a court can annul a statute for infringing a superior rule of law, it very clearly tends to admit the plea of unconstitutionality by any interested party."

153. See page 40, *supra*.

154. DUGUIT, *op. cit. supra* note 48, at 92, 93, where he also says: "For a long time the *Conseil d'État* has accepted the plea of illegality as to administrative regulations, even though it regards them as issued under legislative delegation. Since 1907 the *Conseil* has admitted the plea of excess power against such regulations while maintaining the delegation theory. (*Recueil* (1907) 913; (1908) 1094; (1911) 197). Now if it is delegation, logically the administrative ordinance is really the work of parliament; for unless delegation is meaningless, it means the transfer of power from one institution to another."

"In a decision rendered Dec. 6, 1907, the *Conseil d'État* recognized that *recours* could be had against acts of this character and . . . applications to the high court for the annulment of such acts are (now) received without question." Duguit, *loc. cit. supra* note 32, at 394.

But it has not been established yet and the present situation in France affords little promise that it will be soon. However, a French court once refused to recognize a royal ordinance [155] and the *Conseil d'État* has even annulled acts of parliament for defects of procedure and form.[156] Only the "short step" remains to be taken, and a tribunal which finally concluded to set aside acts of the President can hardly be consistent and accept a legislative act which plainly infringes the constitution.[157]

* * *

La Belle France lies prostrate today under the iron heel of a ruthless invader. Whether she will rise again to resume her former place of leadership in the family of nations, or whether such a family will exist hereafter, time alone will reveal. But of this much we may be certain: the achievements of the French administrative tribunals will not be forgotten. For, in the words of their foremost expounder,[158]

> "We have here one of the most striking examples of the spontaneous formation of law. In the law schools it is still customary to cite, as the classical example of the process, the creation of the pretorian law at Rome. . . . The part played by the *Conseil d'État* and by French jurists, versed in public law, may assuredly be compared, and not unfavorably, with that of the Roman prætor and *jurisprudentes.*"

---

155. The Nimes court in 1834; because "it was a constitutional principle that an ordinance could not derogate from law and the ordinance in question (of 1822) was beyond the legal power of the executive". CAHEN, LA LOI ET LE REGEMENT (1903) 376.

156. BERTHELÉMY, TRAITÉ ELEMENTAIRE DE DROIT ADMINISTRATIF (11th ed. 1926) 12 *et seq.* (as where bills passed by the two chambers were not identical).

157. *E. g.*, the Press Law of Oct. 1830. See Garner, *loc. cit. supra* note 37, at 658.

158. DUGUIT, *loc. cit. supra* note 32, at 393, 407.